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## Criminal Law and Procedure

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# CRIMINAL LAW AND PROCEDURE

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## I. INTRODUCTION

This article surveys developments in criminal law and procedure in Virginia from July 2001 to September 2002. The article attempts to provide a summary of both the most important cases decided during that time by the Supreme Court of Virginia and the Virginia Court of Appeals and significant legislation concerning crime and punishment enacted into law during the 2002 General Assembly Session. While not a complete synopsis of every case or new law, this article includes those developments that, in the judgment of these authors, represent departures from previously established legal principles or clarify important areas of the law.

## II. RESTRICTION OF *BAKER* CLAIMS

In 2001, we saw the effective demise of an area of litigation that had previously produced a large number of actions and resulted in a significant number of vacated convictions, often with

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the result that the cases could not practically be retried due to the passage of time and loss of evidence.

The seminal case was *Baker v. Commonwealth*,<sup>1</sup> in which the Virginia Court of Appeals held that the failure to notify the parents of a juvenile defendant of the institution of proceedings against the juvenile, as required by the then-applicable provisions of Virginia Code sections 16.1-263 and 16.1-264, prohibited the juvenile court from retaining jurisdiction over the matter.<sup>2</sup> The court held that the lack of jurisdiction rendered the case's transfer to circuit court, as well as any conviction therein, void, thereby requiring the conviction to be vacated by the court of appeals.<sup>3</sup>

The initial court of appeals decision in *Baker* was affirmed by the Supreme Court of Virginia in *Commonwealth v. Baker*,<sup>4</sup> in which the court also ruled that its judgment would apply retroactively.<sup>5</sup> In March of 2000, the court held in *Moore v. Commonwealth*<sup>6</sup> that, even where a contemporaneous objection was not made to the lack of parental notice, the convictions were nevertheless void because the defect was jurisdictional and not subject to waiver by the juvenile either in the juvenile court or the circuit court.<sup>7</sup> Three justices dissented from the holding in *Moore*, however, and it proved to be the high-water mark of the *Baker* claim era.<sup>8</sup>

On September 14, 2001, the Supreme Court of Virginia rendered two opinions that effectively extinguished the use of *Baker* claims other than by direct appeal. In *Nelson v. Warden*,<sup>9</sup> the court overruled *Moore* and adopted Justice Kinser's dissent in that case, holding that the petitioner's "convictions were merely voidable," not void *ab initio*, and thus Moore's failure to raise the issue in a timely manner constituted a waiver of the error.<sup>10</sup>

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1. 28 Va. App. 306, 504 S.E.2d 394 (Ct. App. 1998).
  2. *Id.* at 315, 504 S.E.2d at 399; *see also* VA. CODE ANN. §§ 16.1-263, -264 (Repl. Vol. 1999).
  3. 28 Va. App. at 315, 504 S.E.2d at 399.
  4. 258 Va. 1, 516 S.E.2d 219 (1999) (per curiam).
  5. *Id.* at 2, 516 S.E.2d at 219.
  6. 259 Va. 431, 527 S.E.2d 406 (2000).
  7. *Id.* at 440, 527 S.E.2d at 411.
  8. *Id.* at 441, 527 S.E.2d at 411.
  9. 262 Va. 276, 552 S.E.2d 73 (2001).
  10. *Id.* at 285, 552 S.E.2d at 78.

Three justices dissented from the new majority's ruling in *Nelson*.<sup>11</sup>

On the same day, the Supreme Court of Virginia held in *Commonwealth v. Southerly*<sup>12</sup> that the Virginia Court of Appeals did not have jurisdiction to hear a *Baker* claim that had originated in the circuit court as a motion to vacate a void conviction.<sup>13</sup> This was because the statute governing the court of appeals' appellate jurisdiction in criminal cases, Virginia Code section 17.1-406(A), restricted the court's jurisdiction to appeals "from . . . any final conviction in a circuit court of . . . a crime."<sup>14</sup> This language was held not to encompass "a motion to vacate filed long after the conviction has become final and seeking a declaration that the trial court lacked jurisdiction to take the action that is sought to be vacated."<sup>15</sup> Such an action was held to be "definitely civil in nature" rather than criminal, and therefore properly within the original jurisdiction of the supreme court; thus, the court of appeals should have transferred the case to the supreme court.<sup>16</sup>

Relying on *Southerly*, the Virginia Court of Appeals later transferred to the Supreme Court of Virginia, in addition to pending *Baker* claims,<sup>17</sup> an appeal of a circuit court order revoking a defendant's probation,<sup>18</sup> and an appeal from a circuit court's refusal to set aside defendant's guilty plea that had been filed more than twenty-one days after judgment.<sup>19</sup> In each instance, the court of appeals held that, after the *Southerly* ruling, original jurisdiction over such actions is properly within the supreme court.<sup>20</sup> The supreme court disagreed, however, holding that a revocation was a *criminal proceeding*<sup>21</sup>—despite dictum in an earlier opinion to the

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11. *Id.* at 285–93, 552 S.E.2d at 78–82 (Koontz, J., dissenting).

12. 262 Va. 294, 551 S.E.2d 650 (2001).

13. *Id.* at 296, 551 S.E.2d at 653.

14. *Id.* at 299, 551 S.E.2d at 653 (quoting VA. CODE ANN. § 17.1-406(A) (Repl. Vol. 1999)).

15. *Id.*

16. *See id.*

17. *See id.*

18. *See Green v. Commonwealth*, 37 Va. App. 92, 93, 554 S.E.2d 108, 109 (Ct. App. 2001).

19. *See Williams v. Commonwealth*, 37 Va. App. 97, 99–102, 554 S.E.2d 111, 112–13 (Ct. App. 2001).

20. *See Green*, 37 Va. App. at 93, 554 S.E.2d at 109; *see also Williams*, 37 Va. App. at 99, 554 S.E.2d at 113.

21. *Green v. Commonwealth*, 263 Va. 191, 195, 557 S.E.2d 230, 232 (2002).

contrary.<sup>22</sup> The court also held that “because a motion to withdraw a guilty plea [was] *designed* by statute to be filed and disposed of while the circuit court still retains jurisdiction over the case, such a motion [was] criminal in *nature*” and thus belonged in the court of appeals.<sup>23</sup> The supreme court transferred both cases back to the court of appeals.<sup>24</sup>

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22. *Heacock v. Commonwealth*, 228 Va. 235, 242, 321 S.E.2d 645, 649 (1984), held otherwise. The *Green* court in discussing *Heacock* stated:

We disagree with the Court of Appeals' conclusion that a different result is required by our decision in *Heacock*. There, we held that while a forfeiture proceeding on a bond entered in a criminal case is a purely civil matter, the surety is entitled to due process protections of notice and a hearing prior to forfeiture. We also stated in dictum that proceedings to revoke probation are civil in nature.

Our holding today is incompatible with this dictum, which we expressly reject. Although a probation revocation hearing is not a stage of a criminal prosecution and thus does not afford a convict all rights attending a criminal prosecution, such revocation hearing is nevertheless a criminal proceeding.

*Green*, 263 Va. at 195–96, 557 S.E.2d 232–33 (citations omitted).

23. *Williams v. Commonwealth*, 263 Va. 189, 189, 557 S.E.2d 233, 233 (2002) (citing *Southerly*, 262 Va. at 299, 551 S.E.2d at 653); see VA. CODE ANN. § 171-406(A) (Repl. Vol. 1999)).

24. *Green*, 263 Va. at 196, 557 S.E.2d at 233; *Williams*, 263 Va. at 190, 557 S.E.2d at 234.

III. FOURTH AMENDMENT<sup>25</sup>A. *Standing/Expectation of Privacy*

To determine whether an individual has standing to bring a Fourth Amendment claim, “the relevant inquiry . . . is whether a person has an expectation of privacy. Significantly, the privacy expectation, and consequent constitutional protection, attaches to people, not to places or things.”<sup>26</sup> In *McCray v. Commonwealth*,<sup>27</sup> the Supreme Court of Virginia held that where an individual destroyed property in his hotel room and the officers had reason to believe that he “smash[ed] things,” as a matter of law, the defendant no longer maintained an objectively reasonable expectation of privacy in the room.<sup>28</sup>

Although the Supreme Court of Virginia noted that the contents of a wrapped parcel were unquestionably subject to protection by the Fourth Amendment, “a party has no reasonable expectation of privacy in the size, weight or other exterior characteristics of a package or parcel placed into the stream of

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25. For consistency purposes the authors employed the same article structure adopted by the authors of the 2001 Annual Survey article on criminal law. See William J. Dinkin & Cullen D. Selzer, *Annual Survey of Virginia Law: Criminal Law*, 35 U. RICH. L. REV. 537 (2001). Tiling the section headings after the first ten amendments of the Constitution serves as

a shorthand means of describing which component of the Due Process Clause of the Fourteenth Amendment is at issue. This is necessarily so because the first ten amendments to the Federal Constitution do not apply to the states; rather, many of the protections afforded by those amendments have been incorporated into the Due Process Clause of the Fourteenth Amendment, which expressly applies to the states.

*Id.* at 538 n.1. Dinkin and Selzer cite to the United States Supreme Court’s explanation in *Duncan v. Louisiana* that “[b]ecause we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court – would come with the Sixth Amendment’s guarantee.” *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) (alteration in original). Dinkin and Selzer further explained that “[t]he modern trend in incorporation theory is that of ‘selective incorporation,’ whereby rights deemed to be ‘fundamental’ are ‘incorporated into the Fourteenth Amendment and applied to the states to the same extent that [they] appl[y] to the federal government.” *Id.* (quoting JEROLD H. ISRAEL ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION* 43 (1997)) (alterations in original).

26. Dinkin & Selzer, *supra* note 25, at 540 (citing *Katz v. United States*, 389 U.S. 347, 351 (1967); see also ISRAEL, *supra* note 25, at 73–74).

27. 36 Va. App. 27, 548 S.E.2d 239 (Ct. App. 2001).

28. *Id.* at 38, 548 S.E.2d at 245.

commerce.”<sup>29</sup> Thus, given the officers’ observation of several suspicious characteristics, such as the place of origin, the size and weight of the package, the method of mailing, and the handwritten label addressed to and from a business, the officers had a reasonable, articulable suspicion to briefly seize the item and allow it to be checked by a drug dog.<sup>30</sup>

## B. Search Warrants

In *Whitaker v. Commonwealth*,<sup>31</sup> the Virginia Court of Appeals held that a search warrant that police had held for six days before they conducted the search was not stale where it was reasonable to believe the alleged conduct at defendant’s home was ongoing.<sup>32</sup> The court held, however, that the warrant did not justify the detention of the defendant personally after he was followed by car for a mile and a half from his home.<sup>33</sup> The drugs on his person as well as his statements derived from the seizure were suppressed.<sup>34</sup>

In a case of first impression, the Virginia Court of Appeals reviewed a case in which police officers executed a search warrant for narcotics at a location known for drug trafficking.<sup>35</sup> The court held that a person of “reasonable caution” would surely deem a protective frisk of the occupants on the premises necessary for the safety of all concerned, even though the warrant had not directed

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29. *Hurley v. Commonwealth*, 36 Va. App. 83, 89, 548 S.E.2d 266, 269 (Ct. App. 2001) (citations omitted).

30. *See id.* at 89–90, 548 S.E.2d at 269.

31. 37 Va. App. 21, 553 S.E.2d 539 (Ct. App. 2001).

