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CRIMINAL LAW

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I. INTRODUCTION AND SCOPE

This article summarizes most published criminal law decisions of the Supreme Court of Virginia and the Virginia Court of Appeals sitting en banc, issued between July 1, 1998 and July 1, 1999.[1] This article also includes selected published panel opinions of the Virginia Court of Appeals and a summary of the most significant criminal law enactments from the 1999 session of the Virginia General Assembly.

II. CONSTITUTIONAL LAW

A. *Fourth Amendment–Search and Seizure*

1. Application to Aliens

In *Kasi v. Commonwealth*,[2] the Supreme Court of Virginia upheld

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1. Along with the decisions summarized in this article, the Supreme Court of Virginia affirmed, without a separate opinion, the following decisions of the Virginia Court of Appeals: (1) *Commonwealth v. Price*, 256 Va. 373, 506 S.E.2d 317 (1998), *aff'g* 25 Va. App. 655, 492 S.E.2d 447 (Ct. App. 1997) (holding that the defendant's right to a speedy trial was violated when he was held in custody until trial, a period in excess of five months based upon a finding of probable cause); (2) *Lynn v. Commonwealth*, 257 Va. 239, 514 S.E.2d 147 (1999), *aff'g* 27 Va. App. 336, 499 S.E.2d 1 (Ct. App. 1998) (holding that the trial court properly refused the defendant's proffered instructions on "cooling off," "right to arm," and "relative strength and size"). The Virginia Court of Appeals, sitting en banc, also published the following decisions, without separate opinions: (1) *Epps v. Commonwealth*, 29 Va. App. 169, 510 S.E.2d 279 (Ct. App. 1999) (affirming the judgment of the trial court but withdrawing the panel decision of the court of appeals in *Epps v. Commonwealth*, 28 Va. App. 58, 502 S.E.2d 140 (Ct. App. 1998)); (2) *Stevenson v. Commonwealth*, 28 Va. App. 562, 507 S.E.2d 625 (Ct. App. 1998) (affirming the judgment of the trial court). See *Stevenson v. Commonwealth*, 27 Va. App. 453, 499 S.E.2d 580 (Ct. App. 1998), for the court's panel decision.

2. 256 Va. 407, 508 S.E.2d 57 (1998). The case came before the Supreme Court of Virginia on automatic appeal of Kasi's death sentence. The court consolidated this appeal with the appeal of the capital murder conviction, however the defendant did not perfect his appeals of the noncapital convictions. *See id.* at 413, 508 S.E.2d at 60.

the defendant's convictions for capital murder and other offenses in connection with the shooting of Central Intelligence Agency ("CIA") employees.[3] The supreme court held that (1) the defendant's forcible abduction from Pakistan was not prohibited by an extradition treaty; (2) the Fourth Amendment does not protect aliens in foreign territories or in international waters from unreasonable searches and seizures; and (3) the defendant's roommate, a lessee of the apartment, had the authority to consent to the search of a suitcase found in a hall closet.[4]

The defendant in *Kasi* was a native of Pakistan and resided in an apartment with a friend in Fairfax County. The day after the shootings, the defendant returned to Pakistan.[5] Nearly four and one-half years later, agents of the Federal Bureau of Investigation ("FBI") apprehended the defendant in a hotel room in Pakistan.[6]

There is no extradition treaty directly between the United States and Pakistan, but the Attorney General assumed, as represented by the defendant, that the Extradition Treaty between the United States and the United Kingdom is in force in Pakistan. The supreme court held that there is nothing in this treaty that prohibits the "forcible abduction" of the defendant.[7]

Referring to *United States v. Verdugo-Urquidez*,[8] the supreme court stated that the Fourth Amendment did not apply to the defendant because the Amendment was not intended "to apply to activities of the United States directed against aliens in foreign territory or in international waters."[9]

The record established that the defendant's roommate, a lessee of the apartment, consented to the search of a suitcase found in the hall closet. The supreme court upheld the trial court's finding that the roommate had the authority to consent to the search of the suitcase.[10]

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3. *See id.* at 407, 508 S.E.2d at 57.
4. *See id.* at 417-20, 508 S.E.2d at 62-64.
5. *See id.* at 412, 508 S.E.2d at 59.
6. *See id.* at 414, 508 S.E.2d at 60-61.
7. *See id.* at 417-18, 508 S.E.2d at 62-63.
8. 494 U.S. 259 (1990).
9. *Kasi*, 256 Va. at 419, 508 S.E.2d at 63.
10. *See id.* at 420, 508 S.E.2d at 64.

2. Blanket Waiver as a Condition of Suspended Sentence

In *Anderson v. Commonwealth*,[11] the Supreme Court of Virginia upheld a "blanket waiver" on certain probation conditions.[12] The court held that (1) the waiver of the defendant's Fourth Amendment rights was given knowingly and voluntarily and was not the result of coercion; (2) the condition was not overly broad; and (3) the condition was reasonable considering the circumstances.[13]

In this case, Anderson received a suspended sentence after pleading guilty to felonious possession of a firearm upon school property. One of the conditions of his suspended sentence was that "he . . . submit his person, place of residence, and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant."[14] The agreement also stated that "by his signature below, [Anderson] acknowledges that, if this agreement is accepted by the court, he understands he is waiving his Fourth Amendment right against unreasonable searches and seizures during the period specified above."[15]

Approximately five months later, two off-duty police officers saw Anderson and two friends exiting a van, acting "'very loud'" in public. The officers approached the three men, at which point Anderson dropped a "'small white baggie.'"[16] Upon Anderson's arrest, the officer seized that baggie as well as another baggie and a backpack that contained a handgun.[17]

A panel of the Virginia Court of Appeals affirmed the trial court's finding that Anderson's waiver of his Fourth Amendment rights in the plea agreement was valid.[18] The court of appeals, sitting en banc, also affirmed the trial court's finding.[19] The supreme court agreed with the court of appeals and found that Anderson's plea agreement containing the waiver was voluntary and not the result of coercion.[20] The supreme court also reasoned that because the purpose of the waiver was to ensure Anderson's good conduct, the scope of the

11. 256 Va. 580, 507 S.E.2d 339 (1998).
12. *See id.* at 586-87, 507 S.E.2d at 342.
13. *See id.*
14. *Id.* at 582, 507 S.E.2d at 340.
15. *Id.* at 582-83, 507 S.E.2d at 340 (alteration in original).
16. *Id.* at 583, 507 S.E.2d at 341.
17. *See id.* at 583-84, 507 S.E.2d at 341.
18. *See* Anderson v. Commonwealth, 25 Va. App. 565, 490 S.E.2d 274 (Ct. App. 1997).
19. *See* Anderson v. Commonwealth, 26 Va. App. 535, 495 S.E.2d 547 (Ct. App. 1998) (en banc).
20. *See Anderson*, 256 Va. at 585, 507 S.E.2d at 341.

waiver needed to be broad. Finally, the court found that because the waiver required Anderson to submit to "any law enforcement officer," the search did not have to be related to the defendant's probation nor did the searching officer have to have prior knowledge of the waiver.[21]

3. Detention: Reasonable Suspicion

In *Welshman v. Commonwealth*,[22] the Virginia Court of Appeals decided the following issues: (1) whether an officer's order to a group of people to lie down on the sidewalk with their arms extended out from their bodies was constitutionally justified; and (2) whether the officer had a reasonable, articulable suspicion to search the defendant after he refused to extend his arms from his body as directed by the officer.[23]

In this case, the Lynchburg Police Department was conducting a surveillance in the 2100 block of Main Street when they observed two individuals in the middle of the street exchange cash with pedestrians and drivers for what appeared to be crack cocaine. The area was known as an "open-air drug market" in which the police had responded to numerous calls of drug activity and shooting incidents. As four officers approached the scene, the two suspects moved onto the sidewalk where a group of people were standing. One of the approaching officers directed everyone on the sidewalk to lie down with their arms extended out from their bodies in order to ensure the safety of the officers and other pedestrians.[24] Everyone complied with the officer's directive except the defendant, who did not extend his arms out from his body, but instead kept them under his torso. The officer, who feared the defendant might be armed, approached the defendant and told him again to extend his arms. The defendant again refused to follow the officer's order, so the officer rolled the defendant over and searched for a weapon. When the officer did not see a weapon on the ground where the defendant had been lying, the officer conducted a pat-down of the defendant. During the pat-down, the officer felt several smaller wrapped objects in the defendant's left front pants pocket. The officer concluded the objects were crack cocaine and pulled them from the defendant's

21. *See id.* at 586, 507 S.E.2d at 342.
22. 28 Va. App. 20, 502 S.E.2d 122 (Ct. App. 1998) (en banc).
23. *See id.* at 29, 34, 502 S.E.2d at 126, 129.
24. *See id.* at 26-27, 502 S.E.2d at 125.

pocket.[25] This search revealed "five or six chunks of crack cocaine," as well as $150 in cash.[26] Other than the defendant and the two suspects, the officers did not frisk anyone else.[27]

The trial court denied Welshman's motion to suppress, finding that the officers "acted properly and had reasonable probability or reasonable basis to believe that the area involved was very dangerous; that it was a high crime area," and as a result the officers' "actions were reasonable."[28] A divided panel of the court of appeals reversed the trial court's decision and held that the cocaine was discovered as a result of an unreasonable seizure of the defendant's person, in violation of the Fourth Amendment.[29]

On appeal to the full court, the Commonwealth conceded that the defendant was seized within the meaning of the Fourth Amendment when he was directed to lie down on the sidewalk with his arms extended out from his body, and that the officers did not have a reason to believe that the defendant was involved in criminal activity.[30] The court of appeals reviewed several United States Supreme Court cases involving the brief detention of individuals, and concluded that the officer was justified in ordering everyone to lie down on the ground, in order to ensure his safety and the safety of the bystanders.[31] The court reasoned that the officer was justified in legally detaining the individuals on the sidewalk because of the existence of the following factors: (1) the number of people in close proximity to the targeted individuals; (2) the reputation of the house and block for violence; and (3) the nature of the crime suspected by the two individuals who were targeted.[32] The court of appeals held that the refusal of a person to show his hands, in addition to the reputation of the neighborhood, provided the officer with "specific and articulable facts giving rise to the reasonable belief [defendant] 'might be armed and dangerous.'"[33]

25. *See id.* at 27-28, 502 S.E.2d at 126.
26. *Id.* at 28, 502 S.E.2d at 126.
27. *See id.*
28. *Id.*
29. *See* Welshman v. Commonwealth, 25 Va. App. 599, 492 S.E.2d 294 (Ct. App. 1997).
30. *See Welshman*, 28 Va. App. at 29, 502 S.E.2d at 126.
31. *See id.* at 30-32, 502 S.E.2d at 127-28.
32. *See id.* at 32, 502 S.E.2d at 128.
33. *Id.* at 35, 502 S.E.2d at 129.

4. Expectation of Privacy

In *Bramblett v. Commonwealth*,[34] the Supreme Court of Virginia held that the defendant had no reasonable expectation of privacy in the contents of two packages mailed to his sister a year before the offenses were committed because the packages were addressed to her and in her exclusive possession. Further, she had the authority to consent to a search of the boxes.[35]

A panel of the Virginia Court of Appeals decided a case of first impression in *Williams v. Commonwealth*.[36] The court held that the defendant did not have a reasonable expectation of privacy in his boots that had been lawfully seized upon his arrest.[37] The facts at trial indicated that while the defendant was incarcerated on an unrelated charge, his personal belongings, including his boots, were stored at the facility. His boots were examined and found to match a print on the wall of a law office where a murder had been committed. The court held that "[b]ecause the boots were in the lawful custody of the sheriff, the examination of the boots imposed no greater intrusion on [the defendant's] privacy."[38]

5. Probable Cause to Search

In *Hayes v. Commonwealth*,[39] a panel of the Virginia Court of Appeals held that the police officer lacked probable cause to search the defendant while executing a search warrant of a private residence where the defendant was present. The court also found that the officer exceeded the scope of any permissible frisk for weapons.[40]

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34. 257 Va. 263, 513 S.E.2d 400 (1999).

35. *See id.* at 274, 513 S.E.2d at 408. In this case the defendant mailed two packages to his sister in Indiana. *See id.* at 270, 513 S.E.2d at 405. Almost a year later, after the defendant had been questioned concerning the charges of murder, the defendant's sister called the local police and consented to a search of the boxes. *See id.* The packages contained photographs of the murder victims and audiotapes of the defendant's voice, in which he expressed a sexual interest in one of the children and a belief that her parents were trying to "set him up." *Id.*

36. 29 Va. App. 297, 512 S.E.2d 133 (Ct. App. 1999).

37. *See id.* at 303, 512 S.E.2d at 136.

38. *Id.* at 303, 512 S.E.2d at 136; *see id.* at 300-01, 512 S.E.2d at 134-35.

39. 29 Va. App. 647, 514 S.E.2d 357 (Ct. App. 1999).

40. *See id.* at 658-60, 514 S.E.2d at 362-64.

On October 31, 1996, Officer Lowery participated in the execution of a search warrant on a private residence. He testified that the target of the search was cocaine inside the duplex and that no one was named in the warrant. The accompanying affidavit indicated that there were people and cocaine present in the duplex when the informant left, but it did not indicate when the informant left, nor did it describe any of the people present. When the officer arrived, the defendant was seated on a couch on the porch beside the entrance to the duplex.[41] The defendant was not known to the officer and the officer had not seen him engage in any suspicious behavior. Officer Lowery testified that he ordered the defendant to the ground and handcuffed him, for safety reasons, and conducted a pat-down for weapons. During the pat-down, the officer felt and squeezed an object in the defendant's shirt pocket. This object was seized and the defendant was arrested for possession of cocaine. The officer did not testify that he suspected the object was a weapon, nor did he clearly testify that he believed the object to be cocaine.[42]

The trial court denied the defendant's motion to suppress. A panel of the court of appeals, however, overruled this decision and held "that neither the issuance of the search warrant nor the risk of danger to the officers during [the] execution [of the warrant] provided Officer Lowery with probable cause to conduct a full search of [the defendant]."[43] The court stated that the search warrant was for a private residence and neither it nor the accompanying affidavit named or described any person to be searched during the execution. Further, there was no evidence that Officer Lowery knew the defendant or suspected him of engaging in suspicious behavior.[44] While the court of appeals found that the officer was justified in concluding that the defendant was an occupant of the residence, subject to detention and a frisk for weapons, the court held that the officer exceeded the permissible scope of this frisk.[45] The court stated that because the character of the object was not immediately apparent to the officer during the pat-down, the officer was not permitted to investigate the object further.[46]

41. *See id.* at 649, 514 S.E.2d at 358.
42. *See id.* at 649-51, 514 S.E.2d at 358-59.
43. *Id.* at 653, 658, 514 S.E.2d at 360, 362.
44. *See id.* at 658, 514 S.E.2d at 362.
45. *See id.* at 659, 514 S.E.2d at 363.
46. *See id.* at 660, 514 S.E.2d at 363.

6. Search Warrant

A panel of the Virginia Court of Appeals addressed an issue of first impression in *Lebedun v. Commonwealth*.[47] The issue was whether the Commonwealth carried the burden of proving that an affidavit was attached to the search warrant when the defendant moved to suppress the evidence that was seized pursuant to the search warrant.[48] The court held that when the defendant moved to suppress evidence obtained during the execution of a search warrant, the defendant had the burden of proving that the warrant and the affidavit were not attached at the time of execution.[49]

The court of appeals addressed several other issues in this appeal as well. In this case, two men wearing masks, wigs, and gloves robbed a pharmacy in Fairfax County of both narcotics and money.[50] As the shorter man left the store and entered a car, one of the victims saw him remove his mask. This victim later identified the man as Worth Myers, which enabled a search warrant to be obtained and executed at Myers's home.[51] The police also obtained a search warrant for the defendant's home, based on the accompanying affidavit.[52] This affidavit stated that "a fatal drug overdose had occurred at Myers'[s] apartment, that an informant had purchased prescription drugs from Myers, and that . . . Myers had told the informant how he and [the defendant], while wearing masks, committed a series of armed robberies of pharmacies."[53] It also stated that "Myers gave statements . . . as to his involvement in the armed robberies. In his statement [Myers] implicated [the defendant] as the second subject in the robberies."[54] The warrant itself failed to recite the offense, but the affidavit expressly stated that the search pertained to charges of robbery and abduction.[55] A panel of the court of appeals found that Myers's statements contained in the affidavit were made against his penal interest and constituted

47. 27 Va. App. 697, 501 S.E.2d 427 (Ct. App. 1998).
48. *See id.* at 701, 501 S.E.2d at 430.
49. *See id.* at 711-12, 501 S.E.2d at 434.
50. *See id.* at 704, 501 S.E.2d at 430.
51. *See id.* at 704-05, 501 S.E.2d at 430-31.
52. *See id.* at 705, 501 S.E.2d at 431.
53. *Id.* at 707, 501 S.E.2d at 431.
54. *Id.* at 707, 501 S.E.2d at 432.
55. *See id.* at 709, 501 S.E.2d at 433.

reliable information upon which the magistrate could find probable cause to issue a search warrant.[56]

7. Security Checkpoint

In *Wilson v. Commonwealth*,[57] a panel of the Virginia Court of Appeals found that the security checkpoint where the police stopped the defendant's automobile was unconstitutional.[58] The court stated that the Commonwealth failed to present any of the following evidence: (1) that there was a drug dealing problem in the area of the security checkpoint; (2) that there had been any drug-related arrests made as a result of the checkpoint that night; (3) that there had ever been any arrests made for drug dealing in that area; and (4) that security checkpoints like the one in this case were effective tools in combating illegal drug dealing.[59]

