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CRIMINAL LAW

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I. INTRODUCTION AND SCOPE

This article summarizes all published criminal law decisions of the Supreme Court of Virginia and the major criminal law decisions of the Virginia Court of Appeals sitting en banc, issued between July 1, 1997, and July 1, 1998. Due to space limitations, however, the article includes only a few selected published panel opinions of the Virginia Court of Appeals. Also, this article includes a summary of the criminal law opinion from the Supreme Court of the United States which arose from a Virginia case during the period stated above. And finally, this article summarizes the most significant enactments from the 1998 session of the Virginia General Assembly in the field of criminal law.

II. CONSTITUTIONAL LAW

A. *Fourth Amendment—Search and Seizure*

1. Expectation of Privacy

In *Johnson v. Commonwealth*,[1] a panel of the Virginia Court of Appeals reversed a trial court's finding that the defendant had no reasonable expectation of privacy in the place where he stored evidence later used to incriminate him.

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1. 26 Va. App. 674, 496 S.E.2d 143 (Ct. App. 1998).

The defendant was an Accomack County waterman who, together with several other watermen, co-leased a warehouse and an adjacent dock for the purpose of off-loading fish from their boats and packing them for shipment to the market. A Virginia Marine Resources Commission officer came onto the dock without a search warrant and observed several untagged striped bass, in violation of state law, on Johnson's boat. The evidence showed that, in order to come onto the dock, the officer had to go through an opening in a fence clearly marked with "no trespassing" signs and past an occupied business office. The area was not open to the public and, except by invitation, no one other than the co-lessees came onto the property. Although all of the co-lessees had authority to invite outsiders onto the property, none had invited the officer on this occasion.[2]

The trial court overruled Johnson's motion to suppress, finding that, because both Johnson and his co-lessees allowed outsiders onto the property for various reasons and because the fish were in plain view from the dock and from the navigable waters of the creek, Johnson had no reasonable expectation of privacy in the place where they were found.[3] The Commonwealth's Attorney agreed that the "administrative search" exception to the warrant requirement did not apply.[4]

On appeal, the Commonwealth was not allowed to argue the "administrative search" exception, because it had disclaimed reliance on that rationale in the trial court.[5] The court of appeals reviewed the law of curtilage and open fields, then implicitly found that the dock constituted part of the curtilage of the warehouse.[6] The court ruled that Johnson had a reasonable expectation of privacy from searches by those whom his co-lessees had not invited onto the property, and that the officer had no right to be present in the location where she had first seen the untagged fish.[7]

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2. *See id.* at 678-79, 496 S.E.2d at 145.
3. *See id.* at 676-77, 496 S.E.2d at 144.
4. *See id.* at 683, 496 S.E.2d at 147.
5. *See id.*
6. *See id.* 496 S.E.2d at 149.
7. *See id.* at 687, 496 S.E.2d at 149.

2. Consensual Encounters, Investigatory Stops, and Probable Cause

The issues before the Supreme Court of Virginia in *Parker v. Commonwealth*[8] were whether an encounter between a police officer and a pedestrian constituted a seizure under the Fourth Amendment and, if so, whether the seizure was constitutionally permissible. Three uniformed police officers driving a marked police vehicle in a public housing project were "checking various areas . . . for drug activity."[9] As they drove down a street in the housing development, the officers saw "a group of men 'standing around a white Cadillac which had its trunk open.'"[10] The officer driving the police car had made numerous narcotics arrests in the area and had recovered drugs and weapons in the immediate area where these men and the vehicle were located. The area was known to the officer as an "open-air drug market."[11] When the officer drove the police car near the vehicle in question, the men looked toward the police car, shut the vehicle's trunk, and began to disperse. The two officers that were passengers in the police car exited the police car. The officer driving remained in the police car and watched the men disperse. He saw the defendant "turn and place an item with his right hand in the waistband of his shorts."[12] The defendant continued to walk in a direction away from the Cadillac.[13]

While the two other officers remained stationary near the Cadillac, the officer in the police car "backed the police vehicle up" and drove down the road following the defendant.[14] The officer drove the police car alongside the defendant who was about twenty feet away. The officer looked at the defendant who was then looking in the direction of the police car. The defendant turned around and started walking back on the sidewalk in the other direction. The officer continued to follow the defendant who began to walk on "posted" property owned by a

8. 255 Va. 96, 496 S.E.2d 47 (1998).
9. *Id.* at 99, 496 S.E.2d at 49 (citations omitted).
10. *Id.* (citation omitted).
11. *Id.*
12. *Id.* (citation omitted).
13. *See id.*
14. *Id.*

housing authority. The officer drove the police car forty feet off of the street onto the housing authority's property and stopped the police car where the defendant was standing.[15]

The officer, whose weapons were clearly visible, approached the defendant and asked whether he lived in that housing development. The defendant stopped and responded by telling the officer that he did not reside there. The officer then asked the defendant if he had any guns or drugs in his possession, and the defendant replied, "no." Finally, the officer asked the defendant if the officer could "pat him down," and the defendant put his hands up in the air. The officer patted the defendant down for weapons or drugs and found none.[16]

A second officer approached and asked the defendant, who was wearing white mesh shorts and a pair of thin white or peach boxer underwear if he "had anything in his crotch."[17] The defendant said that he did not and "grabbed his basketball shorts and boxer shorts and started, in very exaggerated motions, pulling them to the side, up and down, shaking them in and out."[18] As the defendant was making these motions, the initial officer saw "a pink object through the boxer shorts material."[19] "The officer placed his hand on the object and realized that it was crack cocaine."[20] He removed the item from the defendant's waistband. The item was a sandwich bag containing eighteen red ziplock baggies, each containing crack cocaine.[21]

The Supreme Court of Virginia affirmed the defendant's conviction,[22] but curiously provided no majority opinion. Inasmuch as four justices concurred only in the *result* of the case, the opinion of the supreme court represented the views of only three justices. In its opinion, the court found that when the uniformed police officer, who had been following the defendant from the moment he left the Cadillac, pulled the police car off the roadway onto the housing authority property and stopped

15. *See id.*
16. *See id.* at 99-100, 496 S.E.2d at 49.
17. *Id.*
18. *Id.* at 100, 496 S.E.2d at 49.
19. *Id.*
20. *Id.*
21. *See id.*
22. *See id.* at 107, 496 S.E.2d at 53.

the car where the defendant was standing, the defendant effectively was seized for purposes of the Fourth Amendment.[23] The supreme court held that the police officer's acts constituted a show of authority which restrained the defendant's liberty and, as such, it was a seizure.[24]

The supreme court went on, however, to evaluate whether the seizure was reasonable under the United States Supreme Court's decision in *Terry v. Ohio*.[25] The court found that based upon the facts and circumstances of the case at the time of the seizure, the officer had a "reasonable suspicion, based on objective facts, that the defendant was engaged in criminal activity."[26] The defendant was with a group of men in an "open-air drug market" where the officer had made numerous drug arrests and had recovered drugs and weapons. When the men saw the police, they closed the trunk of the car and dispersed. Furthermore, the officer saw the defendant place an object in the waistband of his shorts. Based upon that evidence, the supreme court found that the officer had a "particularized and objective basis" for suspecting that the defendant was involved in criminal activity.[27]

The court also found that the officer was justified in reaching into the defendant's boxer shorts and seizing the crack cocaine.[28] The court held that the officer had probable cause to believe that the defendant had committed a crime when the officer reached into the shorts to retrieve the object he believed to be crack cocaine.[29] In addition to all of the facts which justified the seizure, the officer testified that he knew from personnel experience that "people often try to hide contraband in their shorts, in their crotch area or in their buttocks area."[30] The officer also knew that "[p]ink baggies are often one of the colors of baggies used to package . . . crack cocaine."[31] When asked by the second officer whether he had anything in his crotch, the

23. *See id.* at 102, 496 S.E.2d at 51.
24. *See id.*
25. 392 U.S. 1 (1968).
26. *Parker*, 255 Va. at 104, 496 S.E.2d at 52.
27. *Id.* at 105, 496 S.E.2d at 52.
28. *See id.* at 104, 496 S.E.2d at 53.
29. *See id.*
30. *Id.*
31. *Id.*

defendant grabbed the waistbands of both his shorts and boxers, and maneuvered them "in an apparent effort to prevent the crack from falling to the ground."[32] The supreme court found that based upon all of this evidence, the officer had probable cause to seize the contraband.[33]

In *Ewell v. Commonwealth*,[34] the issue before the Supreme Court of Virginia was whether the stop and detention of the defendant was reasonable for purposes of the Fourth Amendment. An off-duty police officer, hired by a particular apartment complex to work as a security officer to enforce the complex's policy against trespassing, drove his marked police vehicle into the complex parking lot. As the officer entered the lot, he saw a vehicle, which he did not recognize as one belonging to a resident, parked next to an apartment that was suspected of being the site of narcotics activity. The officer was concerned because it was "very early and the car was parked in an area suspected of 'high narcotics' trafficking."[35] The driver of the car attempted to leave the parking lot immediately upon the officer's arrival. As the vehicle approached, the officer did not recognize the driver as a resident of the apartment complex. Thus, he wanted to stop the vehicle to inquire whether the driver was trespassing.[36]

The vehicle already had exited the parking lot and was on a public street. The officer followed the vehicle out, activated his flashing blue lights, and stopped the car. The officer approached the car, determined that defendant Ewell was the operator, and then, using his flashlight, "saw a beer can that had been fashioned in such a way that it gave the appearance of something that would be used, in [the officer's] experience, to smoke crack cocaine."[37] The officer explained the appearance in detail and why he believed that it was used as a crack pipe. The officer also saw a wooden clothespin charred at one end in an open purse. The officer testified that it was his experience that such

32. *Id.*
33. *See id.*
34. 254 Va. 214, 491 S.E.2d 721 (1997).
35. *Id.* at 216, 491 S.E.2d at 722.
36. *See id.*
37. *Id.*

an item commonly was used to hold a crack pipe when it became too hot to hold with one's hand.[38]

The defendant admitted to the officer that the purse belonged to her and that he would find a crack pipe inside. The officer searched the purse and found two homemade crack pipes that ultimately tested positive for cocaine.[39]

The supreme court reversed Ewell's conviction and found that the trial court erred by refusing to suppress the evidence.[40] The court held that the police officer did not have a reasonable suspicion that Ewell may have been trespassing or engaging in any other criminal activity.[41] The court found that despite the fact that the officer did not recognize Ewell or Ewell's vehicle, which was parked in a high narcotic activity area, the fact that the vehicle simply left upon the arrival of the marked police car was not suspicious conduct.[42] Thus, the supreme court held that the facts did not provide the officer with the basis for a legitimate investigatory stop.[43]

In *Polston v. Commonwealth*,[44] the Supreme Court of Virginia considered whether marijuana, found during a search of the defendant's apartment pursuant to a warrant, should have been suppressed as the fruit of an unlawful search. A police detective obtained a warrant for a search of the defendant's apartment after he and an unidentified informant appeared before a magistrate.[45] The detective represented in his affidavit to the magistrate that, on that date, a "citizen" informant appeared before the magistrate and stated that within the past seventy-two hours he or she observed a quantity of marijuana being stored as well as being offered for sale at the particular identified apartment.[46]

In support of the informant's credibility and reliability, the affidavit stated that the informant appeared before the magis-

38. *See id.*
39. *See id.*
40. *See id.* at 217, 491 S.E.2d at 723.
41. *See id.*
42. *See id.*
43. *See id.*
44. 255 Va. 500, 498 S.E.2d 924 (1998).
45. *See id.* at 501, 498 S.E.2d at 925.
46. *See id.* at 501-02, 498 S.E.2d at 925.

trate under oath and after being advised of the penalty for perjury. The informant chose to remain anonymous for fear of retaliation. The affidavit represented that the affiant had been a police officer for more than six years, was currently assigned to the Vice and Narcotics Unit of his jurisdiction, had made several drug arrests, and was familiar with the drug culture in and around his jurisdiction.[47]

In making the decision to issue a search warrant for the defendant's apartment, "the magistrate questioned the informant under oath, and the informant stated that he was familiar with the local drug culture and that he had used marijuana at least once a week for a number of years."[48] In light of the informant's sworn testimony, the magistrate or the detective added to the affidavit that "[t]his citizen is a self-admitted drug user and is familiar with the drug culture in and around [the County where the defendant's apartment is located]."[49] The magistrate then issued the search warrant. Subsequently, the police found about a pound of marijuana in the defendant's bedroom dresser. She told the police that she sold marijuana.[50]

The defendant argued on appeal that the magistrate did not have a substantial basis to find probable cause necessary for the issuance of a search warrant because the "citizen" referred to in the affidavit was arrested by the police just prior to providing them with the information. The detective also made no effort to investigate or verify either the informant's credibility or the reliability of the information contained in the warrant.[51] The supreme court, applying the "good faith exception" to the exclusionary rule set forth by the United States Supreme Court in *United States v. Leon*[52] found that regardless of the validity of the search warrant, the evidence seized during the search of the defendant's apartment was admissible and the trial court's ruling was correct.[53]

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47. *See id.*
48. *Id.* at 502, 498 S.E.2d at 925.
49. *Id.*
50. *See id.*
51. *See id.* at 502-03, 498 S.E.2d at 925.
52. 468 U.S. 897 (1984).
53. *See Polston*, 255 Va. at 503, 498 S.E.2d at 925.

The supreme court recognized the four occasions when suppression of evidence, despite the existence of a search warrant, is required. First, the supreme court noted that the evils identified in the *Leon* test were not present in this case. Second, the court found that the police officers acted in good faith when they searched the apartment under the authority of an apparently valid search warrant.[54] Third, the court held that the magistrate neither abandoned his judicial role nor was misled by information in the affidavit.[55] In fact, according to the court, "the magistrate questioned the informant about the informant's knowledge of drug activity" in the involved county.[56] Finally, the Supreme Court noted that the warrant was neither facially deficient, nor "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[57] Thus, applying the "good faith exception" to the exclusionary rule, the supreme court affirmed the decision of the Virginia Court of Appeals.

In *McGee v. Commonwealth*,[58] the Virginia Court of Appeals found that the defendant's encounter with the police was not consensual, thus triggering Fourth Amendment scrutiny. The court of appeals also concluded that at the time of the search of the defendant, the police did not have a reasonable suspicion based upon articulable facts to suspect the defendant of criminal activity, and consequently, the search was improper.[59] The court's rulings were very fact-specific, based on the unique circumstances of this case.