32. *See id.* The court stated:

Here, the warrant was issued based upon probable cause to believe the informant had witnessed Whitaker sell marijuana from his home and that “a quantity of marijuana remained for sell [sic].” The delay of six days between issuing the warrant and the search, standing alone, did not vitiate the reasonable belief that contraband would be on the premises and in the possession of Whitaker, the occupant described by the informant. The fact that the remaining drugs were described as a “quantity” significant enough for continued sale, and that they were being offered for sale from a particular residence, suggests a continuing enterprise. Indeed, we have held that “[t]he selling of drugs, by its nature, is an ongoing activity.”

*Id.* at 29–30, 553 S.E.2d at 543 (citations omitted).

33. *Id.* at 34, 553 S.E.2d at 543.

34. *Id.*

35. *Murphy v. Commonwealth*, 37 Va. App. 556, 561, 559 S.E.2d 890, 891 (Ct. App. 2002).

such action.<sup>36</sup> The court distinguished *Ybarra v. Illinois*,<sup>37</sup> which held that a warrant for the search of a public bar for drugs did not permit a frisk of the patrons of the bar.<sup>38</sup> The *Murphy* court did “not see a weapons frisk at a location known for drug trafficking as falling within the ambit of a generalized cursory search in a public place as prohibited by *Ybarra*.”<sup>39</sup>

In *Al-Karrien v. Commonwealth*,<sup>40</sup> the Virginia Court of Appeals held that the defendant had an expectation of privacy in a cup of soup that he set on a counter when ordered to do so by a police officer.<sup>41</sup> Moreover, the court found that the defendant did not abandon the soup by failing to reclaim it.<sup>42</sup> The officers found seven bags of crack cocaine in the soup, but only after stirring it.<sup>43</sup> Therefore, the court of appeals found that because the cocaine was not in plain view there was no probable cause for Al-Karrien’s arrest.<sup>44</sup>

### C. Warrantless Searches of Premises and Vehicles

In *Hargraves v. Commonwealth*,<sup>45</sup> the Virginia Court of Appeals held “that the dispatch of the police pursuant to a contract [with an alarm company] for home security and the sounding of the home’s alarm,” did not provide police who arrived on the scene with authority to conduct a full criminal investigation of the premises.<sup>46</sup> The court rejected the Commonwealth’s contention that consent to such a search was implicit in the contract.<sup>47</sup> Because the police conducted the search in this case without a warrant or valid consent, it was unlawful and the evidence obtained as a result of the illegal search was inadmissible.<sup>48</sup>

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36. *Id.* at 567, 559 S.E.2d at 894.

37. 444 U.S. 85 (1979).

38. *Id.* at 91.

39. *Murphy*, 37 Va. App. at 571, 559 S.E.2d at 896–97.

40. 38 Va. App. 35, 561 S.E.2d 747 (Ct. App. 2002).

41. *See id.* at 45, 561 S.E.2d at 752.

42. *Id.*

43. *Id.* at 41, 561 S.E.2d at 750.

44. *Id.* at 48, 561 S.E. 2d at 754.

45. 37 Va. App. 299, 557 S.E.2d 737 (Ct. App. 2002).

46. *Id.* at 312, 557 S.E.2d at 743.

47. *Id.* at 308, 557 S.E.2d at 741.

48. *Id.* at 312, 557 S.E.2d at 743.



The Supreme Court of Virginia, in *Megel v. Commonwealth*,<sup>49</sup> held that an accused's home may not be subjected to a warrantless search by police while the accused is serving a sentence in the so-called Electronic Incarceration Program<sup>50</sup> pursuant to Virginia Code section 53.1-131.2(A).<sup>51</sup> Reversing an en banc decision by the Virginia Court of Appeals,<sup>52</sup> the supreme court held that the lower court erred in ruling that Megel's entrance into the program converted his home into "the functional equivalent of a jail or prison cell,' resulting in the loss of his Fourth Amendment protection against unreasonable searches and seizures."<sup>53</sup> Therefore, Megel did not waive his Fourth Amendment rights by executing the agreement to enter the program.<sup>54</sup>

In a later case, *Bolden v. Commonwealth*,<sup>55</sup> the Supreme Court of Virginia considered the effect of consent to a search given when the citizen is detained by the police.<sup>56</sup> The supreme court has established that seizure under the Fourth Amendment occurs when "by means of physical force or a show of authority, [an individual's] freedom of movement is restrained."<sup>57</sup> The officers stopped Bolden, intercepted a phone call meant for him, and blocked his car when he tried to leave.<sup>58</sup> He ultimately consented to a search of his trunk, where the police found contraband.<sup>59</sup> The court held that a reasonable person would not have felt free to leave, that his consent was not voluntary, and that the trial court should have suppressed the drugs.<sup>60</sup>

#### D. Reasonable Articulable Suspicion

Police reliance on anonymous tips received considerable attention from the Virginia Court of Appeals in the past year. In

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49. 262 Va. 531, 551 S.E.2d 638 (2001).

50. VA. CODE ANN. § 53.1-131.2 (Repl. Vol. 2002).

51. *Megel*, 262 Va. at 533, 551 S.E.2d at 639.

52. *Megel v. Commonwealth*, 33 Va. App. 648, 536 S.E.2d 451 (Ct. App. 2000) (en banc).

53. *Megel*, 262 Va. at 537, 551 S.E.2d at 642.

54. *Id.*

55. 263 Va. 465, 561 S.E.2d 701 (2002).

56. *Id.* at 470, 561 S.E.2d at 704.

57. *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 553 (1980)).

58. *Id.* at 472, 561 S.E.2d at 705.

59. *Id.* at 469, 561 S.E.2d at 703.

60. *Id.* at 472, 561 S.E.2d at 705.

*Ramey v. Commonwealth*,<sup>61</sup> the court of appeals concluded that the anonymous tip did not have the indicia of reliability sufficient to justify the initial stop of Ramey's vehicle.<sup>62</sup> The tip provided a description of the car, its license number, its last known location, and indicated that the black male driver was "somehow" involved in a fatal gang shooting the previous day.<sup>63</sup> However, the tip relayed "no further information as to the source of the report or in what capacity the black male was involved in the shooting."<sup>64</sup> Thus, the record was devoid of any basis by which to credit the dispatch; although it accurately described the vehicle, the occupants, and their location, that sort of information was "readily observable" to anyone.<sup>65</sup> The tip "disclosed no knowledge of 'concealed criminal activity' or 'ability to predict respondent's future behavior.'"<sup>66</sup>

In *Harris v. Commonwealth*,<sup>67</sup> the Supreme Court of Virginia considered an anonymous tip that a black male was selling drugs at a certain location near a public housing development.<sup>68</sup> The anonymous tipster identified the individual as "Mart Harris," indicated that Harris was wearing jeans, a white T-shirt, and a checkered jacket, and claimed that he was armed.<sup>69</sup> Police observed an individual fitting the description with two companions but did not observe any conduct indicating the presence of guns or drugs.<sup>70</sup> The men were unfamiliar to the officers and were in an area posted "no trespassing."<sup>71</sup> The court stated the following in ruling that the facts available to the officers did not support a seizure:

The Commonwealth relies upon the information of the anonymous tipster that Harris was armed as justification for heightening [the police officer's] inchoate "hunch" that Harris was trespassing to the level of a reasonable, articulable suspicion. In doing so, the Com-

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61. 35 Va. App. 624, 547 S.E.2d 519 (Ct. App. 2001).

62. *Id.* at 632, 547 S.E.2d at 523.

63. *Id.* at 627, 547 S.E.2d at 521.

64. *Id.*

65. *Id.* at 632, 547 S.E.2d at 523.

66. *Id.* at 632, 547 S.E.2d at 524 (quoting *Florida v. J.L.*, 529 U.S. 266 (2000); *Alabama v. White*, 496 U.S. 325 (1990)).

67. 262 Va. 407, 551 S.E.2d 606 (2001).

68. *Id.* at 410, 551 S.E.2d at 607.

69. *Id.*

70. *Id.*

71. *Id.* at 410-11, 551 S.E.2d at 607.

monwealth bootstraps the legitimate concern for law enforcement officers' safety, which permits a protective search of a legally detained suspect, to serve as the basis for detaining the suspect. However, the issue before this Court is not whether [the officer] could, based on the information in the tip that Harris was armed, conduct the protective pat-down had Harris been otherwise lawfully detained, but whether [the officer] had a reasonable, articulable suspicion to warrant detaining Harris in the first place.<sup>72</sup>

Because the officer did not have reasonable articulable suspicion, the evidence was suppressed.<sup>73</sup>

The Virginia Court of Appeals held in *Reed v. Commonwealth*<sup>74</sup> that where a tipster maintained his phone connection with the dispatcher and continued to provide information as police converged on the scene, the informant was not a "wholly anonymous" tipster<sup>75</sup> as that term was contemplated by the United States Supreme Court in *Florida v. J.L.*<sup>76</sup> The informant was characterized as "a disinterested citizen who had just witnessed a crime."<sup>77</sup> By the time the officer approached the suspect, he had received confirmation that the window of a nearby parked car had been broken into as reported by the informant.<sup>78</sup> Thus, the court ruled that the evidence established that the tip was "reliable in its assertion of illegality, not just in its tendency to identify a determinant person,"<sup>79</sup> and the court ruled the seizure to be valid.

### E. Roadblocks

Over the past year, there were three relevant cases dealing with roadblocks. The Virginia Court of Appeals ruled in *Palmer v. Commonwealth*<sup>80</sup> that the Commonwealth need not demonstrate

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72. *Id.* at 416, 551 S.E.2d at 611.

73. *Id.*

74. 36 Va. App. 260, 549 S.E.2d 616 (Ct. App. 2001).

75. *Id.* at 268, 549 S.E.2d at 620.

76. 529 U.S. 266 (2000).

77. *Reed*, 36 Va. App. at 268, 549 S.E.2d at 620.

78. *Id.*

79. *Id.* (quoting *Harris v. Commonwealth*, 33 Va. App. 325, 331, 533 S.E.2d 18, 21 (Ct. App. 2001) (quoting *Florida v. J.L.*, 529 U.S. 266 (2000))). The court of appeals decision in *Harris* was reversed. See *supra* notes 67-73 and accompanying text.

80. 36 Va. App. 169, 549 S.E.2d 29 (Ct. App. 2001).

either site-specific or time-specific law enforcement reasons why a particular traffic checkpoint was established.<sup>81</sup>

The Virginia Court of Appeals ruled in *Wesley v. Commonwealth*<sup>82</sup> that leaving to the officers' discretion how long to operate the checkpoint, within the parameters of thirty minutes and two hours, did not amount to unbridled discretion invalidating the arrest.<sup>83</sup>

Distinguishing the Supreme Court of Virginia's decision in *Bass v. Commonwealth*,<sup>84</sup> the Virginia Court of Appeals held in *Lovelace v. Commonwealth*<sup>85</sup> that a driver's suspicious activity was sufficiently unusual to support an investigative stop.<sup>86</sup> Unlike *Bass*, which involved a driver making a U-turn into a gas station 500 yards before the checkpoint,<sup>87</sup> *Lovelace* involved a driver confronted by a roadblock thirty-five yards ahead of him.<sup>88</sup> He stopped, hesitated, and after looking toward the roadblock, turned into a driveway, and proceeded more than half-way through the driveway without stopping.<sup>89</sup>

#### IV. FIFTH AMENDMENT

##### A. *Double Jeopardy*

Defendants argued a variety of double jeopardy claims over the last year, but few met with success. The United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."<sup>90</sup> This Fifth Amendment protection against double jeopardy "has been held to consist of three guarantees: (1) '[i]t protects against a second prosecution for the same offense after acquittal. [(2)] It protects

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81. *Id.* at 177, 549 S.E.2d at 33.