8. Search Incident to Arrest

In *Glasco v. Commonwealth*,[60] the Supreme Court of Virginia held that the defendant, who voluntarily left his car when contacted by the arresting officer, was a recent occupant of the car, and therefore the officer was permitted to search the interior of the car incident to arrest.[61]

The facts illustrated that the officer was on patrol when he noticed the defendant's car. The officer was familiar with the defendant because he had arrested him two weeks earlier for failure to pay traffic fines. Suspecting that the defendant's license was suspended, the officer followed the defendant while contacting the dispatcher to determine the status of the defendant's license. Before he received a response, the defendant parked his car, got out, and headed toward a house.[62] The officer then pulled his car behind the defendant's, activated his lights, stopped, and asked the defendant if he had a valid driver's license. The defendant turned, walked towards the officer, and showed the officer an identification card, but not a driver's license. The officer arrested the defendant for driving

56. *See id.* at 707-08, 501 S.E.2d at 432.
57. 29 Va. App. 63, 509 S.E.2d 540 (Ct. App. 1999).
58. *See id.* at 69, 509 S.E.2d at 543.
59. *See id.* at 68-69, 509 S.E.2d at 543. The court made this decision based on the balancing test enunciated in *Brown v. Texas*, 443 U.S. 47 (1979). *See Wilson*, 29 Va. App. at 67, 509 S.E.2d at 542.
60. 257 Va. 433, 513 S.E.2d 137 (1999).
61. *See id.* at 441, 513 S.E.2d at 142.
62. *See id.* at 435, 513 S.E.2d at 138.

on a suspended license when he learned, based on the DMV check, that the defendant's license was indeed suspended. In a search of the defendant's person, the officer found two small bags of marijuana, $650 in cash, and a pager. Another officer conducted a search of the defendant's car and found a handgun and a bag of crack cocaine.[63]

The supreme court held that:

> when a police officer observes an automobile, follows it because of his or her prior knowledge regarding the vehicle and its suspected driver, and arrests the driver in close proximity to the vehicle immediately after the driver exits the automobile, . . . the arrestee is a recent occupant of the vehicle within the limits of the Belton rule.[64]

The supreme court affirmed the court of appeals's holding that the search of the passenger compartment of the defendant's vehicle was a lawful search incident to arrest.[65]

In *Rhodes v. Commonwealth*,[66] the Virginia Court of Appeals reversed the trial court's finding that a police officer lawfully searched the defendant incident to issuing him a summons for violation of a city ordinance.[67]

The evidence showed that the defendant was standing in the front yard of a private residence when the officer saw him place a beer bottle on the porch.[68] The defendant told the officer he placed the bottle on the porch "because it was open."[69] The officer testified that he intended to "release [the defendant] on a summons."[70] However, before releasing the defendant, the officer asked him if he was carrying any weapons or narcotics. After the defendant answered no, the officer conducted a pat-down and felt a small rock in the defendant's pants pocket. The officer then examined the rock and arrested the defendant for possession of cocaine.[71]

The trial court denied the defendant's motion to suppress and a divided panel of the Virginia Court of Appeals affirmed the trial

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63. *See id.* at 436, 513 S.E.2d at 138-39.
64. *Id.* at 441, 513 S.E.2d at 142.
65. *See id.* Justice Lacy filed a concurring opinion, in which Justice Koontz joined. *See id.* at 441-48, 513 S.E.2d at 142-46 (Lacy, J., concurring).
66. 29 Va. App. 641, 513 S.E.2d 904 (Ct. App. 1999) (en banc).
67. *See id.* at 642, 513 S.E.2d at 905.
68. *See id.* at 645, 513 S.E.2d at 906.
69. *Id.*
70. *Id.*
71. *See id.* at 643, 513 S.E.2d at 905.

court's ruling.[72] Upon a rehearing en banc, the court of appeals reversed the trial court's finding.[73] In its opinion, the court reviewed the law of searches incident to lawful arrests. Relying on a recent United States Supreme Court decision that rejected Iowa's reasoning that allowed searches incident to citations,[74] the court held that absent "a need to disarm" the defendant or a need "to preserve any evidence" of the offense, an officer's search of a defendant incident to a citation is unreasonable under the Fourth Amendment.[75]

9. Seizure

In *Langston v. Commonwealth*,[76] a panel of the Virginia Court of Appeals held that an encounter between police and the defendant was not consensual, but was a seizure under the meaning of the Fourth Amendment.[77] However, the court upheld the defendant's convictions finding that the defendant's stop and search were supported by reasonable suspicion.[78]

The facts at trial indicated that three uniformed bicycle officers were patrolling a high drug area. After seeing the defendant in a yard posted with a "no trespassing sign," the officers followed the defendant down an alley and questioned him about his identity. The defendant told the officers he was going to the store and then to his girlfriend's house. The officers noticed that the defendant was wearing a long coat that extended to his knees and that he kept touching his right side. The officers asked the defendant if he was carrying drugs or weapons. When he responded negatively, the officers conducted a pat-down of the defendant, found a handgun in the right side of his pants, and arrested him. No other contraband was found in the subsequent search incident to arrest; however, the officers found a bag of cocaine on the floor of the police van when it arrived at the police station. The defendant was charged with possession of cocaine with the intent to distribute and simultaneous possession of cocaine and a firearm.[79]

Ruling that the encounter between the police and the defendant was consensual and the officers had conducted a *Terry* stop sup-

72. *See* Rhodes v. Commonwealth, 28 Va. App. 296, 504 S.E.2d 390 (Ct. App. 1998).
73. *See Rhodes*, 29 Va. App. at 645-46, 513 S.E.2d at 907.
74. *See* Knowles v. Iowa, 525 U.S. 113 (1998).
75. *Rhodes*, 29 Va. App. at 645, 513 S.E.2d at 906-07.
76. 28 Va. App. 276, 504 S.E.2d 380 (Ct. App. 1998).
77. *See id.* at 283, 504 S.E.2d at 383.
78. *See id.* at 287, 504 S.E.2d at 385.
79. *See id.* at 280-81, 504 S.E.2d at 381-82.

ported by reasonable suspicion, the trial court denied the defendant's motion to suppress.[80] A panel of the court of appeals found that the trial court's ruling was erroneous and that the encounter was a seizure.[81] The court held that no reasonable person would have felt free to leave considering the following circumstances: (1) three officers pursued him; (2) the officers were close enough to carry on a conversation; (3) the officers harassed him with repeated questions; and (4) the officers surrounded him when he stopped walking.[82] However, the court upheld defendant's conviction, finding that the police had reasonable suspicion to stop and search the defendant because they saw him on abandoned property that was posted with a "no trespassing sign," and his actions of patting his side created a reasonable suspicion that he was armed and dangerous.[83]

10. Strip Search: Reasonable Suspicion

In *Taylor v. Commonwealth*,[84] a panel of the Virginia Court of Appeals reversed the defendant's conviction, holding that his belligerence to a strip search did not constitute reasonable suspicion to support a strip search following an arrest for marijuana intoxication.[85]

In this case, the defendant was arrested for public intoxication by drugs. The officer's frisk and pat-down of the defendant did not reveal any contraband. The officer stated that finding nothing raised his suspicions, so when they reached the jail, the officer informed the defendant that he would be strip searched. When the defendant became belligerent and combative, the officer called for the assistance of two additional deputies. A strip search revealed a bag of cocaine protruding from the defendant's anus.[86]

The court held that "[a]n arrest for public intoxication by drugs justifies a search of the arrestee incidental to the arrest," but "when the search reveals nothing and does not raise any further suspicions,

80. *See id.* at 281, 504 S.E.2d at 382.
81. *See id.* at 282-83, 504 S.E.2d at 383.
82. *See id.* at 283, 504 S.E.2d at 383.
83. *See id.* at 284, 287, 504 S.E.2d at 384-85.
84. 28 Va. App. 638, 507 S.E.2d 661 (Ct. App. 1998).
85. *See id.* at 640, 644, 507 S.E.2d at 662, 665.
86. *See id.* at 640-41, 507 S.E.2d at 663.

no reasonable suspicion exists that contraband must still be on the person and can only be revealed by a strip search."[87]

11. Warrantless Entry: Reasonable Suspicion

In *Washington v. Commonwealth*,[88] the Virginia Court of Appeals held that (1) officers going to an address supplied by a bail bondsman in search of a wanted felon does not implicate the Fourth Amendment; (2) the officers had a reasonable belief that the person exiting the house was the wanted person; and (3) they could accompany the person into the house while attempting to verify his identity.[89]

A bondsman received an anonymous tip that Reginald Ford had an outstanding warrant and could be found at 2347 Bethel Street in Richmond. The bondsman contacted an officer who verified that a capias was outstanding, but did not obtain a copy of the capias or a description of Ford. The bondsman knew Ford and could recognize him. When the officer and the bondsman knocked on the front door of 2347 Bethel Street in an attempt to arrest Ford, the defendant, Washington, exited the rear door and was stopped by two other officers.[90] When the defendant was asked if he was Ford, he replied, "[N]o. I'm Welford Washington."[91] The officer frisked the defendant, and asked for his identification; the defendant responded that his identification was inside the house. The officer then escorted the defendant into the house where he saw narcotics on the kitchen table. The officers seized the drugs and arrested the defendant. Ford was never found at the address.[92]

The trial court denied the defendant's motion to suppress.[93] In a panel opinion, the court of appeals reversed the convictions.[94] However, on rehearing en banc, the court of appeals reversed the panel and affirmed the defendant's convictions.[95] The court stated that either the bondsman or the officers "could lawfully approach any citizen and ask if he were Ford" because there was an outstanding capias for Ford's arrest and the bondsman had pledged to

87. *Id.* at 644, 507 S.E.2d at 664.
88. 29 Va. App. 5, 509 S.E.2d 512 (Ct. App. 1999) (en banc).
89. *See id.* at 9, 509 S.E.2d at 514.
90. *See id.* at 9-10, 509 S.E.2d at 514.
91. *Id.* at 9, 509 S.E.2d at 514.
92. *See id.* at 9-10, 509 S.E.2d at 514.
93. *See id.* at 9, 509 S.E.2d at 514.
94. *See* Washington v. Commonwealth, 26 Va. App. 657, 496 S.E.2d 135 (Ct. App. 1998).
95. *See Washington*, 29 Va. App. at 16, 509 S.E.2d at 514.

produce Ford.[96] The court held that the capias gave the officers probable cause to arrest, and the corroborated anonymous tip gave the officers the reasonable belief that the defendant was Ford.[97] The court held that the anonymous tip was sufficiently corroborated when the officer verified that there was an outstanding capias for Ford and took the bondsman to the address to identify Ford.[98] The court also stated that the defendant's exiting through the back door in response to a knock on the front door provided the officers with "articulable facts that [also] corroborated the tip."[99] Finally, the court held that the officer was entitled to verify the defendant's identification after he had detained him at the back door.[100] Relying on the decision of *Servis v. Commonwealth*,[101] the court of appeals held that the officer was authorized to escort the defendant into the house in order to maintain the status quo, prevent the fugitive from escaping, and ensure officer safety.[102] The seizure of the contraband was not a result of an illegal entry or search, but a result of the open view doctrine.[103]

The Supreme Court of Virginia addressed another warrantless entry issue in *Bramblett v. Commonwealth*.[104] In this case, the issue before the court was whether the warrantless opening of a motel room door invalidated the seizure of evidence later obtained from the motel room with a search warrant.[105] The supreme court upheld the trial court's findings and held that the warrantless opening of the motel room door did not invalidate the evidence seized pursuant to the search warrant.[106]

The facts at trial indicated that in an earlier conversation with an officer, the defendant expressed his thoughts about committing suicide and agreed to meet the officer at noon. When the defendant failed to keep this appointment, the officer became concerned about the defendant's safety based on their earlier conversations. Two officers went to the defendant's motel, observed his car parked

96. *Id.* at 10, 509 S.E.2d at 514.
97. *See id.* at 12, 509 S.E.2d at 515.
98. *See id.*
99. *Id.*
100. *See id.* at 13, 509 S.E.2d at 516 (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968) and Jones v. Commonwealth, 230 Va. 14, 19, 334 S.E.2d 536, 540 (1985)).
101. 6 Va. App. 507, 371 S.E.2d 156 (Ct. App. 1988).
102. *See Washington*, 29 Va. App. at 14, 509 S.E.2d at 516-17.
103. *See id.* at 16, 509 S.E.2d at 516.
104. 257 Va. 263, 513 S.E.2d 400 (1999).
105. *See id.* at 275, 513 S.E.2d 408.
106. *See id.*

outside, and knocked on the motel room door. When there was no response, the officers asked the motel owner to open the door to the defendant's room, which was empty.[107] "One officer 'stepped into the doorway'... while the other officer 'stood beside the door.'"[108] Neither officer had entered the room when the defendant arrived in a taxicab. Later the same day, the brother of one of the murder victims went to the motel room, wearing a "wire." He reported to the police that he had seen a bullet in a chair. The police obtained a warrant and searched the motel room the next day.[109]

12. Warrantless Entry and Search: Consent

In *McNair v. Commonwealth*,[110] a panel of the Virginia Court of Appeals decided that "once valid consent is given, the police may conduct a reasonable search of a residence until the consent is unequivocally withdrawn."[111]

In this case, the police "responded to a report that there was a robbery in progress at [the defendant's] apartment."[112] Upon the officers' arrival, the defendant consented to a search of his apartment to "'look for anyone that may have done the robbery or any individuals that [may] need assistance.'"[113] After an emergency crew removed a victim from the apartment, an officer went upstairs to look for any evidence that the robbers may have left behind. The officer found a glass test tube containing cocaine in plain view. The defendant was arrested and convicted of possession of cocaine.[114] The court found that the defendant had "(1) consented to the officer's presence in the apartment for the purpose of investigating the robbery, (2) observed the [officer] go upstairs, and (3) knew that the [officer] was searching for clues."[115] The court of appeals found that the defendant's "failure to withdraw his consent is evidence that he consented to the [officer's] search."[116]

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107. *See id.*
108. *Id.*
109. *See id.*
110. 29 Va. App. 559, 561, 513 S.E.2d 866, 867 (Ct. App. 1999), *reh'g granted*, 30 Va. App. 84, 515 S.E.2d 848 (Ct. App. 1999).
111. *Id.* at 565, 513 S.E.2d at 868.
112. *Id.* at 564, 513 S.E.2d at 867.
113. *Id.* at 562, 513 S.E.2d at 867.
114. *See id.*
115. *Id.* at 564, 513 S.E.2d at 868.
116. *Id.*

In *Commonwealth v. Benjamin*,[117] a panel of the Virginia Court of Appeals held that the defendant's arrest was unlawful and constituted an illegal seizure in violation of the Fourth Amendment.[118] In this case, the defendant was wanted for questioning about his involvement in a double homicide. Police officers were watching the suspect's apartment when they observed a person walk towards it. The officers knocked on the apartment door and said they were looking for someone named "Rosheen Waller," nicknamed "Shaw." The defendant stated that his name was "Shamaal Benjamin" and that Waller lived somewhere else. The police officers left his apartment and encountered another young male, who they confirmed was not "Shaw." This young male told the officers that "Shaw" lived in the apartment they just left. The officers proceeded back to the first apartment and knocked on the door.[119] When the defendant's mother opened the door, two officers "stepped over the threshold . . . and asked to speak [with the defendant]."[120] The officers took the defendant outside where the young male identified him as "Shaw."[121] The court found that "the officers did not have consent to enter [the defendant's apartment]" and seize him, and that there were "no exigent circumstances to justify the warrantless entry."[122]

B. *Fifth Amendment*

1. Knowing, Voluntary, Intelligent Waiver

As summarized earlier in this article, the defendant in *Kasi v. Commonwealth*[123] signed a waiver of his rights and gave both an oral and written confession two days after his arrest, while he was being flown from Pakistan to Fairfax County.[124] The evidence showed the following facts: (1) the FBI neither threatened nor made promises to the defendant; (2) the defendant understood both English and his rights; (3) the defendant never refused to answer a question and never expressed fear; and (4) the FBI never coerced the defendant.[125]

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117. 28 Va. App. 548, 507 S.E.2d 113 (Ct. App. 1998).
118. *See id.* at 552, 507 S.E.2d at 115-16.
119. *See id.* at 550-51, 507 S.E.2d at 113-14.
120. *Id.* at 551, 507 S.E.2d at 114.
121. *See id.*
122. *Id.* at 552, 507 S.E.2d at 114.
123. 256 Va. 407, 508 S.E.2d 57 (1998).
124. *See id.* at 412, 508 S.E.2d at 59; *see also supra* Part II.A.1.
125. *See id.* at 416, 508 S.E.2d at 62.