In this case, police received a radio dispatch from an anonymous informant, providing the description of a male who was selling drugs on a particular street corner. About two minutes after the call was dispatched, police arrived in the area. No one was at the street corner, but the defendant was sitting on a nearby porch. Three armed, uniformed police officers in two marked police cars pulled up to a sidewalk, got out of the vehicles, and approached the defendant. One officer told the defen-

54. *See id.* at 504, 498 S.E.2d at 926.
55. *See id.*
56. *Id.*
57. *Id.*
58. 25 Va. App. 193, 487 S.E.2d 259 (Ct. App. 1997) (en banc).
59. *See id.* at 196, 487 S.E.2d at 260.

dant that he had received a report that the defendant "was on this corner selling drugs and [that he] matched the description" of the reported drug dealer.[60] The officer, in the same tone of voice that he used in court, asked the defendant if he could pat him down to ensure that he did not have any weapons on his person. The defendant stood up and extended his arms in front of him with both fists clinched. The officer patted him down, but found no weapons. The officer believed that the defendant could have been holding a small knife or razor blade in his closed fists; therefore, he asked the defendant to open his hands. The defendant did so and revealed some money, a torn ziplock bag, and a piece of crack cocaine.[61]

The court of appeals stated that, in analyzing whether a police-citizen encounter is consensual, the court looks to the totality of the circumstances to determine whether "a reasonable person would have believed that he or she was not free to leave."[62] The court reasoned that "[w]hen the police expressly inform an individual that they have received information that the individual is engaging in criminal activity, the police 'convey a message that compliance with their request is required.'" This is a significant fact "among the 'totality of the circumstances' to determine whether a reasonable person would feel free to leave."[63]

The court of appeals noted that whether the encounter is consensual or amounts to a seizure is determined on a case-by-case basis.[64] The court went on, however, to hold that in this case the officer's statement did not simply "convey a message that the officers were conducting a *general* investigation in response to a report of drug dealing," but targeted the defendant as the subject of the investigation.[65] Moreover, the three armed, uniformed police officers arrived in two marked police cars and immediately approached the defendant. The court found that "[t]he unmistakable message conveyed to the defendant was that the officers had reason to suspect that he was

60. *Id.*
61. *See id.* at 196-97, 487 S.E.2d at 261.
62. *Id.* at 199-200, 487 S.E.2d at 262.
63. *Id.* (citations omitted).
64. *See id.*
65. *Id.* at 201, 487 S.E.2d at 263 (emphasis in original).

selling drugs and that they were detaining him to investigate his activity."[66] Thus, a reasonable person would have believed that he or she was being detained and that there was no option but to submit to the pat down and open his or her hands.[67]

In addition to finding that the defendant was seized by the police based upon their show of authority, the court determined that at the time of the seizure the officer did not have a reasonable suspicion of criminal activity that was based upon articulable facts in order to support an investigatory stop.[68] The anonymous tip was not supported by any independent observations by the police. The court of appeals found that "[a]t most, . . . [the officer] only knew that the defendant may have fit the description of the person that the anonymous tipster observed."[69] The officers did not see any furtive gestures or suspicious behavior on the part of the defendant and nothing suggested that the defendant was engaged in criminal behavior. Consequently, the court of appeals concluded that seizure was unlawful and the evidence should have been suppressed.[70]

In *White v. Commonwealth*,[71] the Virginia Court of Appeals affirmed the defendant's conviction for possession of cocaine with the intent to distribute. The significant issue before the court was whether the officers had a lawful basis to seize the defendant and conduct a warrantless search of his person.[72]

Three police officers were on duty one evening, patrolling together in a police car. They saw a group of five to ten males standing in a semicircle. One man had his back to the street, facing the other men. The group was standing next to a Cadillac, which one of the officers recognized as belonging to the defendant. As the officers approached, they heard someone shout, "'5-0,' a street term for police."[73] The man who had been facing the group turned to look and the same officer who had recognized the car recognized the defendant. The group of men

66. *Id.*
67. *See id.*
68. *See id.* at 202, 487 S.E.2d at 263 (citing Terry v. Ohio, 392 U.S. 1 (1968)).
69. *Id.* at 203, 487 S.E.2d at 264.
70. *See id.*
71. 25 Va. App. 662, 492 S.E.2d 451 (Ct. App. 1997) (en banc).
72. *See id.* at 664, 492 S.E.2d at 452.
73. *Id.*

ran, leaving the Cadillac with its motor running and a door wide open. The officer who recognized the defendant watched as the defendant ran with his hand clenched in a fist. The officer saw him make a downward motion and open his fist. "A large white object fell from his hand and onto the ground."[74] One officer went to retrieve the object while the other two officers followed the group of men who ran behind the residences. The two officers found the defendant sitting on the back steps of one of the houses.[75]

The officers made the defendant stand up and patted him down for weapons. The officer who knew him radioed for a warrant check. Another officer, who had gone to where he saw the defendant drop the object, found what he believed to be cocaine and asked the officer over the radio if he had custody of the defendant. After receiving an affirmative response, that officer told the other officers to bring the defendant around to the front because he had the "dope" that the defendant dropped. The defendant was arrested based upon the cocaine that the officer saw him drop. A stocking cap with $581.00 in various denominations and a pager were found on the defendant's person. An officer saw "shavings" on the floorboard and seat of the Cadillac, which he believed to be crack cocaine. Also, a digital scale was found inside the vehicle. The defendant subsequently made a statement to the police.[76]

The court of appeals found that when the two officers initially detained the defendant, the act was authorized as an investigatory stop under *Terry v. Ohio*.[77] Likewise, the initial "frisk" was authorized because the officers saw a group of men gathered around a car late on a winter evening.[78] As the police approached, they heard someone yell out a slang word for police and the group ran, abandoning the car leaving one of its doors wide open and its engine running. The two officers that chased the group found the defendant sitting on a porch despite the time of year and hour of the night. One of the officers recognized him from "previous encounters" and radioed for a warrant

74. *Id.* at 664-65, 492 S.E.2d at 452.
75. *See id.*
76. *See id.* at 665, 492 S.E.2d at 452-53.
77. *See id.* at 666, 492 S.E.2d at 453 (citing Terry v. Ohio, 392 U.S. 1 (1968)).
78. *See id.*

check. The court of appeals found that all of this evidence supported the two officers' reasonable suspicion that the group of men had been engaged in criminal activity and that the defendant was a "member of the group."[79] Thus, the initial detention and frisk challenged by the defendant were lawful.[80]

In *Moore v. Commonwealth*,[81] the Virginia Court of Appeals affirmed the defendant's convictions for a second offense of possession of heroin with intent to distribute and conspiracy to possess heroin with intent to distribute.[82] In addition to finding that the evidence in this case was sufficient to support the defendant's conspiracy conviction, the court held that the frisk of the defendant, who was the passenger in a legitimately stopped vehicle, was reasonable and did not violate his Fourth Amendment rights.[83]

The court of appeals, recognizing society's "paramount" concern for the safety of police officers, found that the officer was justified in frisking the defendant. The minimal intrusion associated with a frisk was outweighed by the legitimate concern for police safety.[84]

In this case, the Virginia State Trooper stopped a vehicle for speeding. The stop occurred on an interstate highway bridge. The bridge did not have a pedestrian walkway. In addition to the driver of the vehicle, the defendant was the front seat passenger and there was another passenger in the back seat. The trooper was alone. The driver of the vehicle could not produce an operator's license or the registration for the vehicle. All three occupants denied ownership of the car. The trooper took the driver to the police car because he had no proof of identification. The defendant and the other passenger remained in the car. The defendant told the trooper that the driver was "not who he said he was."[85] The trooper arrested the driver for forgery and handcuffed him.[86]

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79. *Id.* at 666, 492 S.E.2d at 454.
80. *See id.* at 666-67, 492 S.E.2d at 454.
81. 25 Va. App. 277, 487 S.E.2d 864 (Ct. App. 1997).
82. *See id.*
83. *See id.* at 283-86, 487 S.E.2d at 867-68.
84. *See id.* at 286-87, 487 S.E.2d at 868-69.
85. *Id.* at 281, 487 S.E.2d at 866.
86. *See id.*

The trooper asked the two passengers to get out of the vehicle. Each acknowledged that he did not have a valid driver's license, and the back seat passenger appeared to be under the influence "of something" and unable to drive. The trooper had "'a bad feeling about' the situation" and was waiting for his backup to arrive.[87] The trooper told the passengers that because the driver was under arrest and no one else could drive the car, he was going to have the car inventoried and then towed. He also told them that, in accordance with police procedure, he intended to remove them from the interstate highway. The trooper frisked them for weapons to ensure his safety while he was inventorying the vehicle and transporting them to a safe place off of the highway.

During the frisk, "the trooper detected and removed from . . . [the defendant's] pocket an unsheathed syringe, which contained a clear, white liquid."[88] After the defendant denied being a diabetic, the trooper arrested him for possession of drug paraphernalia. The trooper then searched the defendant incident to that arrest and found a "bag containing ninety-nine small, blue glassine bags of heroin."[89]

The defendant challenged the frisk of his person, but the court of appeals found that the frisk was proper because the events which unfolded created a situation "fraught with potential danger" for the officer, which justified the minimal intrusion of a frisk.[90] The court noted that the trooper was required to inventory the vehicle. Moreover, he could not leave the two passengers, neither of which could legally drive the vehicle, on the bridge or on the highway. State police policy required the trooper to conduct a pat-down for weapons to ensure the officer's safety before transporting them because the police car has no barrier between the front and rear seats. Based upon all of the facts, the court of appeals found that the frisk was reasonable.[91]

87. *Id.* at 282, 487 S.E.2d at 866.
88. *Id.*
89. *Id.*
90. *See id.* at 286-87, 487 S.E.2d at 868-69.
91. *See id.* at 287, 487 S.E.2d at 869.

In *Jefferson v. Commonwealth*,[92] the Virginia Court of Appeals reversed the defendant's conviction for possession of cocaine. The court found that although the police had probable cause to believe that the defendant had committed a criminal offense, the officer could not effect the arrest without a warrant because the officer had to go onto the defendant's porch which is the curtilage of his home.[93]

The court of appeals found that, based upon information provided by two informants, the officer had probable cause to believe that the defendant recently had committed a criminal offense.[94] The court held that the reliability of the informants was "established by their asserted first-hand knowledge, their independent corroboration of each other's observations, and one of the informant's history of providing accurate information to the police."[95] The first informant, whom the officer had known for about a month, told him about the defendant and others selling cocaine at a particular location. The officer sent a second proven reliable informant to "see what was going on" at that location.[96] The second informant reported the same detailed information that had been provided by the first informant. The court of appeals found that based upon the totality of the circumstances, the lead officer and all of those officers whom he briefed prior to their arrival at the location, which included the arresting officer, had probable cause to arrest the defendant.[97]

Despite its finding of probable cause to arrest, the court of appeals held that the arrest was "unlawful because it was executed within the 'curtilage' of his home without a warrant."[98] The porch was in close proximity to the defendant's house. The back door from which the defendant exited the house when arrested opened "'directly' into the backyard."[99] The defendant was right outside the door and the officer had to walk behind the house before he could see the defendant.

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92. 27 Va. App. 1, 497 S.E.2d 474 (Ct. App. 1998).
93. *See id.* at 17-18, 497 S.E.2d at 482.
94. *See id.* at 13, 497 S.E.2d at 480.
95. *Id.*
96. *Id.* at 7, 497 S.E.2d at 477.
97. *See id.* at 14, 497 S.E.2d at 480.
98. *Id.* at 14, 497 S.E.2d at 480.
99. *Id.* at 17, 497 S.E.2d at 482.

According to the court of appeals, the "area of a residential backyard immediately adjacent" to the back door of the residence is an area accepted as one "to which the activity of home life extends."[100] The court of appeals found that because the defendant was arrested at a location "so intimately tied to the home," he "could reasonably expect it to be treated as a part of his home."[101] Furthermore, the court asserted that nothing in the record suggested that the officer's intrusion into the curtilage was justified by exigent circumstances, nor that the defendant consented to his entry. Thus, the court concluded that because the officer entered the curtilage of the defendant's home without a warrant, the arrest was unlawful.[102]

In *Neal v. Commonwealth*,[103] the Virginia Court of Appeals found that when a police officer observes repeated weaving by a vehicle within a lane of traffic, the officer may have a reasonable and articulable suspicion that the driver is impaired so as to justify an investigatory stop.[104] In this case of first impression, the court of appeals concluded, "[w]e agree with our sister states that weaving within a single traffic lane is an articulable fact which may give rise to a reasonable suspicion of illegal activity."[105] The court also recognized, however, that "[a]n isolated instance of mild weaving within a lane is not sufficiently erratic to justify an investigatory stop."[106]

3.. Roadblocks

In *Crouch v. Commonwealth*,[107] the Virginia Court of Appeals evaluated the constitutionality of a traffic checkpoint. Specifically, the court considered whether a field officer's control over the timing of the checkpoint within the officer's "work week" constituted "unbridled discretion" of that officer so as to render the checkpoint unconstitutional.[108]

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100. *Id.* (citations omitted).
101. *Id.* at 18, 497 S.E.2d at 482.
102. *See id.*
103. 27 Va. App. 233, 498 S.E.2d 422 (Ct. App. 1998).
104. *See id.*
105. *Id.* at 239, 498 S.E.2d at 425.
106. *Id.*
107. 26 Va. App. 214, 494 S.E.2d 144 (Ct. App. 1997).
108. *See id.* at 219, 494 S.E.2d at 146.

The court of appeals noted that the trooper responsible for the checkpoint had no discretion to decide the location of the assigned roadblock.[109] The court further recognized that, although the trooper was allowed to determine when to set up the checkpoint, the decision had to be pre-approved by a supervisor not part of the detail before any vehicles could be stopped.[110] The court found that the rationale for providing the troopers a limited amount of discretion was to allow weather conditions to be evaluated and to determine the availability of other officers to assist.[111] Consequently, based upon the facts, the court of appeals held that the traffic checkpoint was established properly and the trooper's limited, supervised discretion under explicitly neutral guidelines did not constitute "unbridled discretion" prohibited by law.[112]

The Virginia Court of Appeals in *Gilpin v. Commonwealth*,[113] however, held that a legitimate roadblock stop can become unconstitutional if the officer detains the vehicle without justification after the activities called for in the roadblock operational plan have been concluded.[114] Gilpin's vehicle was stopped at a roadblock. After concluding the standard checks called for in the operational plan, the police officer ordered Gilpin, who had a valid North Carolina license, to pull over to the side of the road while he checked Gilpin's license status. The officer suspected that Gilpin's license might be suspended in Virginia because the car was registered to his girlfriend in Virginia, and, in his experience, North Carolina often granted licenses to drivers who had their license suspended in Virginia.[115]

The court of appeals found that these considerations did not give rise to a reasonable suspicion that Gilpin was violating the law, and consequently, the extended detention beyond that normally required by the roadblock was unreasonable under the

109. *See id.* at 219, 494 S.E.2d at 146-47.
110. *See id.* at 220, 494 S.E.2d at 147.
111. *See id.*
112. *See id.* at 219-20, 494 S.E.2d at 146-47.
113. 26 Va. App. 105, 493 S.E.2d 393 (Ct. App. 1997).
114. *See id.* at 110, 493 S.E.2d at 395.
115. *See id.* at 107-08, 493 S.E.2d at 394.

Fourth Amendment.[116] Accordingly, the court dismissed Gilpin's convictions for possession of the guns found during the search of the car and for attempting to escape the officer's custody during the illegal detention.[117]

4. Community Caretaker Function

The Virginia Court of Appeals, in *Wood v. Commonwealth*,[118] had difficulty agreeing on the application of the police "community caretaker" function as justification for a warrantless intrusion on the defendant's privacy interests associated with his home. When called to a home on a domestic violence complaint, police officers arrested the husband and, the wife not being present, waited at the home until a social services representative arrived to awaken and remove their two young children. Then, maintaining that they were looking for a teenage son of the couple who had been reported missing, the officers went into the house and searched upstairs, where they had seen a light on, and detected a foul odor. In plain view, they saw drugs and firearms. They left to get a search warrant, leaving the house unlocked. At the police station, the husband consented to a further search of the residence. Returning without a warrant, the officers seized the contraband and charged the husband with its possession.[119]

A panel of the court of appeals upheld the admission of the evidence because the police, acting as community caretakers, acted reasonably when they looked upstairs for the missing son.[120] On rehearing en banc, a five-judge plurality first expressed doubt that the "community caretaker" rationale could be applied to justify searches of homes, as opposed to automobiles, but held that it could not be applied here because a legitimate "community caretaker" intrusion must be "totally divorced" from any criminal investigation.[121] Also, the intrusion here was, in the opinion of the five judges, an extension of the

116. *See id.* at 112, 493 S.E.2d at 396.
117. *See id.* at 113, 493 S.E.2d at 397.
118. 27 Va. App. 21, 497 S.E.2d 484 (Ct. App. 1998) (en banc).
119. *See id.* at 24-25, 497 S.E.2d at 485-86.
120. *See* Wood v. Commonwealth, 24 Va. App. 654, 484 S.E.2d 627 (Ct. App. 1997).
121. *See Wood*, 27 Va. App. at 28-30, 497 S.E.2d at 487.

criminal investigation rather than a bona fide effort to find the missing teenager.[122]

Two other judges opined that the community caretaker doctrine could justify warrantless entry of a home but concurred in the result because the circumstances did not justify such an intrusion.[123] Three dissenting judges observed that the court of appeals had held, in *Commonwealth v. Waters*,[124] that the community caretaker doctrine was not limited to automobile searches and concluded that the facts of this case justified application of the community caretaker doctrine.[125]

5. Fifth Amendment—Custodial Interrogation

In *Lilly v. Commonwealth*,[126] shortly after the defendant's arrest, he asked a police officer to shoot him.[127] The officer asked the defendant if he thought the officer looked like a murderer. Then, in subsequent conversation, the officer asked the defendant what a murderer looked like. The defendant responded, "me."[128] The Supreme Court of Virginia held that this admission, although unwarned and made while in custody, was properly admitted in evidence because the defendant had initiated the conversation and the statement was voluntary.[129]

B. *Sixth Amendment—Right to Counsel*

In *Watkins v. Commonwealth*,[130] the Virginia Court of Appeals found that a felony defendant had knowingly, intelligently, and voluntarily waived the assistance of counsel and elected to represent himself.[131] The court made this ruling despite the absence of a written waiver and the absence of proof that the defendant understood the nature and consequences of his waiv-

122. *See id.* at 30, 497 S.E.2d at 487.
123. *See id.* at 32, 497 S.E.2d at 489.
124. 20 Va. App. 285, 291, 456 S.E.2d 527, 530 (Ct. App. 1995).
125. *See Wood*, 27 Va. App. at 33-37, 497 S.E.2d at 489-92.
126. 255 Va. 558, 499 S.E.2d 522 (1998).
127. *See id.* at 566, 499 S.E.2d at 529.
128. *Id.*
129. *See id.* at 576, 499 S.E.2d at 533.
130. 26 Va. App. 335, 494 S.E.2d 859 (Ct. App. 1998).
131. *See id.* at 343-46, 494 S.E.2d at 863-65.

er.[132] The court of appeals reached this decision based largely on the defendant's preparation and argument of several elaborate pro se motions and on his request for appointment of a standby counsel to advise him during trial.[133]