82. 37 Va. App. 128, 554 S.E.2d 691 (Ct. App. 2001).

83. *Id.* at 134, 554 S.E.2d at 694.

84. 259 Va. 470, 525 S.E.2d 921 (2000) (holding that the detention of a driver who made a U-turn before entering a checkpoint violated his Fourth Amendment Rights).

85. 37 Va. App. 120, 554 S.E.2d 688 (Ct. App. 2001).

86. *Id.* at 126, 554 S.E.2d at 690.

87. *Bass*, 259 Va. at 477, 525 S.E.2d at 925.

88. *Lovelace*, 37 Va. App. at 126, 554 S.E.2d at 690.

89. *Id.*

90. U.S. CONST. amend. V.

against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense.”<sup>91</sup>

In *Dalo v. Commonwealth*,<sup>92</sup> the defendant was charged with driving under the influence (“DUI”) and with involuntary manslaughter.<sup>93</sup> The preliminary hearing and trial for these charges were held together in general district court, and defendant was convicted of DUI.<sup>94</sup> On appeal in the circuit court, Dalo claimed that he could not be prosecuted on the involuntary manslaughter charge as he had already been convicted of the DUI charge, which the Commonwealth conceded at trial was a lesser-included offense.<sup>95</sup> The Virginia Court of Appeals ruled that because the legislature clearly intended to allow multiple punishments for these offenses, the prosecution did not offend the double jeopardy clause.<sup>96</sup>

In *Brown v. Commonwealth*,<sup>97</sup> the Virginia Court of Appeals held that the offenses of robbery and carjacking were separate crimes committed by separate acts and that the defendant was properly charged with and convicted of both offenses.<sup>98</sup> The court concluded that:

[T]he General Assembly made it clear that conviction for the offense of carjacking does not prohibit the Commonwealth from pursuing any other crime an offender commits while the carjacking is in progress. [Virginia] Code § 18.2-58.1(C) provides: “The provisions of this section shall not preclude the applicability of any other provision of the criminal law of the Commonwealth which may apply to any course of conduct which violates this section.”<sup>99</sup>

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91. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)) (alterations in original).

92. 37 Va. App. 156, 554 S.E.2d 705 (Ct. App. 2001).

93. *Id.* at 160–61, 554 S.E.2d at 707. The defendant was charged under Virginia Code sections 18.2-36.1(A) (Cum. Supp. 2002) (involuntary manslaughter) and 18.2-266 (Repl. Vol. 1996 & Cum. Supp. 2002) (driving under the influence). *Id.* Virginia Code section 18.2-36.1(A) contemplates a killing resulting from driving under the influence. *Id.* at 18.2-36.1(A) (Repl. Vol. 1996 & Cum. Supp. 2002).

94. *Dalo*, 37 Va. App. at 160–61, 554 S.E.2d at 707.

95. *Id.* at 161–62, 554 S.E.2d at 707.

96. *Id.* at 169, 554 S.E.2d at 711.

97. 37 Va. App. 507, 559 S.E.2d 415 (Ct. App. 2002).

98. *Id.* at 514–16, 559 S.E.2d at 419–20.

99. *Id.* at 518, 559 S.E.2d at 421 (quoting VA. CODE ANN. § 18.2-58.1(c) (Repl. Vol. 1996 & Cum. Supp. 2002)).

In *Gray v. Commonwealth*,<sup>100</sup> the Virginia Court of Appeals ruled that, where the circuit court dismissed an earlier indictment on defendant's motion because it alleged an offense that had not been enacted at the time of the conduct in question, a later indictment under the former code section was not barred by double jeopardy.<sup>101</sup> This was because the dismissal was grounded upon a legal infirmity in the charging instrument, in contrast to an adjudication of factual issues.<sup>102</sup>

In *Kenyon v. Commonwealth*,<sup>103</sup> the Virginia Court of Appeals held that no double jeopardy issue was raised where, in circuit court, the Commonwealth moved to dismiss by *nolle prosequi* a charge that had been appealed from the general district court.<sup>104</sup> The Commonwealth then proceeded to obtain a new warrant which resulted in a second general district court conviction, followed by a second appeal to the circuit court and a conviction there.<sup>105</sup> As a matter of law, defendant's appeal of the first general district court conviction rendered that conviction a nullity.<sup>106</sup> In the first appeal to the circuit court, no jeopardy attached because there was a *nolle prosequi* before the defendant was put in jeopardy.<sup>107</sup> Thus, for double jeopardy purposes, it was as if the first round of proceedings never existed at all, and, consequently, the second round resulted in a valid conviction.<sup>108</sup>

The Supreme Court of Virginia, in *Commonwealth v. Washington*,<sup>109</sup> held that a defendant's failure to make an *express* objection to the trial court's declaration of a mistrial was an implicit waiver of any subsequent claim on double jeopardy grounds.<sup>110</sup> In this case, the trial court declared a mistrial *sua sponte* when there appeared to be an insufficient number of jurors to proceed with the trial.<sup>111</sup> The trial court's statements in the record clearly indi-

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100. 37 Va. App. 353, 558 S.E.2d 545 (Ct. App. 2002).

101. *Id.* at 359, 558 S.E.2d at 548.

102. *Id.*

103. 37 Va. 668, 561 S.E.2d 17 (2002).

104. *Id.* at 671-72, 561 S.E.2d at 19.

105. *Id.*

106. *Id.* at 675, 561 S.E.2d at 21.

107. *Id.*

108. *Id.*

109. 263 Va. 298, 559 S.E.2d 636 (2002).

110. *Id.* at 304-05, 559 S.E.2d at 639.

111. *Id.* at 300-02, 559 S.E.2d at 637-38.

cated it was aware that the defense would claim double jeopardy in the event of a retrial, which it did.<sup>112</sup> The Virginia Court of Appeals held that a second trial in these circumstances violated double jeopardy and dismissed the conviction,<sup>113</sup> but the supreme court reversed and reinstated the conviction.<sup>114</sup>

The supreme court noted that defense counsel presented very clear objections at trial, but that she had not specifically objected to the mistrial announced by the court and had even participated in setting a new date for trial.<sup>115</sup> The failure to voice a definitive objection to the mistrial resulted in a waiver of double jeopardy protection.<sup>116</sup> Justice Koontz wrote a dissenting opinion, joined by Justices Lacy and Keenan, pointing out that procedural bar was inappropriate where it was abundantly clear that the trial judge was informed of the issues engendered by the declaration of the mistrial, that the defendant did not consent to the mistrial, and that the defendant asserted the bar of double jeopardy to the retrial.<sup>117</sup>

#### B. *Right Against Self-Incrimination—Miranda Protections*

In *Commonwealth v. Gregory*,<sup>118</sup> the Supreme Court of Virginia held that, even assuming defendant's statement "I think I should talk to my lawyer," was an invocation of his right to counsel, his confession to police that occurred over a week after his release from the initial custody was admissible.<sup>119</sup> The break in custody rendered inapplicable the rule of *Edwards v. Arizona*<sup>120</sup> against re-initiation of questioning by police after a demand for a lawyer.<sup>121</sup> Conversely, in *Potts v. Commonwealth*,<sup>122</sup> a defendant's own re-initiation of conversation with police after a request for a

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112. *Id.*

113. *Washington v. Commonwealth*, 35 Va. App. 202, 220, 543 S.E.2d 638, 646 (Ct. App. 2001).

114. *Washington*, 263 Va. at 306, 559 S.E.2d at 640.

115. *Id.*

116. *Id.* at 304–05, 559 S.E.2d at 639.

117. *Id.* at 306–14, 559 S.E.2d at 640–45 (Koontz, J., dissenting).

118. 263 Va. 134, 557 S.E.2d 715 (2002).

119. *Id.* at 148–50, 557 S.E.2d at 723–24.

120. 451 U.S. 477 (1981).

121. *Gregory*, 263 Va. at 149, 557 S.E.2d at 724.

122. 35 Va. App. 485, 546 S.E.2d 229 (Ct. App. 2001).

lawyer during the initial interview was held by the Virginia Court of Appeals to constitute a waiver of his *Miranda* rights.<sup>123</sup>

The Supreme Court of Virginia later ruled in *Commonwealth v. Redmond*<sup>124</sup> that the accused statement's—"[c]an I speak to my lawyer? I can't even talk to my lawyer before I make any kind of comments or anything?"—did not constitute a "clear and unambiguous" request for counsel.<sup>125</sup> In the plurality opinion, the court applied a de novo standard of review to determine whether the circuit court erred in holding that the "statements did not reflect an unambiguous, unequivocal invocation of [the defendant's] right to counsel."<sup>126</sup> In support of its conclusion the court cited to the "context of the defendant's questions, the tone of his voice, his voice inflections, and his demeanor" as indicating ambiguity as to a request for counsel.<sup>127</sup> The court suggested that the statement could have merely constituted a request for a further explanation of his *Miranda* rights and not a request for counsel.<sup>128</sup> These factors led the court to hold that a "reasonable police officer" would not have interpreted the defendant's statements as an invocation of his right to counsel.<sup>129</sup> Therefore the defendant's confession to police in the same interrogation was admissible.<sup>130</sup>

Justice Kinser, in a concurring opinion joined by Justices Lacy and Lemons, sidestepped the issue of the potential violation of the right to council and asserted that so much "overwhelming evidence" existed that pointed toward the defendant's guilt as to render mute the issue of the admissibility of the confession.<sup>131</sup> Thus, even if the admission into evidence of the confession was in error, the "error in this case was harmless beyond a reasonable doubt."<sup>132</sup>

The dissent, authored by Justice Koontz, roundly rejected the analysis of the plurality opinion and suggested that there could be no more clear request for counsel than the statement "[c]an I

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123. *Id.* at 495, 546 S.E.2d at 234.

124. No. 012447, 2002 Va. LEXIS 105 (Va. Sept. 13, 2002) (unpublished opinion).

125. *Id.* at \*2.

126. *Id.* at \*5-6.

127. *Id.* at \*14.

128. *Id.*

129. *Id.* at \*15.

130. *Id.*

131. *Id.* at \*17 (Kinser, J., concurring).

132. *Id.* at \*16 (Kinser, J., concurring).



speak to my lawyer.”<sup>133</sup> He stated that “[i]t requires an almost total disregard for human experience to conclude that in such circumstances a reasonable police officer would not have understood that Redmond was requesting counsel . . . .”<sup>134</sup> Additionally, the Justice rejected the characterization of the admission as harmless error.<sup>135</sup> He argued that the confession provided the only independent evidence of certain key facts of the crime and should not have been admitted.<sup>136</sup>

In *Belmer v. Commonwealth*,<sup>137</sup> the Virginia Court of Appeals held that no exclusion was required as to statements made by a juvenile defendant to his mother and her boyfriend when left alone by police in an interrogation room.<sup>138</sup> When the boy said he wanted to talk to a lawyer the detective simply left the room, but secretly listened in on the conversation electronically.<sup>139</sup> The court found it important that the detective did not improperly “lull” them into a feeling of security or tell them the conversation would be private; thus they were held to have no expectation of privacy in the interrogation room.<sup>140</sup>

In *Thomas v. Commonwealth*,<sup>141</sup> the Virginia Court of Appeals held that an officer’s arrest of Thomas based on contraband he found near the area, but not in the area, in which he had seen Thomas make a throwing motion, did not provide probable cause

133. *Id.* at \*21 (Koontz, J., dissenting).