The Supreme Court of Virginia found that the trial court's ruling that "the waiver was knowing, voluntary, and intelligent [was] fully supported by the record."[126]

In *Commonwealth v. Benjamin*,[127] a panel of the Virginia Court of Appeals held that reading the defendant his rights in a jumbled and unintelligible manner was equivalent to failing to advise him of his Fifth Amendment rights; therefore, the defendant's waiver of these rights was not "knowing, voluntary, and intelligent."[128] After watching a videotape of the defendant's interrogation, the trial judge made several rulings. Among those rulings, the trial judge found that: (1) the defendant's *Miranda* rights were given "in an unintelligible manner";[129] (2) the defendant did not verbally acknowledge that he understood his Fifth Amendment rights; and (3) the defendant's "'waiver of [these] rights was not given freely, intelligently, and voluntarily.'"[130] The court of appeals upheld the trial court's decision to grant the defendant's motion to suppress the statement made during this interrogation.[131]

2. Right to Counsel

In *Cherrix v. Commonwealth*,[132] the Supreme Court of Virginia determined that the defendant's confession was inadmissible because his Sixth Amendment right to counsel was violated.[133] The defendant claimed that the interrogation continued after he invoked his right to counsel.[134] The officer testified that he read the defen

126. *Id.*
127. 28 Va. App. 548, 507 S.E.2d 113 (Ct. App. 1998).
128. *Id.* at 554, 567 S.E.2d at 115-16.
129. *Id.* at 553, 507 S.E.2d at 115. The court of appeals stated that the only time the officer's diction was unintelligible on the videotape was when he was reading the defendant his *Miranda* rights. *See id.*
130. *Id.* at 552, 507 S.E.2d at 114. The trial judge noted that the defendant wrote "yes" on the waiver form only after the officer instructed him to do so if he could read and understand English; however, the defendant was not instructed that he was waiving his *Miranda* rights by signing the form. *See id.* at 554, 507 S.E.2d at 115.
131. *See id.* at 554-55, 507 S.E.2d at 116.
132. 257 Va. 292, 513 S.E.2d 642 (1999).
133. *See id.* at 300-01, 513 S.E.2d at 648.
134. *See id.* at 300, 513 S.E.2d at 648. The defendant did "not explicitly argue that the admission of his confession violated his Sixth Amendment right to counsel." *Id.* at 301 n.2, 513 S.E.2d at 648 n.2. The supreme court agreed with the Commonwealth that "the Sixth Amendment right to counsel is charge-specific and does not 'travel with a defendant and attach [itself] to any other crimes.'" *Id.* (alteration in original). The facts at trial indicated that the defendant was questioned on three separate occasions. *See id.* at 300-01, 513 S.E.2d at 648. Specifically, on June 7, 1996, the defendant signed a written waiver of his *Miranda* rights, and on April 16, 1997, the defendant elected to speak with the officer. *See id.* at 300, 513 S.E.2d at 648. On April 25, 1997, the officer again spoke to the defendant at Accomack

dant his *Miranda* rights on three occasions, and that the defendant did not ask for counsel at any time.[135] The supreme court held that although the defendant testified to the contrary, the trial court has the discretion to evaluate the credibility of witnesses, and its decision to accept the officer's testimony over the defendant's was supported by the record.[136]

In *McDaniel v. Commonwealth*,[137] a panel of the Virginia Court of Appeals held that the defendant had unambiguously invoked his right to counsel by stating, after the administration of *Miranda* warnings, "I think I would rather have an attorney here to speak for me."[138] In this case, the officer testified that he arrested the defendant for statutory burglary, grand larceny, and receiving stolen property, and that he read the defendant his *Miranda* rights upon his arrest. After transporting the defendant to police headquarters, the officer started to interrogate him. The defendant's first response to the interrogation was "I think I would rather have an attorney here to speak for me."[139] The officer continued the interrogation and the defendant eventually confessed to committing the crimes. The defendant testified that he requested an attorney when the interrogation began.[140] "[T]he trial judge ruled that the [defendant's] request for counsel was ambiguous," and the confession was admissible because he used the word "rather."[141] However, in a panel decision, the court of appeals held that the defendant "unambiguously responded with sufficient clarity that a reasonable police officer would have understood that [the defendant] wanted an attorney."[142] The court reversed the trial court's denial of the suppression motion and remanded the case for a new trial.[143]

County jail pursuant to the defendant's request. *See id.*

135. *See id.* at 300-01, 513 S.E.2d at 649.

136. *See id.* at 301-02, 513 S.E.2d at 648-49.

137. 28 Va. App. 432, 506 S.E.2d 21 (Ct. App. 1998). On December 15, 1998, the court of appeals granted a rehearing en banc. *See* McDaniel v. Commonwealth, 28 Va. App. 660, 507 S.E.2d 672 (Ct. App. 1998) (en banc).

138. *See McDaniel*, 28 Va. App. at 436-37, 506 S.E.2d at 23-24.

139. *Id.* at 433, 506 S.E.2d at 22.

140. *See id.*

141. *Id.* at 434, 506 S.E.2d at 22.

142. *Id.* at 435, 506 S.E.2d at 24.

143. *See id.* at 437, 506 S.E.2d at 24.

3. Double Jeopardy[144]

The issue before the Supreme Court of Virginia in *Phillips v. Commonwealth*,[145] was whether the defendant's felony charges, which were based on the same acts as his misdemeanor convictions, were the subject of a simultaneous or a successive prosecution.[146]

The defendant was charged with felony charges of selling marijuana on school grounds and misdemeanor charges of distributing marijuana based on the same acts. On October 29, 1996, the defendant was "convicted on the misdemeanor charges and waived a preliminary hearing on the . . . felony charges."[147] The circuit court denied the defendant's motion to quash the indictments, ruling that the defendant "had not been subjected to successive prosecutions."[148] After his conditional guilty plea, the defendant was sentenced on the felony offenses.

In a panel opinion, the Virginia Court of Appeals affirmed the felony convictions and held that when felony and misdemeanor charges are heard in a single evidentiary hearing, even though the warrants were obtained on different dates, they are part of a single prosecution.[149] The court of appeals denied the defendant's petition for a rehearing en banc.[150] The supreme court focused its attention on the second issue asserted by the defendant, which was whether the decision in *Slater v. Commonwealth*[151] barred the felony prosecution because the charges were instituted on different dates

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144. See discussion of *Payne v. Commonwealth*, 257 Va. 216, 509 S.E.2d 293 (1999), *infra* Part II.C, for a discussion of double jeopardy principles in the context of a capital case.

145. 257 Va. 548, 514 S.E.2d 340 (1999).

146. *See id.* at 549-50, 514 S.E.2d at 341.

147. *Id.* at 550, 514 S.E.2d at 341.

148. *Id.*

149. *See id.* (citing Phillips v. Commonwealth, 27 Va. App. 674, 680-81, 500 S.E.2d 848, 851 (Ct. App. 1998)). The court of appeals used Virginia Code section 19.2-294 in reaching this conclusion. However, the Supreme Court of Virginia held that the defendant failed to raise at trial the issue of whether or not his misdemeanor convictions barred the felony prosecutions at trial, under Virginia Code section 19.2-294. *See Phillips*, 257 Va. at 551, 514 S.E.2d at 342.

150. *See Phillips*, 257 Va. at 550, 514 S.E.2d at 341.

151. 15 Va. App. 593, 425 S.E.2d 816 (Ct. App. 1993). In *Slater*, the Virginia Court of Appeals found that when criminal charges are instituted determines whether multiple charges based on the same act are simultaneous or successive. *See id* at 596, 425 S.E.2d at 817. The court of appeals concluded that being charged with a felony offense and a misdemeanor offense, based on the same act, and being tried and convicted on the misdemeanor offense at the same time as the preliminary hearing on the felony offense did not subject the defendant to successive prosecution. *See id.* In *Phillips*, the Supreme Court of Virginia found "that the court of appeals properly limited its holding in *Slater* to the particular facts [of] that case." *Phillips*, 257 Va. at 553, 514 S.E.2d at 343.

and were not part of a single prosecution.[152] The supreme court affirmed the court of appeals, finding that "when 'felony and misdemeanor charges are instituted at separate times, [based on the same acts,] but are heard simultaneously in a single proceeding, they are part of a single prosecution.'"[153] Therefore, the defendant had not been subjected to improper successive prosecutions in violation of Virginia Code section 19.2-294.[154]

4. *Miranda* Rights

In *Timbers v. Commonwealth*,[155] a panel of the Virginia Court of Appeals reversed the defendant's convictions.[156] The court held that a booking officer's interrogation of the defendant in her holding cell regarding the defendant's true identity violated the defendant's *Miranda* rights.[157]

C. *Eighth Amendment–Death Penalty*

During the time period covered in this article, the Supreme Court of Virginia upheld death sentences in eight of nine capital murder cases.[158] Throughout these cases, the court refused to address

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152. *See Phillips*, 257 Va. at 552-53, 514 S.E.2d at 342.

153. *Id.* at 552, 514 S.E.2d at 343.

154. *See id.* at 553, 514 S.E.2d at 343. *See generally* VA. CODE ANN. § 19.2-294.1 (Repl. Vol. 1995 & Cum. Supp. 1999).

155. 28 Va. App. 187, 503 S.E.2d 233 (Ct. App. 1998).

156. *See id.*

157. *See id.* at 197, 201-02, 503 S.E.2d at 237, 240.

158. *See* Walker v. Commonwealth, 258 Va. 54, 515 S.E.2d 565 (1999) (holding that the murder of two individuals within three-year period and future dangerousness and vileness justified the death sentence); Cherrix v. Commonwealth, 257 Va. 292, 513 S.E.2d 642 (1999) (holding that murder in course of forcible sodomy and future dangerousness and vileness justified the death sentence); Bramblett v. Commonwealth, 257 Va. 263, 513 S.E.2d 400 (1999) (holding that a murder committed as part of the same transaction as three other murders and future dangerousness justified the death sentence); Hedrick v. Commonwealth, 257 Va. 328, 513 S.E.2d 634 (1999) (holding that murder in the commission of robbery and future dangerousness and vileness justified the death sentence); Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999) (reversing the trial court and holding that murder in the commission of robbery and future dangerousness and vileness did not justify the death sentence); Payne v. Commonwealth, 257 Va. 216, 509 S.E.2d 293 (1999) (holding that murder in the commission of robbery, murder in the commission of rape, murder in the commission of or subsequent to object sexual penetration, murder in the commission of or subsequent to attempted rape, and future dangerousness and vileness justified the death sentence); Kasi v. Commonwealth, 256 Va. 407, 508 S.E.2d 57 (1998) (holding that murder committed as part of the same act as an additional murder and vileness justified death sentence); Reid v. Commonwealth, 256 Va. 561, 506 S.E.2d 787 (1998) (holding that murder in the commission of attempted rape and/or attempted robbery and vileness justified death sentence); Swisher

certain issues that it had decided previously. These issues include the following: (1) a trial court is not required to permit a defendant to mail a questionnaire to potential jurors;[159] (2) a defendant has no right to additional peremptory challenges in a capital murder trial;[160] (3) a trial court has the discretion to require the Commonwealth to file a bill of particulars;[161] (4) the aggravating factors that the jury may consider to impose the death sentence are not unconstitutionally vague;[162] and (5) the failure to provide the jury instructions clarifying these terms is not unconstitutional.[163] The cases related to the law governing capital punishment are summarized below.

In *Atkins v. Commonwealth*,[164] the Supreme Court of Virginia affirmed the defendant's conviction, but reversed the death sentence and remanded the case for a new sentencing proceeding.[165] The court found that the trial court committed reversible error when it failed to ensure that the jury received a proper verdict form.[166] The verdict form given to the jury failed to provide the option of sentencing the defendant to life imprisonment upon a finding that neither of the aggravating factors was proven beyond a reasonable doubt.[167] The court found that even though the defense counsel did not make a precise objection to the Commonwealth's verdict form (which was erroneous), it was sufficient that the defense counsel stated his preference for his verdict form (which provided the missing option).[168] On remand for a new sentencing proceeding, the supreme court stated that the Commonwealth would be permitted to introduce evidence that is relevant to prove either aggravating factor.[169]

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v. Commonwealth, 256 Va. 471, 506 S.E.2d 763 (1998) (holding that murder in the commission of abduction with intent to defile, murder in the commission of or subsequent to rape or forcible sodomy, and future dangerousness and vileness justified the death sentence).

159. *See Cherrix*, 257 Va. at 299, 513 S.E.2d at 647-48; *Hedrick*, 257 Va. at 328, 513 S.E.2d at 639; *Swisher*, 256 Va. at 478-79, 506 S.E.2d at 767.

160. *See Atkins*, 257 Va. at 172-73, 510 S.E.2d at 453-54; *Swisher*, 256 Va. at 478-79, 506 S.E.2d at 767.

161. *See Walker*, 258 Va. at 62-63, 515 S.E.2d at 570; *Hedrick*, 257 Va. at 337, 513 S.E.2d at 639; *Swisher*, 256 Va. at 479-80, 506 S.E.2d at 768.

162. *See Walker*, 258 Va. at 61, 515 S.E.2d at 569; *Cherrix*, 257 Va. at 299, 513 S.E.2d at 647; *Bramblett*, 257 Va. at 263, 513 S.E.2d at 404; *Atkins*, 257 Va. at 172, 510 S.E.2d at 453.

163. *See Walker*, 258 Va. at 61, 515 S.E.2d at 569; *Bramblett*, 259 Va. at 268, 513 S.E.2d at 404.

164. 257 Va. 160, 510 S.E.2d 445 (1999).

165. *See id.* at 179-80, 510 S.E.2d at 457.

166. *See id.* at 177, 510 S.E.2d at 456.

167. *See id.* at 176-77, 510 S.E.2d at 456.

168. *See id.* at 177 n.8, 510 S.E.2d at 456 n.8.

169. *See id.* at 178, 510 S.E.2d at 457.

In *Walker v. Commonwealth*,[170] the Supreme Court of Virginia affirmed the death penalty of the defendant who broke into each victims' apartment and shot each victim multiple times in front of the victims' family members.[171] This is the first capital murder case relying exclusively on Virginia Code section 18.2-31(8).[172] The court found that the death penalty was not disproportionate for the defendant who had a substantial criminal history, a history of violent actions, and had committed two unprovoked, brutal murders within a six month period.[173]

In *Bramblett v. Commonwealth*,[174] the Supreme Court of Virginia affirmed the death penalty of a defendant, as well as his three first-degree murder convictions, three counts of using a firearm in the commission of a murder, and arson.[175] The court held that testimony concerning acts that occurred in the late 1970s was admissible in the penalty phase on the issue of future dangerousness, and that the time gap only affected the weight of the evidence, not its admissibility.[176] The court found that the death penalty was not disproportionate or excessive in this case where the defendant had a criminal history and had murdered young children.[177]

In *Hedrick v. Commonwealth*,[178] the Supreme Court of Virginia affirmed the death penalty for a defendant who committed murder during the commission of a robbery.[179] The court upheld the trial court's exercise of discretion in admitting enlarged photographs of the victim's injuries.[180] Further, the court found that the death penalty was not disproportionate for the defendant who had prior convictions for armed robbery and who had committed an aggravated battery upon the victim.[181] The court rejected the defendant's contention that an aggravated battery is not committed when the victim dies instantaneously from a single gunshot wound.[182] Instead, the court found that an aggravated battery occurred

170. 258 Va. 54 , 515 S.E.2d 565 (1999).
171. *See id.* at 74, 515 S.E.2d at 576.
172. VA. CODE ANN. § 18.2-31(8) (Cum. Supp. 1999). This section deals with "[t]he willful, deliberate, and premeditated killing of more than one person within a three-year period." *Id.*
173. *See Walker,* 258 Va. at 72-74, 515 S.E.2d at 576-77.
174. 257 Va. 263, 513 S.E.2d 400 (1999).
175. *See id.* at 279, 513 S.E.2d at 410.
176. *See id.* at 278, 513 S.E.2d at 410.
177. *See id.* at 278-79, 513 S.E.2d at 410.
178. 257 Va. 328, 513 S.E.2d 634 (1999).
179. *See id.* at 343, 513 S.E.2d at 642.
180. *See id.* at 337-38, 513 S.E.2d at 639.
181. *See id.* at 338-39, 513 S.E.2d at 639-40.
182. *See id.* at 338, 513 S.E.2d at 640.

because the defendant shot the victim in the face at close range after robbing her, raping her, forcing her to commit sodomy, abducting her, and holding her for approximately five hours, binding her hands and covering her eyes and mouth.[183]

In *Cherrix v. Commonwealth*,[184] the Supreme Court of Virginia affirmed the death penalty of the defendant.[185] The court found that the death penalty was not disproportionate for the defendant who had a lengthy criminal history, including a history of violent offenses, and lured the victim to a strange area, forcibly sodomized her, and shot her in the head as she begged for her life.[186] The court also affirmed the trial court's decision that "'what a person may expect [from] the penal system' is not relevant mitigation evidence."[187]

In *Payne v. Commonwealth*,[188] on mandatory review, the Supreme Court of Virginia addressed for the first time whether a court can impose more than one death sentence for the murder of one victim.[189] The defendant, who murdered two people, was sentenced to death on four capital murder convictions.[190] The defendant was found guilty of murder in the commission of robbery and murder in the commission of rape of one victim, and guilty of murder in the commission of object sexual penetration and murder in the commission of attempted rape for the second victim.[191] There was a strong dissent by Justice Koontz that could allow for future arguments on this issue.[192]

In *Payne*, the supreme court looked to the test announced in *Blockburger v. United States*,[193] and analyzed the Virginia capital murder statute.[194] The court found that each offense required proof of different facts and therefore, constituted more than one capital offense.[195] The supreme court held that the General Assembly intended each distinct offense to be punished separately, which allows for the imposition of more than one death sentence per victim,

183. *See id.* at 339, 513 S.E.2d at 640.
184. 257 Va. 292, 513 S.E.2d 642 (1999).
185. *See id.* at 314, 513 S.E.2d at 656.
186. *See id.* at 312-14, 513 S.E.2d at 655.
187. *Id.* at 310, 513 S.E.2d at 653.
188. 257 Va. 216, 509 S.E.2d 293 (1999).
189. *See id.* at 229, 509 S.E.2d at 301.
190. *See id.*
191. *See id.* at 221, 224, 509 S.E.2d at 296, 298.
192. *See id.* at 229, 509 S.E.2d at 301 (Koontz, J., dissenting).
193. 284 U.S. 299 (1932).
194. *See Payne*, 257 Va. at 228, 509 S.E.2d at 300-01 (construing VA. CODE ANN. § 18.2-31 (Cum. Supp. 1999)).
195. *See id.* at 228, 509 S.E.2d at 301.

and does not violate the Fifth Amendment protection against double jeopardy.[196]

In *Swisher v. Commonwealth*,[197] the Supreme Court of Virginia upheld the trial court's rejection of jury instructions that would have allowed the jury to find the defendant guilty of manslaughter rather than capital or first degree murder based on his voluntary intoxication.[198] The court approved this rejection because the proffered jury instructions contained incorrect statements of the law and would have allowed for a result that was contrary to common law.[199] The court reiterated that although voluntary intoxication may negate the specific intent necessary to prove capital or first degree murder, it is not admissible to reduce the offense to manslaughter.[200]

In *Reid v. Commonwealth*,[201] the Supreme Court of Virginia reiterated that the test for vileness does not require that the defendant's mental state embrace the intent to commit a vile crime, but only requires consideration of the number or the nature of the batteries inflicted on the victim.[202] The court also restated that a trial court must consider mitigating evidence in determining the appropriate sentence, but is not required to give the evidence controlling effect.[203]

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196. *See id.* at 229, 509 S.E.2d at 301.
197. 256 Va. 471, 506 S.E.2d 763 (1998).
198. *See id.* at 488, 506 S.E.2d at 772.
199. *See id.* The jury instructions proffered by the defendant were as follows:
INSTRUCTION NO. R-1
If you find that the defendant was so greatly intoxicated by the voluntary use of alcohol and drugs that he was incapable of deliberating or premeditating, then you cannot find him guilty of capital murder or murder in the first degree. Voluntary intoxication is not a defense to second degree murder or manslaughter.
INSTRUCTION NO. Q
You have been instructed on more than one grade of homicide and if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant, and find him guilty of the lesser offense. For example, if you have a reasonable doubt as to whether he is guilty of capital murder or first degree murder, you shall find him guilty of first degree murder. If you have a reasonable doubt as to whether he is guilty of first degree murder or second degree murder, you shall find him guilty of second degree murder or of voluntary manslaughter. If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty.
Id.
200. *See id.*
201. 256 Va. 561, 506 S.E.2d 787 (1998).
202. *See id.* at 570, 506 S.E.2d at 793.
203. *See id.* at 569, 506 S.E.2d at 792.