C. *Sixth Amendment—Speedy Trial*

In *Baker v. Commonwealth*,[134] the Virginia Court of Appeals affirmed its panel decision[135] and dismissed this case for lack of a speedy trial.[136] Baker was charged and indicted for burglary and related offenses. The circuit court set trial for Baker and his co-defendants on a date within the five month speedy trial period.[137] The Commonwealth then moved for a continuance to add new charges, and Baker and his co-defendants objected.[138] The trial court overruled the defendants' objection and inquired about possible dates on which to hold trial.[139] Baker's counsel suggested a date which was suitable to all counsel but it was outside the five month period in which the Commonwealth was required to bring the defendants to trial. The court was unable to try the case on the date suggested and, instead, set trial two days sooner than the suggested date.[140] The date, however, was still beyond the five month period. When the five month period expired, Baker moved to dismiss, for lack of a speedy trial under the statute.[141] The court took the motion under advisement, and the Commonwealth sought and obtained an additional continuance to which Baker did not object.[142] The trial court ultimately overruled Baker's motion to dismiss holding that Baker had waived his

132. *See id.*
133. *See id.*
134. 26 Va. App. 175, 493 S.E.2d 687 (Ct. App. 1997) (en banc).
135. *See* 25 Va. App. 19, 486 S.E.2d 111 (Ct. App. 1997).
136. *See Baker*, 26 Va. App. at 176, 493 S.E.2d at 687.
137. *See Baker*, 25 Va. App. at 21-22, 486 S.E.2d at 112-13; *see also* VA. CODE ANN. § 19.2-243 (Repl. Vol. 1995 & Cum. Supp. 1998).
138. *See Baker*, 25 Va. App. at 21, 486 S.E.2d at 112.
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*

statutory speedy trial rights by suggesting a date outside the five month period.[143]

The Virginia Court of Appeals reversed and dismissed the indictments.[144] The court held that, by suggesting the available date only after the trial court had overruled his objection to the Commonwealth's first continuance motion, Baker had not waived his speedy trial rights or agreed to the continuance.[145] The court of appeals noted that it was incumbent on the Commonwealth to bring the defendant to trial within the statutory period and that the defendant has no duty to demand a trial within that period.[146] The court opined that a waiver must be an intentional relinquishment of a known right or privilege[147] and that courts must indulge every reasonable presumption against the waiver of fundamental constitutional rights.[148]

D. *Sixth Amendment—Confrontation*

In *James v. Commonwealth*,[149] the Supreme Court of Virginia found no violation of the defendant's Sixth Amendment right of confrontation and cross-examination when the trial court prohibited counsel from asking an expert witness whether a Commonwealth's witness was "capable of lying."[150] The defendant shot two men, killing one and causing severe brain injury to the other.[151] When the latter recovered, he testified against the defendant at trial. The Commonwealth also presented the testimony from the medical doctor who had treated the witness's brain injuries. The doctor explained that the witness was recovering from "problems with thinking, memory, [and] judgment."[152] On cross-examination, the defense attempted to

143. *See id.*
144. *See id* at 25, 486 S.E.2d at 114.
145. *See id.* at 23-24, 486 S.E.2d at 113-14.
146. *See id.* (citing Baity v. Commonwealth, 16 Va. App. 497, 501, 431 S.E.2d 891, 893 (Ct. App. 1993)); Taylor v. Commonwealth, 12 Va. App. 425, 429-30, 404 S.E.2d 86, 88 (Ct. App. 1991)).
147. *See id.* at 24-25, 486 S.E.2d at 114 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
148. *See id.* (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).
149. 254 Va. 95, 487 S.E.2d 205 (1997).
150. *See id.* at 98, 487 S.E.2d at 206.
151. *See id.* at 96, 487 S.E.2d at 206.
152. *Id.* at 97, 487 S.E.2d at 206.

ask the doctor whether the witness was "capable of lying today."[153] The trial court sustained the Commonwealth's objection and allowed the defense only to ask whether the witness's injuries affected his ability to distinguish right from wrong or truth from falsehood.[154]

The supreme court affirmed the decision of the trial court.[155] The court reiterated the well-established principle that the Sixth Amendment provides only the opportunity for cross-examination.[156] Questioning must be conducted according to the rules of evidence, and thus, matters of credibility of witnesses are exclusively for the jury.[157]

E. *Eighth Amendment—Death Penalty*

In *Buchanan v. Angelone*,[158] the Supreme Court of the United States considered and rejected what had become a routine complaint of Virginia death row inmates.[159] The complaint was that the standard Virginia jury instructions for the penalty phase of a capital case violated the Eighth and Fourteenth Amendments by failing to provide the jury with express guidance on the concept of mitigation and to instruct the jury on particular statutorily defined mitigating factors.[160]

Buchanan, convicted of capital murder of multiple people in the same act or transaction,[161] presented evidence of his troubled childhood and dysfunctional family life.[162] The trial court denied Buchanan's request that the judge give jury instructions on each of the statutorily defined mitigating factors[163] and order the jury to consider the existence of such factors as mitigating against the death penalty.[164] The judge also refused to in-

153. *Id.*
154. *See id.* at 97, 487 S.E.2d at 207.
155. *See id.*
156. *See id.*
157. *See id.*
158. 118 S. Ct. 757 (1998).
159. *See id.* at 763.
160. *See id.*; *see also* VA. CODE ANN. § 19.2-264.4(B) (Repl. Vol. 1996).
161. *See generally* VA. CODE ANN. § 18.2-31(7) (Repl. Vol. 1996).
162. *See Buchanan*, 118 S. Ct. at 759.
163. *See* VA. CODE ANN. § 19.2-264.4 (B) (Repl. Vol. 1996).
164. *See Buchanan*, 118 S. Ct. at 759-60.

struct the jury to consider all the circumstances of the offense and Buchanan's history and background in reaching their decision.[165] Instead, the trial court instructed the jury that if they found either vileness or future dangerousness beyond a reasonable doubt, then they may fix the penalty at death; but, if they found from all the evidence that the death penalty was not justified, then they must fix the penalty at life in prison.[166] The penalty verdict form also required the jury to state that they had considered all the evidence before reaching a verdict of death.[167]

On certiorari from the denial of federal habeas corpus relief by the United States Court of Appeals for the Fourth Circuit, the United States Supreme Court held that Buchanan's argument confused the Eighth Amendment's requirements for the eligibility phase of a capital case, in which the fact finder determines if the defendant has committed a crime for which the death penalty may be imposed, and those of the selection phase, in which the sentencer actually decides if this defendant should receive the death penalty.[168] In the eligibility phase, the fact finder's discretion must be channeled to ensure that the death penalty is not disproportionate to the crime and is not arbitrarily or capriciously applied.[169] In the selection phase, by contrast, the Court held that the Eighth Amendment requires only that the sentencer not be precluded from considering any constitutionally relevant mitigating evidence and does not require states to provide affirmative structuring of the way in which mitigating evidence is considered.[170] By directing the jury to base their decision on all the evidence, the Virginia jury instructions complied with the Eight and Fourteenth Amendments.[171]

The Supreme Court of Virginia upheld four death sentences during the period covered in this article.[172] Summarized below

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165. *See id.*
166. *See id.* at 760. These are standard jury instructions.
167. *See id.*
168. *See id.* at 761-67.
169. *See id.*
170. *See id.*
171. *See id.* at 763.
172. *See* Walton v. Commonwealth, 256 Va. 85, 501 S.E.2d 134 (1998) (murder during commission of robbery while armed with deadly weapon; sentence based on

are the cases relating to the law governing capital punishment.[173]

In *Jackson v. Commonwealth*,[174] the Supreme Court of Virginia affirmed the death penalty of a defendant who was sixteen years-old at the time he committed the murder.[175] The murder was accomplished in the course of an attempted armed robbery of a stranger who was waiting for a companion to purchase crack cocaine.[176] Jackson contended that Virginia law had not approved capital punishment of minors in accordance with the United States Supreme Court's requirements as established in *Stanford v. Kentucky*.[177] The supreme court found that such punishment was permitted under sections 16.1-269.1 and 16.1-272 of the Virginia Code,[178] authorizing adult penalties for properly transferred juveniles over fourteen years of age.[179] The court found that the death penalty was not disproportionate for the defendant, who had a substantial previous record of criminal activity (including violent offenses) and who shot a stranger in cold blood when his victim would not produce money in response to his demand.[180]

Justice Hassell dissented, asserting that the death penalty was disproportionate for Jackson because all other sixteen-year-old juveniles convicted of capital murder in Virginia have received life sentences.[181] The majority, however, held that the defendant's age was only one factor and that the court should compare Jackson's case not only with those of other sixteen-

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future dangerousness); Jackson v. Commonwealth, 255 Va. 625, 499 S.E.2d 538 (1998) (murder in course of attempted robbery while armed with deadly weapon; sentence based on future dangerousness); Lilly v. Commonwealth, 255 Va. 558, 499 S.E.2d 522 (1998) (murder in course of robbery while armed with deadly weapon; sentence based on future dangerousness and vileness); Beck v. Commonwealth, 253 Va. 373, 484 S.E.2d 898 (1997) (murder in course of rape and three murders in course of robbery while armed with deadly weapon; sentence based on future dangerousness and vileness).

173. Capital cases, involving other noteworthy points of criminal law, are discussed later in this article.

174. 255 Va. 625, 499 S.E.2d 538 (1998).

175. *See id.* at 652, 499 S.E.2d at 555.

176. *See id.* at 632-33, 499 S.E.2d at 542-43.

177. 492 U.S. 361 (1989).

178. VA. CODE ANN. §§ 16.1-269.1, -272 (Repl. Vol. 1996 & Cum. Supp. 1998).

179. *See Jackson*, 255 Va. at 647, 499 S.E.2d at 552.

180. *See id.* at 651-52, 499 S.E.2d at 554-55.

181. *See id.* at 652-55, 499 S.E.2d at 555-57 (Hassell, J., dissenting).

year-olds, but with all capital murder convictions.[182] Moreover, the majority held that the court should consider the crime and the defendant, especially those involving murder in the course of attempted robbery and the future dangerousness predicate.[183]

In *Lilly v. Commonwealth*,[184] the Supreme Court of Virginia rejected a claim that the holding of *Simmons v. South Carolina*[185] required that a capital murder defendant be permitted to "educate" a jury during voir dire about the defendant's non-eligibility for parole.[186] The supreme court held that the jury was instructed properly on this subject, and the defense was allowed to argue it in the penalty phase closing argument.[187]

In *Walton v. Commonwealth*,[188] the trial court, conducting the penalty phase without a jury after Walton pleaded guilty to capital murder and related felonies, orally found that the evidence proved both the vileness and the future dangerousness predicates, but its sentencing order contained only a finding of future dangerousness.[189] Walton contended on appeal that the court erred in finding that vileness was proven. The Supreme Court of Virginia refused to consider the claim, holding that because "a trial court speaks only through its written orders," the death sentence was not predicated on the vileness finding.[190] The court refused to consider a nunc pro tunc sentencing order entered after the defendant had filed his notice of appeal because the trial court had lost jurisdiction of the case at that point.[191]

In *Beck v. Commonwealth*,[192] the Supreme Court of Virginia upheld the trial judge's receipt and consideration, for sentencing purposes, of "victim impact" evidence from persons not related

182. *See id.* at 651-52, 499 S.E.2d at 554-55.
183. *See id.*
184. 255 Va. 558, 499 S.E.2d 522 (1998).
185. 512 U.S. 154 (1994).
186. *See Lilly*, 255 Va. at 567, 499 S.E.2d at 529.
187. *See id.* at 567-70, 499 S.E.2d at 529-31.
188. 256 Va. 85, 501 S.E.2d 134 (1998).
189. *See id.* at 87, 501 S.E.2d 135.
190. *Id.* at 94, 501 S.E.2d at 140 (quoting Davis v. Mullins, 252 Va. 141, 148, 466 S.E.2d 90, 94 (1996)).
191. *See id.*
192. 253 Va. 373, 484 S.E.2d 898 (1997).

to the deceased victims.[193] Beck contended that such evidence went beyond that constitutionally permitted under relevant statutes[194] and case law.[195] The supreme court ruled that the reference in these cases to evidence from the victims' family members described the nature, not the source, of such evidence.[196] The sources of such evidence are limited only "by the relevance of such evidence to show the impact of the defendant's actions."[197] The court found nothing in the statutes which prohibited such evidence from persons other than family members.[198]

In addition, the defendant complained that the "victim impact" evidence in his case included "recommendations" that the death penalty be imposed. The court concluded that the trial court received these comments only as expressions of the depth of the witnesses' feelings regarding the impact of these crimes and that the trial judge was presumed, by his training and experience, to have separated the permissible "victim impact" evidence from the potentially prejudicial remarks.[199]

F. *Fourteenth Amendment*

1. Due Process

The Supreme Court of Virginia, in *Walton v. Commonwealth*,[200] upheld the constitutionality of section 18.2-259.1 of the Virginia Code, providing for the automatic suspension of one's driver's license for six months upon conviction for a drug offense.[201] During an authorized police search of Walton's home, the police found marijuana, which Walton admitted us-

193. *See id.* at 381-86, 484 S.E.2d at 903-06.

194. *See* VA. CODE ANN. §§ 19.2-11.01, -264.5, -299.1 (Repl. Vol. 1995 & Cum. Supp. 1998).

195. *See Beck*, 253 Va. at 381-82, 484 S.E.2d at 903-04 (citing Payne v. Tennessee, 501 U.S. 808 (1991)); Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379 (1994), *cert. denied*, 516 U.S. 829 (1995).

196. *See Beck*, 253 Va. at 381, 484 S.E.2d at 904.

197. *Id.*

198. *See id.*

199. *See id.* at 586, 484 S.E.2d at 906.

200. 255 Va. 422, 497 S.E.2d 869 (1998), *aff'g* 24 Va. App. 757, 485 S.E.2d 641 (Ct. App. 1997).

201. *See id.* at 428, 497 S.E.2d at 873.

ing. The trial court convicted him of possession and suspended his driver's license for six months, pursuant to the statute.[202]

On appeal, Walton claimed that the application of the statute deprived him of substantive due process of law.[203] Applying the presumption of constitutionality, the court held that, because the statute did not affect a fundamental constitutional right, it would be upheld if it had a "reasonable relation to a proper purpose and [was] neither arbitrary nor discriminatory."[204] The court concluded that the purpose of this statute was to protect persons using the Commonwealth's highways and that the legislature "could reasonably assume that a person who possesses illegal substances would use those substances and could operate a motor vehicle under the influence of [the] substances."[205]

2. Due Process—Right to Confront Witnesses—Disclosure of Police Observation Post

In *Davis v. Commonwealth*,[206] the Virginia Court of Appeals held that the trial court erred when it denied the defendant's pretrial motion to compel disclosure of the location of a police observation post. The court recognized that the Commonwealth enjoys a qualified privilege not to disclose the location of a police observation post.[207] The court noted, however, that when a defendant shows that he or she needs that information to conduct a defense and there is no other adequate means of "getting at the same point," the trial court must balance law enforcement and citizen safety concerns against the defendant's constitutional right to confront witnesses and to prepare a defense.[208]

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202. *See id.* at 424, 497 S.E.2d at 871.

203. *See id.* at 427-28, 497 S.E.2d at 872-73.

204. *Id.* at 427-28, 497 S.E.2d at 872 (quoting Duke v. County of Pulaski, 219 Va. 428, 438, 247 S.E.2d 824, 829 (1978)).

205. *Id.* 428, 497 S.E.2d 873 (quoting *Walton*, 24 Va. App. at 761, 485 S.E.2d at 643).

206. 25 Va. App. 588, 491 S.E.2d 288 (Ct. App. 1997).

207. *See id.* at 593, 491 S.E.2d at 290.

208. *See id.* at 593-94, 491 S.E.2d at 290-91.