134. *Id.* at \*22 (Koontz, J., dissenting).

135. *Id.* at \*23 (Koontz, J., dissenting).

136. *Id.* at \*24 (Koontz, J., dissenting).

137. 36 Va. App. 448, 553 S.E.2d 123 (Ct. App. 2001).

138. *Id.* at 461–62, 553 S.E.2d at 129.

139. *Id.* at 452–53, 553 S.E.2d at 125.

140. *Id.* at 461, 553 S.E.2d at 129. The court addressed the effect of the Interception of Wire, Electronic or Oral Communications Act to determine if the officer had violated its provisions. *Id.* at 454–55, 553 S.E.2d at 125–30 (discussing VA. CODE ANN. §§ 19.2-61 to -70.3 (Cum. Supp. 2002)). The court held he had not because the circumstances did not justify the expectation of noninterception. *Id.* at 454–56, 553 S.E.2d at 125–30. Judge Elder dissented, stating:

I would hold that a right of family privacy protecting certain communications between parents and children is implicit in Virginia law and protects the conversation at issue in this case. Even in the absence of such a privacy right, I would hold that appellant’s subjective expectation of privacy in the interview room was one that society should be prepared to recognize as reasonable under the facts of this case. Therefore, I respectfully dissent.

*Id.* at 462, 553 S.E.2d at 129–30 (Elder, J., dissenting) (footnote omitted).

141. 38 Va. App. 49, 561 S.E.2d 754 (Ct. App. 2002).

for his arrest.<sup>142</sup> Moreover, the court held that the trial court erred in admitting Thomas's statement, which flowed directly from his unlawful arrest.<sup>143</sup>

## V. DUE PROCESS

### A. *Indictments*

In *Gardner v. Commonwealth*,<sup>144</sup> the Supreme Court of Virginia held that, although the indictment alleged that defendant had obtained money described as the property of her grandfather by false pretenses, the evidence showed that the bank was the actual victim of the offense.<sup>145</sup> The loss was attributed to the bank because the grandfather's account was not debited and he incurred no loss.<sup>146</sup> Since the Commonwealth alleged in the indictment that the money obtained by the defendant was the property of Gardner, but the evidence showed the money was the property of the bank, it proved a different offense, resulting in a fatal variance requiring dismissal of the indictment.<sup>147</sup>

The Supreme Court of Virginia also held in *Powell v. Commonwealth*,<sup>148</sup> a capital murder case, that the court could not make a pretrial amendment to an indictment that materially changed the nature of the offense originally charged by allowing the use of a gradation offense the grand jury had never considered.<sup>149</sup>

### B. *Right to Evidence*

The Virginia Court of Appeals ruled in *Chase v. Commonwealth*<sup>150</sup> that the alleged "denial" of a potentially exculpatory blood test, in addition to the usual breath test, was not a violation

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142. *Id.* at 54–55, 561 S.E. 2d at 756.

143. *Id.* at 55, 561 S.E.2d at 757.

144. 262 Va. 18, 546 S.E.2d 686 (2001).

145. *Id.* at 20, 546 S.E.2d at 687.

146. *Id.*

147. *Id.* at 25, 546 S.E.2d at 690.

148. 261 Va. 512, 544 S.E.2d 679 (2001).

149. *Id.* at 538–39, 544 S.E.2d at 694–95.

150. 37 Va. App. 194, 555 S.E.2d 422 (Ct. App. 2001).

of due process.<sup>151</sup> The defendant, after registering a .10 on the breath test, called his attorney who then asked the trooper to transport defendant to the hospital for an independent blood test.<sup>152</sup> The trooper refused this request.<sup>153</sup> The defendant argued this refusal violated due process by denying him the opportunity to obtain exculpatory evidence.<sup>154</sup> However, the court ruled that no federal due process violation occurred because defendant was not *prevented* from obtaining the evidence he sought; the defendant, not the trooper, had the responsibility to arrange for the second test.<sup>155</sup>

In *Smoot v. Commonwealth*,<sup>156</sup> the Virginia Court of Appeals held that the Commonwealth is required to disclose all of the defendant's written and recorded statements, irrespective of whether a law enforcement officer is the recipient.<sup>157</sup> Consequently, the court held that the trial court's ruling that Smoot's inculpatory letters written to his fellow inmates were not encompassed by the court's discovery order was error.<sup>158</sup> However, the court found this did not constitute reversible error because the Commonwealth's late disclosure of inculpatory evidence did not prejudice the defendant's case.<sup>159</sup>

## VI. TRIAL AND ITS INCIDENTS

### A. *Sufficiency of the Evidence*

One of the most common issues on appeal is whether the evidence at trial was sufficient to sustain the conviction. When the sufficiency of the evidence is questioned on appeal, the appellate court will review the facts in the light most favorable to the prevailing party at trial and will reverse the trial court only if that

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151. *Id.* at 200-01, 555 S.E.2d at 425.

152. *Id.* at 196-97, 555 S.E.2d at 423.

153. *Id.*

154. *Id.* at 197, 555 S.E.2d at 423.

155. *Id.* at 200-01, 555 S.E.2d at 425.

156. 37 Va. App. 495, 559 S.E.2d 409 (Ct. App. 2002).

157. *Id.* at 501, 559 S.E.2d at 412.

158. *Id.*

159. *Id.* at 502, 559 S.E.2d at 412-13.

court's decision was plainly wrong or without evidence to support it.<sup>160</sup>

## 1. Drug Related Cases

The question of what evidence is sufficient to sustain a conviction for sale of "drug paraphernalia"<sup>161</sup> was addressed in *Morrison v. Commonwealth*.<sup>162</sup> In that case, the "Fatty Shack," which was owned by the defendant, was selling water pipes, papers, roach clips, and other similar products.<sup>163</sup> He was advised by the police to stop selling the items; however, when the police returned six months later, the items were still for sale.<sup>164</sup> The defendant claimed the Commonwealth must prove he had actual knowledge that the items were to be used for illegal drugs.<sup>165</sup> In affirming the conviction, the Virginia Court of Appeals held that the Commonwealth was only required to prove the defendant was aware when he possessed with the intent to sell, or actually sold the items, that buyers in general are likely to use them for illegal drugs.<sup>166</sup> This was shown by a sign posted in the store that the items were not to be used for smoking marijuana.<sup>167</sup>

In *Toliver v. Commonwealth*,<sup>168</sup> the Virginia Court of Appeals held that to find a defendant guilty of the intent to engage in a drug transaction within 1000 feet of a school, the Commonwealth must actually prove that the defendant intended to distribute the drugs in the school zone, not just that he possessed them there.<sup>169</sup> In this case, Toliver was only within 1000 feet of a school because the police chased him there.<sup>170</sup>

In *Birdsong v. Commonwealth*,<sup>171</sup> the Virginia Court of Appeals addressed the issue of what constitutes sufficient evidence to

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160. *Higginbotham v. Commonwealth*, 216 Va. 349, 218 S.E.2d 534 (1975).

161. VA. CODE ANN. § 18.2-265.1 (Repl. Vol. 2000 & Cum. Supp. 2002).

162. 37 Va. App. 273, 557 S.E.2d 724 (Ct. App. 2002).

163. *Id.* at 276, 557 S.E.2d at 725-26.

164. *Id.* at 276, 557 S.E.2d at 726.

165. *Id.* at 279, 557 S.E.2d at 727.

166. *Id.* at 282-83, 557 S.E.2d at 729.

167. *Id.* at 284, 557 S.E.2d at 730.

168. 38 Va. App. 27, 561 S.E.2d 743 (Ct. App. 2002).

169. *Id.* at 32-33, 561 S.E.2d at 746.

170. *Id.* at 29-31, 561 S.E.2d at 744-45.

171. 37 Va. App. 603, 560 S.E.2d 468 (Ct. App. 2002).

prove constructive possession of drugs and a gun.<sup>172</sup> In this case, the police executed a search warrant at the home of defendant's mother, where defendant was living.<sup>173</sup> In the "male" bedroom, there was a dresser and safe containing \$6,600 in cash and an ounce of cocaine.<sup>174</sup> The defendant had a key, used the room, and spent more time at the home than a brother who had a previous drug arrest.<sup>175</sup> In addition, the police found papers and letters addressed to the defendant in the room and recovered money from a sock that contained the defendant's DNA.<sup>176</sup> Looking at the totality of the circumstantial evidence, the court affirmed the trial court's conviction.<sup>177</sup>

## 2. Child Sexual Assault Cases

In *Morning v. Commonwealth*,<sup>178</sup> the Virginia Court of Appeals addressed the issue of the amount of corroborating evidence necessary to support a confession and sustain a conviction for two counts of carnal knowledge of a minor.<sup>179</sup> In this case, thirteen-year-old N.J. ran away from home and was later discovered in the home of the defendant, age twenty.<sup>180</sup> At first, the defendant denied that N.J. was with him.<sup>181</sup> The defendant later confessed to police that he engaged in oral sex and sexual intercourse with

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172. *Id.*

173. *Id.* at 605, 560 S.E.2d at 469.

174. *Id.* at 606, 560 S.E.2d at 469-70.

175. *Id.*

176. *Id.*

177. *Id.* at 610, 560 S.E.2d 471-72. *See also* Landes v. Commonwealth, 37 Va. App. 710, 561 S.E.2d 37 (Ct. App. 2002) (finding that under Virginia Code section 18.2-115, when a lienor refuses to disclose location of property on demand of lienholder, there is a prima facie case of larceny); Rose v. Commonwealth, 37 Va. App. 728, 561 S.E.2d 46 (Ct. App. 2002) (finding that notice of habitual offender status and directive not to drive do not have to be proven when defendant pled guilty to a first offense of being a habitual offender); Councill v. Commonwealth, 37 Va. App. 610, 560 S.E.2d 472 (Ct. App. 2002) (holding that campus police have jurisdiction which includes the streets adjacent to the campus); Bruhn v. Commonwealth, 37 Va. App. 537, 559 S.E.2d 880 (2002) (holding that proof of embezzlement is not proof of larceny); Sabol v. Commonwealth, 37 Va. App. 9, 553 S.E.2d 533 (Ct. App. 2001) (holding that in two counts of rape where the victim was defendant's stepdaughter, pushing the victim down the hall was sufficient to show proof of force, threat or intimidation; however, threatening to take away privileges was not sufficient for second count of rape).

178. 37 Va. App. 679, 561 S.E.2d 23 (Ct. App. 2002).

179. *Id.* at 684-85, 561 S.E.2d at 25.

180. *Id.* at 682, 561 S.E.2d at 24.