In *Kasi v. Commonwealth*,[204] discussed earlier in this article, the Supreme Court of Virginia held that the defendant was not entitled to contact a juror in order to question the juror about jury deliberations.[205] Specifically, the court found that the alleged misconduct occurred inside the jury room and after the verdict during the guilt phase, but prior to the jury's being sequestered, and therefore did not rise to a level that warranted investigation.[206]

III. CRIMINAL PROCEDURE

A. *Discovery*

In *Hanson v. Commonwealth*,[207] a panel of the Virginia Court of Appeals held that the defendant's previous statements to Maryland authorities concerning an unrelated shooting incident were not "relevant" in his murder trial within the meaning of Rule 3A:1 of the Supreme Court of Virginia.[208] However, the court found that the defendant's direct examination testimony about the earlier shooting incident was relevant to his defense that he suffered from an "intermittent explosive disorder," and it opened the door to explore the statements made about this earlier incident on cross examination.[209]

B. *Plea Agreements–Rule 3A:8(c)(1)(C)(2)*

In *Commonwealth v. Sandy*,[210] the Supreme Court of Virginia determined whether a defendant can enforce the terms of a plea agreement that he executed with the Commonwealth's Attorney.[211]

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204. 256 Va. 407, 508 S.E.2d 57 (1998).
205. *See id.* at 424-25, 508 S.E.2d at 66-67.
206. *See id.*
207. 29 Va. App. 69, 509 S.E.2d 543 (Ct. App. 1999).
208. *See id.* at 78, 509 S.E.2d at 547. On direct examination the defendant testified about a shooting incident in 1990, which led to his conviction for attempted murder. *See id.* at 74, 509 S.E.2d at 545. On cross-examination, the Commonwealth's Attorney asked the defendant about statements he had made to the Maryland authorities in regards to the 1990 shooting incident. *See id.* at 75, 509 S.E.2d at 546. Specifically the Commonwealth asked the defendant if he remembered saying, "he 'did not feel bad about shooting [his] victim,' that he 'wished the exit wound could be even bigger,' and that he wished he had his nine millimeter so his target 'would have dropped to the ground.'" *Id.* (alteration in original). *See generally* VA. SUP. CT. R. 3A:1.
209. *See id.* at 80-81, 509 S.E.2d at 548-49.
210. 257 Va. 87, 509 S.E.2d 492 (1999).
211. *See id.* at 88, 509 S.E.2d at 492.

The defendant was indicted for thirty-two counts of intentionally and fraudulently issuing grain receipts. After several plea negotiations, the defendant, the Commonwealth's Attorney, and a representative of the Virginia Department of Agriculture executed and signed an agreement. The agreement provided that the defendant would receive full transactional immunity from all acts related to the information he provided to the Commonwealth's Attorney.[212]

Specifically, the agreement contained the following provisions:

> 3. That if... [the Commonwealth's Attorney] is reasonably satisfied that the information provided by [the defendant] is full and complete, [the Commonwealth's Attorney] will move the Court to amend seven of the indictments ... to petty larceny and that she will move the Court to nol pros or dismiss all of the other indictments.
> 4. That [the Commonwealth's Attorney] will recommend to the Court that [the defendant] be fined Five Hundred Dollars ($500.00) on each of the no more than seven (7) misdemeanor charges for which he is convicted, and be sentenced to six (6) months in jail on each such charge, to run concurrently, all suspended on the condition that the fines be paid.[213]

After signing the agreement, the defendant met with the Commonwealth's Attorney and provided her with information regarding other criminal offenses. Several days later, in a letter to defense counsel, the Commonwealth's Attorney informed the defendant that she would not honor the agreement because she had verified that the defendant lied to her. The defendant filed a petition in the circuit court and requested the court to enforce the agreement. After conducting an *ore tenus* hearing, the trial court held that there was no enforceable agreement between the defendant and the Commonwealth.[214] The defendant was then tried and convicted of seven counts of fraudulently and intentionally issuing grain receipts.[215]

Reversing the convictions, a panel of the court of appeals held a contractual relationship existed between the defendant and the Commonwealth that could not be unilaterally withdrawn.[216] Upon a rehearing en banc, the court of appeals affirmed the panel decision and ordered specific performance of the agreement.[217]

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212. *See id.*
213. *Id.* at 89, 509 S.E.2d at 492-93.
214. *See id.* at 89-90, 509 S.E.2d at 493.
215. *See id.*
216. *See* Sandy v. Commonwealth, 25 Va. App. 1, 486 S.E.2d 102 (Ct. App. 1997).
217. *See* Sandy v. Commonwealth, 26 Va. App. 724, 496 S.E.2d 167 (Ct. App. 1998) (en banc).

The supreme court reversed the court of appeals by holding that a Commonwealth's Attorney may withdraw from a proposed agreement any time before the actual entry of the defendant's guilty plea or before the defendant changes his position in reliance on the agreement resulting in prejudice to him.[218] This decision was based in part on Rule 3A:8(c)(1)(C)(2),[219] which governs plea agreements in criminal proceedings. The court held that this rule requires the circuit court to approve the plea agreement, which did not occur in this case.[220]

C. *Right to Preliminary Hearing*

In *Armel v. Commonwealth*,[221] the Virginia Court of Appeals, in a panel decision, held that the defendant was not deprived of his right to a preliminary hearing when he was directly indicted and tried for the same offenses that had been previously nol prossed in general district court.[222]

On July 17, 1996, the defendant was arrested on charges of uttering a check with the intent to defraud and possession of a firearm after being convicted of a felony. When a Commonwealth witness failed to appear at the defendant's preliminary hearing in the general district court, the charges were nol prossed. On September 9, 1996, a grand jury directly indicted the defendant on the same offenses. The trial court ruled that the defendant was not entitled to a preliminary hearing because he was not "arrested on a charge of felony" at the time of his indictment.[223] A panel of the court of appeals found that after the charges in general district court were nol prossed, the defendant was no longer arrested on a charge of felony.[224] The defendant was then properly indicted on the same offenses without the benefit of a preliminary hearing.[225]

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218. *See Sandy*, 257 Va. at 91, 509 S.E.2d at 494.
219. VA. SUP. CT. R. 3A:8(c)(1)(C)(2).
220. *See Sandy*, 257 Va. at 91, 509 S.E.2d at 493-94.
221. 28 Va. App. 407, 505 S.E.2d 378 (Ct. App. 1998).
222. *See id.* at 411, 505 S.E.2d at 380.
223. *Id.* at 408-09, 505 S.E.2d at 379.
224. *See id.* at 410-11, 505 S.E.2d at 380.
225. *See id.*

IV. JUVENILES

A. *Commitment Review Hearing*

In *Richardson v. Commonwealth*,[226] a panel of the Virginia Court of Appeals held that a juvenile and domestic relations court order in a commitment review hearing is final and appealable.[227] The defendant in this case was committed to the Department of Juvenile Justice on June 11, 1997. The juvenile court declined to rescind the defendant's commitment in a commitment review hearing on August 7, 1997. The circuit court dismissed the defendant's August 18, 1997 appeal as untimely, holding that the June 11 commitment order, not the August 7 order, was the appealable order.[228] The court of appeals reversed and held that an order determining whether to modify, revoke, or continue a juvenile's commitment following a review hearing is "a final, appealable order."[229] The court of appeals remanded the case to the circuit court to consider the defendant's appeal because the August 7 order was an appealable order.[230]

B. *Sentencing*

In *Jackson v. Commonwealth*,[231] the Virginia Court of Appeals, in a panel decision, held that a circuit court had the statutory authority to impose a juvenile sentencing option as a condition of suspending the execution of a prison sentence.[232] In this case, the circuit court tried the defendant as an adult. He plead guilty to the charges of petit larceny and statutory burglary. The trial judge sentenced the defendant to ten years in prison for the statutory burglary charge to be served concurrently with one year in prison for the petit larceny charge. The court then suspended both sentences upon the conditions that the defendant be committed to the Department of Juvenile

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226. 28 Va. App. 389, 504 S.E.2d 884 (Ct. App. 1998).
227. *See id.* at 393, 504 S.E.2d at 886.
228. *See id.* at 390, 504 S.E.2d at 885.
229. *Id.* at 391-92, 504 S.E.2d at 885.
230. *See id.* at 393, 504 S.E.2d at 886.
231. 29 Va. App. 418, 512 S.E.2d 838 (Ct. App. 1999).
232. *See id.* at 423-24, 512 S.E.2d at 841. The court found the statutory authority in VA. CODE ANN. § 16.1-272(A)(1)-(2) (Repl. Vol. 1999).

Justice until he turned twenty-one, that he complete the "Serious Offender Program," and that he be of good behavior for a period of ten years.[233]

C. *Transfers*

In *Commonwealth v. Baker*,[234] the Supreme Court of Virginia affirmed the court of appeals's decision that the transfer of a defendant's charge from a juvenile and domestic relations court to a circuit court was ineffectual, and the subsequent convictions void, because the juvenile's biological father did not receive notice that the petition had been filed, in violation of Virginia Code section 16.1-263(A).[235] The supreme court held to apply this decision retrospectively.[236]

V. SUBSTANTIVE CRIMINAL LAW

A. *Abduction: Principal in the Second Degree*

In *Taylor v. Commonwealth*,[237] a panel of the Virginia Court of Appeals decided an issue of first impression concerning the abduction of a child by its natural parent.[238] The court held that the defendant, who aided her fiancé in taking his child from the child's mother, could not be convicted for abduction as a principal in the second degree.[239] The facts at trial indicated that the defendant's fiancé had a child with another woman. The defendant's fiancé was never married to the other woman, and they had never lived together. The defendant's fiancé had never paid child support and no custody order was pending or in effect.[240] The court found that "if no custody proceedings are pending, the natural parent of a child may not be convicted for abducting the child 'with the intent . . . to withhold or conceal him from any person . . . lawfully entitled to his

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233. *See Jackson*, 29 Va. App. at 419-20, 512 S.E.2d at 839.

234. 258 Va. 1, 516 S.E.2d 219 (1999) (per curiam).

235. *See id.* at 2, 516 S.E.2d at 220; *see also* VA. CODE ANN. § 16.1-263(A) (Repl. Vol. 1999). As the court noted, this statute was amended effective July 1, 1999 to provide for notice to at least one parent, rather than to both parents. *See infra* Part IX.

236. *See Baker*, 258 Va. at 2, 516 S.E.2d at 220.

237. 28 Va. App. 498, 507 S.E.2d 89 (Ct. App. 1998). On January 6, 1999, the court of appeals granted a rehearing en banc. *See* Taylor v. Commonwealth, 28 Va. App. 723, 508 S.E.2d 888 (Ct. App. 1999) (en banc).

238. *See Taylor*, 28 Va. App. at 509-10, 507 S.E.2d at 91-92.

239. *See id.* at 509-10, 507 S.E.2d at 94.

240. *See id.* at 501, 507 S.E.2d at 90.

charge.'"[241] The court of appeals further held that a person "who aids [the] parent in taking the child also does not commit abduction."[242]

B. *Aggravated Sexual Battery*

In *Castelow v. Commonwealth*,[243] the Virginia Court of Appeals, in a panel decision, held that a child's statement to her stepmother regarding alleged sexual molestation that had occurred sixteen months earlier was inadmissible and its admission at trial required reversal of the defendant's aggravated sexual battery conviction.[244]

At trial, the victim testified that on October 27, 1995, she was watching television with the defendant in the living room of her mother's house when the defendant gave her beer to drink. The victim further testified that by 2:00 a.m. she had consumed six beers and was drunk. The victim testified that as she walked past the defendant on her way to bed, he grabbed her and she fell to the floor. The defendant then got on top of her, unbuttoned her blouse, touched her breasts and the clothing around her vaginal area, and then tried to kiss her. Sixteen months later, in February 1997, the victim's stepmother questioned her about something she had written in her diary. The victim's stepmother testified that the victim told her about the incident with the defendant.[245]

After reviewing the case law concerning the definition of "recently after the commission," the court of appeals held that, in the absence of evidence explaining the sixteen month delay, the Commonwealth failed to provide a foundation from which the trial judge could find that the complaint met the statutory requirement of being made "recently after [the] commission of the offense."[246]

C. *Child Neglect and Cruelty to Children*

In *Ellis v. Commonwealth*,[247] a panel of the Virginia Court of Appeals reversed the defendant's convictions for child neglect and cruelty to children, finding that inattention and inadvertence cannot

241. *Id.* at 507, 507 S.E.2d at 93 (alteration in original).
242. *Id.* at 510, 507 S.E.2d at 94.
243. 29 Va. App. 305, 512 S.E.2d 137 (Ct. App. 1999).
244. *See id.* at 312-13, 512 S.E.2d at 139-40.
245. *See id.* at 308-09, 512 S.E.2d at 138.
246. *Id.* at 312, 512 S.E.2d at 139-40.
247. 29 Va. App. 548, 513 S.E.2d 453 (Ct. App. 1999).

be equated with actions taken willfully.[248] The facts at trial indicated that the defendant left her two young children, ages four and two, napping in a closed bedroom in their first-floor apartment while she visited a neighbor's house. Earlier that day, she lit her cigarette on a gas burner and inadvertently left it on. The burner caused a fire that injured the two young children.[249] The court found there was no evidence that the defendant left the apartment with the intent to injure her children or that she knew that her children would be injured as a likely result of her departure.[250]

D. *Escape*

In *Cavell v. Commonwealth*,[251] the Virginia Court of Appeals held that the evidence was insufficient to convict the defendant of escape because the officer did not effectuate an arrest.[252] In this case, an officer armed with "OC" spray approached a crowd and ordered them to disperse. As the crowd dispersed, the officer saw the defendant, who the officer knew had an outstanding felony warrant. The officer approached the defendant and told him he needed to speak with him. When the officer was within ten feet of the defendant he told him he was under arrest. The defendant responded with profanity. The officer then moved within four to five feet of the defendant and again told him he was under arrest. Before the officer could get any closer, the defendant ran.[253]

After reviewing Virginia's law of arrest, the court of appeals concluded that an arrest cannot be made without touching or submission.[254] The court found that the defendant did not submit to the officer's showing of authority nor did the officer touch the defendant, and therefore the officer did not effectuate an arrest.[255] Since the defendant was neither under arrest, nor in custody, he could not be found guilty of escape.[256]

248. *See id.* at 557-58, 513 S.E.2d at 458.
249. *See id.* at 551-53, 513 S.E.2d at 455.
250. *See id.* at 555-58, 513 S.E.2d at 457-58.
251. 28 Va. App. 484, 506 S.E.2d 552 (Ct. App. 1998) (en banc).
252. *See id.* at 487, 506 S.E.2d at 553.
253. *See id.* at 485, 506 S.E.2d at 553.
254. *See id.* at 487, 506 S.E.2d at 553.
255. *See id.*
256. *See id.* In a related case, on an issue of first impression, a panel of the Virginia Court of Appeals held that the underlying offense for which an accused is in custody is not an essential element of misdemeanor escape under Virginia Code section 18.2-479. *See* Williams v. Commonwealth, 29 Va. App. 696, 700, 514 S.E.2d 381, 383 (Ct. App. 1999).