In *Davis*, the defendant was charged with distribution of cocaine. The police conducted a surveillance at a specific location, and an officer saw the defendant on the sidewalk with another woman. The officer, who had seen Davis before, watched her drop a white object into the hand of the other woman. The object was identified later as crack cocaine. The court found that based upon evidence from a pretrial evidentiary hearing, defense counsel had demonstrated that there were obstructions in the area.[209] An investigator for the defense testified that, depending upon where the police officer was secreted, the officer's view may have been obstructed. Photographs of the area showed trees, telephone poles and other objects which could have obstructed an individual's view. The court also noted the lack of evidence corroborating the surveillance officer's testimony and the presence of other people in the area during surveillance.[210] Furthermore, the purchaser of the cocaine could not identify the defendant as the seller. Thus, the court concluded that under these conditions the defendant was entitled to know the location of the observation post.[211]

In addition, the court held that the trial court erred by refusing to allow the defendant to call certain witnesses.[212] The witnesses were two property owners who had allowed the police to use their property for the observation post. According to the court, because the police officer was the only witness to the drug transaction, the defendant's ability to raise the issue of whether the officer's view was obstructed was critical to her defense.[213] The defendant independently discovered these property owners and defense counsel represented that they were willing to testify.[214] Also, defense counsel represented that the surveillance post was no longer in use.[215] Given these circumstances, the court held that Davis should have been allowed to present those witnesses to challenge the officers' ability to observe the events.[216]

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209. *See id.* at 594, 491 S.E.2d at 291.
210. *See id.*
211. *See id.*
212. *See id.*
213. *See id.* at 595-96, 491 S.E.2d at 291-92.
214. *See id.* at 594 n.2, 491 S.E.2d at 291 n.2.
215. *See id.* at 596, 491 S.E.2d at 292.
216. *See id.*

III. CRIMINAL PROCEDURE—PROVIDING DNA RATIO PRIOR TO TRIAL

In *Caprio v. Commonwealth*,[217] the Supreme Court of Virginia reversed in part the defendant's conviction for murder based upon a violation of section 19.2-270.5 of the Virginia Code.[218] The defendant, relying upon section 19.2-270.5, argued that the trial court erred by refusing to continue the case or, alternatively, by refusing to bar the testimony of an expert with respect to a particular statistic.[219] Specifically, the defendant challenged an expert witness' testimony of a one in 120,000 statistical probability of a DNA match, claiming that the statistic was a "report" or "statement" of "the results of a DNA analysis" conducted by the expert who reviewed and combined results of different tests.[220] Although the defendant had been provided with all of the independent tests used by the expert to determine the ratio, because he was not provided with the specific ratio in a timely manner, the Commonwealth violated the statute. Accordingly, the defendant either was entitled to a continuance or the expert should not have been permitted to testify with respect to the ratio.[221]

The court found that, based upon the plain meaning of the statute, the expert's blood frequency extrapolation was included in the provision of Virginia Code section 19.2-270.5; therefore, the trial court should have granted the defendant a continuance

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217. 254 Va. 507, 493 S.E.2d 371 (1997).

218. VA. CODE ANN. § 19.2-270.5 (Repl. Vol. 1995 & Cum. Supp. 1998).

At the time of the defendant's trial, section 19.2-270.5, provided in pertinent part:

> At least twenty-one days prior to commencement of the proceedings in which *the results of a DNA analysis* will be offered as evidence, the party intending to offer the evidence . . . *shall* provide or make available copies of the *profiles* and the *report* or *statement* to be introduced. In the event that such notice is not given, and the person proffers such evidence, then the court may in its discretion *either* allow the opposing party a continuance *or*, under appropriate circumstances, bar the person from presenting such evidence.

Caprio, 254 Va. at 511, 493 S.E.2d at 373 (quoting VA. CODE ANN. § 19.2-270.5 (Repl. Vol. 1995) (emphasis added)).

219. *See id.* at 509, 493 S.E.2d at 372.

220. *Id.* at 512, 493 S.E.2d at 374.

221. *See id.* at 511, 493 S.E.2d at 373.

once it determined that the evidence was admissible.[222] Further, because the one in 120,000 probability of individuals with such a blood profile differed so greatly from the one in 210 probability based upon earlier, more limited test results given to defense counsel, the court could not say that the error was harmless.[223]

IV. SUBSTANTIVE CRIMINAL LAW

A. *Homicide; Involuntary Manslaughter*

The Supreme Court of Virginia found the evidence sufficient to prove criminal negligence and, thus, involuntary manslaughter in *Greenway v. Commonwealth*.[224] Greenway contended that the evidence proved only his excessive speed of eighty-five miles per hour on the interstate highway.[225] The court, however, ruled that Greenway was overlooking the context in which the evidence showed his offense occurred. He was driving in heavy Memorial Day weekend traffic on Interstate 95, weaving through traffic, and repeatedly and abruptly changing lanes rather than adjusting his speed to that of the surrounding drivers. It was in that context that he was driving when he hit another vehicle from behind, killing the driver and her passenger.[226] The evidence sufficed to convict Greenway for manslaughter based upon his criminal negligence.

B. *Forcible Sodomy—Proof of Penetration*

In *Moore v. Commonwealth*,[227] the Supreme Court of Virginia reversed the defendant's conviction for the rape of a child under the age of thirteen. In *Moore*, due to the nature of the child's testimony and the lack of medical or forensic evidence, the Commonwealth failed to prove the essential element of penetration. During the Commonwealth's case-in-chief, the vic-

222. *See id.* at 511-12, 493 S.E.2d 374.
223. *See id.*
224. 254 Va. 147, 487 S.E.2d 224 (1997).
225. *See id.* at 151, 491 S.E.2d at 226.
226. *See id.*
227. 254 Va. 184, 491 S.E.2d 739 (1997).

tim testified that the defendant placed his penis "in" and "on" her vagina.[228] The court characterized this evidence as "in a state of equipoise" on the essential element of penetration.[229] The court noted that *Moore* was not a case where inconsistencies developed during cross-examination of the victim or where other evidence contradicted the testimony of the victim.[230] Instead, this case involved two different accounts of essential facts that were all provided by the victim during direct examination. Consequently, a portion of the Commonwealth's own evidence was consistent with innocence.[231]

The court noted that the prosecutor incorrectly believed that proof of the defendant's penis "on" the victim's vagina was sufficient to prove penetration.[232] While recognizing that "penetration of any portion of the vulva" is sufficient to prove penetration, the court found that when the child referred to her "vagina," she clearly was "describing the external part of that portion of her anatomy."[233] Thus, the victim's testimony standing alone, as a matter of law, failed to prove penetration.

In *Horton v. Commonwealth*,[234] the Supreme Court of Virginia affirmed the conviction of two defendants, Horton and Newby, of forcible sodomy by engaging in cunnilingus. The court found that the Commonwealth had proven that the respective defendants penetrated the outer portion of their victim's genitalia.[235] In Horton's situation, the twelve-year-old victim awoke to find Horton standing at the door of her bedroom. Describing the defendant's actions, the victim stated that after Horton licked her breasts and attempted to "get his penis in [her] vagina," he then licked her vagina with his tongue.[236]

In Newby's situation, the victim testified that Newby first "put his penis in [her] vagina," but because her vagina area

228. *See id.* at 187-88, 491 S.E.2d at 740-41.
229. *Id.* at 189, 491 S.E.2d at 741.
230. *See id.* at 189-90, 491 S.E.2d at 742.
231. *See id.*
232. *See id.*
233. *Id.* at 190, 491 S.E.2d at 792.
234. 255 Va. 606, 499 S.E.2d 258 (1998).
235. *See id.* at 608, 499 S.E.2d at 258.
236. *Id.* at 609, 494 S.E.2d at 259.

was dry and unlubricated, he pulled his penis out.[237] Next, Newby "put his mouth on [her] vaginal area and he drooled . . . ."[238] When asked if the defendant's mouth was specifically on her vaginal area, the victim replied that "he was 'on my vulva area.'"[239] She also testified that Newby put his mouth on her genitalia at least twice and put his penis back into her vagina. He eventually ejaculated inside her. The defendant testified at trial and claimed that the victim consented to the sexual activity. Newby testified that he "did lick Mrs. [C's] vaginal area" and "did penetrate her with [his] penis," but that the victim never resisted.[240]

The supreme court discussed the nature of cunnilingus, which is the act of "stimulation of the vulva or clitoris with the lips or tongue."[241] The court also recognized the anatomy of the female genitalia in relation to the act of cunnilingus and found that "penetration of any portion of the vulva is sufficient to prove sodomy by cunnilingus," and that "[p]enetration of the vaginal opening or vagina is not required."[242]

The court held in Horton's case, that the victim's testimony that the defendant licked her vagina demonstrated penetration of her vulva or outermost portion of her genitalia; therefore, the Commonwealth proved sodomy by cunnilingus.[243] The court reached the same conclusion in Newby's case. According to the court, "[t]he jury could have inferred from [the] evidence that Newby licked [the victim's] vagina or vaginal opening" in order to lubricate her because he then re-inserted his penis into the victim's vagina.[244] All the evidence presented by the Commonwealth tended to prove that the defendant penetrated the victim's outermost genitalia and committed forcible sodomy by cunnilingus.

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237. *Id.* at 611, 494 S.E.2d at 260.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 612, 499 S.E.2d at 261.
242. *Id.* at 613, 499 S.E.2d at 261-62.
243. *See id.* at 614, 499 S.E.2d at 262.
244. *Id.*

C. *Grand Larceny—Proof of Value*

In *Parker v. Commonwealth*,[245] the Supreme Court of Virginia reversed the defendant's conviction for grand larceny and remanded the case for a new trial on the charge of petit larceny. The court found that the Commonwealth failed to prove beyond a reasonable doubt that the value of the stolen item was $200 or more.[246] The defendant stole the handset of a cordless telephone but left the base of the telephone behind. The owner of the telephone testified that she valued the "cordless telephone unit" at more than $200. The receipt showed that the owner paid $239.99 for the entire telephone unit four months prior to its theft.[247] The court found that because there was no evidence that the handset was worth $200 or more, the Commonwealth failed to prove that the value of the handset met the required statutory amount for grand larceny.[248] The court rejected the trial court's specific finding that the base of the cordless telephone unit had no functional value without the handset.[249] In addition, the court rejected the Commonwealth's theory that the value of a stolen component of a unit is the same as the value of the entire unit when the theft renders the whole unit inoperable.[250]

D. *Single Larceny Rule*

In *Richardson v. Commonwealth*,[251] the Virginia Court of Appeals dealt with the construction and applicability of the "single larceny doctrine." The trial court convicted the defendant of two counts of grand larceny and two counts of felonious petit larceny for thefts which occurred in various locations within a hospital complex. The defendant claimed that the thefts constituted a single act of larceny rather than four separate lar-

245. 254 Va. 118, 489 S.E.2d 482 (1997).
246. *See id.* at 121, 489 S.E.2d at 483-84.
247. *See id.* at 119, 489 S.E.2d at 483.
248. *See id.* at 120, 489 S.E.2d at 483; *see also* VA. CODE ANN. § 18.2-95 (Repl. 1996 & Cum. Supp. 1998).
249. *See id.* at 121, 489 S.E.2d at 484.
250. *See id.*
251. 25 Va. App. 491, 489 S.E.2d 697 (Ct. App. 1997) (en banc).

cenies. The court of appeals affirmed the defendant's conviction on three of the larcenies and reversed one.[252]

The critical question involved the theft of two purses which occurred at or about the same time and from the same nurses' station. The court noted the difficulty related to applying the "single larceny doctrine."[253] The court explained, however, that "[t]he overriding principle behind the single larceny doctrine is to prevent the state from aggregating multiple criminal penalties for a single criminal act."[254] To determine whether multiple thefts which occur at the same location constitute only one larceny, the critical question is whether the thefts "were part of the same larcenous impulse or scheme and were part of a continuous act constituting a single larceny."[255] If so, the single larceny rule applies and the thefts constitute a single larceny.[256]

The court agreed with the trial court concerning the defendant's theft of items from several floors or separate buildings within the hospital complex.[257] Although accomplished pursuant to the defendant's "general scheme to steal," the thefts were separate and distinct.[258] The court held that each theft "was a separate and discrete offense and was not part of the same impulse or continuous larcenous act at the same location."[259]

The court, however, reversed the trial court with regard to the two thefts of purses from the same nurses' station. Addressing those thefts, the court found that the evidence was insufficient to prove that the defendant "formed separate and distinct intentions to steal or to commit two separate thefts even though the purses were separated by approximately ten feet."[260] Consequently, the court found only one larceny under the single larceny doctrine because the thefts occurred at ap-

252. *See id.* at 493-95, 489 S.E.2d at 698-99.
253. *See id.* at 496-97, 489 S.E.2d at 700.
254. *Id.* at 496, 489 S.E.2d at 700.
255. *Id.* at 497, 489 S.E.2d at 700.
256. *See id.* at 495-98, 489 S.E.2d at 700.
257. *See id.* at 498, 484 S.E.2d at 701.
258. *Id.*
259. *Id.*
260. *Id.*

proximately the same time, from the same room or location, and pursuant to one impulse or design to steal items from the nurses' station.[261]

In *Sagastume v. Commonwealth*,[262] the Virginia Court of Appeals refused to apply the "single larceny rule" to a case where the defendant raped a woman, stole personal property from her home, and then attempted to flee in her car. The defendant originally was charged, in addition to other offenses, with three counts of grand larceny for the theft of personal property belonging to the victim and her husband, the theft of firearms belonging to them, and the theft of the victim's Volvo.[263] The trial court granted the defendant's motion to strike larceny of the firearms because it was indistinguishable from the other personal property stolen, but the court allowed a change for the independent larceny of the Volvo to stand.[264]

The court of appeals found that the trial court correctly allowed two separate charges of larceny to go to the jury. The court noted that the record demonstrated that the defendant took various items of personal property from the house and that "the purpose of the thefts was to sell the items, or possibly in the case of the rifles, to use them for protection."[265] The court recognized that "[t]he jury could also have inferred that the larceny of the Volvo occurred at a later time, outside the home, and [that] the intent evinced by this theft was to steal the car to transport appellant away from the scene of his crimes."[266] Thus, the court determined that the jury could reasonably have concluded that regardless of any "general scheme" the two larceny offenses were independent and "not part of the same impulse or continuous larcenous act at the same location."[267] Accordingly, the court affirmed the defendant's convictions.[268]

261. *See id.* at 498-99, 489 S.E.2d at 701.
262. 27 Va. App. 466, 499 S.E.2d 586 (Ct. App. 1998).
263. *See id.* at 469, 499 S.E.2d at 588.
264. *See id.* at 470, 499 S.E.2d at 588.
265. *Id.* at 472, 499 S.E.2d at 589.
266. *Id.*
267. *Id.*
268. *See id.*

E. *Burglary*

The Supreme Court of Virginia in *Tyler v. Commonwealth*,[269] found that fingerprint evidence alone was sufficient to support a conviction for statutory burglary and grand larceny. A burglar broke into a store by shattering a plate glass window. Police found shards of glass all over the sidewalk just below the window. Six pieces of broken glass found at the base of the broken window contained the defendant's latent fingerprints. Police found some of the pieces leaning against the inside and some against the outside of the building. Additionally, the police discovered the defendant's prints on both sides of five of the glass pieces. Although the defendant had never worked for the store, he contended that the evidence did not eliminate the possibility that he may have come along the sidewalk and innocently picked up these pieces of glass, leaning them where they were found in order to avoid stepping on them.[270]

Comparing this case with *Avent v. Commonwealth*[271] and applying the familiar principle that circumstantial evidence must only eliminate those reasonable hypotheses of innocence which flow from the evidence itself,[272] the court found it unreasonable to infer that the defendant would have tampered with six pieces of glass by leaning them both outside and inside the window while leaving the remaining pieces scattered on the sidewalk.[273] Instead, the court found that the only reasonable inference was that the defendant had broken the window and pulled the fragments out to avoid cuts as he entered the store.[274]

269. 254 Va. 162, 487 S.E.2d 221 (1997).
270. *See id.* at 163-64, 487 S.E.2d 222.
271. 209 Va. 474, 164 S.E.2d 655 (1968).
272. *See* Turner v. Commonwealth, 218 Va. 141, 146-47, 235 S.E.2d 357, 361 (1977).
273. *See Tyler*, 254 Va. at 167, 487 S.E.2d at 224.
274. *See id.*

F. *Perjury*

In *Waldrop v. Commonwealth*,[275] the Supreme Court of Virginia reversed a perjury conviction for failing to report cash donations on a campaign finance disclosure form. Not only did the court find that the donations in question were not required to be reported under the law, but it also relied on the principle that perjury requires that the defendant know that the statement was false when made.[276] This defendant lacked the requisite knowledge when he acted on advice of counsel, who interpreted an unclear statute to provide that the donations in question did not have to be reported on the form.[277]

G. *Driving Under the Influence*

A panel of the Virginia Court of Appeals in *Leake v. Commonwealth*,[278] shed important new light on the circumstances under which one may be deemed to be operating a motor vehicle and, thus, convicted of driving or operating the vehicle while under the influence of intoxicants. Leake was found standing beside his truck on the passenger side with the door open and in the process of sliding a large knife under the floorboard mat on the passenger side. The key was in the ignition and the motor was running, the headlights and taillights were illuminated, and no one else was present. Leake told the officer he had "just left his house to ride around the block and was going straight back home."[279]

The court analyzed several earlier Supreme Court of Virginia decisions delineating the operation of a motor vehicle and concluded that, because Leake had remained with his truck after he started the engine and because no one else was present, he had clearly operated the vehicle within the intendment of the law.[280]

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275. 255 Va. 210, 495 S.E.2d 822 (1998).
276. *See id.* at 215, 495 S.E.2d at 825.
277. *See id.* at 214-15, 495 S.E.2d at 825.
278. 27 Va. App. 101, 497 S.E.2d 522 (Ct. App. 1998).
279. *Id.* at 104, 497 S.E.2d at 524.
280. *See id.* at 108, 499 S.E.2d at 525-26.