181. *Id.*

N.J.<sup>182</sup> At trial, N.J. at first refused to answer questions, but later testified that there was no sexual activity between the two of them.<sup>183</sup> In affirming the trial court's conviction, the court held that only slight corroboration is needed to prove the *corpus delicti* and N.J.'s testimony corroborated the defendant's testimony on every point except for the sexual activity.<sup>184</sup> The trial court did not believe N.J.'s denial of sexual activity and found that the defendant's attempts to cover-up the relationship further indicated guilt.<sup>185</sup>

In *Commonwealth v. Bower*,<sup>186</sup> the Supreme Court of Virginia addressed the level of intimidation required to sustain a conviction under Virginia Code section 18.2-67.2 for animate object sexual penetration.<sup>187</sup> This case involved a father who entered the bedroom of his thirteen-year-old daughter, "put his hand underneath her pajamas and fondled her breasts for a period of five minutes. . . . , [and] then placed his hand inside her panties; first resting his hand on her bare bottom and then putting his finger into her vagina for a twenty-minute period."<sup>188</sup> During this episode, the child faced away from her father and pretended to be asleep.<sup>189</sup> About thirty minutes later, Bower got up and left the room.<sup>190</sup> The court reversed the lower court's holding that Bower had committed the acts without the element of intimidation, citing testimony proving that the victim was afraid and in pain during the assault.<sup>191</sup> This testimony, coupled with the familial relationship and relative age and size of the parties, constituted sufficient proof that the defendant intimidated the victim and overcame her will in committing the assault.<sup>192</sup>

In a case involving indecent liberties with a minor, the Virginia Court of Appeals held that the "presence" requirement under Virginia Code section 18.2-370 includes being within sight of chil-

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182. *Id.* at 683, 561 S.E.2d at 24.

183. *Id.* at 683-84, 561 S.E.2d at 25.

184. *Id.* at 686, 561 S.E.2d at 26.

185. *Id.*

186. 264 Va. 41, 563 S.E.2d 763 (2002).

187. *Id.* at 43, 563 S.E.2d at 736-37 (analyzing VA. CODE ANN. § 18.2-67 (Repl. Vol. 2000)).

188. *Id.* at 43, 563 S.E.2d at 737.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 45-46, 563 S.E.2d at 736-37, 739.

dren where a reasonable probability exists of being seen.<sup>193</sup> In this case, the court found that the defendant was in the presence of children while standing inside his home with his genitals exposed in front of glass doors and across the street from a daycare facility.<sup>194</sup>

### 3. Perjury

In *Donati v. Commonwealth*,<sup>195</sup> the Virginia Court of Appeals reviewed what evidence is necessary to prove perjury.<sup>196</sup> During a revocation hearing for a prior conviction, the Commonwealth introduced a videotape which purported to show the defendant exposing himself and masturbating in a public building.<sup>197</sup> The defendant testified under oath that he was the person on the videotape, but denied exposing himself or masturbating.<sup>198</sup> As a result of that testimony, the defendant was charged with perjury.<sup>199</sup> At the trial for perjury, the Commonwealth introduced the tape and a witness who identified the defendant entering the building.<sup>200</sup> The Commonwealth presented no evidence, however, as to what the defendant did in the building.<sup>201</sup> The defendant argued that under *Schwartz v. Commonwealth*,<sup>202</sup> he could not be convicted of perjury because conviction requires the testimony of two witnesses or one witness and significant corroborating evidence.<sup>203</sup> In affirming the trial court's conviction, the court held that *Schwartz* was not applicable to this situation because one person's testimony was not being weighed against another person's testimony.<sup>204</sup> However, the dissent argued that *Schwartz*

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193. *Holley v. Commonwealth*, 38 Va. App. 158, 164, 562 S.E.2d 351, 354 (Ct. App. 2002); see VA. CODE ANN. § 18.2-370 (Cum. Supp. 2002). The court stated that the distance between the defendant and the children was irrelevant if the defendant was visible to the children. *Holley*, 38 Va. App. at 164, 562 S.E.2d at 354.

194. *Holley*, 38 Va. App. at 160, 562 S.E.2d at 352.

195. 37 Va. App. 575, 560 S.E.2d 455 (Ct. App. 2002).

196. *Id.*

197. *Id.* at 577, 560 S.E.2d at 455.

198. *Id.* at 577, 560 S.E.2d at 455-56.

199. *Id.*

200. *Id.* at 579, 560 S.E.2d at 457.

201. *See id.*

202. 68 Va. (27 Gratt.) 1025 (1876) (holding that one's statements alone are not sufficient to convict of perjury).

203. *Donati*, 37 Va. App. at 576, 560 S.E.2d at 455.

204. *Id.* at 578, 560 S.E.2d at 456; see also 41 AM. JUR. *Perjury* § 66 ("A conviction for

was applicable and the contents of the video was a question for the fact-finder, but since there was no other corroborating witness, the evidence was insufficient.<sup>205</sup>

#### 4. Weapons Related Convictions

In *Sykes v. Commonwealth*,<sup>206</sup> the Virginia Court of Appeals decided the issue of whether a razor blade constitutes a weapon under the concealed weapon statute.<sup>207</sup> The holding of a prior case, *O'Banion v. Commonwealth*,<sup>208</sup> seemed to indicate that a razor blade must have a handle in order to fit under the concealed weapon statute.<sup>209</sup> However, the *Sykes* court explained that *O'Banion* concerned a box cutter—essentially a razor with a handle—and that the holding in *Sykes* was not limited to razor blades with handles.<sup>210</sup> Therefore, a razor blade with or without an attached handle satisfies the definition of a concealed weapon in Virginia Code section 18.2-308.<sup>211</sup>

In *Armstrong v. Commonwealth*,<sup>212</sup> the Supreme Court of Virginia held that a firearm does not need to be “operable” to sustain a conviction for possession of a firearm by a felon under Virginia Code section 18.2-308.2.<sup>213</sup>

#### 5. Miscellaneous Cases

In *Bennet v. Commonwealth*,<sup>214</sup> the Virginia Court of Appeals

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perjury cannot be sustained merely on the contradictory sworn statements of the defendant, but the state must prove which of the two statements is false, and must show that statement to be false by other evidence than the contradictory statement.”)

205. *Id.* at 583, 580 S.E.2d at 459 (Benton, J., dissenting).

206. 37 Va. App. 262, 556 S.E.2d 794 (Ct. App. 2001).

207. *Id.* at 271, 556 S.E.2d at 798 (interpreting VA. CODE ANN. § 18.2-308 (Cum. Supp. 2002)).

208. 33 Va. App. 47, 531 S.E.2d 599 (Ct. App. 2000).

209. *Sykes*, 37 Va. App. at 272, 556 S.E.2d at 798–99 (citing *O'Banion*, 33 Va. App. at 59–60, 531 S.E.2d at 605).

210. *Id.* at 272, 556 S.E.2d at 799 (citing *O'Banion*, 33 Va. App. at 60, 531 S.E.2d at 605).

211. *Id.*; see VA. CODE ANN. § 18.2-308 (Cum. Supp. 2002).

212. 263 Va. 573, 562 S.E.2d 139 (2002).

213. *Id.* at 584, 562 S.E.2d at 145 (interpreting VA. CODE ANN. § 18.2-308.2 (Cum. Supp. 2002)).

214. 35 Va. App. 442, 546 S.E.2d 209 (Ct. App. 2001).



reversed two convictions for felony assault on a police officer.<sup>215</sup> The court held that words alone are not sufficient to sustain a conviction for assault against a police officer.<sup>216</sup>

In *Cotton v. Commonwealth*,<sup>217</sup> the Virginia Court of Appeals addressed the issue of felony murder.<sup>218</sup> The issue was whether felony child abuse could be a predicate felony or whether the child abuse merges with the murder charge.<sup>219</sup> The court held that felony child abuse could be a predicate felony and further stated that, to be a predicate felony, the felony must be related in time, place, and causal connection to the death in question.<sup>220</sup>

In *Tucker v. Commonwealth*,<sup>221</sup> the defendant was driving in excess of the speed limit when a police officer signaled for him to pull over.<sup>222</sup> Instead, Tucker sped up, and a high speed chase ensued.<sup>223</sup> The Virginia Court of Appeals clarified the meaning of "driving so as to endanger a person" under Virginia Code section 46.2-817(B)<sup>224</sup> and established that a showing of *actual* endangerment of any person is not necessary to sustain a felony conviction under Virginia Code section 46.2-817.<sup>225</sup>

In *Johnson v. Commonwealth*,<sup>226</sup> the Virginia Court of Appeals clarified that it is not necessary to prove a specific intent to interfere under Virginia Code section 5.1-22, which criminalizes interference with the operation of an aircraft.<sup>227</sup>

The Virginia Court of Appeals held in *Lawson v. Commonwealth*,<sup>228</sup> that for purposes of a felony failure-to-appear warrant, the defendant must actually be charged with a felony, not simply

215. *Id.* at 450, 546 S.E.2d at 212.

216. *Id.* at 449, 546 S.E.2d at 212.

217. 35 Va. App. 511, 546 S.E.2d 241 (Ct. App. 2001).

218. *Id.* at 514, 546 S.E.2d at 243.

219. *Id.* at 516, 546 S.E.2d at 244.

220. *Id.*

221. 38 Va. App. 343, 564 S.E.2d 144 (Ct. App. 2002).

222. *Id.* at 344-45, 564 S.E.2d at 145.

223. *Id.*

224. *Id.* at 346-47, 564 S.E.2d at 146-47 (interpreting VA. CODE ANN. § 46.2-817 (Repl. Vol. 2002)).

225. *Id.*

226. 37 Va. App. 634, 561 S.E.2d 1 (Ct. App. 2002).

227. *Id.* at 642, 561 S.E.2d at 4; *see also* VA. CODE ANN. § 5.1-22 (Repl. Vol. 1999 & Cum. Supp. 2002).

228. 38 Va. App. 93, 561 S.E.2d 775 (Ct. App. 2002).

fail to appear before a court in a show-cause hearing on an underlying felony.<sup>229</sup>

In *Crislip v. Commonwealth*,<sup>230</sup> the Virginia Court of Appeals held that the phrase “in public” for a drunk-in-public charge means to be in public view.<sup>231</sup> The court refused to adopt a narrower definition, advanced by the defendant, that “in public” means a public place,<sup>232</sup> and affirmed the trial court’s conviction finding that the defendant was “in public” on his own front porch in plain view of neighboring homes and streets.<sup>233</sup>

### B. Admissibility of Evidence

The Virginia Court of Appeals and the Supreme Court of Virginia decided a number of cases regarding the admissibility of evidence this past year. The following examples merely compose an illustrative list of these cases.<sup>234</sup>

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229. *Id.* at 97, 561 S.E.2d at 777.

230. 37 Va. App. 66, 554 S.E.2d 96 (Ct. App. 2001).

231. *Id.* at 71, 554 S.E.2d at 98.

232. *Id.* at 72, 554 S.E.2d at 99. The court found it irrelevant that the defendant was on the premises of his own home for purposes of determining whether he was in public. *Id.*

233. *Id.*

234. See also *Bloom v. Commonwealth*, 262 Va. 814, 554 S.E.2d 84 (2001) (holding that the trial court did not err in admitting out of court statements as party admissions where the defendant was sufficiently identified as the person who made the statements via the Internet); *Weathers v. Commonwealth*, 262 Va. 803, 553 S.E.2d 729 (2001) (holding that the trial court’s decision to admit evidence of the defendant’s prior convictions based on only substantial compliance with applicable notice requirements was affirmed); *Pearson v. Commonwealth*, 37 Va. App. 583, 560 S.E.2d 459 (Ct. App. 2002) (finding that a revocation hearing is a continuation of original sentencing and therefore the defendant’s prior record is admissible); *Goodman v. Commonwealth*, 37 Va. App. 374, 558 S.E.2d 555 (Ct. App. 2002) (finding that incoherence, unconsciousness, or inability to refuse do not constitute a refusal to give blood for DUI purposes); *Summerlin v. Commonwealth*, 37 Va. App. 288, 557 S.E.2d 731 (Ct. App. 2002) (finding defendant’s phone messages admissible to show state of mind and intent); *Brown v. Commonwealth*, 37 Va. App. 169, 554 S.E.2d 711 (Ct. App. 2001) (holding that the trial court did not err in admitting testimony of victim’s stepmother regarding victim’s recent complaint of a sexual offense); *Wolfe v. Commonwealth*, 37 Va. App. 136, 554 S.E.2d 695 (Ct. App. 2001) (regarding the admissibility of evidence during sentencing hearing); *Rollins v. Commonwealth*, 37 Va. App. 73, 554 S.E.2d 99 (Ct. App. 2001) (resolving the apparent conflict in requirements for admissibility of intoxilyzer-5000 results, and finding that substantial compliance with procedures is sufficient).