E. *Indecent Liberties with a Child*

In *Siquina v. Commonwealth*,[257] the defendant was watching television in a bedroom with a friend's five-year-old daughter when he placed his hand over the child's mouth, led her to a bathroom, kissed the child, and forced his tongue in her mouth. The defendant instructed the child to face the toilet with her back to him. When the child's mother opened the bathroom door, she saw the defendant standing "very close" behind the child with his pants and underwear pulled down and his erect penis exposed but the child did not see his genitals. The defendant was convicted of taking indecent liberties with a child and attempted rape.[258]

A panel of the Virginia Court of Appeals held that the evidence presented at trial was sufficient to prove that the defendant took indecent liberties with a child.[259] The court found that an adult's intentional display of his or her genitals in the presence of a child, "where a reasonable probability exists that they might be seen by that child, regardless of the child's actual perception of such a display" satisfies the word "expose" as used in Virginia Code section 18.2-370.[260] The court also held that the specific intent to commit rape can be shown without any evidence that the defendant touched his victim's sexual organs or removed her clothing.[261]

F. *Involuntary Manslaughter*

In *Conrad v. Commonwealth*,[262] a panel of the Virginia Court of Appeals reversed the defendant's conviction of involuntary manslaughter, and found the evidence insufficient to support the conviction.[263] In this case, the defendant fell asleep while driving and drove off the road, striking and killing a jogger. The defendant worked the day before the accident and had been awake all night. The responding officer testified that the defendant said he caught himself dozing off four or five times, but decided to continue driving

257. 28 Va. App. 694, 508 S.E.2d 350 (Ct. App. 1998).
258. *See id.* at 696-97, 508 S.E.2d at 351-52.
259. *See id.* at 697-98, 508 S.E.2d at 352.
260. *Id.* at 699, 508 S.E.2d at 353; *see* VA. CODE ANN. § 18.2-370 (Repl. Vol. 1996 & Cum. Supp. 1999).
261. *See id.* at 700-01, 508 S.E.2d at 353-54.
262. 29 Va. App. 661, 514 S.E.2d 364 (Ct. App. 1999), *reh'g granted*, 30 Va. App. 94, 515 S.E.2d 780 (Ct. App. 1999).
263. *See Conrad*, 29 Va. App. at 664, 514 S.E.2d at 365.

because he was only about five minutes from home.[264] The court of appeals held that the defendant's conduct did not support a finding of criminal negligence.[265] The court could not conclude that the defendant "knew or should have known that his conduct in proceeding the short distance to his nearby home 'probably would cause injury to another' or that he acted mercilessly or inhumanely in failing to stop."[266] The court of appeals stated that the evidence may have only supported a finding of ordinary or gross negligence.[267]

G. *Object Sexual Penetration*

In *Jett v. Commonwealth*,[268] the Virginia Court of Appeals affirmed the trial court's finding that the evidence was sufficient to support a conviction for object sexual penetration.[269] The nine-year-old victim testified at trial that the defendant taught her to put a hairbrush "on the outside of [her] pookie . . . and rub it."[270] She also testified that the defendant told her to do the same thing with her Barbie doll, and that the defendant would use his finger or his tongue to "rub [her] pookie back and forth."[271] The victim's mother testified that "the victim's vaginal area was often red, rashed, and her 'clitoris would be very swollen.'"[272] She also testified that the victim would sit "'in sitz baths . . . because her pookie hurt.'"[273] The victim and her mother sought medical attention because the problem was so severe.[274]

At trial, the defendant moved to strike the charges because the Commonwealth failed to prove evidence of penetration of the labia majora. The trial court denied the motion and the defendant was convicted.[275] After a review of the case law concerning the issue of penetration, the court held that "evidence of penetration or stimulation of the clitoris is sufficient to establish penetration of the labia majora" which is part of the vulva.[276] The court of appeals relied on

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264. *See id.* at 665, 514 S.E.2d at 366. The defendant testified that he told the officer that he had dozed off one or two times. *See id.* at 666-67, 514 S.E.2d at 366.
265. *See id.* at 669, 514 S.E.2d at 367-68.
266. *Id.* at 672, 514 S.E.2d at 369.
267. *See id.*
268. 29 Va. App. 190, 510 S.E.2d 747 (Ct. App. 1999) (en banc).
269. *See id.* at 197, 510 S.E.2d at 750.
270. *Id.* at 193, 510 S.E.2d at 748.
271. *Id.*
272. *Id.* at 195, 510 S.E.2d at 749.
273. *Id.*
274. *See id.*
275. *See id.* at 193-95, 510 S.E.2d at 748-49.
276. *Id.* at 195, 510 S.E.2d at 749.

a previous decision which held that "'[p]enetration may be prove[n] by circumstantial evidence and is not dependent on direct testimony,'"[277] and only slight penetration is necessary.[278] The court found that the circumstantial evidence submitted through the testimony of the victim and her mother sufficed to establish the element of penetration.[279]

The court of appeals distinguished this case from *Moore v. Commonwealth*[280] because the Commonwealth, in this case, presented the testimony of the victim's mother concerning her daughter's vaginal pain and required medical attention, in addition to that of the victim's testimony.[281] The court concluded that the direct and indirect testimony of penetration is distinguishable from *Moore*, and was sufficient to establish penetration.[282]

H. *Obstruction of Justice*

In *Ruckman v. Commonwealth*,[283] a panel of the Virginia Court of Appeals held that the defendant did not "obstruct" the trooper's investigation of a single-vehicle accident by giving conflicting statements as to whether he could remember who was driving.[284] On October 20, 1996, a Virginia State Trooper responded to the scene of a single-vehicle accident, where the defendant told the trooper that the other man in the truck was driving. In April 1997, the defendant again told the trooper that he was not driving the truck. However, in June 1997, the defendant told the trooper that he could not remember who was driving the truck.[285]

I. *Obtaining Property by False Pretenses*

In *Lewis v. Commonwealth*,[286] a panel of the Virginia Court of Appeals decided another issue of first impression. The court held

277. *Id.* at 194, 510 S.E.2d at 748.
278. *See id.* at 194, 510 S.E.2d at 749.
279. *See id.* at 196, 510 S.E.2d at 749.
280. 254 Va. 184, 191, 491 S.E.2d 739, 742-43 (1997) (holding that the victim's testimony that the defendant put his penis "on" her vagina was insufficient to establish the essential element of penetration).
281. *See Jett*, 29 Va. App. at 196-97, 510 S.E.2d at 749-50.
282. *See id.* at 197, 510 S.E.2d at 750.
283. 28 Va. App. 428, 505 S.E.2d 388 (Ct. App. 1998).
284. *See id.* at 431, 505 S.E.2d at 390.
285. *See id.* at 430, 505 S.E.2d at 389.
286. 28 Va. App. 164, 503 S.E.2d 222 (Ct. App. 1998).

that evidence showing that the defendant took property under a conditional sales contract and that the victim retained the legal title to secure the unpaid balance of the purchase price was sufficient to support a conviction for obtaining property by false pretenses.[287] The court, however, reversed the defendant's conviction because the trial court failed to instruct the jury that the intent to defraud must exist at the time the false representations are made.[288]

The facts at trial indicated that in March 1996 the defendant negotiated for the purchase of a Sir Speedy printing franchise, but the sale was never completed. On April 3, 1996, the defendant went to Brown's Mazda to purchase a truck and presented himself as the president and owner of a Sir Speedy printing franchise. The defendant stated that the franchise was going to purchase the truck for the company, and he would return in three days with the full purchase price of the truck. The finance manager relied on the defendant's representations and had him fill out the necessary paperwork, including the title form and permanent registration form. The defendant received a temporary certificate of ownership and the keys to the truck. The dealership never received payment for the truck.[289] The court of appeals held that "the property interest conveyed by both the delivery of possession to [the defendant] and the completion of the temporary certificate of ownership in the [defendant's] name was sufficient to support a conviction for larceny by false pretenses."[290]

The court of appeals reversed the defendant's conviction, however, holding that the trial court erred when it failed to instruct the jury that: "Fraudulent intent must be proved by more than a mere showing that [the defendant] knowingly provided a false statement to Brown's Mazda. In addition, the fraudulent intent must have existed at the time the false pretenses were made."[291]

In *Bolden v. Commonwealth*,[292] a panel of the Virginia Court of Appeals reversed the defendant's conviction of obtaining an automobile by false pretenses, finding that the defendant owned and possessed the automobile at the time of the alleged fraud.[293] In this case, the defendant received a loan from Toyota to purchase a 1996 Toyota RAV-4. The certificate of title listed the defendant as the

287. *See id.* at 170, 503 S.E.2d at 225.
288. *See id.* at 172-73, 503 S.E.2d at 225-26.
289. *See id.* at 166-67, 503 S.E.2d at 223.
290. *Id.* at 170, 503 S.E.2d at 225.
291. *Id.* at 172, 503 S.E.2d at 225-26.
292. 28 Va. App. 488, 507 S.E.2d 84 (Ct. App. 1998).
293. *See id.* at 490, 507 S.E.2d at 85.

owner and Toyota as the lienholder. Approximately five months later, the Department of Motor Vehicles issued the defendant a duplicate certificate of title based upon her application and the information in a letter allegedly from Toyota stating that her lien had been satisfied.[294]

The indictment charged the defendant with obtaining a vehicle from the lienholder by false pretenses. At trial, a Toyota employee testified that the defendant had not made any payments on the loan, and the defendant admitted to falsifying the letter in order to obtain a lien-free duplicate certificate of title so that she could sell the car.[295] The court of appeals agreed with the defendant's argument on appeal and held that at the time the defendant acquired the new certificate of title, she was the legal owner of the vehicle, not Toyota.[296] The court stated that a lienholder's "physical possession of the certificate of title [does] not give it ownership of the vehicle."[297] The court held that the defendant was in lawful possession of the vehicle at the time she perpetrated the fraud on the Department of Motor Vehicles; therefore, she could not be convicted of larceny by false pretenses from the lienholder, Toyota.[298]

J. *Possession of a Sawed-off Shotgun*

In *Dillard v. Commonwealth*,[299] a panel of the Virginia Court of Appeals reversed the defendant's conviction for possession of a sawed-off shotgun.[300] The court of appeals held that in order to meet the statutory definition of "sawed-off shotgun," the Commonwealth must prove that the shotgun was at least .225 caliber.[301] The court stated that the trial court erred in ruling that the language concerning the caliber of the gun constituted an affirmative defense, as that ruling reversed the burden of proof.[302] Although the court found that

294. *See id.* at 490-91, 507 S.E.2d at 85.
295. *See id.* at 491, 507 S.E.2d at 85.
296. *See id.* at 492, 507 S.E.2d at 86.
297. *Id.* at 493, 507 S.E.2d at 86.
298. *See id.* at 494, 507 S.E.2d at 87.
299. 28 Va. App. 340, 504 S.E.2d 411 (Ct. App. 1998).
300. *See id.* at 343-44, 504 S.E.2d at 412-13.
301. *See id.*
302. *See id.* at 346, 504 S.E.2d at 414.

the evidence in this case sufficiently proved this element, it reversed and remanded the case because the trial court did not consider the sufficiency of the evidence to prove this element.[303]

K. *Voluntary Manslaughter*

In *Commonwealth v. Presley*,[304] the Supreme Court of Virginia found that the evidence was sufficient to prove the defendant's acts caused the victim's death and upheld the defendant's conviction for voluntary manslaughter.[305] In this case, the victim died from a subdural hematoma caused by an injury to her head that occurred within several hours of her death. The defendant and the victim were involved in a sexual relationship and shared a house with another man. On the night in question, the defendant and the victim had an argument over an affair the victim previously had. The roommate heard arguing and banging coming from the victim's upstairs bedroom.[306] He also heard the victim say "[p]lease don't hit me" and the defendant call her a "fucking bitch."[307] The roommate went upstairs and saw the victim on the floor, and the defendant's hands were around her throat.[308] About forty-five minutes later, the police responded to a call about an unconscious female. The victim was found lying on her floor with multiple bruises and very labored breathing. She died approximately three hours later. The defendant told the officers that he "tore [the victim] to shreds," that he "beat the hell out of her on the floor," and that he "hit her with a chair."[309]

VI. JURY INSTRUCTIONS

A. *Defense of Personal Property*

In *Alexander v. Commonwealth*,[310] a panel of the Virginia Court of Appeals held that the trial court committed reversible error when it failed to instruct the jury on the law of defense of personal

303. *See id.* at 343-44, 504 S.E.2d at 412-13. The court of appeals held that the Commonwealth proved this element by proving that the defendant possessed a twelve gauge shotgun because a 12-gauge shotgun has a caliber greater than .225. *See id.* at 348, 504 S.E.2d at 415.

304. 256 Va. 465, 507 S.E.2d 72 (1998).

305. *See id.* at 470, 507 S.E.2d at 74.

306. *See id.* at 467, 469, 507 S.E.2d at 72-74.

307. *Id.* at 467, 507 S.E.2d at 73.

308. *See id.* at 468-69, 507 S.E.2d at 73-74.

309. *Id.* at 468, 507 S.E.2d at 73.

310. 28 Va. App. 771, 508 S.E.2d 912 (Ct. App. 1999), *aff'd on reh'g*, 30 Va. App. 152, 515 S.E.2d 808 (Ct. App. 1999) (en banc).

property.[311] The facts at trial indicated that a repo man arrived at the defendant's home to repossess the defendant's car. The repo man agreed to allow the defendant to remove his personal property from the car. While the defendant was partially inside the car, the repo man jacked the car up and demanded the keys, at which point the defendant went into the house and returned with the keys. The defendant also brought an unloaded rifle with him and placed it in the flowerbed.[312] The defendant testified that when the repo man approached him in a "belligerent manner," he feared for his personal safety and the safety of his property.[313] The defendant retrieved the rifle from the flowerbed and held it at his side. After "believ[ing] that [the repo man] was intent upon assaulting him," the defendant raised his rifle and pointed it at the repo man.[314] The defendant was charged with and convicted of brandishing a firearm.[315]

A panel of the court of appeals found that because the defendant agreed to the repossession of his car only if he was first allowed to remove his personal property, the repo man was required to either allow the defendant to remove his personal property or to desist and resort to appropriate legal remedies.[316] The court held that because "[the repo man's] attempt to dispossess [the defendant] of his property was 'without right,' [the defendant] was privileged to use reasonable force in defense of his personal property."[317] Finally, the court held that because there was a factual dispute as to whether the amount of force was reasonable, the trial court was required to instruct the jury on the law of defense of personal property.[318]

B. *Lesser-included Offense*

In *Dalton v. Commonwealth*,[319] the Virginia Court of Appeals, en banc, addressed an issue of first impression: whether a defendant

311. *See Alexander*, 28 Va. App. at 779, 508 S.E.2d at 916.
312. *See id.* at 774, 508 S.E.2d at 913.
313. *Id.*
314. *Id.* at 775, 508 S.E.2d at 913.
315. *See id.* at 774, 508 S.E.2d at 913.
316. *See id.* at 776, 508 S.E.2d at 914.
317. *Id.*
318. *See id.* at 779, 508 S.E.2d at 916. Judge Bumgardner filed a dissenting opinion in this case. *See id.* at 779-80, 508 S.E.2d at 916 (Bumgardner, J., dissenting).
319. 29 Va. App. 316, 512 S.E.2d 142 (Ct. App. 1999) (en banc).

who has not been charged as an accessory after the fact is entitled to a jury instruction on the offense of being an accessory after the fact when this instruction is supported by the evidence.[320]

The defendant appealed his conviction for first degree murder and argued that the trial court erred in refusing to instruct the jury on the crime of accessory after the fact to murder. The court of appeals reversed the conviction, holding that the evidence warranted an instruction on the crime of accessory after the fact to murder, and that the defendant was entitled to such an instruction even though the defendant was not originally charged with accessory after the fact.[321]

In a dissenting opinion, Judge Lemons stated that the majority's holding is contrary to common law, as it allows for the crime of accessory after the fact to be considered as if it were a lesser-included offense of murder.[322] The dissent concluded that the "conviction for a crime which has neither been charged in the indictment, nor is a lesser-included offense of the named charge, would require an accused to defend a different offense from that which he or she is charged."[323]

VII. EVIDENCE

A. *Expert Testimony*

In *Hussen v. Commonwealth*,[324] the Supreme Court of Virginia determined whether an expert witness's testimony on the issue of consent impermissibly invades the province of the jury.[325] In this case, the defendant was charged with rape and forcible sodomy. Over the defendant's objection, a sexual assault nurse qualified as an expert witness and testified that a one-half centimeter laceration just below the victim's vaginal opening was inconsistent with a woman having consensual sex for the first time.[326]

320. *See id.* at 323, 512 S.E.2d at 145.
321. *See id.* at 327-28, 512 S.E.2d at 147-48.
322. *See id.* at 334, 512 S.E.2d at 150 (Lemons, J., dissenting).
323. *Id.* at 338, 512 S.E.2d at 153 (Lemons, J., dissenting).
324. 257 Va. 93, 511 S.E.2d 106 (1999).
325. *See id.* at 94, 511 S.E.2d at 106.
326. *See id.* at 96-98, 511 S.E.2d at 107-08.