H. *Possession of Contraband with the Intent to Distribute*

In *White v. Commonwealth*,[281] the Virginia Court of Appeals held that the evidence was sufficient to prove that White possessed cocaine with the intent to distribute. A police officer testified that he saw the defendant drop a "large white object," which had been clenched in his hand, after the group dispersed upon being warned of the arrival of the police.[282] The officer, who had been about twenty-five feet away, went over to where he saw the object fall and found cocaine.[283]

The court, recognizing that the credibility of the witnesses was for the trial court to determine as trier of fact, found that the evidence supported the trial court's conclusion that White possessed the cocaine.[284] The officer's testimony and the defendant's statements proved possession.[285] The court also found that the evidence proved that White possessed the contraband with the intent to distribute.[286] Despite the fact that White possessed a relatively small amount of cocaine, he had a pager and $581 on his person. The police also found an "electronic scale" and shavings of cocaine inside White's vehicle. The court found that the defendant's possession of cocaine, a large sum of money, and drug paraphernalia supported the conclusion that he possessed the cocaine with the intent to distribute.[287]

V. DEFENSES—INTOXICATION

In *Downing v. Commonwealth*,[288] the Virginia Court of Appeals rejected an attempt to meld intoxication with evidence of a neurological condition to present an insanity defense. In this case, Downing stabbed his sister-in-law to death after a drinking spree.[289] Charged with murder, he called a court-appointed

281. 25 Va. App. 662, 492 S.E.2d 451 (Ct. App. 1997) (en banc).
282. *See id.* at 664, 492 S.E.2d at 452.
283. *See id.*
284. *See id.* at 667, 492 S.E.2d at 454.
285. *See id.*
286. *See id.* 668, 492 S.E.2d at 454.
287. *See id.*
288. 26 Va. App. 717, 496 S.E.2d 164 (Ct. App. 1998).
289. *See id.* at 719-20, 496 S.E.2d at 165.

defense psychiatrist to testify that he suffered from "pathological intoxication," a condition which allegedly results in an uncharacteristic and pathologically violent reaction to intoxication and which, according to the defense expert, is often neurologically based.[290] Downing sought appointment of a neurologist as well, but because the psychologist testified that a neurological evaluation was not necessary to his diagnosis, the trial court ruled that appointment of a neurologist was not necessary for a fair trial.[291] The Virginia Court of Appeals affirmed the trial court decision, holding that under the test of *Ake v. Oklahoma*,[292] *Britt v. North Carolina*,[293] and *Husske v. Commonwealth*,[294] the trial court's denial of the motion for appointment of the additional expert did not prejudice the defendant.[295]

At trial, Downing presented the psychologist's testimony in support of a proffered insanity defense, and the Commonwealth presented the testimony of another expert that there was no general consensus in the medical community that pathological intoxication was a recognized diagnosis.[296] At the close of the evidence, the trial court ruled that Downing's condition could not, as a matter of law, form the basis of an insanity defense, and struck the evidence of his condition.[297] Finding that he was not so intoxicated that he could not premeditate the crime, the trial court convicted him of first degree murder.[298]

Downing appealed the trial court's decision to strike the evidence of his condition in support of his insanity defense and to refuse to appoint the neurologist. He contended that the court of appeals should recognize pathological intoxication as a second exception[299] to the general rule that voluntary intoxication is not an excuse for any crime.[300] The court of appeals

290. *See id.* at 720, 496 S.E.2d at 165.
291. *See id.* at 721, 496 S.E.2d at 165-66.
292. 470 U.S. 68 (1985).
293. 404 U.S. 226 (1971).
294. 252 Va. 203, 476 S.E.2d 920 (1996), *cert. denied*, 117 S. Ct. 1092 (1997).
295. *See Downing*, 26 Va. App. at 723-24, 496 S.E.2d at 167.
296. *See id.* at 720-21, 496 S.E.2d at 166.
297. *See id.* at 721, 496 S.E.2d at 166.
298. *See id.*
299. The first exception is that voluntary intoxication can negate the deliberation and premeditation required for first degree murder.
300. *See Downing*, 26 Va. App. at 721, 496 S.E.2d at 166 (citing Wright v. Com-

rejected this argument, finding that the court was bound by the rule that voluntary intoxication, even if it produces a state of temporary insanity, cannot constitute an insanity defense.[301]

VI. EVIDENCE

A. *Confessions*

In *Jackson v. Commonwealth*,[302] the Supreme Court of Virginia clarified the requirement of corroboration for a confession and showed the rather minimal level of corroboration necessary for a defendant's confession to attempted robbery. Jackson confessed to demanding money from his victim, and then killing the victim when he did not produce any. Jackson climbed into his victim's truck while the victim waited as his passenger attempted to buy crack cocaine nearby. Jackson contended that there was no corroboration for his admission that he had demanded money from his victim before shooting him.[303] The supreme court found sufficient corroboration in (i) the passenger's testimony that he had left the victim in the truck while he went to buy drugs, (ii) the testimony of neighbors that they saw the passenger leave and the defendant get into the vehicle, talk to the driver, and then shoot him, (iii) the fact that an accomplice's palm print was found outside the driver's door, and (iv) the fact that the keys were gone from the ignition.[304] The facts were consistent with Jackson's statement that the accomplice stood outside the car and had reached in and taken the keys to prevent the driver from leaving.[305] To uphold a confession, the court held that corroboration only needs to be more consistent with the commission of the offense than with its non-

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monwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988) (citing Boswell v. Commonwealth, 61 Va. (Gratt.) 860, 870 (1871))).

301. *See id.* at 722, 496 S.E.2d at 166-67 (citing Jordon v. Commonwealth, 181 Va. 490, 494, 25 S.E.2d 249, 250 (1943) (citing Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923))).

302. 255 Va. 625, 499 S.E.2d 538 (1998).

303. *See id* at 645-46, 499 S.E.2d at 551.

304. *See id.* at 646, 499 S.E.2d at 551.

305. *See id.*

commission.[306] According to the court, the evidence in this case met that standard.[307]

B. *Hearsay—Excited Utterances*

In *Braxton v. Commonwealth*,[308] the Virginia Court of Appeals relied on the excited utterances exception to the hearsay rule to uphold the admission of a hearsay statement of a one-year-old child's description of how a man had hit the child's mother on the head leading to her death. The child had been found sleeping over his mother's body in a dazed state. The statement in question was made sometime later to an adult who was watching the child. Evidence indicated that the child had been quiet during the interim since he had been found. Although it was not clear how much time had elapsed between his mother's murder and when he was found, an additional interval of time had elapsed before he made the statement.[309]

The court of appeals held that the admission of an excited utterance is not determined solely by the length of time elapsed. In this case, the child's young age, which indicated a lack of ability to fabricate the account, his condition, and the circumstances surrounding the statement all indicated that it was a spontaneous response to a startling event.[310]

C. *Expert Opinions and Other Evidentiary Rulings*

Allowing an expert to testify to hearsay from a complaining witness and to offer an opinion on the ultimate issue violated a defendant's due process rights, which required reversal of his conviction in *Jenkins v. Commonwealth*.[311] Jenkins had been convicted of aggravated sexual battery of a boy under the age of thirteen. The child had not testified at trial, but the Commonwealth introduced the defendant's confession to one instance of aggravated sexual battery of the boy and the expert testimony

306. *See id.*
307. *See id.*
308. 26 Va. App. 176, 493 S.E.2d 688 (Ct. App. 1997).
309. *See id.* at 181-82, 493 S.E.2d at 690-91.
310. *See id.* at 184-85, 493 S.E.2d 692.
311. 254 Va. 333, 492 S.E.2d 131 (1997).

of a clinical psychologist who had examined the child. The doctor testified that the child told him he had been "sexed;" thus, the doctor opined that the child suffered from a stress-induced adjustment disorder.[312] When asked his opinion what had caused the stress, the doctor stated that the child "had been sexually abused."[313]

The Supreme Court of Virginia found that the psychologist's opinion invaded the province of the jury and that the doctor's repetition of what the child had told him was hearsay, which did not fall under any exceptions to the hearsay rule.[314]

Finding the error to be of constitutional dimension, the court applied the "beyond a reasonable doubt" standard for harmless error.[315] The defendant's confession proved one instance of aggravated sexual battery; thus, the erroneous evidence may have been harmless for purposes of the conviction.[316] Yet, the court found that it may have led the jury to believe, as the prosecutor had argued, that the abuse had occurred on more than one occasion. Therefore, the error could not be regarded as harmless beyond a reasonable doubt for sentencing purposes.[317]

In *Zelenak v. Commonwealth*,[318] the Virginia Court of Appeals affirmed the defendant's convictions for attempted robbery, conspiracy to commit robbery, and a related firearms charge. The court found that the trial court did not err on two evidentiary rulings.[319]

A manager of a pizza restaurant was making a night deposit at a bank when he was approached by a man with a gun and told to stop. Instead, the manager jumped into his car and telephoned the police from his cellular telephone. A vehicle entered the bank parking lot, drove to the back of the bank where the gunman ran and then sped off. The police stopped

312. *See id.* at 335-39, 492 S.E.2d at 132-34.
313. *Id.* at 336, 492 S.E.2d at 133.
314. *See id.* at 336, 339, 492 S.E.2d at 132, 134-35 (citing Cartera v. Commonwealth, 219 Va. 516, 248 S.E.2d 784 (1978)).
315. *See id.* at 336, 482 S.E.2d at 134 (citing Chapman v. California, 386 U.S. 18 (1967)).
316. *See id.* at 338, 492 S.E.2d at 134.
317. *See id.*
318. 25 Va. App. 295, 487 S.E.2d 873 (Ct. App. 1997) (en banc).
319. *See id.* at 297, 487 S.E.2d at 874.

the vehicle that had retrieved the gunman. The defendant was the driver of that vehicle. The gunman and another man were the passengers.[320]

Prior to the defendant's trial, her attorney filed a notice of intent to present an insanity defense. The trial court, on motion of the defendant, ordered that she be evaluated to determine her competency to stand trial. The defendant later withdrew her notice of intent to present an insanity defense. Thereafter, the Commonwealth filed a motion in limine to preclude the expert testimony of a clinical social worker. The Commonwealth argued that the testimony would be offered as proof of an ultimate issue of fact because it related to the defendant's state of mind at the time of the offense. The court deferred ruling until trial.[321]

Zelenak's defense at trial was that she participated in the crimes because she was afraid of the passenger and the gunman in the car. Defense counsel proffered that the clinical social worker would testify that the defendant was in great fear of the man and was afraid that if she did not do as he said, she would be harmed. The expert would opine that "[the defendant] got to the point where she believed escape from [the man] or disobedience would result in her death or the death of a member of her family."[322] The trial court granted the Commonwealth's motion to exclude the testimony of this witness.[323]

The court of appeals found that the trial court's ruling was correct because the proffered testimony amounted to an opinion on "the precise and ultimate issue in the case."[324] Experts may express an opinion about matters not within common knowledge, but they may not invade the province of the jury by expressing an opinion upon an "ultimate issue of fact."[325] Zelenak's defense was duress. In order to prove duress, she was required to show that her actions were the direct product of

320. *See id.* at 297-98, 487 S.E.2d at 874.
321. *See id.* at 298, 487 S.E.2d at 874.
322. *Id.* at 299, 487 S.E.2d at 875.
323. *See id.* at 298-99, 487 S.E.2d at 874-75.
324. *Id.* at 300, 487 S.E.2d at 875.
325. *Id.*

threats that caused a reasonable fear of death or serious injury. Thus, whether Zelenak acted because she was under duress was the ultimate issue in the case and precisely the testimony an expert witness is precluded from offering.[326]

Prior to Zelenak's testimony at trial, her counsel moved to prohibit the prosecutor from cross-examining her about statements that she made during her competency evaluation. The prosecutor argued that cross-examination about the statements would only be for impeachment. The record does not contain the trial court's ruling on the motion because the court reporter was changing tapes.[327]

After Zelenak testified on her own behalf, the Commonwealth called her as a rebuttal witness. The prosecutor asked her if there was "[s]ome reason" why she did not like her family or why she would not "care whether anything happened to them."[328] The defendant said that she loved her family very much. The Commonwealth, over defense counsel's objection, then asked if she told the psychologists that certain members of her family had "physically and sexually abused her."[329] The defendant claimed on appeal that the trial court erred by allowing the prosecutor to ask that question, suggesting that it violated Virginia Code section 19.2-169.7.[330] This statute prohibits the use of statements made during a competency evaluation by the defendant against the defendant except as it relates to the question of his or her mental condition at the time of the offense.[331]

The court of appeals found that the trial court did not err by permitting the question. Section 19.2-169.7 of the Virginia Code specifically relates to statements made by the defendant about the alleged offense or the offense charged. The defendant argued that, although the statement she attempted to preclude did not directly relate to the offense, it should be prohibited because it was irrelevant and highly prejudicial. The court

326. *See id.*
327. *See id.* at 301, 487 S.E.2d at 876.
328. *Id.*
329. *Id.*
330. VA. CODE ANN. § 19.2-169.7 (Repl. Vol. 1995 & Cum. Supp. 1998).
331. *See Zelenak*, 25 Va. App. at 301, 487 S.E.2d at 876.

ruled that in light of the defendant's concession with regard to the nature of the questions and statement and in the absence of a record of the trial court's ruling, the ruling is presumed correct.[332] The court of appeals refused to reverse the trial court's decision to allow the question and response.[333]

D. *Lay Opinions*

The Supreme Court of Virginia found the admission of a child's opinion regarding the defendant's driving speed to be harmless error in *Greenway v. Commonwealth*.[334] The twelve-year-old boy, who testified he had been riding as a passenger in cars all his life, had witnessed the defendant speed along Interstate 95 shortly before striking a vehicle from the rear and killing the driver and passenger of that vehicle. When asked if he had an opinion of how fast the vehicle had been moving, the boy first said he did not, then ventured an estimate of ninety miles per hour. The supreme court reiterated its prior rulings that any lay person, even one not licensed to drive, is competent to estimate the speed of a moving vehicle if they had an adequate opportunity to observe the vehicle in motion,[335] and if they have a "knowledge of time and distance."[336] Furthermore, the court held that children are competent witnesses so long as they demonstrate the requisite abilities to observe, recollect, and communicate events intelligently and truthfully.[337] The court's ruling, thus, was not predicated on a decision that an unlicensed twelve-year-old would not, as a matter of law, be deemed competent to estimate speed, but rather, that the evidence in this case did not demonstrate that this child had any "knowledge of time and distance."[338] Moreover, the court asserted that his statement as to whether he had ade-

332. *See id.*
333. *See id.* at 301-02, 487 S.E.2d at 876.
334. 254 Va. 147, 154, 487 S.E.2d 224, 228 (1997).
335. *See* Moore v. Lewis, 210 Va. 522, 525, 111 S.E.2d 788, 790 (1960).
336. *Greenway*, 254 Va. at 152, 487 S.E.2d at 227.
337. *See* Cross v. Commonwealth, 195 Va. 62, 64, 77 S.E.2d 447, 449 (1953).
338. *Greenway*, 254 Va. at 152, 487 S.E.2d at 227.

quate opportunity to observe the defendant's car in motion was equivocal at best.[339]

The error was harmless, however, because the child's mother also testified that the defendant was traveling at least eighty-five miles per hour.[340] No other evidence of recklessness existed; therefore, the child's testimony was cumulative.[341]

E. *Other Crimes Evidence*

In *Guill v. Commonwealth*,[342] the Supreme Court of Virginia held that evidence of previous crimes was improperly admitted to prove the defendant's intent to commit rape during a burglary. The defendant broke into a family's home and was caught backing out of the bedroom of two teenage girls. He had broken in through a window from which a pocketbook and money were visible, and his statement to the police indicated he had broken in for the purpose of stealing. The trial court admitted evidence that, years before, he broke into another home and tried to rape one of the occupants. The Supreme Court of Virginia reversed both the trial court and the court of appeals, holding that a prior crime can be used to show intent only when it is causally related to, logically connected with, or part of the same transaction as the offense on trial.[343] No such connection was present in this case. Even assuming, without deciding, that prior crimes showing a modus operandi could be admitted to prove intent rather than identity, the court found that the crimes in this case were insufficiently idiosyncratic to be admissible.[344] A dissent by Chief Justice Carrico and Justice Compton disagreed on both points.[345]

In *Bullock v. Commonwealth*,[346] the Virginia Court of Appeals affirmed the defendant's convictions of malicious wounding, robbery, and two counts of use of a firearm during the

339. *See id.*
340. *See id.* at 154, 487 S.E.2d at 228.
341. *See id.*
342. 255 Va. 134, 495 S.E.2d 489 (1998).
343. *See id.* at 141, 495 S.E.2d at 493.
344. *See id.* at 141-42, 495 S.E.2d at 493.
345. *See id.* at 142-46, 495 S.E.2d at 493-96.
346. 27 Va. App. 255, 498 S.E.2d 433 (Ct. App. 1998).