## 1. Expert Witness Testimony

The Supreme Court of Virginia addressed two issues on appeal in the case of *Pritchett v. Commonwealth*.<sup>235</sup> During a trial for murder, robbery, and attendant firearm charges, defense counsel proffered testimony of a mental health expert regarding the susceptibility of mentally retarded persons to suggestive police interrogation and the defendant's reaction to his interrogation by the police.<sup>236</sup> The trial court "rejected the expert's testimony on the ground that it 'would invade the province of the jury as to the ultimate issue of intent.'"<sup>237</sup> However, the Supreme Court of Virginia held that the testimony of a mental health expert regarding the susceptibility of a mentally retarded person to suggestive police interrogation was admissible to assist the jury in determining the reliability of the defendant's confession to the police.<sup>238</sup> The court further held that the lower court's failure to allow this testimony was not harmless error—because the defendant's reaction to such an interrogation is an inadmissible comment on the veracity of the defendant's trial testimony—and, therefore, remanded the case for trial.<sup>239</sup>

In *Velazquez v. Commonwealth*,<sup>240</sup> the defendant attempted to limit the testimony of the expert witness, a Sexual Assault Nurse Examiner ("SANE").<sup>241</sup> During the rape trial, a SANE was permitted to testify as an expert that the victim's injuries were both "inconsistent with consensual intercourse," and that they were "consistent with non-consensual intercourse."<sup>242</sup> On appeal, the defendant argued that the SANE was not qualified to give the opinions because they constituted a medical diagnosis and the SANE was not qualified to practice medicine.<sup>243</sup> The defendant further contended that the opinions of the SANE were opinions on the ultimate issue and thus invaded the province of the jury.<sup>244</sup>

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235. 263 Va. 182, 557 S.E.2d 205 (2002).

236. *Id.* at 183, 557 S.E.2d at 206.

237. *Id.* at 187, 557 S.E.2d at 208.

238. *Id.*

239. *Id.*

240. 263 Va. 95, 557 S.E.2d 213 (2002).

241. *Id.* at 100, 557 S.E.2d at 216.

242. *Id.*

243. *Id.* at 101, 557 S.E.2d at 217.

244. *Id.*

The Supreme Court of Virginia held in *Velazquez* that the testimony concerning sexual assault diagnosis did not constitute the practice of medicine and was admissible where the witness possessed adequate knowledge, training, and experience to render an informed opinion.<sup>245</sup> The court further held that part of the admitted testimony addressed the ultimate issue of fact because the SANE's opinion that the victim's injuries were consistent with non-consensual intercourse, if believed, would preclude the jury from reaching any decision other than that the victim suffered a rape.<sup>246</sup> The court, therefore, remanded the case for a new trial.<sup>247</sup>

## 2. Lay Witness Testimony

In *Sapp v. Commonwealth*,<sup>248</sup> the Supreme Court of Virginia addressed the issue of the admission of previous testimony when the witnesses are unavailable due to fear of testifying.<sup>249</sup> During the trial, both the alleged victim of a robbery and malicious wounding and another witness for the Commonwealth refused to testify for fear of reprisals.<sup>250</sup> The victim claimed that while no one had threatened him "officially, [there were] . . . maybe one or two verbal threats," and the witness stated that he did not want to testify due to "talk in the streets."<sup>251</sup> The trial court assured the witnesses that they would not be forced to testify and found that the witnesses were unavailable.<sup>252</sup> The Commonwealth then introduced the witnesses' preliminary hearing testimony.<sup>253</sup>

The supreme court held that, at a minimum, a refusal to testify should be met with an order from the trial court to testify.<sup>254</sup> Here, there was little, if any, judicial pressure to have the witnesses testify.<sup>255</sup> As a result, the admission of the preliminary

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245. *Id.* at 104, 106, 557 S.E.2d at 219, 220.

246. *Id.* at 105, 557 S.E.2d at 219.

247. *Id.* at 106, 557 S.E.2d at 220.

248. 263 Va. 415, 559 S.E.2d 645 (2002).

249. *Id.* at 418, 559 S.E.2d at 646.

250. *Id.* at 418, 559 S.E.2d at 646-47.

251. *Id.* at 418, 559 S.E.2d at 646-48.

252. *Id.* at 422-23, 559 S.E.2d at 649.

253. *Id.* at 418-22, 559 S.E.2d at 646-49.

254. *Id.* at 426, 559 S.E.2d at 651.

255. *Id.*

hearing testimony was found to be an abuse of the trial court's discretion.<sup>256</sup>

In the case of *Smallwood v. Commonwealth*,<sup>257</sup> the Virginia Court of Appeals addressed the difference between adverse testimony and an adverse witness.<sup>258</sup> A witness called by the Commonwealth gave testimony that the Commonwealth believed to be false.<sup>259</sup> The Commonwealth then asked the trial court to find the witness to be an adverse witness and to allow the Commonwealth to impeach.<sup>260</sup> The court found, however, that the witnesses' testimony was not injurious to the Commonwealth's case; therefore, the Commonwealth could use leading questions to question the witness, but could not impeach the witness.<sup>261</sup>

In *Saunders v. Commonwealth*,<sup>262</sup> the Virginia Court of Appeals affirmed the trial court's decision to admit the transcript of a preliminary hearing because the victim had died before trial.<sup>263</sup>

### 3. Other Admissibility Issues

In *Quinones v. Commonwealth*,<sup>264</sup> a case concerning a prosecution for aggravated sexual battery and indecent liberties with a minor, the Virginia Court of Appeals ruled on the admissibility of prior sexual misconduct and pornographic tapes found in the defendant's apartment.<sup>265</sup> The defendant allegedly abused his seven-year-old step-granddaughter by rubbing baby lotion all over her body, including her private parts.<sup>266</sup> During the trial, the defendant's daughter testified that when she was five years old, the defendant asked her to touch or taste his penis.<sup>267</sup> Also, during trial,

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256. *Id.*

257. 36 Va. App. 483, 553 S.E.2d 140 (Ct. App. 2001).

258. *Id.* at 487-94, 553 S.E.2d at 142-45.

259. *Id.* at 488, 553 S.E.2d at 142.

260. *Id.*

261. *Id.*

262. 38 Va. App. 192, 562 S.E.2d 367 (Ct. App. 2002).

263. *Id.* at 197-98, 562 S.E.2d at 370.

264. 35 Va. App. 634, 547 S.E.2d 524 (Ct. App. 2001).

265. *Id.* at 636-37, 547 S.E.2d at 525-26.

266. *Id.* at 638, 547 S.E.2d at 526.

267. *Id.* at 637-38, 547 S.E.2d at 526.

a police officer testified that he seized “hardcore porno” tapes from the defendant’s apartment.<sup>268</sup>

The court of appeals held that the prior sexual misconduct was too remote in time—almost twenty years earlier—and involved a different type of misconduct than that of which the defendant was currently accused.<sup>269</sup> The court ruled that the prejudicial effect of the testimony was not outweighed by the negligible probative value; therefore, the trial court erred in admitting the testimony.<sup>270</sup> As to the admissibility of the pornographic tapes, the court held that the trial court erred in admitting the tapes because the prejudicial effect outweighed the probative value and because the Commonwealth presented no evidence that the child had been shown the tapes or that they had any relation to the current case.<sup>271</sup>

In *Sabo v. Commonwealth*,<sup>272</sup> the victim was injured in an automobile accident when her brakes failed.<sup>273</sup> Believing that her former boyfriend, the defendant, cut her brake lines, the victim tape recorded a conversation with the defendant, a conversation in which he eventually made incriminating statements about the brakes.<sup>274</sup> The Virginia Court of Appeals held that the victim in the case was not acting as a police agent even though the police initiated the procedure for the victim to record telephone conversations.<sup>275</sup> Although she coaxed him into making incriminating statements, the statements were voluntarily given and a proper foundation was laid for admitting the tape.<sup>276</sup>

The Supreme Court of Virginia, in *Scates v. Commonwealth*,<sup>277</sup> addressed the admissibility of evidence of other crimes committed by the defendant.<sup>278</sup> In a trial for breaking and entering and grand larceny, the evidence showed that the defendant entered

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268. *Id.* at 638, 547 S.E.2d at 526.

269. *Id.* at 637–38, 547 S.E.2d at 526.

270. *Id.* at 641, 547 S.E.2d at 528.

271. *Id.* at 642, 547 S.E.2d at 528.

272. 38 Va. App. 63, 561 S.E.2d 761 (Ct. App. 2002).

273. *Id.* at 68, 561 S.E.2d at 763.

274. *Id.* at 70, 561 S.E.2d at 764.

275. *Id.* at 76, 561 S.E.2d at 767.

276. *Id.*

277. 262 Va. 757, 553 S.E.2d 756 (2002).

278. *Id.* at 759, 553 S.E.2d at 757.

the victim's home through an unlocked door.<sup>279</sup> The trial court allowed a detective to testify that the defendant had admitted to using a credit card to enter other homes and commit larcenies.<sup>280</sup> Because there was no evidence that the defendant had used a credit card to unlock the door, the court found that evidence of other crimes did not fall into any of the accepted exceptions for such testimony.<sup>281</sup> As a result, the supreme court held that both the trial and appeals courts erred in allowing the testimony, and the matter was remanded for a new trial.<sup>282</sup>

In the case of *Clark v. Commonwealth*,<sup>283</sup> the Supreme Court of Virginia clarified that a defendant does not have the right to an independent medical exam of a rape victim.<sup>284</sup>

### C. Issues During Trial

#### 1. Waiver of Right to Jury Trial

Although it is a well established rule that a defendant's waiver of a jury trial must be voluntary, the Virginia Court of Appeals clarified the meaning of "voluntary" in *Robinson v. Commonwealth*.<sup>285</sup> In this case, when the defendant requested a jury trial, the trial court said the defendant could have a jury trial on the condition that the court would increase the defendant's conditions for bond.<sup>286</sup> The defendant then waived his right to a jury trial.<sup>287</sup> However, the court of appeals reversed and remanded, holding that this choice was not a voluntary waiver.<sup>288</sup>

In the case of *Commonwealth v. Williams*,<sup>289</sup> the trial court denied the defendant's request for a jury trial after he had previ-

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279. *Id.*

280. *Id.* at 760, 553 S.E.2d at 758.

281. *Id.* at 762, 553 S.E.2d at 759.

282. *Id.* at 763, 553 S.E.2d at 760.

283. 262 Va. 517, 551 S.E.2d 642 (2001).

284. *Id.* at 521, 551 S.E.2d at 644.

285. 36 Va. App. 1, 548 S.E.2d 227 (Ct. App. 2001).

286. *Id.* at 3-4, 548 S.E.2d at 228.

287. *Id.* at 6, 548 S.E.2d at 229.