On appeal,[327] the defendant argued that the trial court erred in allowing the expert to testify on the issue of consent because it was an ultimate issue of fact.[328] The supreme court concluded that the expert did not express an opinion on the ultimate issue of consent, but only expressed an opinion as to the nature and location of the victim's injury in relation to consensual, first-time intercourse.[329] Playing a game of semantics, the dissent opined that the expert's testimony was really an expression of her expert opinion on whether the injury was the result of a sexual assault.[330]

In *Currie v. Commonwealth*,[331] a panel of the Virginia Court of Appeals upheld the defendant's convictions for burglary, attempted rape, and assault and battery, holding that (1) expert testimony regarding the reliability of the victim's identification of the defendant was inadmissible;[332] (2) composite drawing and police records of other sexual assaults in the area were not exculpatory;[333] and (3) the preliminary hearing transcript was not admissible to impeach the victim's testimony.[334]

In this case, the victim was in the bathroom of her apartment when she heard a noise in the living room. She headed toward the noise, and saw a man with his pants down and his penis exposed. The man grabbed the victim's breast, and she kicked him. After producing a knife, the man grabbed the victim's pants and began to pull them down. The victim then pushed the man and ran to her bedroom to call the police. The victim described the man to the police including his missing upper tooth, a rash on his neck, and various marks on his arms. A few days after the incident, the victim identified the defendant in a photographic lineup. The victim again identified the defendant at trial. The trial court allowed an expert on eyewitness identification to testify regarding the theory of memory in the field of psychology and the problems of cross-racial identifica-

327. When the court of appeals denied the defendant's petition for appeal, he filed a habeas corpus petition. The Supreme Court of Virginia held that the defendant was entitled to pursue a delayed appeal because his counsel failed to seek an appeal from the judgment of the court of appeals. *See id.* at 94, 511 S.E.2d at 106.

328. *See id.* at 98, 511 S.E.2d at 108.

329. *See id.* at 99, 511 S.E.2d at 109.

330. *See id.* at 100, 511 S.E.2d at 110 (Poff, J., dissenting).

331. 30 Va. App. 58, 515 S.E.2d 335 (Ct. App. 1999).

332. *See id.* at 66, 515 S.E.2d at 339.

333. *See id.* at 69, 515 S.E.2d at 340.

334. *See id.* at 73, 515 S.E.2d at 342.

tions. The trial court excluded the expert's testimony on five other topics.[335]

The court of appeals held that the admissibility of expert testimony concerning eyewitness identification is left to the discretion of the trial court.[336] The court held that the trial court did not err in excluding the expert's testimony on issues concerning the correlation between eyewitness certainty and accuracy.[337] The court stated that the jury was capable of evaluating the reliability of the victim's identification based on the suggested problems with memory.[338] The court also found that the sealed composite drawing provided "no favorable information to the accused, and its exclusion did not deprive him of a fair trial."[339] Because the defendant could not specifically identify the ways in which the police reports were exculpatory, "the trial court did not err in declining to provide the requested materials to the defendant."[340] Finally, the court of appeals held that "the trial court did not err in refusing to admit the preliminary hearing transcript."[341] The court stated that because the victim acknowledged her preliminary hearing testimony, the defendant was precluded from introducing extrinsic evidence to impeach the victim.[342]

B. *Fingerprint Cards to Prove Identity*

In *Crawley v. Commonwealth*,[343] the Virginia Court of Appeals, in a panel decision, held that fingerprint cards were insufficient to prove the defendant's identity in a breaking and entering prosecution.[344] The court of appeals held that "although the . . . fingerprint cards bore the same first and last names and identical birth dates, no evidence in the record proved [the defendant's] name or birth

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335. *See id.* at 62-63, 515 S.E.2d at 337-38. The expert was not allowed to testify on the following five topics:

> (1) the correlation between eyewitness certainty and accuracy; (2) the effect of viewing time and stress on eyewitness accuracy; (3) the perpetrator's display of a weapon and its effect on eyewitness accuracy; (4) the effect that participating in preparing a composite sketch of a subject has on the accuracy of subsequent identifications; and (5) the concept of transference.

Id. at 63, 515 S.E.2d at 337-38.

336. *See id.* at 65, 515 S.E.2d at 338.
337. *See id.* at 65, 515 S.E.2d at 339.
338. *See id.* at 66, 515 S.E.2d at 339.
339. *Id.* at 68, 515 S.E.2d at 340.
340. *Id.* at 69, 515 S.E.2d at 340.
341. *Id.* at 73, 515 S.E.2d at 342.
342. *See id.* at 72-73, 515 S.E.2d at 342.
343. 29 Va. App. 372, 512 S.E.2d 169 (Ct. App. 1999).
344. *See id.* at 379-80, 512 S.E.2d at 173.

date."[345] The court stated that "the only evidence admitted at trial that linked [the defendant] to the break-in was that his gender, race and height were the same as those of both the perpetrator, as proved by the fingerprint cards, and the person observed fleeing the scene of the crime."[346] This evidence was insufficient "to exclude all reasonable hypotheses of innocence and, therefore, did not prove beyond a reasonable doubt that the defendant was inside the victim's apartment."[347]

C. *Gang-Related Evidence*

In *Utz v. Commonwealth*,[348] another case of first impression this year, the Virginia Court of Appeals held that an expert can testify about the culture of street gangs.[349] A unanimous panel of the court held that a detective with extensive experience and knowledge of gangs was qualified to give expert testimony concerning gang-related evidence.[350] The court also held that evidence concerning the culture of street gangs and evidence that the defendant and the victim were members of different gangs was admissible in the defendant's trial for second degree murder and use of a firearm in the commission of that murder.[351]

Several witnesses testified that the victim was outside an apartment complex when he heard someone yelling. The victim headed towards a parking lot while exchanging insults with the defendant. Once the victim reached the parking lot, he "raised his hands as if he was going to fight."[352] The defendant then turned and at close range shot the victim once in the head. None of the witnesses saw a gun or other weapon in the victim's hands. The defendant testified that he shot the victim in self-defense. During a motion in limine, the trial court ruled that expert testimony from a detective pertaining to the defendant's and the victim's gang affiliations was admissible to rebut the defendant's self-defense claim and to show that the defendant had another motive for shooting the victim. The detective testified that the defendant had likely come onto the "turf"

345. *Id.* at 378, 512 S.E.2d at 172.
346. *Id.*
347. *Id.* at 379-80, 512 S.E.2d at 173.
348. 28 Va. App. 411, 505 S.E.2d 380 (Ct. App. 1998).
349. *See id.* at 418, 505 S.E.2d at 383-84.
350. *See id.* at 426, 505 S.E.2d at 387.
351. *See id.*
352. *Id.* at 416, 505 S.E.2d at 382.

of the victim's gang and that a concealed hand could mean the victim was armed with a weapon.[353]

A panel of the court of appeals upheld the trial court's ruling and found that gang-related evidence is admissible "if it is sufficiently relevant to a proper issue in the case, weighing this probative value against the danger of unfair prejudice."[354] The court held that "the gang-related evidence was relevant to establish a motive for the murder and was probative of [the defendant's] intent."[355] The court also pointed out that the detective in this case had many hours of gang-related training, many years of experience as a law enforcement officer, and familiarity with both the defendant's and the victim's gang.[356]

D. *Hearsay Exceptions*

In *Robinson v. Commonwealth*,[357] the Supreme Court of Virginia faced a two-part issue of first impression concerning the value of items contained on price tags.[358] The question presented was whether the amount on a retailer's price tag, or if the price tag is not offered into evidence, a witness's testimony concerning the amount he observed on the tag, constitutes inadmissible hearsay when offered to prove the value of the item involved in a theft.[359] The supreme court found that evidence of this type is hearsay and does not fall into any of the currently accepted exceptions to the hearsay rule.[360] However, in affirming the judgment of the trial court, the supreme court created a new exception to the hearsay rule and held that in shoplifting cases, evidence of price tags regularly affixed to items or testimony concerning the amounts shown on such tags would be sufficient to prove an item's value.[361]

The dissent stated that in creating the new exception to the hearsay rule, the majority shifted the burden of proving the value of the taken merchandise from the Commonwealth to the defendant.[362] The dissent also stated that the new exception is not necessary

353. *See id.* at 416-18, 426, 505 S.E.2d at 382-84, 387.
354. *Id.* at 421, 505 S.E.2d at 385 (citing John E. Theuman, Annotation, *Admissibility of Accused's Membership in Gang*, 39 A.L.R. 4th 775 (1985)).
355. *Id.* at 423, 505 S.E.2d at 386.
356. *See id.* at 425-26, 505 S.E.2d at 387.
357. 258 Va. 3, 516 S.E.2d 475 (1999).
358. *See id.* at 7, 516 S.E.2d at 477.
359. *See id.*
360. *See id.* at 9, 516 S.E.2d at 478.
361. *See id.* at 10, 516 S.E.2d at 479.
362. *See id.* (Keenan, J., dissenting).

because evidence of this nature could be admitted through the business records exception, as long as a proper foundation is laid.[363]

In *Pitt v. Commonwealth*,[364] a panel of the Virginia Court of Appeals held that a nontestifying codefendant's statements to a detective were not admissible against the defendant under the hearsay exception for statements against penal interest.[365] The facts at trial indicate that the defendant and codefendant were arrested and taken to police headquarters in connection with an attempted robbery. They both waived their *Miranda* rights and made statements. Thereafter, they were indicted for attempted robbery. The court granted the Commonwealth's pretrial motion for a joint trial. During the joint trial, the Commonwealth introduced a tape of the codefendant's statement. In this statement, the codefendant said that the defendant approached the victim in order to obtain crack cocaine.[366] When the victim did not give the defendant cocaine, the defendant started wrestling with the victim and the codefendant then "wrestled" the victim to the ground "like a football tackle" to protect the defendant.[367] The codefendant also stated that "he saw the [defendant] try to pry open the victim's mouth in order to take cocaine [he] believed was hidden there."[368] The codefendant asserted his Fifth Amendment right against self-incrimination and refused to testify. The trial court instructed the jury that the codefendant's statement was not to be used as evidence against the defendant.[369]

The court of appeals held that the codefendant's statements were not statements made against his penal interest and were therefore inadmissible against the defendant.[370] The court came to this conclusion because they found that at the time he made this statement, the codefendant was not aware that his statements, especially those which incriminated the defendant, were made against his own penal interest.[371] However, the court held that the admission of the codefendant's statements was harmless error.[372] In

363. *See id.* at 11, 516 S.E.2d at 479 (Keenan, J., dissenting). The majority contended that the evidence did not fall within the business records exception because a proper foundation was not laid. *See id.* at 9, n.3, 516 S.E.2d at 478, n.3.

364. 28 Va. App. 730, 508 S.E.2d 891 (Ct. App. 1999).

365. *See id.* at 742-43, 508 S.E.2d at 897-98.

366. *See id.* at 734-35, 737, 508 S.E.2d at 894-95.

367. *Id.* at 738, 508 S.E.2d at 895.

368. *Id.*

369. *See id.* at 738, 508 S.E.2d at 895-96.

370. *See id.* at 742-43, 508 S.E.2d at 897-98.

371. *See id.*

372. *See id.* at 756, 508 S.E.2d at 904.

addition, the panel stated that the codefendant's statement was admissible because it was "trust-worthy" and did not violate the defendant's Sixth Amendment right to confrontation.[373]

E. *Prior Crimes*

In *Dunbar v. Commonwealth*,[374] a panel of the Virginia Court of Appeals held that the defendant's admission that he sold cocaine to make ends meet established a "general scheme" of drug sales and was admissible as evidence of prior crimes in his trial for possession of cocaine with the intent to distribute.[375] During the trial, the arresting officer testified that the defendant responded "yes" when asked "if he sold a little [cocaine] to make ends meet."[376]

In *Boney v. Commonwealth*,[377] a panel of the Virginia Court of Appeals reversed the defendant's convictions, holding that the admission of "other crimes" was erroneous.[378] In this case, the defendant was charged with the malicious wounding of his wife and the killing of her lover. Over the defendant's objections, the trial court allowed evidence of prior assaults by the defendant in 1992 and 1993.[379] The defendant's wife testified that "quite a few times" she had been involved "in a situation with [the defendant] and a gun."[380] She testified vaguely about an incident in 1992 between the defendant and herself. The defendant stipulated that he had been convicted of assault and battery as a result of a 1993 incident involving his wife, himself, and another man. The trial court instructed the jury to consider the conviction only as evidence of the defendant's motive and intent.[381]

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373. *See id.* at 754-56, 508 S.E.2d at 903-04. Judge Lemons concurred in the result that the defendant's statement was admissible. *See id.* at 761, 508 S.E.2d at 907 (Lemons, J., concurring). Judge Benton also filed a separate opinion, concurring in part and dissenting in part. *See id.* at 763, 508 S.E.2d at 908 (Benton, J., concurring in part and dissenting in part).

The court of appeals held that based on the decision in *Bruton v. United States*, 391 U.S. 123 (1968), the trial court's limiting instruction was insufficient to prevent prejudice to the defendant and constituted an abuse of discretion. This abuse of discretion was harmless, however, because there was other evidence that "overwhelmingly proved" the defendant attempted to rob the victim. *See Pitt*, 28 Va. App. at 746-48, 508 S.E.2d at 899-900.

374. 29 Va. App. 387, 512 S.E.2d 823 (Ct. App. 1999).

375. *See id.* at 392-93, 512 S.E.2d at 826.

376. *Id.* at 389, 512 S.E.2d at 824.

377. 29 Va. App. 795, 514 S.E.2d 810 (Ct. App. 1999).

378. *See id.* at 802, 514 S.E.2d at 813. The defendant was convicted of burglary, first degree murder, malicious wounding, and related firearms offenses. *See id.* at 800, 514 S.E.2d at 812.

379. *See id.* at 799-800, 514 S.E.2d at 812.

380. *Id.*

381. *See id.* at 799-800, 514 S.E.2d at 812.

The court of appeals held that the trial court's admission of both the wife's testimony and the defendant's prior assault and battery conviction was erroneous because the evidence was not probative of the defendant's motive or intent in the instant case and was highly prejudicial to the defendant.[382] The court held that:

> [e]vidence of other crimes is relevant and admissible if it tends to prove any element of the offense charged, including the intent of the accused [as long as there is] a causal relation or logical or natural connection between the two acts, or they . . . form parts of one transaction, with sufficient probative value to overcome the incidental prejudice to the accused.[383]

F. *Rape Shield Law*

In *Brown v. Commonwealth*,[384] a panel of the Virginia Court of Appeals reversed the defendant's convictions, and held that the trial court erred in refusing to strike two prospective jurors and that evidence of a complaining witness's prior testimony in an unrelated rape prosecution does not fall under the rape shield law.[385]

In this case, the trial court denied the defendant's motion to strike three prospective jurors for cause. The first prospective juror "had been the victim of an attempted abduction and [an] attempted sexual assault."[386] She was unable to tell the trial court, undoubtedly, that this would not affect her ability to make a decision.[387] The second prospective juror was the Chief Counsel to the United States Secret Service and when questioned, he stated that "he might give more weight to an officer's testimony."[388] The third prospective juror stated "she knew [the defendant] 'from the area.'"[389] The Commonwealth removed her with its fourth peremptory strike.[390]

The panel held that the trial court erred in refusing to strike the first juror for cause because her responses "created [a] reasonable doubt about her fitness as a juror."[391] The court of appeals also held

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382. *See id.* at 801, 514 S.E.2d at 813.

383. *Id.* (citing Guill v. Commonwealth, 255 Va. 134, 138-40, 495 S.E.2d 489, 491-92 (1998)) (alteration in original) (internal quotations omitted) (citation omitted).

384. 29 Va. App. 199, 510 S.E.2d 751 (Ct. App. 1999).

385. *See id.* at 202, 510 S.E.2d at 752. The defendant was convicted of attempted rape, forcible sodomy, animate object sexual penetration, abduction, robbery, and assault. *See id.*

386. *Id.* at 204, 510 S.E.2d at 753.

387. *See id.* at 204-05, 510 S.E.2d at 753-54.

388. *Id.* at 208, 510 S.E.2d at 755.

389. *Id.* at 210, 510 S.E.2d at 756.

390. *See id.* at 211, 510 S.E.2d at 757.