commission of a felony. The court rejected the defendant's claim that the trial court improperly admitted evidence of his "subsequent bad acts."[347]

The victim was a man who had just gotten out of his car at his apartment complex. He was shot at close range with a weapon that the police concluded was not a handgun. The victim saw his assailant's face. The victim gave the police a description of his assailant and later picked him out of a photo lineup.[348]

The defendant objected to evidence introduced from two witnesses at trial. One of the witnesses, Stanley Hawkins, identified a sawed-off shotgun as the weapon he had borrowed from the defendant and had used in a robbery in that jurisdiction about one month after the victim was shot. He added that, approximately one week after he borrowed the gun, he purchased the gun from the defendant for twenty-five dollars. The same night he purchased the gun, Hawkins threw it out of the car while being pursued by the police. At that time, the defendant was also in the car with Hawkins.[349]

The second witness, a police detective, testified that after an undercover surveillance operation which led to the pursuit discussed by Hawkins, the police recovered the shotgun thrown from the car. The victim identified the defendant as his assailant and the recovered shotgun as the weapon used by his assailant. The defense presented four alibi witnesses in an effort to convince the jury that the defendant was elsewhere at the time of the offenses.[350]

The court of appeals found that the trial court correctly allowed Hawkins' and the police detective's testimony about the shotgun into evidence.[351] The court determined that the testimony linked the defendant to the shotgun that was introduced into evidence as the weapon used in the charged offenses.[352] This evidence tended to prove the identity of the defendant as

347. *Id.* at 255, 498 S.E.2d at 433-34.
348. *See id.* at 258-59, 498 S.E.2d at 434.
349. *See id.* at 259, 498 S.E.2d at 435.
350. *See id.* at 262, 498 S.E.2d at 436.
351. *See id.* at 260-63, 498 S.E.2d at 435-37.
352. *See id.* at 262, 498 S.E.2d at 436.

the criminal agent in the robbery and malicious wounding counts.[353] The court went on to state, "[i]n addition, appellant's possession of the shotgun was an element of the two counts of use of a firearm in the commission of a felony. Consequently, the disputed evidence was sufficiently related to the crimes charged and satisfied [the] threshold requirement [that it have probative value]."[354]

In addition, the court determined that the second part of the test concerning admissibility of evidence of "other crimes" or "other bad acts" was met because the probative value outweighed any incidental prejudicial effect.[355] The court noted that the defendant presented an alibi defense and that the Commonwealth bore the burden to prove beyond a reasonable doubt that the defendant was the person who committed the crimes.[356] The challenged evidence tended to establish the defendant's ownership of the weapon used in the shooting, which was critical in linking the defendant to the crimes and in corroborating the victim's identification of the defendant as his assailant.[357] The incidental prejudice associated with the evidence reflecting that the defendant was "involved with questionable associates in questionable circumstances" was outweighed by the substantial probative value of the evidence.[358]

F. *Exculpatory Evidence*

In *Soering v. Deeds*,[359] the Supreme Court of Virginia applied familiar principles to find that a habeas corpus petitioner, imprisoned for two murders, had not been deprived of due process of law by the withholding of exculpatory evidence.[360] Information known by the police but not disclosed to the defense, about the brief detention and questioning of two drifters was found not to be material exculpatory evidence. The two drifters later committed an unrelated murder in a neighboring jurisdic-

353. *See id.* at 261-62, 498 S.E.2d at 435-36.
354. *Id.* at 261-62, 498 S.E.2d at 436.
355. *See id.* at 262-64, 498 S.E.2d at 435-37.
356. *See id.* at 262, 498 S.E.2d at 436.
357. *See id.*
358. *Id.* at 263, 498 S.E.2d at 436.
359. 255 Va. 457, 499 S.E.2d 514 (1998).
360. *See id.* at 464, 499 S.E.2d at 518.

tion after being stopped and questioned by the police while hitchhiking on a highway in the county where the murders in question had occurred. Because there was no connection between the drifters and the murders for which petitioner was convicted and because any suspicion of them would require the jury to ignore overwhelming evidence of the petitioner's guilt, there was no reasonable probability that disclosure would have led to a different outcome in petitioner's trial.[361]

VII. TRIALS

A. *Jurisdiction Venue*

In *Foster-Zahid v. Commonwealth*,[362] the Supreme Court of Virginia affirmed the defendant's conviction of custodial interference (felony parental abduction) for the reasons stated in the opinion of the Virginia Court of Appeals.[363] The issues were whether the Fairfax County Circuit Court had jurisdiction to try the defendant for abduction and whether Fairfax, Virginia, was the appropriate venue.[364] Consistent with the custody agreement and court order, the child's father took him from Fairfax, Virginia, to Wisconsin for his fall visit with his mother. The court order required the mother to return the child to his father in Fairfax two days later. The defendant failed to return the child to his father as required by the court order. The father obtained a Wisconsin court order enforcing the Virginia decree, but the defendant absconded with the child to California and then Colorado. She was apprehended in Colorado for the abduction of the child and tried in Fairfax County, Virginia.[365]

Felony parental abduction applies to any person who withholds a child outside of Virginia from the child's custodial parent in violation of a Virginia court order if the custodial parent resides in Virginia.[366] The court of appeals found that the

361. *See id.*
362. 254 Va. 168, 489 S.E.2d 687 (1997).
363. *See* Foster-Zahid v. Commonwealth, 23 Va. App. 430, 477 S.E.2d 759 (Ct. App. 1996).
364. *See Foster-Zahid*, 254 Va. at 168, 489 S.E.2d at 687.
365. *See Foster-Zahid*, 23 Va. App. at 434-35, 477 S.E.2d at 761.
366. *See* VA. CODE ANN. § 18.2-79.1(A) (Repl. Vol. 1996 & Cum. Supp. 1998).

statutory language demonstrates the legislature's intent "to make criminal an act occurring outside of Virginia that causes harm within."[367] The "gravamen of the offense is the *withholding* of the child from the custodial parent *outside* the Commonwealth."[368] The court noted that the clear intent of the statute, when read along with its misdemeanor component for abductions within the Commonwealth, is to punish more severely those offenders who withhold a child from his or her custodian when the detention is accomplished outside of Virginia, thereby further restricting the ability to retrieve the child.[369]

The court found that despite the fact that the original detention and later removal of the child occurred outside the Commonwealth, the immediate harm of depriving the custodial parent of custody of his son occurred within Virginia, specifically Fairfax County. Thus, Virginia properly exercised jurisdiction over the defendant.[370] The court also found that under Virginia Code section 18.2-49.1(A) the legislature "clearly provided that venue exists where the crime of custodial interference occurred, i.e., where the harm resulted as a direct and immediate consequence of the violation of the court order," which in this case was Fairfax County.[371] The aggrieved father was a resident of Fairfax County at the time of the abduction, and the child was to be returned to Fairfax County pursuant to a valid and enforceable Fairfax County Circuit Court custody order. It was clearly established that the harm contemplated by the statute occurred in this locus. Thus, the court found that venue in Fairfax County was proper.[372]

B. *Guilty Pleas*

In *Sandy v. Commonwealth*,[373] the Virginia Court of Appeals held that the Commonwealth had breached the terms of a plea agreement and that the trial court should have granted

367. *Foster-Zahid*, 23 Va. App. at 436-37, 477 S.E.2d at 762.
368. *Id.* at 432, 477 S.E.2d at 762.
369. *See id.* at 437, 477 S.E.2d at 762.
370. *See id.* at 440-41, 477 S.E.2d at 764.
371. *Id.* at 442, 477 S.E.2d at 765.
372. *See id.* at 442-43, 477 S.E.2d at 765.
373. 26 Va. App. 724, 496 S.E.2d 167 (Ct. App. 1998) (en banc), *aff'g* 25 Va. App. 1, 486 S.E.2d 102 (1997).

the defendant specific performance of his plea agreement.[374] Sandy had been charged with thirty-two felony counts of issuing fraudulent grain receipts in violation of Virginia Code section 3.1-722.28.[375] He and the Commonwealth's Attorney negotiated a plea agreement that, if he would meet with the prosecutor and provide her with information to her reasonable satisfaction about activities in the county which he knew about, she would nolle prosequi all but seven of the charges, amend those seven to petty larceny, and recommend certain sentences for him. Sandy met and furnished information which the prosecutor initially indicated satisfied her, but before the pleas could be executed, she decided she did not believe him and declared the agreement had been breached. Sandy moved the trial court to order specific performance of the agreement. At the hearing, the Commonwealth failed to produce any evidence that the information Sandy had provided was false. The trial court ruled that in absence of approval by the trial court, there was no valid agreement—only a tentative acceptance of the agreement on the part of the Commonwealth.[376]

The court of appeals held that the trial court abused its discretion in refusing specific performance.[377] Sandy relied to his detriment on the agreement, had no other adequate remedy, and wound up being convicted not only of the seven misdemeanors the agreement had called for, but also for seven felonies as well. The Commonwealth failed to prove that Sandy had not carried out his obligations under the agreement.[378]

The Virginia Court of Appeals specified that the remedy would require the convictions be vacated and the Commonwealth make good faith motions to amend the seven charges and to dismiss the remaining charges.[379] A trial judge, other than the one who heard the case before, would receive the defendant's guilty pleas and, assuming the court accepted the

374. *See id.* at 725, 496 S.E.2d at 168.

375. VA. CODE ANN. § 3.1-722.28 (Repl. Vol. 1994); *see* Sandy v. Commonwealth, 25 Va. App. 1, 3, 486 S.E.2d 102, 103 (Ct. App. 1997).

376. *See Sandy* at 3-4, 8-9, 486 S.E.2d at 103-04, 106.

377. *See id.* at 11-12, 486 S.E.2d at 107-08.

378. *See id.* at 11, 486 S.E.2d at 107.

379. *See* Sandy v. Commonwealth, 26 Va. App. 724, 725, 496 S.E.2d 167, 168 (Ct. App. 1998) (en banc), *aff'g* 25 Va. App. 1, 486 S.E.2d 102 (Ct. App. 1997).

motions, the Commonwealth would be required to make a good faith recommendation for the sentences contemplated in the agreement.[380]

In *Watkins v. Commonwealth*,[381] the Virginia Court of Appeals held that the Commonwealth was not bound by the terms of a plea agreement after it was permitted to nolle prosequi the charges and bring a new indictment. The court found that the action of the trial court in entering a nolle prosequi of an indictment "lays 'to rest that indictment and the underlying warrant without disposition [of the case], as though they had never existed.'"[382] The new indictment is a new charge, distinct from the original charge or indictment.[383]

C. *Trial in Defendant's Absence*

In *Hohman v. Commonwealth*,[384] the Supreme Court of Virginia affirmed the decision of the trial court, finding the defendant guilty of five misdemeanors for the reasons set forth by the Virginia Court of Appeals. The defendant had appealed his misdemeanor convictions to the circuit court. The notice of appeal set forth a trial date and advised the defendant that he must be present in court on that date. Also, the notice stated that, if the defendant was on bond and did not appear in court, the bond may be revoked. The defendant signed the notice but did not appear in court on the designated day. His counsel, however, was present on the defendant's behalf. Counsel waived a jury and agreed to a trial date. An order setting the trial date indicated that a copy of that order was mailed to the defendant.[385]

The defendant was released on bond prior to trial. He signed documentation pertaining to the conditions of release which required him to appear in court to answer for the charged offenses "at all times and places and before any court or judge to

380. *See id.*

381. 27 Va. App. 473, 499 S.E.2d 589 (Ct. App. 1998) (en banc).

382. *Id.* at 474, 499 S.E.2d at 590 (citing Burfoot v. Commonwealth, 23 Va. App. 38, 44, 473 S.E.2d 724, 727 (Ct. App. 1996)).

383. *See id.*

384. 255 Va. 3, 493 S.E.2d 886 (1997).

385. *See* Hohman v. Commonwealth, No. 0815-95-4 (Va. Ct. App. Dec. 31, 1996).

which this case may be rescheduled, continued, transferred, certified or appealed."[386] The bond agreement, which also specified his trial date, warned that the defendant's failure to appear may result in him being tried and convicted in his absence.

On the specified date of trial, the defendant was not present in court, and on his behalf, his attorney entered pleas of "not guilty." The defendant was found guilty, and a sentencing date was set. The circuit court also issued a *capias* for the defendant's arrest. The defendant did not appear for sentencing but the court continued the sentencing hearing until the defendant could be located.[387]

The Virginia Court of Appeals, noting that the defendant did not allege that he was unaware of the second trial date, found that he had waived his right to be present.[388] In a letter to the trial judge, which was made a part of the record, the defendant stated that he was present at the courthouse on the day of his trial but left after he was advised that he would not be able to plead guilty to a reduced charge. Based upon the evidence, the court of appeals found that the trial court reasonably concluded the defendant had notice of his trial date and, by his conduct, had waived the right to be present.[389] He knowingly and voluntarily failed to appear for his trial, and consequently, he forfeited his constitutional rights of confrontation and due process and his statutory rights under Virginia Code section 19.2-237.[390]

D. *Juries*

The Supreme Court of Virginia in *Mason v. Commonwealth*,[391] affirmed the rejection of a motion for a mistrial when, during jury deliberations, a defendant alleged that one

386. *Id.*
387. *See id.*
388. *See id.*
389. *See id.*
390. VA. CODE ANN. § 19.2-237 (Repl. Vol. 1995 & Cum. Supp. 1998) (allowing a court to proceed to trial in a misdemeanor case if the accused fails to appear and plead).
391. 255 Va. 505, 498 S.E.2d 921 (1998).

juror had insufficient proficiency in the English language to provide him a fair trial. The trial judge questioned the juror on the record when the motion for a mistrial was made. The supreme court held that the record supported the trial judge's conclusion that the juror was qualified to sit.[392]

E. *Jury Selection*

In *Lilly v. Commonwealth*,[393] the Supreme Court of Virginia held that a relative of the chief investigator in a criminal case was not automatically disqualified from serving on the jury.[394] Although prior case law had held that crime victims were analogous to parties to litigation in the sense that their relatives were per se disqualified from jury service,[395] the court declined to extend the same reasoning to police investigators.[396]

F. *Jury Instructions*

The Supreme Court of Virginia in *Turner v. Commonwealth*,[397] affirmed the defendant's conviction for first degree murder, thereby rejecting his challenge to the trial court's refusal to instruct the jury on the lesser-included offense of voluntary manslaughter.[398] The court affirmed the decision of the Virginia Court of Appeals[399] which found that the refusal of the instruction, if error, was harmless because the jury was instructed on the lesser-included offense of second degree murder and rejected it by finding the defendant guilty of first degree murder.[400] The court of appeals concluded that by rejecting the option of second degree murder, the jury necessarily rejected the factual basis upon which it might have rendered a verdict on the lesser-included offense of voluntary manslaughter

392. *See id.* at 510, 498 S.E.2d at 924.
393. 255 Va. 558, 449 S.E.2d 522 (1998).
394. *See id.* at 569-70, 449 S.E.2d at 530-31.
395. *See* Gray v. Commonwealth, 226 Va. 591, 593-94, 311 S.E.2d 409, 410 (1984); Jacques v. Commonwealth, 51 Va. (10 Gratt.) 690, 695 (1853).
396. *See Lilly*, 255 Va. at 570, 499 S.E.2d at 531.
397. 255 Va. 1, 492 S.E.2d 447 (1997).
398. *See id.* at 1, 492 S.E.2d at 447.
399. *See id.*
400. *See id.*

which, like second degree murder, must fall when premeditation is found.[401] Because premeditation is an element of first degree murder and cannot co-exist with reasonable provocation, which is an element of voluntary manslaughter, the court of appeals concluded that, assuming the trial court erred in failing to instruct the jury on voluntary manslaughter, the error was harmless because it could not have affected the verdict.[402]

G. *Reopening Cases*

In *Jackson v. Commonwealth*,[403] the Supreme Court of Virginia upheld a trial court's exercise of discretion in allowing the Commonwealth to reopen its case and to present the testimony of an additional witness after the defendant moved to strike the Commonwealth's evidence.[404]

VIII. SENTENCING

A. *Enhanced Punishment for Second or Subsequent Offense*

In *Thomas v. Commonwealth*,[405] the Supreme Court of Virginia addressed the question of whether section 46.2-357(B)(3) of the Virginia Code[406] subjects the defendant to an enhanced penalty for a subsequent offense if, at the time of the commission of the subject offense, the defendant has not actually been "convicted" of the earlier offense. As a preliminary matter, the court rejected the defendant's claim that Virginia Code section 46.2-357(B)(3) was unconstitutionally vague and ambiguous.[407] The court found that the challenged phrase "second or subsequent such offense" was neither vague nor ambiguous.[408]

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401. *See* Turner v. Commonwealth, 23 Va. App. 270, 277, 476 S.E.2d 504, 508 (Ct. App. 1996).

402. *See id.* at 270, 476 S.E.2d at 504.

403. 255 Va. 625, 499 S.E.2d 538 (1998).