288. *Id.*

289. 262 Va. 661, 553 S.E.2d 760 (2001).

ously waived that right.<sup>290</sup> The Supreme Court of Virginia held that it was within the discretion of the trial court to deny the defendant's subsequent request for a jury trial, after having already waived that right, without the trial court making any notation that the first waiver was voluntary.<sup>291</sup> Therefore, the court held there was no abuse of discretion and affirmed the ruling of the trial court.<sup>292</sup>

## 2. Waiver of Counsel

In *McNair v. Commonwealth*,<sup>293</sup> the defendant was provided with several, successively court-appointed attorneys to represent him.<sup>294</sup> At various times prior to trial, the defendant requested the replacement of each court-appointed attorney, which the trial court granted.<sup>295</sup> At trial, the defendant again asked that the court replace his attorney, and the attorney made a motion to withdraw.<sup>296</sup> The court granted the attorney's motion to withdraw but denied the defendant's request for another attorney, at which point the defendant proceeded to trial without counsel.<sup>297</sup> The Virginia Court of Appeals, en banc, held that this was not a voluntary waiver of counsel and remanded the case for further proceedings.<sup>298</sup>

## 3. Voir Dire

In *DeLeon v. Commonwealth*,<sup>299</sup> the Virginia Court of Appeals remanded a case for retrial because the trial court improperly denied defendant's motion to strike a juror for cause.<sup>300</sup> During voir dire in the rape trial, a juror stated that her sister-in-law had been raped and that she was "not sure" whether or not that would

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290. *Id.* at 665, 553 S.E.2d at 761.

291. *Id.* at 671, 553 S.E.2d at 765.

292. *Id.*

293. 37 Va. App. 687, 561 S.E.2d 26 (Ct. App. 2002) (en banc).

294. *Id.* at 693, 561 S.E.2d at 29.

295. *Id.*

296. *Id.* at 692-94, 561 S.E.2d at 29.

297. *Id.* at 693-94, 561 S.E.2d at 29.

298. *Id.* at 695-97, 561 S.E.2d at 30-31.

299. No. 1595-01-4, 2002 Va. App. LEXIS 364, at \*1 (Ct. App. June 25, 2002).

300. *Id.*



affect her hearing the case.<sup>301</sup> She was upset and stated she would identify with the victim.<sup>302</sup> However, she also stated that she was not biased against the defendant and could listen to the evidence fairly.<sup>303</sup> The trial court denied defendant's motion to strike the prospective juror for cause.<sup>304</sup> The court of appeals held that the juror's responses failed to establish that she could sit as an impartial juror and created a reasonable doubt as to her fairness—a factor that must be resolved in favor of the accused.<sup>305</sup>

In *Barrett v. Commonwealth*,<sup>306</sup> the Supreme Court of Virginia held that the trial court abused its discretion in not striking a perspective juror who was the brother of a police officer who was going to be a witness at trial.<sup>307</sup> During voir dire, the prospective juror stated that he could be impartial and follow the law.<sup>308</sup> The court held, however, that in order to avoid any appearance of impropriety and retain faith in the jury system, the trial court should have struck the juror.<sup>309</sup> The court remanded the case for further proceedings.<sup>310</sup>

In *Hill v. Commonwealth*,<sup>311</sup> the Virginia Court of Appeals held that a defendant had the right to voir dire prospective jurors with respect to the sentencing ranges of the charges.<sup>312</sup> The court said that a defendant is entitled to an impartial jury—a jury that is impartial not only as to the guilt and innocence portion of a bifurcated trial but also impartial as to sentencing.<sup>313</sup> The only appropriate time to question potential jurors as to impartiality regarding sentencing is during voir dire because that is when peremptory strikes are available to remove any potential juror who cannot be impartial.<sup>314</sup>

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301. *Id.* at \*1–2.

302. *Id.*

303. *Id.*

304. *Id.* at \*3.

305. *Id.* at \*4–6.

306. 262 Va. 823, 553 S.E.2d 731 (2001).

307. *Id.* at 824, 553 S.E.2d at 731.

308. *Id.* at 824–25, 553 S.E.2d at 732.

309. *Id.* at 826–27, 553 S.E.2d at 733.

310. *Id.* at 827, 553 S.E.2d at 733.

311. 36 Va. App. 375, 550 S.E.2d 351 (Ct. App. 2001).

312. *Id.* at 381, 550 S.E.2d at 354.

313. *Id.* at 380–81, 550 S.E.2d at 353–54.

314. *Id.* at 381, 550 S.E.2d at 354.

The Supreme Court of Virginia disagreed, however, and reversed the *Hill* decision.<sup>315</sup> It held that in a non-capital criminal prosecution, the defendant does not have a constitutional or statutory right to ask members of the jury panel questions regarding the range of punishment that may be imposed on the defendant if he is ultimately convicted.<sup>316</sup> The court reasoned that such questions “will only result in speculation by jury panel members,” and will be answered in a “factual vacuum.”<sup>317</sup> Furthermore, the court stated that such questions are not relevant to any of the four criteria set forth in Virginia Code section 8.01-358—relationship to the parties, interest in the cause, formation of opinions about the cause, or bias or prejudice—and, therefore, they fall outside of the scope of the defendant’s statutory and constitutional rights.<sup>318</sup> The court noted that questions regarding potential sentencing are only relevant in capital murder cases, in which the defendant may be sentenced to death.<sup>319</sup>

Similarly, in *Hills v. Commonwealth*,<sup>320</sup> the Supreme Court of Virginia held that a defendant cannot question prospective jurors regarding parole ineligibility during voir dire.<sup>321</sup> The court held that parole ineligibility is a question solely applicable during sentencing and a jury instruction is sufficient.<sup>322</sup>

#### 4. Speedy Trial

In *White v. Commonwealth*,<sup>323</sup> the Virginia Court of Appeals dealt with the issue of what constitutes a speedy trial.<sup>324</sup> The defendant’s case was already set for trial when the Commonwealth realized that the date fell two days after the speedy trial deadline.<sup>325</sup> On the Commonwealth’s motion, the trial court reduced

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315. *Commonwealth v. Hill*, No. 012316, 2002 Va. LEXIS 104 (Va. Sept. 13, 2002).

316. *Id.* \*8.

317. *Id.* at \*7.

318. *Id.* at \*8; *see also* VA. CODE ANN. § 8.01-358 (Repl. Vol. 2000 & Cum. Supp. 2002) (prescribing the guarantees of an accused’s right to trial by an impartial jury).

319. *Hill*, 2002 Va. LEXIS 104, at \*7.

320. 262 Va. 807, 553 S.E.2d 722 (2001).

321. *Id.* at 809, 553 S.E.2d at 723.

322. *Id.* at 812, 553 S.E.2d at 725; *see also* *Fishback v. Commonwealth*, 260 Va. 104, 122, 532 S.E.2d 629, 638 (2000).

323. 37 Va. App. 658, 561 S.E.2d 12 (Ct. App. 2002).

324. *Id.* at 660, 561 S.E.2d at 13.

325. *Id.* at 661, 561 S.E.2d at 14.

the defendant's bond to a personal recognizance bond.<sup>326</sup> The defendant refused to endorse the bond and the sheriff released the defendant from the jail.<sup>327</sup> Without addressing whether the defendant was still in custody after being released without signing the bond, the court held that the defendant was not in custody for purposes of speedy trial.<sup>328</sup> The defendant had brought the continuation of his detention upon himself when he failed to endorse the bond.<sup>329</sup>

## 5. Jury Instructions

The appellate court also addressed a number of questions with respect to jury instructions. On appeal, in deciding whether a trial court erred in denying a requested jury instruction, the facts must be viewed in the light most favorable to the party who offered the instruction.<sup>330</sup> As long as more than a "scintilla" of evidence exists to support the instruction, it should be given.<sup>331</sup>

In *Willis v. Commonwealth*,<sup>332</sup> the trial court refused to instruct the jury on any of the lesser included offenses of first degree murder, where the evidence indicated that a fight with and the attempted robbery of the defendant by the victim preceded the killing.<sup>333</sup> However, because some time had elapsed between those events and the killing, the court held that evidence of premeditation was so clear that the trial court properly refused the lesser-included instructions.<sup>334</sup>

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326. *Id.*

327. *Id.* at 661-62, 561 S.E.2d at 14.

328. *Id.* at 666, 561 S.E.2d at 16.

329. *Id.* at 667, 561 S.E.2d at 17.

330. *Commonwealth v. Vaughn*, 263 Va. 31, 33, 557 S.E.2d 220, 221 (2002) (citing *Blondel v. Hays*, 241 Va. 467, 469, 403 S.E.2d 340, 341 (1991)).

331. *Remington v. Commonwealth*, 262 Va. 333, 352, 551 S.E.2d 620, 629 (2001) (quoting *Justus v. Commonwealth*, 222 Va. 667, 678, 283 S.E.2d 905, 911 (1981)).

332. 37 Va. App. 224, 556 S.E.2d 60 (Ct. App. 2001).

333. *Id.* at 230-31, 556 S.E.2d at 63-64.

334. *Id.* at 231-32, 556 S.E.2d at 64. The appeal also raised a speedy trial issue. *See id.* at 227-28, 556 S.E.2d at 62. Because the defendant was a juvenile at the time of the offense, a preliminary hearing was held in juvenile and domestic relations general district court. *Id.* at 228, 556 S.E.2d at 62. However, the defendant had previously been tried as an adult, which divested the juvenile court of jurisdiction. *Id.* at 228-29, 556 S.E.2d at 62-63. Therefore, even though the trial was held more than five months after the preliminary hearing in the juvenile court, the speedy trial clock did not start at that point because that court did not have jurisdiction. *Id.* at 229, 556 S.E.2d at 63.

In *Commonwealth v. Vaughn*,<sup>335</sup> the Supreme Court of Virginia held that the defendant was not entitled to an instruction on the lesser-included offense of assault in a malicious wounding case.<sup>336</sup> The court explained that “[the defendant] had no evidence demonstrating that he did not intend to maim, disfigure, disable, or kill . . . thus, under the circumstances [there is] no evidence supporting the jury instruction requested by [the defendant].”<sup>337</sup> However, in *Leal v. Commonwealth*,<sup>338</sup> the Virginia Court of Appeals held that assault by a mob is a lesser included offense of malicious wounding by a mob, and the failure to instruct the jury on the lesser offense was not harmless error.<sup>339</sup>

In *Tice v. Commonwealth*,<sup>340</sup> the Virginia Court of Appeals held that the trial court erred by giving an instruction over the defendant’s objection.<sup>341</sup> The instruction allowed the jury to find him guilty of capital murder based upon the theory that he acted in concert with others to rape or kill the victim without requiring the jury to find that he was an active or immediate killer.<sup>342</sup> The court of appeals found that the instruction was improper because it allowed the jury to find Tice, an accessory, guilty of capital murder when only the actual perpetrator of the murder can be convicted of capital murder.<sup>343</sup>

In *Gaines v. Commonwealth*,<sup>344</sup> the Virginia Court of Appeals dismissed a firearm conviction because the trial court improperly rejected a jury instruction.<sup>345</sup> The court of appeals found that while the trial court rejected the instruction solely for its noncon-

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335. 263 Va. 31, 557 S.E.2d 220 (2002).

336. *Id.* at 36, 557 S.E.2d at 223.

337. *Id.*

338. 37 Va. App. 525, 559 S.E.2d 874 (Ct. App. 2002).