391. *Id.* at 208, 510 S.E.2d at 755.

that the trial court erred in refusing to strike the second juror for cause because his comments also "created a reasonable doubt about his ability to sit impartially."[392] In reference to the third prospective juror, the court of appeals found that her knowledge of the defendant was not sufficient to disqualify her from serving on the jury.[393] On a peripheral matter, the court stated that the Commonwealth's use of a peremptory strike to remove the juror would not have cured any prejudice to the defendant.[394]

In *Brown*, the court of appeals also decided whether the trial court erred in refusing to allow the victim to be questioned about her testimony in a prior, unrelated rape case.[395] The court found that the victim's testimony in the earlier, unrelated rape trial did not fall within the definition of "prior sexual conduct" in the rape shield law.[396] The panel held that the defendant sought to question the victim about her previous testimony, not her previous sexual conduct, so it was not protected by the rape shield law.[397]

G. *Relevant Evidence at Sentencing*

The issue before the Supreme Court of Virginia in *Commonwealth v. Shifflett*,[398] was whether two circuit courts erred in limiting the evidence the defendants sought to introduce during the sentencing phase of their bifurcated noncapital jury trials.[399] In addressing this issue, the court analyzed Virginia Code section 19.2-295.1, and the meaning of the term "relevant."[400]

The case before the supreme court involved two separate criminal appeals. In the first case a jury found the defendant, Shifflett, guilty of a second or subsequent offense of operating a motor vehicle on a public highway after being declared an habitual offender.[401] Prior to sentencing, defense counsel informed the court that he intended to introduce "mitigating testimony about the defendant's employment [and] his family responsibilities."[402] The trial court ruled that the

392. *Id.* at 210, 510 S.E.2d at 756.
393. *See id.* at 211, 510 S.E.2d at 757.
394. *See id.* at 212, 510 S.E.2d at 757.
395. *See id.* at 202, 510 S.E.2d at 752-53.
396. *See id.* at 216, 510 S.E.2d at 759.
397. *See id.*
398. 257 Va. 34, 510 S.E.2d 232 (1999).
399. *See id.* at 37, 510 S.E.2d at 233.
400. *See id.*
401. *See id.* at 38, 510 S.E.2d at 233.
402. *Id.*

mitigating evidence would be limited to the following factors: "range of punishment established by legislature, injury to the victim, use of weapon, extent of offender's participation, the offense, offender's motive in committing the offense, prior record and rehabilitative efforts, drug and alcohol use, age, health and education."[403] After the jury returned its sentence and before the judge sentenced the defendant, the defendant's employer testified.[404]

A panel of the court of appeals held that the trial court did not abuse its discretion in refusing to allow testimony concerning the financial impact that incarceration would have on the defendant's family and employment because it was not relevant evidence for the jury to consider in sentencing.[405] Upon a rehearing en banc, the court of appeals reversed the trial court's ruling and remanded the case for a new sentencing proceeding, holding that the testimony of the defendant's family responsibilities and employment was offered to show his character, his propensities, and his positive contribution to his family.[406]

In the second case before the supreme court, a jury found the defendant, Taylor, guilty of conspiracy to distribute marijuana, possession with the intent to distribute marijuana, and transportation of marijuana into Virginia with the intent to distribute.[407] During the sentencing phase, the trial court ruled that evidence "relating [his] whole [life] story" was not relevant and therefore inadmissible.[408] The trial court permitted the defendant to testify about his education, his work experience, and the circumstances surrounding his previous convictions. Several days later, the trial court granted the defendant's request to insert a proffer of testimony into the record. At a post-trial hearing, the defendant testified about his family life; however, the trial court denied the defendant's motion, holding that the motion was untimely and the evidence was not relevant to sentencing.[409] In an unpublished panel opinion, the

403. *Id.*
404. *See id.* at 39, 510 S.E.2d at 234.
405. *See* Shifflett v. Commonwealth, 24 Va. App. 538, 543, 484 S.E.2d 134, 136 (Ct. App. 1997).
406. *See* Shifflett v. Commonwealth, 26 Va. App. 254, 256, 261, 494 S.E.2d 163, 164, 166-67 (Ct. App. 1997) (en banc).
407. *See Shifflett*, 257 Va. at 40, 510 S.E.2d at 234.
408. *Id.* at 40-41, 510 S.E.2d at 234-35.
409. *See id.* at 41-42, 510 S.E.2d at 235.

court of appeals reversed the trial court's finding and remanded the case for a new sentencing proceeding, stating that the decision was controlled by the court of appeals's en banc decision in *Shifflett*.[410]

On appeal, the Supreme Court of Virginia reasoned that the General Assembly created Virginia Code section 19.2-295.1 with the factors that are considered relevant in capital cases.[411] Therefore, the factors that are relevant in noncapital cases should be limited to those factors that are relevant in capital cases.[412] In the first case, the supreme court held that the court of appeals erroneously created bases for admission of the testimony about Shifflett's family responsibilities and employment that were never presented to the trial court.[413] The supreme court affirmed the trial court's finding and held "that the trial court . . . did not abuse . . . its discretion by refusing to allow evidence [about] the impact of the defendant's incarceration on his family and . . . employment."[414] In the second case, the supreme court found that the court of appeals erred in relying on the proffered testimony in making its decision.[415] The court also affirmed the trial court's finding in the second case, and held that the trial court did not abuse its discretion in refusing to allow evidence of the defendant's life history.[416]

VIII. MISCELLANEOUS

A. *Enhanced Sentencing*

In *Batts v. Commonwealth*,[417] a panel of the Virginia Court of Appeals reversed the defendant's sentence for use of a firearm in the commission of a robbery, finding that the enhanced mandatory five-year sentence lacked a valid predicate conviction and exceeded the statutory authority of the jury.[418]

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410. *See id.* at 42, 510 S.E.2d at 235.
411. *See id.* at 42, 510 S.E.2d at 236.
412. *See id.* at 42-43, 510 S.E.2d at 236. Those mitigating factors include the following: (1) evidence of no significant history of criminal activity; (2) evidence that defendant was under the influence of extreme mental or emotional disturbance; (3) evidence that the victim was a participant or consented to the act; (4) evidence that the defendant lacked the capacity; (5) the age of the defendant; and (6) extenuating circumstances that tend to explain, but not excuse, the crime. *See id.* at 43, 510 S.E.2d at 236.
413. *See id.* at 44, 510 S.E.2d at 237.
414. *Id.* at 45, 510 S.E.2d at 237.
415. *See id.*
416. *See id.*
417. 30 Va. App. 1, 515 S.E.2d 307 (Ct. App. 1999).
418. *See id.* at 16, 515 S.E.2d at 315.

In this case, the defendant tried to prevent the Commonwealth from using a prior firearm conviction as an enhancer in his trial on a different charge of robbery and use of a firearm in the commission of a robbery.[419] At the time of the trial in the instant case, the defendant was awaiting sentencing on the earlier firearm conviction.[420] When the court refused to rule on the motion and agreed to grant the Commonwealth a continuance, the defendant's counsel "conceded the legal point" and "agreed" to the jury instruction which allowed for the enhanced mandatory five-year sentence.[421] At the conclusion of the evidence, "when the trial judge asked [defendant's] counsel if he had an objection to the proposed [jury] instruction, counsel stated, '[t]hat's acceptable.'"[422] The case was then continued for sentencing. In the interim, the defendant's earlier firearm conviction was set aside and he was convicted of two other unrelated firearm charges and sentenced to three years on the first and five years on the second. The defendant then filed a motion to set aside the verdict in the instant case, alleging that the enhanced sentence jury instruction was improper.[423] The trial judge sentenced the defendant to five years on the firearm charge stating that although "circumstances changed, which might have allowed [him] . . . to impose a lesser sentence," things "have gone all the way around again and have come back to the beginning."[424]

The court of appeals held that the jury instruction provided an incorrect statement of law because there was no evidence to support enhanced punishment for a "second or subsequent conviction."[425] The court found the defendant "was subjected to a maximum mandatory sentence that was not [statutorily] authorized at the time the jury determined his . . . punishment" and remanded the case for a new sentencing proceeding.[426]

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419. *See id.* at 5, 515 S.E.2d at 309-10.

420. *See id.* at 6, 515 S.E.2d at 310.

421. *Id.* at 7-8, 515 S.E.2d at 310-11. The defendant's counsel attempted to note his objection on the record concerning the court's refusal to rule on the motion in limine and decision to grant the Commonwealth a continuance. Rather than allow the court to continue the case, the defendant's counsel agreed to the jury instruction. The Commonwealth requested a continuance, alleging that the defendant's attorney had the first case continued for tactical reasons. *See id.* at 5-8, 515 S.E.2d at 309-11.

422. *Id.* at 8, 515 S.E.2d at 311.

423. *See id.* at 9, 515 S.E.2d at 311.

424. *Id.* at 9-10, 515 S.E.2d at 311-12.

425. *Id.* at 12, 515 S.E.2d at 313.

426. *Id.* at 16, 515 S.E.2d at 315.

B. *"Highway" Defined*

In *Roberts v. Commonwealth*,[427] a panel of the Virginia Court of Appeals reversed the defendant's conviction for driving after being adjudicated an habitual offender and held that a convenience store parking lot is not a "highway" as defined in the Virginia Code.[428] The facts in this case indicate that the officer "observed [the defendant] driving a white van through the parking lot of a 7-Eleven" store.[429] After stopping the defendant and arresting him for being drunk in public, the officer found that he "had been adjudicated an habitual offender and his license to operate a motor vehicle had been suspended."[430] The officer "testified that he did not see any traffic signs within the parking lot" and that the "lot was accessible to the public by five entrances."[431] The 7-Eleven store manager testified that the store was owned by a private corporation, which contracted with another company for the maintenance of the parking lot.[432] She testified that she was authorized to ask people to leave the property, and on occasion she had called the police who charged the people with trespassing.[433] The court of appeals held that "based upon the restricted public access to the premises, the parking lot of the 7-Eleven store was not a 'highway' as defined by [Virginia] Code section 46.2-100."[434]

C. *Insanity Defense*

In *Jones v. Commonwealth*,[435] a panel of the Virginia Court of Appeals reversed the defendant's convictions for murder and use of a firearm in the commission of that murder, holding that the trial court committed reversible error when it refused to allow the defendant to present expert testimony concerning her insanity defense unless she changed her plea to not guilty by reason of insanity.[436] The court of appeals found that the defendant complied with the requirements of Virginia Code sections 19.2-254 and 19.2-

427. 28 Va. App. 401, 504 S.E.2d 890 (Ct. App. 1998).
428. *See id.* at 406, 504 S.E.2d at 892.
429. *Id.* at 402, 504 S.E.2d at 890.
430. *Id.*
431. *Id.*
432. *See id.* at 403, 504 S.E.2d at 891.
433. *See id.*
434. *Id.* at 406, 504 S.E.2d at 892.
435. 28 Va. App. 444, 506 S.E.2d 27 (Ct. App. 1998).
436. *See id.* at 445, 449, 506 S.E.2d at 27, 30.

168[437] when she pled not guilty at her arraignment, and held that there is no legal requirement that the defendant enter a formal plea of not guilty by reason of insanity before presenting evidence of insanity.[438]

D. *Parole Eligibility*

A panel of the Virginia Court of Appeals in *Hanson v. Commonwealth*[439] held that a "defendant's parole ineligibility is . . . not a factor that juries . . . [are] permitted to consider in determining [a defendant's] sentence" in a murder trial.[440]

E. *Possession of Tools with the Intent to Commit Larceny*

In *Mercer v. Commonwealth*,[441] a panel of the Virginia Court of Appeals held that the evidence supported the jury's finding that the defendant's altered pants were an "outfit" that he possessed with the intent to utilize them to commit larceny.[442] In this case, a store employee observed the defendant place two boxes of Nicorette gum into his pants pocket. The items slid down the defendant's leg to his ankle, but did not hit the floor. The defendant's left pants pocket was cut open and there was a drawstring at the cuffs of the pants legs. This allowed an item to fall from the pocket, down the defendant's leg, without falling onto the floor.[443]

F. *Right to Appeal and Motion to Reopen*

In *Commonwealth v. Zamani*,[444] the Supreme Court of Virginia held that: (1) the defendant's appearance in circuit court did not constitute the case being "heard"; (2) the general district court has the authority to modify and reverse its original judgment; and (3) the defendant may simultaneously pursue an appeal in circuit court and an application to reopen in general district court.[445]

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437. *See id.* at 447, 506 S.E.2d at 29 (discussing Virginia Code sections 19.2-254 and 19.2-168).
438. *See id.* at 447-48, 506 S.E.2d at 29.
439. 29 Va. App. 69, 509 S.E.2d 543 (Ct. App. 1999).
440. *Id.* at 81-82, 509 S.E.2d at 549.
441. 29 Va. App. 380, 512 S.E.2d 173 (Ct. App. 1999).
442. *See id.* at 385, 512 S.E.2d at 175.
443. *See id.* at 383, 512 S.E.2d at 174. The Nicorette gum was valued at $110. *See id.*
444. 256 Va. 391, 507 S.E.2d 608 (1998).
445. *See id.* at 396-98, 507 S.E.2d at 610-11.

On March 21, 1996, the defendant was convicted in general district court of two misdemeanor sexual battery charges and received suspended jail sentences.[446] The defendant noted his appeal to the circuit court on the same day. On April 8, 1996, the defendant appeared in circuit court, waived his right to a jury trial, and agreed to a continuance. On April 12, 1996, the defendant reappeared in the general district court where the case was reopened. After hearing additional evidence, the general district court found that there was sufficient evidence to convict, but withheld final adjudications until a later date. On April 19, 1996, the defendant appeared in circuit court to withdraw his appeal.[447] The circuit court denied his motion, however, and ruled that the case had been transferred to the circuit court on appeal and that the general district court no longer had jurisdiction. The circuit court then affirmed the original suspended jail sentence.[448]

The court of appeals reversed and remanded the case to the circuit court with directions to vacate its order and remand the case to the general district court for entry of its April 12, 1996 order.[449] Using familiar principles of statutory construction, the supreme court affirmed the decision of the court of appeals, holding that the language of Virginia Code section 16.1-133.1[450] clearly demonstrates the intent to provide a defendant with the opportunity of both an appeal to circuit court and an application to reopen in general district court.[451] The supreme court analyzed the definition of the term "heard" as found in Virginia Code section 16.1-133.1,[452] and held that the incidents on April 8, 1996, were merely procedural and that a de novo hearing must occur before a general district court's jurisdiction is terminated.[453]

G. *Sentencing Deferred for Mental Examination*

In *Simerly v. Commonwealth*,[454] a panel of the Virginia Court of Appeals reversed the defendant's convictions for rape, abduction with the intent to defile, and malicious wounding, holding that the trial

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446. *See id.* at 394, 507 S.E.2d at 609.
447. *See id.* at 394, 507 S.E.2d at 608-09.
448. *See id.* at 395, 507 S.E.2d at 609.
449. *See* Zamani v. Commonwealth, 26 Va. App. 59, 66, 492 S.E.2d 854, 858 (Ct. App. 1997).
450. VA. CODE ANN. § 16.1-133.1 (Repl. Vol. 1996).
451. *See Zamani*, 256 Va. at 397-98, 507 S.E.2d at 611-12.
452. *See id.* at 396, 507 S.E.2d at 610.
453. *See id.* at 396-97, 507 S.E.2d at 610.
454. 29 Va. App. 710, 514 S.E.2d 387 (Ct. App. 1999).

court erred when it refused to defer sentencing and order a mental examination pursuant to Virginia Code section 19.2-300.[455] The court found that Virginia Code section 19.2-300 gives a defendant, who has been convicted of an offense that "indicates sexual abnormality," the right to a mental examination.[456] The statute mandates that the court order such an examination upon the defendant's request.[457] The court pointed out the difference between Virginia Code sections 19.2-300 and 19.2-176, stating that section 19.2-176 provides the trial judge with discretion to order a mental evaluation after conviction and before sentencing, "[i]f . . . the judge . . . finds reasonable ground[s] to question [the defendant's] mental state."[458]

H. *Single Larceny Doctrine*

In *Acey v. Commonwealth*,[459] a panel of the Virginia Court of Appeals held that the evidence was sufficient to prove the defendant had the requisite intent to commit larceny; however, only a single conviction for larceny and a single conviction for possession of a firearm were warranted.[460] The facts at trial indicate that the defendant entered a friend's home with permission and drank some beer. The defendant testified that his friend told him to get rid of the guns. Neither the friend nor the arresting officer remembered this statement. The defendant then removed a shotgun from the closet, a handgun from a holster in the bedroom, and a handgun from the dresser. The defendant placed the firearms in his friend's car and drove to his own house, where he called the police and others and told them he was armed and suicidal. Upon leaving his house, the defendant was pulled over by a state trooper and arrested. The defendant was convicted on three counts of larceny of a firearm and three counts of possession of a firearm by a felon.[461]

The court of appeals held that the circumstances of this case entitled the trial court to infer that the defendant maintained the requisite intent when he took the weapons.[462] The court also found that the defendant's actions fell within the scope of the single larceny

455. *See id.* at 712, 514 S.E.2d at 389.
456. *Id.* at 713, 514 S.E.2d at 389 (quoting VA. CODE ANN. § 19.2-300 (Repl. Vol. 1995)).
457. *See id.*
458. *Id.* at 717, 514 S.E.2d at 391 (quoting VA. CODE ANN. § 19.2-176(A) (Repl. Vol. 1995)).
459. 29 Va. App. 240, 511 S.E.2d 429 (Ct. App. 1999).
460. *See id.* at 246-51, 511 S.E.2d at 431-34.
461. *See id.* at 245-46, 511 S.E.2d at 431-32.
462. *See id.* at 246-47, 511 S.E.2d at 432.

doctrine and that this doctrine should be applied to larceny of a firearm.[463] Finally, the court held that when the defendant possessed the three firearms, he committed a single offense.[464]

I. *"Speedy Trial" Statute*

In *Powell v. Commonwealth*,[465] a panel of the Virginia Court of Appeals reversed the defendant's convictions for second-degree murder and use of a firearm in the commission of a murder, holding that the defendant's statutory speedy trial rights were violated.[466] The defendant was arrested on January 26, 1996. On March 19, 1996, the juvenile and domestic relations court found probable cause and certified the matters to the grand jury. The defendant was indicted in May 1996. On October 9, 1996, the trial court denied the defendant's motion to dismiss the charges, stating that there was a continuance on the motion of the defendant. However, the record does not reveal an order by the circuit court judge setting the case for trial or an order for a continuance. The defendant's original attorney also testified that he could not recall requesting a continuance in this case.[467]

J. *Transcripts*

In *Commonwealth v. Harley*,[468] the Supreme Court of Virginia made a very narrow ruling that the Commonwealth lacked standing to appeal as an aggrieved party[469] and that the issue of providing free transcripts to indigent criminal defendants was mooted by the court of appeals's ruling that the denial of the free transcript was harmless.[470]

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463. *See id.* at 247-49, 511 S.E.2d at 432-33.

464. *See id.* at 251, 511 S.E.2d at 434.

465. 29 Va. App. 745, 514 S.E.2d 785 (Ct. App. 1999).

466. *See id.* at 751, 514 S.E.2d at 788. That statute provides, in pertinent part:

> Where a general district court has found that there is probable cause to believe that the accused has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court.

VA. CODE ANN. § 19.2-243 (Repl. Vol. 1995 & Cum. Supp. 1999).

467. *See Powell*, 29 Va. App. at 747, 749, 514 S.E.2d at 786-87.