404. *See id.* at 645, 499 S.E.2d at 550.

405. 256 Va. 38, 501 S.E.2d 391 (1998).

406. VA. CODE ANN. § 46.2-357(B)(3) (Cum. Supp. 1998) (allowing for enhanced penalty for a subsequent offense while driving, after having been determined to be an habitual offender).

407. *See Thomas*, 256 Va. at 41-42, 501 S.E.2d at 392.

408. *Id.*

There was no need to resort to legislative history to construe the clear language of the statute because there was no ambiguity.[409]

The court further found that the legislature's choice of the word "offense" rather than the word "conviction" made clear its intent to authorize "punishment enhancement without a prior conviction."[410] The court noted that the purpose of section 46.2-357 "is to deter criminal conduct by punishing those who repeatedly drive after having been declared an habitual offender, rather than to reform habitual offenders."[411] That being the case, the only logical interpretation is that a prior "offense" is all that is necessary to trigger the enhanced punishment under the statute.[412]

B. *Costs*

In *Ohree v. Commonwealth*,[413] the Virginia Court of Appeals upheld Virginia's statutory scheme for recoupment of jury fees, court appointed attorney's fees, and other fees and costs from convicted indigent defendants.[414] Ohree had been indicted for welfare fraud and moved the circuit court to excuse her from the obligation to pay jurors' fees in the event that she was convicted.[415] When the circuit court refused, she objected, but waived trial by jury. Upon conviction, she was ordered, over her objection and as a condition of suspended sentence, to pay standard court costs, including her court appointed attorney's fee, the clerk's fee, the Commonwealth's Attorney's fee, and other appropriate fees.[416]

The court of appeals rejected her claim that the requirement to pay jurors' fees unconstitutionally prevented her from exercising her right to a jury trial, finding that only unnecessary

409. *See id.*
410. *Id.*
411. *Id.* at 42, 501 S.E.2d at 393.
412. *See id.*
413. 26 Va. App. 299, 494 S.E.2d 484 (Ct. App. 1998).
414. *See id.* at 312, 494 S.E.2d at 491 (discussing VA. CODE ANN. § 19.2-336).
415. *See id.* at 303, 494 S.E.2d at 486.
416. *See id.*

burdens on that right violate the Constitution.[417] The court found this particular provision was necessary to reimburse the public for the expenditure which her conduct necessitated.[418] Because the statutory scheme was not unconstitutional, the court determined that she voluntarily waived her right to a jury trial to avoid the expense of jurors' fees.[419]

Ohree's challenge to the assessment of other costs as violative of the Equal Protection and Due Process Clauses was held procedurally defaulted for failure to raise those arguments in the trial court and, alternately, without merit.[420] Because the purpose of assessing costs was simply to reimburse the public for the cost of the defendant's trial and because the statutory scheme provided for extensions of time or excuse of payment for those who genuinely are unable to pay costs, the scheme did not violate the Constitution.[421]

C. *Jury Recommendations*

Two Virginia Court of Appeals decisions addressed the issue of what type of mitigation evidence is admissible for jury consideration in the penalty phase of Virginia's recently enacted bifurcated jury trial procedure.[422] In *Shifflett v. Commonwealth*,[423] the court held that the testimony of the employer concerning the defendant's good work record and attempts to schedule transportation to work so he would not have to drive as an habitual offender as well as the testimony of the defendant's girlfriend that he "was a responsible father who worked earnestly to provide for his children" should have been admitted.[424] The court reasoned that the defendant's character and habits were relevant for sentencing purposes.[425] On the

417. *See id.* at 312-13, 494 S.E.2d at 491.
418. *See id.* The court assumed that she had standing to raise this issue in light of her waiver of jury trial, resulting in the absence of assessment of such fees. *See id.*
419. *See id.* at 313, 494 S.E.2d at 491.
420. *See id.* at 313-16, 494 S.E.2d at 491-92.
421. *See id.*
422. *See* VA. CODE ANN. § 19.2-295.1 (Repl. Vol. 1995 & Cum. Supp. 1998).
423. 26 Va. App. 254, 494 S.E.2d 163 (Ct. App. 1997) (en banc).
424. *Id.* at 260-61, 494 S.E.2d at 166.
425. *See id.*

other hand, in *Caudill v. Commonwealth*,[426] the court held that evidence that the defendant's wife had a medical condition and was dependent on him for transportation to her treatments fell under the well established rule[427] that the impact of the defendant's prospective punishment on his family is not legitimate mitigation evidence.[428]

IX. POST-TRIAL MATTERS

A. *Expungement*

The Supreme Court of Virginia clarified the parameters of eligibility for expungement in *Commonwealth v. Jackson*.[429] Jackson pled nolo contendere to a charge of larceny by concealment of merchandise. The trial court deferred judgment for a probationary period, then dismissed her charge. She sought expungement in circuit court under Virginia Code section 19.2-392.2.[430] The Commonwealth, citing *Gregg v. Commonwealth*,[431] contended that she was not eligible for expungement because she was not innocent.[432] The circuit court distinguished this case from *Gregg* because Jackson had pled nolo contendere rather than guilty and granted expungement.[433] The supreme court reversed, holding that the determinative factor was not how Jackson had pled, but that the trial court had found sufficient evidence to find her guilty of the crime charged, and therefore, she could not be regarded as innocent and eligible for expungement.[434] In a footnote, the court questioned the trial court's authority to defer disposition and then dismiss her charges because Virginia Code section 19.2-303.2,[435] authorizing such dispositions, expressly excludes

426. 27 Va. App. 81, 497 S.E.2d 513 (Ct. App. 1998).
427. *See* Coppola v. Commonwealth, 220 Va. 243, 254, 257 S.E.2d 797, 804 (1979).
428. *See Caudill*, 27 Va. App. at 81, 497 S.E.2d at 513.
429. 255 Va. 552, 499 S.E.2d 276 (1998).
430. VA. CODE ANN. § 19.2-392.2 (Repl. Vol. 1995); *see Jackson* 255 Va. at 554-55, 499 S.E.2d at 277-78.
431. 227 Va. 504, 316 S.E.2d 741 (1984).
432. *See id.*; *Jackson*, 255 Va. at 554, 499 S.E.2d at 277-78.
433. *See Jackson*, 255 Va. at 555, 499 S.E.2d at 277-78.
434. *See id.* at 555-57, 499 S.E.2d at 278-279.
435. VA. CODE ANN. § 19.2-303.2 (Repl. Vol. 1995).

larceny offenses.[436] The court noted, however, that the Commonwealth had not raised this issue in the lower courts.[437]

B. *Probation Revocations*

In two opinions involving the same defendant and the same set of facts, two panels of the Virginia Court of Appeals clarified the meaning of the universal probation condition[438] that a defendant "be of good behavior." In both *Holden v. Commonwealth* cases,[439] the defendant pled guilty to sexual offenses against children. The Loudoun County Circuit Court imprisoned him on some counts and, pursuant to a plea agreement, took his guilty pleas on other counts under advisement pending his completion of a probationary period when he is released from prison.[440] The Fairfax County Circuit Court had given him an active prison sentence with additional time suspended.[441] A common condition of both probationary dispositions was that the defendant "be of good behavior."[442] While serving his prison sentence, Holden was caught writing letters to a "pen pal" whom he had contacted through an advertisement in the back of a magazine. The letters he wrote and the letters he had received from the pen pal discussed in salacious terms the authors' desires and future plans to engage in the sexual abuse of children.[443] Both trial courts had revoked Holden's probation, holding that these correspondences did not constitute good behavior.[444]

On appeal, Holden contended in both cases that the "good behavior" requirement was violated only if he committed new

436. *See Jackson*, 255 Va. at 555 n.1, 499 S.E.2d at 278 n.1.
437. *See id.*
438. This condition is implied by law, even when it is not expressly stated. *See* Coffey v. Commonwealth, 209 Va. 760, 167 S.E.2d 343 (1969).
439. 27 Va. App. 38, 497 S.E.2d 492 (Ct. App. 1998); 26 Va. App. 403, 494 S.E.2d 892 (Ct. App. 1998).
440. *See Holden*, 26 Va. App. at 405-06, 494 S.E.2d at 894.
441. *See Holden*, 27 Va. App. at 40-41, 497 S.E.2d at 493.
442. *Holden*, 26 Va. App. at 405-06, 494 S.E.2d at 894.
443. *See Holden*, 27 Va. App. at 40-41, 497 S.E.2d at 493.
444. *See id.*

violations of law, and because the letters were not illegal,[445] they could not justify revocation of his probation.[446]

In the Fairfax County case, Holden argued that the order suspending his sentence had not given him fair notice under the Due Process Clause that such behavior would be regarded as a violation.[447] The court of appeals rejected Holden's arguments, ruling that the "good behavior" requirement was violated not only by new criminal offenses but by any "substantial misconduct," which included Holden's correspondences.[448] The court further held in the Fairfax County case that Holden had not only fair notice, but also actual knowledge and that his letters were a violation of the terms of his probation.[449]

In the Loudoun County case, Holden argued that the letters were protected speech under the First Amendment and, thus, could not be grounds for probation revocation.[450] The court held that his obscene letter writing enjoyed no First Amendment protection.[451]

X. JUVENILES

A. *Juvenile Jurisdiction*

In *Winston v. Commonwealth*,[452] the Virginia Court of Appeals dealt with an unusual problem in court jurisdiction, regarding defendants who are near the age of majority. Upon arrest, Winston told the police that he was eighteen years old; therefore, he was charged as an adult with felonies. At trial in the circuit court, he told the court that he was nineteen and gave a date of birth which would have made him an adult at

445. *But see* 18 U.S.C. § 1461 (1994) (sending obscene letters through the mail is a federal felony). The case had not, however, been heard in the trial courts on the theory that this was a federal crime.

446. *See Holden*, 26 Va. App. at 408-10, 494 S.E.2d at 895.

447. *See Holden*, 27 Va. App. at 44-46, 497 S.E.2d at 495.

448. *See id.* at 42-44, 497 S.E.2d at 493-95.

449. *See id.* at 44-46, 497 S.E.2d at 495-96.

450. *See Holden* 26 Va. App. at 409-10, 494 S.E.2d at 895.

451. *See id.* at 409, 494 S.E.2d at 895.

452. 26 Va. App. 746, 497 S.E.2d 141 (Ct. App. 1998).

the time of the crimes. At his sentencing hearing, his mother also testified that he was an adult.[453]

While his convictions were on appeal, Winston began claiming that he was born in 1978 rather than 1976 and that he had been a juvenile at the time of the crimes. He moved to vacate his convictions for lack of jurisdiction. The court of appeals remanded the case to the circuit court to conduct an evidentiary hearing on Winston's age.[454]

At the evidentiary hearing, Winston presented certain documentary evidence which he claimed proved that he had been born in 1978, but neither he nor his mother recanted their earlier testimony that he had been an adult at the time of the crimes.[455] The circuit court found that it could not determine Winston's age from his new evidence but found that, based on earlier testimony, he had been an adult at the time of the crimes.[456]

Winston appealed again, and the court of appeals affirmed.[457] The court rejected Winston's claim that the circuit court, by finding that it could not determine his age from his evidence, had disregarded the higher court's instructions to decide the issue.[458] The court held that the burden of proving lack of jurisdiction is on the party attacking jurisdiction.[459] The circuit court simply held that Winston had not borne this burden to prove that he had been an adult at the time of the crimes. Finding the evidence sufficient to support the lower court's judgment, the court of appeals affirmed.[460]

B. *Juvenile Sentencing*

The Virginia Court of Appeals in *Suleiman v. Commonwealth*,[461] decided an issue of first impression concerning the

453. *See id.* at 749-50, 497 S.E.2d at 143-44.
454. *See id.*
455. *See id.*
456. *See id.*
457. *See id.* at 758, 497 S.E.2d at 148.
458. *See id.* at 753.
459. *See id.* at 752, 497 S.E.2d at 144-45.
460. *See id.* at 758, 487 S.E.2d at 148.
461. 26 Va. App. 506, 495 S.E.2d 532 (Ct. App. 1998).

written findings necessary to sentence a juvenile under Virginia Code section 16.1-285.1[462] as a serious juvenile offender.[463] Suleiman appealed to the circuit court his juvenile disposition for robbery, and the circuit court found him guilty and sentenced him under Virginia Code section 16.1-285.1 as a serious juvenile offender.[464] The dispositional order contained express findings that he was over fourteen at the time of the offense, that he committed an offense that would, if committed by an adult, be a felony punishable by more than twenty years in prison, and that his commitment as a serious juvenile offender was necessary to meet the rehabilitative needs of the juvenile.[465] Suleiman contended that the order was defective in that it did not also contain a finding that the defendant was not a proper person to receive treatment through juvenile programs other than incarceration.[466]

The court of appeals analyzed the language of Virginia Code section 16.1-285.1(A)[467] and noted that the only express findings the statute requires are those stated in the circuit court order as summarized above.[468] The statute also requires that the commitment order "be supported by a determination that the . . . juvenile is not a proper person to receive treatment or rehabilitation through other juvenile programs or facilities" but that no express written finding to this effect is required.[469] The court found that the circuit court's statement that "commitment under this section is necessary to meet the rehabilitative needs of the juvenile" implicitly reflected a finding that he was not a proper person to receive treatment through other juvenile alternatives.[470] The court then analyzed the record to reject his contention that the evidence did not support these findings.[471]

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462. VA. CODE ANN. § 16.1-285.1 (Repl. Vol. 1996).
463. *See Suleiman*, 26 Va. App. at 510-13, 495 S.E.2d at 535-37.
464. *See id.* at 508-10, 495 S.E.2d at 533-34.
465. *See id.* at 511, 495 S.E.2d at 535.
466. *See id.* at 510, 495 S.E.2d at 534.
467. VA. CODE ANN. § 16.1-285.1(A) (Repl. Vol. 1996).
468. *See Suleiman*, 26 Va. App. at 511, 495 S.E.2d at 535.
469. *Id.*
470. *Id.*
471. *See id.* at 511-13, 495 S.E.2d at 535-36.

C. *Transfer Procedures*

The Supreme Court of Virginia addressed juvenile transfer procedures in *Jackson v. Commonwealth*.[472] Jackson, a juvenile, was transferred for trial as an adult and did not appeal the transfer decision. The circuit court issued indictments without first reviewing the transfer papers from the juvenile court in accordance with the requirements of Virginia Code section 16.1-269.6[473] that was in effect in September, 1994. The circuit court later conducted the review, entered an order directing the Commonwealth to obtain indictments, and issued a superseding set of indictments.[474] Jackson contended that the circuit court should have quashed the earlier set of indictments, and the Commonwealth contended that no review of the transfer papers was necessary because Jackson had not appealed the transfer decision.[475] The supreme court held that the Virginia Code at that time required a review of the transfer papers even when the transfer decision was not appealed, but observed that subsequent legislation had amended Virginia Code section 16.1-269.6(B) so as to require such review only when the transfer has been appealed.[476]

Jackson further contended that the circuit court never acquired jurisdiction to try him because it did not conduct the transfer review until nine months after the transfer order and, thus, failed to act on the transfer order within a reasonable time. The supreme court, citing *Jamborsky v. Baskins*,[477] held that although conducting the transfer review was jurisdictional, the time within which it was conducted was not. The court found the nine-month delay unreasonable but not prejudicial to Jackson. The court further held that, even during the period when the circuit court had no jurisdiction to try Jackson because it had not yet conducted the transfer review, Jackson's concurrences in the continuances had waived his rights to a speedy trial under Virginia Code section 19.2-243.[478]

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472. 255 Va. 625, 499 S.E.2d 538 (1998).
473. VA. CODE ANN. § 16.1-269.6 (Repl. Vol. 1996 & Cum. Supp. 1998).
474. *See Jackson*, 255 Va. at 631-32, 499 S.E.2d at 542-43.
475. *See id.*
476. *See id.*
477. 247 Va. 506, 442 S.E.2d 636 (1994).
478. VA. CODE ANN. § 19.2-243 (Repl. Vol. 1995 & Cum. Supp. 1998); *see Jackson*

In *Panameno v. Commonwealth*,[479] the Supreme Court of Virginia ruled that, upon transferring a juvenile to circuit court for trial as an adult, the juvenile court need not make an explicit finding that he is competent to stand trial unless his competency has been challenged. The court was guided by the 1994 enactment of Virginia Code section 16.1-269.1(A)(3),[480] which establishes a presumption of competency and places the burden of proof of incompetency on the challenging party, in place of former Virginia Code section 16.1-269, which required an explicit finding in the transfer order that the juvenile was competent to stand trial.[481]

XI. APPEALS

A. *Appeals De Novo*

In *Zamani v. Commonwealth*,[482] the Virginia Court of Appeals had occasion to resolve an unusual conflict of jurisdiction between a circuit court and a general district court. Zamani had been convicted in general district court of two misdemeanor offenses and timely appealed to the circuit court. More than ten days after the judgment had been entered in the district court, and after the circuit court had set a trial date but before trial de novo in the circuit court had commenced, the district court granted Zamani's motion under Virginia Code section 16.1-133.1[483] to reopen his case.[484] On rehearing, the district court found sufficient evidence to convict him but withheld judgment and took his case under advisement for one year.[485] Zamani then appeared in circuit court and withdrew his appeal, but the circuit court held that the district court had lost jurisdiction to reopen the case when ten days had elapsed from the date of the original judgment in district court.[486] The circuit

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255 Va. 642-44, 538 S.E.2d at 548-50.