468. 256 Va. 216, 504 S.E.2d 852 (1998).

469. *See id.* at 218, 504 S.E.2d at 854. The Commonwealth asserted it had standing as an "aggrieved party" under the meaning of Virginia Code section 17-116.08. *See id.* at 218, 504 S.E.2d at 853; *see also* VA. CODE ANN. § 17-116.08 (Repl. Vol. 1996 & Cum. Supp. 1999).

470. *See Harley*, 256 Va. at 218, 504 S.E.2d at 852.

The trial court denied the defendant's motion for a transcript of a suppression hearing at the state's expense.[471] The court of appeals held that the defendant was constitutionally entitled to a free transcript of the suppression hearing; however, the denial of this transcript was harmless error and the convictions were affirmed.[472] The Commonwealth sought reversal of the court of appeals's ruling that the defendant was constitutionally entitled to a free transcript of the suppression hearing because it would lead to "the squandering of substantial amounts of public monies."[473]

The Supreme Court of Virginia held that the Commonwealth is not aggrieved by the court of appeals's ruling because the issue was rendered moot by the final judgment of the court of appeals.[474] The court limited its holding to this case only, stating that "the harmless error ruling avoided the 'imposition of a burden' upon the Commonwealth and the 'squandering of . . . public monies' on 'transcripts . . . of pre-trial proceedings.'"[475]

K. *Trespass*

A panel of the Virginia Court of Appeals decided another case of first impression in *Holland v. Commonwealth*.[476] The court held that police officers "had the power to accept [a] property manager's authority to bar any specified individual from the property" because this power allowed the police to prevent crime, protect property, and preserve the peace.[477] In this case, a housing manager executed a power of attorney appointing all members of the Leesburg Police Department as her agents. The power of attorney gave the police the power to issue barment notices to unauthorized individuals present on the property. A Leesburg police officer issued a barment notice to the defendant that stated the defendant would be arrested for trespassing if he returned to the property. Four months later, the defendant was arrested for trespassing on the property. The court of appeals affirmed the defendant's conviction.[478]

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471. *See id.* at 217, 504 S.E.2d at 852-53.
472. *See* Harley v. Commonwealth, 25 Va. App. 342, 350-51, 488 S.E.2d 647, 650-51 (Ct. App. 1997).
473. *Harley*, 256 Va. at 218, 504 S.E.2d at 853.
474. *See id.* at 219, 504 S.E.2d at 853.
475. *Id.* at 219, 504 S.E.2d at 854.
476. 28 Va. App. 67, 502 S.E.2d 145 (Ct. App. 1998).
477. *Id.* at 75, 502 S.E.2d at 149.
478. *See id.* at 68-70, 502 S.E.2d at 145-46.

L. *Unanimous Verdict*

In *Humbert v. Commonwealth*,[479] a panel of the Virginia Court of Appeals reversed the defendant's convictions for assault and battery on a law enforcement officer and possession of cocaine, holding that the record did not support a finding that the guilty verdict was unanimous.[480]

During the jury's deliberations, the trial court brought the jury back into the courtroom three different times. The first time, the trial judge informed the jury it was getting late and that if they did not return a verdict soon, they would have to come back in the morning.[481] The judge also addressed the jury's concerns about differences of opinion they were having on the issue of assault and battery, by stating that, "[t]here is no difference of opinion on assault. . . . The law is the law. . . . I don't know what would be the problem unless somebody just wants to be arbitrary."[482] During the second time, the trial judge asked the jury if they thought they could reach a unanimous verdict. Several jurors indicated that they could not, one stated that they could, and one indicated that he or she did not think the defendant was guilty. When the jury was brought back a third time, they had reached a verdict of guilty on both charges. However, when the trial judge polled the jury, the eleventh juror was unable to confirm that she supported the guilty verdicts.[483]

The court of appeals held that the circumstances surrounding the jury's deliberations revealed a "coerceive effect" on the eleventh juror's response to the jury poll and the trial court erred in concluding the verdict was unanimous.[484]

IX. 1999 LEGISLATION

In 1999, there were several major legislative developments in the field of criminal law. Some of the more important developments are summarized below.

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479. 29 Va. App. 783, 514 S.E.2d 804 (Ct. App. 1999).
480. *See id.* at 794, 514 S.E.2d at 809-10.
481. *See id.* at 787-88, 514 S.E.2d at 806.
482. *Id.*
483. *See id.* at 787-89, 514 S.E.2d at 806-07. The eleventh juror appeared to be crying and her initial response to the trial judge was, "I can't say it." She then shook her head "affirmatively" and eventually gave a verbal response of "yes." *See id.* at 788-89, 514 S.E.2d at 806-07.
484. *See id.* at 794, 514 S.E.2d at 809-10.

The General Assembly enhanced the penalty provision of Virginia Code section 18.2-33 from a Class 3 felony to confinement in a state correctional facility for not less than five years nor more than forty years.[485]

Virginia Code section 18.2-36.1 was amended to require a court to revoke the driver's license of anyone convicted of involuntary manslaughter while driving under the influence.[486] Virginia Code section 18.2-51.4 was also amended to require the same action be taken for anyone convicted of maiming, or like offenses, resulting from driving while intoxicated.[487]

Virginia Code section 18.2-38 was amended and section 18.2-42.1 was added to include certain acts of violence, in addition to assault and battery, which if committed by a collection of persons, would make the acts crimes by a mob.[488]

Virginia Code section 18.2-57 was amended to include assault and battery against a correctional officer.[489] Subsection "D" has been deleted, however, this subsection's mandatory minimum term of six months has been included in subsection "C."[490] Virginia Code section 18.2-57 was also amended to enhance the penalty provision for the battery of a teacher, principal, or guidance counselor. It now provides for a mandatory two-day period of incarceration and a mandatory six months if a gun or other weapon that is prohibited on school property is used.[491]

Virginia Code sections 18.2-61, 18.2-67.1, and 18.2-67.2 were amended to require only bodily injury rather than "serious physical" injury as an element of rape, forcible sodomy, and object sexual

485. *See* Act of Mar. 22, 1999, ch. 282, 1999 Va. Acts 325 (codified as amended at VA. CODE ANN. § 18.2-33 (Cum. Supp. 1999)).

486. *See* Act of Apr. 7, 1999, ch. 945, 1999 Va. Acts 2440 (codified as amended at VA. CODE ANN. § 18.2-36.1 (Cum. Supp. 1999)).

487. *See* Act of Apr. 7, 1999, ch. 987, 1999 Va. Acts 2611 (codified as amended at VA. CODE ANN. § 18.2-51.4 (Cum. Supp. 1999)).

488. *See* Act of Apr. 6, 1999, ch. 612, 1999 Va. Acts 950 (codified as amended at VA. CODE ANN. §§ 18.2-38, -42.1 (Cum. Supp. 1999)).

489. *See* Act of Mar. 28, 1999, ch. 771, 1999 Va. Acts 1355 (codified as amended at VA. CODE ANN. § 18.2-57 (Cum. Supp. 1999)).

490. *See* VA. CODE ANN. § 18.2-57(C) (Cum. Supp. 1999).

491. *See* Act of May 7, 1999, ch. 1036, 1999 Va. Acts 2739 (codified as amended at VA. CODE ANN. § 18.2-57(D) (Cum. Supp. 1999)).

penetration.[492] Virginia Code section 18.2-67.2:1 was also amended to include intimidation against the spouse as a requirement for marital sexual assault.[493]

The General Assembly added a new section to the Virginia Code, section 18.2-64.2, that makes carnal knowledge of an inmate, parolee, probationer, or pretrial or post-trial offender a Class 6 felony.[494] This section requires the accused to be an employee in a position of authority over the victim, to have knowledge that the victim is under the jurisdiction of the correctional facility, and to have carnal knowledge of the victim.[495] This chapter also amends section 18.2-67.4, making the sexual battery of an inmate, parolee, probationer, or pretrial or posttrial offender a Class 1 misdemeanor.[496]

Virginia Code section 18.2-130 was amended to state that secretly or furtively peeping, spying, or attempting to do so through a peephole, with the intent to see someone nude or partially dressed, is punishable as a Class 1 misdemeanor.[497]

Virginia Code sections 18.2-247 and 54.1-3401 were amended so that the definition of marijuana now includes (i) any oily extract containing less than twelve percent of THC by weight, when the oily extract is mixed or intermingled with marijuana, and (ii) the mature stalks, fibers, oil, or cake made from the seeds of the plant if mixed with other parts of the plant.[498]

Virginia Code section 18.2-270 was amended by enhancing the penalty provision for a third DUI offense within ten years to a Class 6 felony.[499] Further, the fourth and subsequent offenses now carry a one-year mandatory minimum jail sentence. That section also contains the following amendments: (1) a person whose license is suspended following a DUI conviction must remain on probation for

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492. *See* Act of Mar. 22, 1999, ch. 294, 1999 Va. Acts 339 (codified as amended at VA. CODE ANN. §§ 18.2-61, -67.1, -67.2 (Cum. Supp. 1999)).

493. *See* Act of Mar. 24, 1999, ch. 367, 1999 Va. Acts 419 (codified as amended at VA. CODE ANN. § 18.2-67.2:1 (Cum. Supp. 1999)).

494. *See* Act of Mar. 22, 1999, ch. 294, 1999 Va. Acts 339 (codified at VA. CODE ANN. § 18.2-64.2 (Cum. Supp. 1999)).

495. *See* VA. CODE ANN. § 18.2-64.2 (Cum. Supp. 1999).

496. *See* Act of Mar. 22, 1999, ch. 294, 1999 Va. Acts 339 (codified as amended at VA. CODE ANN. § 18.2-67.4 (Cum. Supp. 1999)).

497. *See* Act of Mar. 24, 1999, ch. 351, 1999 Va. Acts 398 (codified as amended at VA. CODE ANN. § 18.2-130 (Cum. Supp. 1999)).

498. *See* Act of Mar. 28, 1999, ch. 661, 1999 Va. Acts 1054 (codified as amended at VA. CODE ANN. §§ 18.2-247, 54.1-3401 (Cum. Supp. 1999)).

499. *See* Act of Apr. 7, 1999, ch. 987, 1999 Va. Acts 2611 (codified as amended at VA. CODE ANN. § 18.2-270 (Cum. Supp. 1999)).

the same period as the suspension, not to exceed three years; (2) first and second time DUI offenders will be required to attend the VASAP program; and (3) the fine for a DUI conviction while transporting a minor will increase from a minimum of $100 and maximum of $500 to a minimum of $500 and a maximum of $1,000.[500]

The penalty provision of Virginia Code section 18.2-280 was enhanced to a Class 6 felony for any person who willfully discharges any firearm in public that results in bodily injury to another person.[501] If such conduct does not result in bodily injury to another person, the offense is a Class 1 misdemeanor. Subsection "D" allows the Commonwealth to prosecute under any other applicable law instead of this section.[502]

Virginia Code section 18.2-308.1 was amended to include knives with metal blades of three inches or longer (except for butter knives and implements used for food preparation) on the list of weapons prohibited on school property.[503]

The General Assembly amended Virginia Code sections 18.2-308.1, 18.2-308.2, and 18.2-308.4 to create Virginia's Project Exile, which is similar to the federal "Project Exile."[504] These changes provide that any person convicted of (i) possessing a firearm on school grounds with the intent to use it or display it in a threatening manner,[505] (ii) possessing a firearm after having been previously convicted of a violent felony,[506] or (iii) simultaneously possessing a firearm and drugs with the intent to sell[507] is ineligible for probation and will be sentenced to a minimum, mandatory term of imprisonment of five years, which cannot be suspended or served consecutively with any other sentence. This imprisonment term can be reduced to two years only if the felon's prior felony was nonviolent.[508]

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500. *See* VA. CODE ANN. § 18.2-270 (Cum. Supp. 1999).

501. *See* Act of Mar. 22, 1999, ch. 282, 1999 Va. Acts 325 (codified as amended at VA. CODE ANN. § 18.2-280 (Cum. Supp. 1999)).

502. *See* VA. CODE ANN. § 18.2-280(D) (Cum. Supp. 1999).

503. *See* Act of Mar. 27, 1999, ch. 587, 1999 Va. Acts 905 (codified as amended at VA. CODE ANN. § 18.2-308.1 (Cum. Supp. 1999)).

504. *See* Act of Mar. 29, 1999, ch. 846, 1999 Va. Acts 1344 (codified as amended at VA. CODE ANN. §§ 18.2-308.1, -308.2, -308.4 (Cum. Supp. 1999)). In creating Virginia's Project Exile, this chapter amends numerous other Virginia Code sections and adds section 19.2-80.2, which deals with the arresting officer's duty to provide the magistrate with the defendant's criminal history. *See* VA. CODE ANN. § 19.2-80.2 (Cum. Supp. 1999).

505. *See* VA. CODE ANN. § 18.2-308.1(B) (Cum. Supp. 1999).

506. *See id.* § 18.2-308.2(A) (Cum. Supp. 1999).

507. *See id.* § 18.2-308.4(A) (Cum. Supp. 1999).

508. *See id.* §§ 18.2-308.1, -308.2, -308.4 (Cum Supp. 1999).

The General Assembly amended Virginia Code section 18.2-391 to include the selling, renting, or loaning to juveniles electronic files or messages that contain images depicting sexually explicit nudity, sexual conduct, or sadomasochistic abuse, as well as any electronic file or message that contains words descriptive of any matter enumerated above. Any violation of this section is a Class 1 misdemeanor.[509]

Virginia Code section 19.2-71 was amended to provide that no law enforcement officer can seek issuance of process by any judicial officer for the arrest of a person for the offense of capital murder without prior authorization by the Commonwealth's Attorney.[510]

The General Assembly amended Virginia Code section 19.2-299 to require a thorough presentence report when the defendant pleads guilty without a plea agreement or is found guilty by the court after a plea of not guilty.[511]

Virginia Code section 17.1-805 was amended to include the following violations as "violent felony" offenses: (1) any violation of section 18.2-36.1; (2) any violation of sections 18.2-40, 18.2-41, or 18.2-67.5:1 involving a third conviction of either sexual battery or attempted sexual battery; (3) any Class 4 felony violation of section 18.2-154; and (4) any Class 4 felony violation of section 18.2-155.[512]

Virginia Code section 16.1-263 was amended to require the juvenile and domestic relations court to notify only "a parent" rather than both parents when a petition has been filed.[513]

The General Assembly repealed Virginia Code sections 46.2-351 through 46.2-355, which allowed for the determination and adjudication provisions of the Habitual Offender Act.[514]

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509. *See* Act of Apr. 7, 1999, ch. 936, 1999 Va. Acts 2428 (codified as amended at VA. CODE ANN. § 18.2-391 (Cum. Supp. 1999)).

510. *See* Act of Mar. 29, 1999, ch. 266, 1999 Va. Acts 310 (codified as amended at VA. CODE ANN. § 19.2-71 (Cum. Supp. 1999)).

511. *See* Act of Mar. 29, 1999, ch. 903, 1999 Va. Acts 1741 (codified as amended at VA. CODE ANN. § 19.2-299 (Cum. Supp. 1999)).

512. *See* Act of Mar. 24, 1999, ch. 349, 1999 Va. Acts 394 (codified as amended at VA. CODE ANN. § 17.1-805 (Repl. Vol. 1999)).

513. *See* Act of Apr. 7, 1999, ch. 952, 1999 Va. Acts 2487 (codified as amended at VA. CODE ANN. § 16.1-263 (Cum. Supp. 1999)).

514. *See* Act of Apr. 14, 1999, ch. 945 & 987, 1999 Va. Acts 2440 & 2611. The General Assembly retained the restoration provisions in the Habitual Offender Act. *See* VA. CODE ANN. §§ 46.2-360 to -361 (Cum. Supp. 1999).

Virginia Code section 46.2-817 was amended to include any person who attempts to escape or elude a law-enforcement officer.[515] The statute now requires willful and wanton disregard of the officer's signals and the penalty has been increased to a Class 6 felony. If a person charged under this provision reasonably believes he was being pursued by someone other than a law enforcement officer, he may raise this as an affirmative defense. Misdemeanor convictions under this section now require suspension of the driver's license by the court for a period of not less than thirty days nor more than one year.[516]

The General Assembly amended Virginia Code section 3.1-796.122 stating that a second or subsequent animal cruelty offense within five years will be a Class 6 felony if either offense resulted in the death or euthanasia of an animal.[517] A court may require any person convicted of an animal cruelty violation to pay for and attend an anger management or other treatment program or obtain psychiatric or psychological counseling.[518]

The General Assembly added section 3.1-796.128:2 to the Virginia Code.[519] This section prohibits the sale of garments containing domestic dog or cat fur. A violation of this section will be punishable by a fine of not more than $10,000.[520]

515. *See* Act of Mar. 28, 1999, ch. 720, 1999 Va. Acts 1200 (codified as amended at VA. CODE ANN. § 46.2-817 (Cum. Supp. 1999)).

516. *See* VA. CODE ANN. § 46.2-817 (Cum. Supp. 1999).

517. *See* Act of Mar. 17, 1999, ch. 209, 1999 Va. Acts 233 (codified as amended at VA. CODE ANN. § 3.1-796.122 (Cum. Supp. 1999)).

518. *See* VA. CODE ANN. § 3.1-796.122 (Cum. Supp. 1999).

519. *See* Act of Mar. 28, 1999, ch. 678, 1999 Va. Acts 1097 (codified at VA. CODE ANN. § 3.1-796.128:2 (Cum. Supp. 1999)).

520. *See* VA. CODE ANN. § 3.1-796.128:2 (Cum. Supp. 1999).