479. 255 Va. 473, 498 S.E.2d 920 (1998).

480. VA. CODE ANN. § 16.1-269.1(A)(3) (Repl. Vol. 1996 & Cum. Supp. 1998).

481. *See Panameno*, 255 Va. at 475, 498 S.E.2d at 921.

482. 26 Va. App. 59, 492 S.E.2d 854 (Ct. App. 1997).

483. VA. CODE ANN. § 16.1-133.1 (Repl. Vol. 1996 & Cum. Supp. 1998).

484. *See Zamani*, 26 Va. App. at 61, 492 S.E.2d at 855.

485. *See id.*

486. *See id.*

court further held that, because he was withdrawing his appeal, it must affirm the original judgment of the district court under Virginia Code section 16.1-133.[487]

The court of appeals applied the rule of statutory construction whereby two statutes which are closely interrelated must be read together and effect must be given to all of their provisions.[488] The court noted that neither section 16.1-133.1, which authorizes a district court to reopen a case within sixty days after judgment, nor sections 16.1-132 and 16.1-133, which provide for automatic appeal and trial de novo in the circuit court if appeal is noted within ten days of the district court's judgment, "contains language indicating that the exercise of one right limits or precludes the exercise of the other."[489] The court concluded that if a district court reopens a defendant's case before his trial de novo has actually begun in circuit court, the clerk of the circuit court must send the papers of the case back to the district court; thus, the district court has jurisdiction to reconsider the case. Consequently, the defendant need not withdraw his appeal in circuit court.[490]

B. *Record on Appeal*

In *Watkins v. Commonwealth*,[491] the Virginia Court of Appeals rejected the Commonwealth's position on the scope of the writ of certiorari under Virginia Code section 8.01-675.4.[492] The court held that this writ could be used to direct the trial court to supply a missing transcript which had not been made a part of the record on appeal in accordance with Rules 5A:7 and 5A:8 of the Rules of the Supreme Court of Virginia.[493]

Watkins, indicted for burglary and related offenses, had waived representation by counsel and elected to represent him-

487. *See id.* at 65, 492 S.E.2d at 855.

488. *See id.* at 63, 492 S.E.2d at 856-57 (citing Board of Supervisors v. Marshall, 215 Va. 756, 761, 214 S.E.2d 146, 150 (1975); ACB Trucking, Inc. v. Griffin, 5 Va. App. 542, 547-48, 365 S.E.2d 334, 337-38 (Ct. App. 1988)).

489. *Id.* at 63, 492 S.E.2d at 856.

490. *See id.* at 65-66, 492 S.E.2d at 858.

491. 26 Va. App. 335, 494 S.E.2d 859 (Ct. App. 1998).

492. VA. CODE ANN. § 8.01-675.4 (Repl. Vol. 1992 & Cum. Supp. 1998).

493. *See Watkins*, 26 Va. App. at 340-43, 494 S.E.2d at 862-63.

self in a hearing memorialized by court order but for which there was no transcript in the record on appeal. The court of appeals issued a writ of certiorari directing the trial court to supply the missing transcript. The Commonwealth moved to vacate the writ, arguing that it could be used only to supply items which already had been properly made a part of the record on appeal as defined by Rules 5A:7 and 5A:8 of the Rules of the Supreme Court of Virginia. The Commonwealth maintained that, because the burden is on the appellant to show that the judgment of the trial court is incorrect, the absence of the crucial transcript must redound against him.[494]

The court of appeals acknowledged that the Commonwealth's position found some support in *Washington v. Commonwealth*,[495] but held that subsequent case law from the Supreme Court of Virginia[496] had implicitly overruled *Washington*.[497] The court further held that the use of the writ of certiorari could actually enlarge the record on appeal to include items not originally included therein.[498] Finally, the court determined that enlargement of the record was necessary in this case because waiver of the right to counsel could not be presumed from a silent record, and thus, the absence of the transcript showing waiver would, in this situation, redound against the Commonwealth, not the appellant.[499]

C. *Commonwealth's Appeals to the Supreme Court of Virginia*

In the first appeal heard by the Supreme Court of Virginia in *Commonwealth v. Jenkins*,[500] the court reversed the decision of the Virginia Court of Appeals and reinstated Jenkins' convictions for first degree murder and use of a firearm during the commission of murder. The issue before the supreme court was whether the evidence was sufficient to prove that the victim died from gunshot wounds inflicted by Jenkins. The defendant

494. *See id.* at 340, 494 S.E.2d at 862.
495. 216 Va. 185, 217 S.E.2d 815 (1975).
496. *See, e.g.*, Buck v. Commonwealth, 247 Va. 449, 443 S.E.2d 414 (1994); Godfrey v. Commonwealth, 227 Va. 460, 317 S.E.2d 781 (1984).
497. *See Watkins*, 26 Va. App. at 340-42, 494 S.E.2d at 862.
498. *See id.*
499. *See id.*
500. 255 Va. 516, 499 S.E.2d 263 (1998).

fired several gunshots at the victim, inflicting three wounds. The victim was transported to the hospital and treated for his injuries, which included emergency surgery to repair his colon. He died four days later, never having left the hospital.[501]

At a jury trial, the medical examiner who performed the autopsy on the victim testified concerning the specifics of the three gunshot wounds sustained by the victim. He stated that the victim had aspirated vomit because there was vomit in his "airway" and lungs. When asked whether he had an opinion as to the cause of death, the medical examiner stated that the victim died "as a result of this aspiration following the gunshot wound to the abdomen."[502]

A surgical resident who treated the victim testified that the victim appeared to have been in good health before he was shot. The resident testified that the day of the victim's death, he noticed that the victim was "markedly pale and sweating profusely."[503] The victim, who was lying on his back, began vomiting. The resident rolled the victim onto his side. Once the victim stopped vomiting, the resident rolled him back to his original position. The victim stopped breathing and died shortly thereafter.[504]

The resident added that, at the time of victim's death, he may have had "some type of seizure activity."[505] He acknowledged that he was not a neurologist but simply saw "some spastic movements in his extremities."[506] He also could not offer an opinion concerning whether the victim had actually had a seizure.[507]

The defendant offered as evidence the typewritten discharge summary dictated and signed by the resident. A handwritten note which appeared on the top margin of the first page stated:

501. *See id.* at 518, 499 S.E.2d at 264.
502. *Id.*
503. *Id.*
504. *See id.* at 518-19, 499 S.E.2d at 264.
505. *Id.*
506. *Id.* at 519, 499 S.E.2d at 264.
507. *See id.*

> Many Factors contributed to his death but all were result of
> Gun Shot wound
> Bowel injury and contamination
> Extensive laparotomy
> Intubated.[508]

No witness testified regarding the note or its origin, and defense counsel did not request that the handwritten portion be excluded.[509]

The supreme court noted that "[w]hen a defendant has inflicted wounds upon a victim that result in an affliction or disease the defendant is criminally responsible for the victim's death from that affliction or disease if the wounds caused the death indirectly through a chain of natural effects and causes."[510] The evidence showed that the victim was in good health prior to being shot. The medical examiner opined that he "died as a result of [the] aspiration following the gunshot wound to the abdomen."[511] Additionally, the handwritten notation on the discharge summary, introduced into evidence by the defendant, specified that "[m]any factors contributed to [Jackson's] death but all were [the] result of Gun Shot wound."[512] Based upon this evidence, the court found that the evidence proved the required causal connection between the defendant's acts and the victim's death, and the jury's finding that the victim died as a result of the gunshot wounds inflicted by the defendant was correct.[513]

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508. *Id.*

509. *See id.*

510. *Id.* at 521, 499 S.E.2d at 265.

511. *Id.* at 524, 499 S.E.2d at 266.

512. *Id.* The court noted that because the defendant offered the discharge summary as evidence and did not request that the handwritten portion be excluded, he waived any later objection to it being considered by the jury. Consequently, the court also found that the court of appeals erred when it refused to consider that evidence when evaluating whether the evidence was sufficient to support the conviction. *See id.* at 521-22, 499 S.E.2d at 266.

513. *See id.*

XII. MISCELLANEOUS

A. *Judgments*

In *Myers v. Commonwealth*,[514] the decision of a panel of the Virginia Court of Appeals to dismiss an appeal reemphasized the necessity for appellants to correct errors in judgments before they become final. In 1992, Myers was charged with murder in violation of Virginia Code section 18.2-32[515] and felony child neglect. In a bench trial, the court expressly found her not guilty of first degree murder but found her guilty of second degree felony murder.[516]

The conviction order stated that Myers had been convicted of second degree murder under Virginia Code section 18.2-32. Myers appealed her conviction, arguing that the evidence had been insufficient to support a conviction of felony murder under Virginia Code section 18.2-33.[517] In 1995 in an unpublished, en banc opinion, the court of appeals had held that Myers was precluded from appellate relief because she had failed to challenge her conviction under Virginia Code section 18.2-32 which was the correct statute.[518] The Supreme Court of Virginia had upheld that decision, also in an unpublished judgment.[519]

Myers then invoked Virginia Code section 8.01-428(B)[520] to persuade the trial court to correct its 1992 judgment order to reflect that her conviction had actually been under Virginia Code section 18.2-33, not 18.2-32.[521] Subsequently, she again sought on appeal to challenge the sufficiency of the evidence to support the conviction. The court of appeals dismissed her appeal because the proceeding under Virginia Code section 8.01-428(B) merely had enabled the trial court to correct a clerical error. The proceeding did not reinvest the trial court with juris-

514. 26 Va. App. 544, 496 S.E.2d 80 (Ct. App. 1998).
515. VA. CODE ANN. § 18.2-32 (Repl. Vol. 1996 & Cum. Supp. 1998).
516. *See Myers*, 26 Va. App. at 546, 496 S.E.2d at 81. The child neglect charge was dismissed. *See id.*
517. VA. CODE ANN. § 18.2-33 (Repl. Vol. 1996 & Cum. Supp. 1998).
518. *See Myers*, 26 Va. App. at 546, 496 S.E.2d at 81.
519. *See id.*
520. VA. CODE ANN. § 8.01-428(B) (Repl. Vol. 1992 & Cum. Supp. 1998).
521. *See Myers*, 26 Va. App. at 546, 496 S.E.2d at 81.

diction to vacate its earlier judgment or to enter in its place a new judgment which could then be appealed. Because the prior judgment had become final in 1992, it could not now be appealed.[522]

B. *Statutory Construction*

In *Waldrop v. Commonwealth*,[523] the Supreme Court of Virginia applied two familiar principles of statutory construction to reverse and dismiss a conviction for perjury. Waldrop was an elected public official whose alleged perjury consisted of failing to report on his campaign finance disclosure form two donations given to defray his legal expenses in withstanding a recount proceeding after his election. The case turned on whether these donations were "campaign contributions" within the meaning of that term in the former Fair Elections Practices Act.[524] The court looked to the 1993 recodification of that law as the Campaign Finance Disclosure Act[525] which made clear that campaign contributions were only those given to a candidate "for the purpose of influencing the outcome of an election."[526]

Applying the principle that a recodification of a statute is presumed not to intend any substantive change in the law unless a contrary intent plainly appears in the statute, the court held that the definition of campaign contributions also applied under the prior law and that the money in question had not been given to influence the outcome of an election because the election had been concluded.[527] The court further held that, at the very least, the old law had been ambiguous as to whether such contributions must be reported and that, because failure to do so was a criminal offense, the defendant was entitled to the benefit of every reasonable doubt about the statute's construction.[528]

522. *See Myers*, 26 Va. App. at 548-49, 496 S.E.2d at 82-83.
523. 255 Va. 210, 495 S.E.2d 822 (1998).
524. VA. CODE ANN. § 24.1-257 (repealed 1993).
525. VA. CODE ANN. §§ 24.2-900 to 24.2-930 (Repl. Vol. 1997 & Cum. Supp. 1998).
526. *Id.* § 24.2-901(A) (Repl. Vol. 1997).
527. *See Waldrop*, 255 Va. at 214, 495 S.E.2d at 824-25.
528. *See id.* at 214-15, 495 S.E.2d at 824-25.

C. *Jurisdiction and Void/Voidable Orders*

In *Holden v. Commonwealth*,[529] a panel of the Virginia Court of Appeals wrestled with, and did not quite resolve, the issue of whether a court may defer a finding of guilt and grant "probation before judgment" in cases other than those where such a disposition is authorized by statute.[530] Holden had been indicted for multiple counts of sexual offenses against children and made a plea agreement whereby he pled guilty to several offenses. Holden was sentenced to active prison time for some counts, and a finding of guilt on the others would be deferred pending his successful completion of a probationary period after release from prison.[531] Conviction and sentence subsequently were imposed in the cases where judgment had been withheld based on his misconduct while in prison. Holden did not object on procedural grounds in the trial court but contended on appeal that the trial court had lost jurisdiction when it adopted the "probation before judgment" disposition, which was not authorized by the Virginia Code or by common law.[532]

The court of appeals unequivocally rejected the jurisdictional argument, holding that "[a] contrary result would deem jurisdictional a mere procedural deviation, resulting in the unwarranted nullification of consent judgments."[533] The court gave mixed signals, however, on whether this dispositional practice would be deemed erroneous if objections to it were preserved properly in the trial court. While apparently characterizing it in the passage quoted above as a "procedural deviation," the court elsewhere stated that "this practice is authorized"[534] but cited only Virginia Code sections 19.2-298[535] and 19.2-303.[536]

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529. 26 Va. App. 403, 494 S.E.2d 892 (Ct. App. 1998).

530. *See* VA. CODE ANN. §§ 16.1-278.8(4), (4a) (Cum. Supp. 1998) (certain juvenile offenders); 18.2-251 (Cum. Supp. 1998) (first offense simple possession of drugs); 19.2-303.2 (Repl. Vol. 1995) (certain misdemeanor property offenders).

531. *See Holden*, 26 Va. App. at 405-06, 494 S.E.2d at 893-94.

532. *See id.* at 406-07, 494 S.E.2d at 895.

533. *Id.* at 408, 494 S.E.2d at 895.

534. *Id.* at 407, 494 S.E.2d at 894.

535. VA. CODE ANN. § 19.2-298 (Repl. Vol. 1995 & Cum. Supp. 1998) (sentence pronounced, or imposition of sentence suspended, *after finding of guilty* (emphasis added)).

536. VA. CODE ANN. § 19.2-303 (Repl. Vol. 1995 & Cum. Supp. 1998) (probation

XIII. LEGISLATION

In 1998, there were only a few major legislative developments in the field of criminal law. Although a complete summary of all enactments would be prohibitively long, some of the more important ones are summarized below.

Chapter 892 of the Acts of Assembly amends Virginia Code section 18.2-152.4 to add halting or disabling of computer data, programs, or software to the crime of computer trespass.[537]

Chapter 821 of the Acts of Assembly amends Virginia Code sections 18.2-95 and 18.2-108.1 to reconcile the penalties for larceny of a firearm as not less than one year or more than twenty years in prison.[538]

Chapter 825 of the Acts of Assembly enacts new Virginia Code section 18.2-370.01 to create a new class one misdemeanor when a juvenile over the age of thirteen knowingly and with lascivious intent exposes his or her sexual or genital parts to a child under the age of fourteen and more than five years the defendant's junior.[539]

Chapter 579 of the Acts of Assembly adds a new Virginia Code section 18.2-74.2 which prohibits partial birth abortions except when necessary to save the life of the mother and provides that a violation is a class one misdemeanor.[540]

Chapter 251 of the Acts of Assembly amends Virginia Code section 19.2-398 to recognize the Commonwealth's right to appeal criminal cases from the Virginia Court of Appeals to the Supreme Court of Virginia.[541]

Chapter 887 of the Acts of Assembly amends Virginia Code section 18.2-31 to create a subsection 12, defining a new category of capital murder, consisting of the willful, deliberate, and

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after conviction).

537. *See* Act of May 19, 1998, ch. 892, 1998 Va. Acts 2507.

538. *See* Act of Apr. 22, 1998, ch. 821, 1998 Va. Acts 2011.

539. *See* Act of Apr. 22, 1998, ch. 825, 1998 Va. Acts 2013.

540. *See* Act of Apr. 15, 1998, ch. 579, 1998 Va. Acts 1366-67.

541. *See* Act of Apr. 7, 1998, ch. 251, 1998 Va. Acts 375.

premeditated killing of a child under the age of fourteen by an adult over the age of twenty-one.[542]

542. *See* Act of Apr. 22, 1998, ch. 887, 1998 Va. Acts 2242.