339. *Id.* at 531–33, 537, 559 S.E.2d at 877–78, 880; *see also* *Commonwealth v. Sands*, 262 Va. 724, 553 S.E.2d 733 (2001) (holding that the trial court did not err in refusing jury instruction of self defense in spousal murder case); *Byers v. Commonwealth*, 37 Va. App. 174, 554 S.E.2d 714 (Ct. App. 2001) (holding that the trial court did not err in refusing jury instruction regarding possession of a firearm for self defense where it was not supported by the evidence).

340. 38 Va. App. 332, 563 S.E.2d 412 (Ct. App. 2002).

341. *Id.* at 335, 563 S.E.2d at 414.

342. *Id.* at 336, 563 S.E.2d at 414.

343. *Id.* at 339–40, 563 S.E.2d at 416.

344. 38 Va. App. 326, 563 S.E.2d 410 (Ct. App. 2002).

345. *Id.* at 331, 563 S.E.2d at 412.

formance with model jury instructions, the instruction constituted an accurate statement under Virginia Code section 19.2-263.2.<sup>346</sup>

## 6. Miscellaneous

The Virginia Court of Appeals remanded *Thomas v. Commonwealth*<sup>347</sup> because the Commonwealth failed to present evidence of the city and state where the alleged sexual abuse occurred—merely presenting the street address did not suffice to establish jurisdiction.<sup>348</sup> Nothing in the record tied the “location to the locality within the Commonwealth.”<sup>349</sup> The court held, however, that although “the Commonwealth’s failure to prove jurisdiction requires reversal of Thomas’[s] convictions, it did not require dismissal of the charges again[st] him.”<sup>350</sup> Therefore, the court remanded the case for rehearing.<sup>351</sup>

In *Humphrey v. Commonwealth*,<sup>352</sup> the Virginia Court of Appeals held that the common law defense of necessity remains available, upon an appropriate factual predicate, as a defense to a charge of possessing a firearm after having been convicted of a felony under Virginia Code section 18.2-308.2.<sup>353</sup>

In a separate case entitled *Thomas v. Commonwealth*,<sup>354</sup> the Virginia Court of Appeals held that the Commonwealth was not required to allege in an indictment the existence of a prior violent felony to support the imposition of a mandatory sentence.<sup>355</sup> However, if the indictment is for an offense with varying classes of felonies or grades of offenses, the penalty is an element that the Commonwealth must specifically allege in the indictment.<sup>356</sup>

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346. *Id.* at 330, 563 S.E.2d at 411–12; *see also* VA. CODE ANN. § 19.2-263.2 (Repl. Vol. 2000 & Cum. Supp. 2002).

347. 36 Va. App. 326, 549 S.E.2d 648 (Ct. App. 2001).

348. *Id.* at 332, 549 S.E.2d at 651.

349. *Id.* at 333, 549 S.E.2d at 651.

350. *Id.*

351. *Id.*

352. 37 Va. App. 36, 553 S.E.2d 546 (Ct. App. 2001).

353. *Id.* at 40, 553 S.E.2d at 548; *see also* VA. CODE ANN. § 18.2-308.2 (Cum. Supp. 2002).

354. 37 Va. App. 748, 561 S.E.2d 56 (Ct. App. 2002).

355. *Id.* at 750–51, 562 S.E.2d at 57.

356. *Id.* at 753, 561 S.E.2d at 58; *see also* *Apprendi v. New Jersey*, 530 U.S. 466, 474–76 (2000) (holding that the Constitution “require[s] that any fact . . . that increases the

## VII. FIRST AMENDMENT

In *Commonwealth v. Hicks*,<sup>357</sup> the Supreme Court of Virginia overturned a trespassing policy employed by the Richmond Redevelopment and Housing Authority ("RRHA") as unconstitutional under the First and Fourteenth Amendments to the United States Constitution.<sup>358</sup> In an effort to eradicate drug activity in a low-income Richmond housing development, the housing authority sought to bar persons who did not have a legitimate reason to be on the property.<sup>359</sup> The Richmond City Council enacted an ordinance that closed the streets in the development to the public and deeded them to the housing authority.<sup>360</sup> The RRHA erected signs, but there was no barrier or other physical change to the streets.<sup>361</sup> The police arrested Hicks, whom the RRHA had previously barred for trespassing on the sidewalk of the development.<sup>362</sup> The court held that Hicks had standing because "in the context of a First Amendment challenge, a litigant may challenge government action granting government officials standardless discretion even if that government action as applied to the litigant is constitutionally permissible."<sup>363</sup> Evidence established that the housing authority had formulated no written policies or guidelines on the enforcement of its trespass policy.<sup>364</sup> Its unwritten policies gave the housing manager unfettered discretion to determine who she authorized to be on the property.<sup>365</sup> She could allow people in to pass out literature, picket, demonstrate, hold meetings, and the like, or keep them out, based solely on her personal viewpoint of the content of the speech involved.<sup>366</sup> A citizen's First Amendment rights cannot be predicated upon the unfettered discretion of a government official; therefore, the unwritten

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maximum penalty for a crime" beyond the prescribed statutory maximum, other than the fact of a prior conviction, "must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt").

357. 264 Va. 48, 563 S.E.2d 674 (2002).

358. *Id.* at 58, 563 S.E.2d at 680.

359. *Id.* at 51, 563 S.E.2d at 676.

360. *Id.*

361. *See id.* at 51-52, 563 S.E.2d at 676.

362. *Id.* at 53, 563 S.E.2d at 677.

363. *Id.* at 55, 563 S.E.2d at 678.

364. *Id.* at 59, 563 S.E.2d at 680.

365. *Id.* at 59-60, 563 S.E.2d at 680-81.

366. *Id.* at 60, 563 S.E.2d at 681.

trespass policies of the authority were unconstitutionally overbroad and unenforceable.<sup>367</sup>

## VIII. CRIMES AND NEW LEGISLATION

### A. *Driving Offenses*

The legislature clarified statutory language concerning DUI's to require the warrant or indictment on which a person is convicted to allege that such person has previously been convicted of an offense committed within the specified time period of five or ten years.<sup>368</sup> The same legislation also clarified that a person who is convicted of driving under the influence for the second time within ten years must forfeit his license for three years.<sup>369</sup> Additionally, the legislature provided that a blood test is admissible as a hospital business record in a prosecution for a DUI when the test was taken in a hospital emergency room.<sup>370</sup>

The General Assembly amended the law governing hit-and-run incidents so that a hit-and-run that only results in property damage of less than \$1000 is now a Class 1 misdemeanor.<sup>371</sup> An accident that results in the injury or death of any person, or property damage over \$1000, is a Class 5 felony.<sup>372</sup>

The legislature created the new offense of aggressive driving, which provides that a person is guilty of aggressive driving if he violates one or more of a list of traffic violations.<sup>373</sup> Examples of these violations are: following too closely, failing to observe lanes marked for traffic, and stopping on a highway with the intent to harass, intimidate, injure, or obstruct another person.<sup>374</sup> Aggressive driving shall be punished as a Class 2 misdemeanor; how-

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367. *Id.* at 58, 563 S.E.2d at 680.

368. *See* VA. CODE ANN. § 18.2-271 (Cum. Supp. 2002).

369. *Id.*

370. *Id.* § 18.2-268.2 (Cum. Supp. 2002).

371. *Id.* § 46.2-894 (Repl. Vol. 2002).

372. *Id.*

373. *Id.* §§ 46.2-492, -868.1 (Cum. Supp. 2002).

374. *Id.*

ever, aggressive driving with the intent to injure another person shall be punished as a Class 1 misdemeanor.<sup>375</sup>

Another new law creates a rebuttable presumption that the driver has consumed an alcoholic beverage in violation of Virginia Code section 18.2-323.1:

[I]f (i) an open container is located in the passenger compartment of a motor vehicle, (ii) the alcoholic beverage in the open container has been at least partially removed and (iii) the appearance, conduct, odor of alcohol, speech, or other physical characteristic of the driver of the motor vehicle may be reasonably associated with the consumption of an alcoholic beverage.<sup>376</sup>

A violation of this Code section is a Class 4 misdemeanor.<sup>377</sup>

### B. *Commonwealth Right of Appeal*

Under prior law, to appeal from circuit court the Commonwealth had to certify that the evidence at issue in the appeal was essential to the proceedings.<sup>378</sup> Under new law, the Commonwealth only needs to certify “that the appeal is not taken for the purpose of delay and that the evidence is substantial proof of a fact material to the proceeding.”<sup>379</sup> Additionally, the legislature expanded the Commonwealth’s right of appeal by providing that any circuit court sentencing order that is contrary to statutory mandatory sentencing or restitution terms is appealable.<sup>380</sup>

### C. *Juvenile Law and Procedure*

The legislature provided that the court may impose an adult sentence on a juvenile tried as an adult and convicted of a violent felony, but may order that a portion of the sentence be served in a juvenile correctional facility.<sup>381</sup>

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375. *Id.* § 46.2-868.1(B).

376. *Id.* § 18.2-323.1 (Cum. Supp. 2002).

377. *Id.*

378. *Id.* § 19.2-398 (Repl. Vol. 2000).

379. *Id.* § 19.2-398(A)(2) (Cum. Supp. 2002).

380. *Id.* § 19.2-398(C).

381. *Id.* §§ 16.1-272, -285.2 (Cum. Supp. 2002).



Previously, a juvenile could have her privilege to have a driver's license delayed or denied up to thirty days for a truancy violation.<sup>382</sup> Under new law, upon a second or subsequent truancy offense, a juvenile's privilege to have a driver's license will be denied for one year or until the juvenile reaches eighteen, whichever is longer.<sup>383</sup>

Presumably in response to *Salvatierra v. City of Falls Church*,<sup>384</sup> which decided the same issue for adults, the legislature clarified that a juvenile who is on probation or parole for an offense that would be a Class 1 misdemeanor or a felony if committed by an adult, may be detained in a secure facility pursuant to a detention order or warrant when there is probable cause to believe he violated the terms of his probation or parole.<sup>385</sup>

In *Panell v. Commonwealth*,<sup>386</sup> the Supreme Court of Virginia held that there is no constitutional requirement that a court apply a reasonable doubt standard or exclude hearsay in a juvenile probation revocation proceeding.<sup>387</sup>

This year, the legislature amended the "assault and battery" provision of the Virginia Code.<sup>388</sup> This amendment expands the schoolteacher exceptions to the "simple assault" and "assault and battery" definitions.<sup>389</sup> The exceptions now include a principal, assistant principal, guidance counselor, or public security officer.<sup>390</sup>

#### D. *New Crimes*

The General Assembly provided that it is a Class 5 felony to possess with the intent to injure another with a "radiologic agent,"<sup>391</sup> defined as any substance able to release radiation levels that are "capable of causing death or serious bodily injury."<sup>392</sup> If

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382. *Id.* § 16.1-278.9(A1) (Cum. Supp. 2001).

383. *Id.* § 16.1-278.9(A1) (Cum. Supp. 2002).

384. 35 Va. App. 453, 546 S.E.2d 214 (Ct. App. 2001).

385. VA. CODE ANN. § 16.1-248.1 (Cum. Supp. 2002).

386. 263 Va. 497, 561 S.E.2d 724 (2002).

387. *Id.* at 499, 561 S.E.2d at 725.

388. *See* VA. CODE ANN. § 18.2-57(D) (Cum. Supp. 2002).

389. *Id.*

390. *Id.*

391. *Id.* § 18.2-52.1(A) (Cum. Supp. 2002).

392. *Id.* § 18.2-52.1.

the person manufactures, sells, gives, distributes, or uses an infectious "radiologic agent" with the intent to injure another, he is guilty of a Class 4 felony.<sup>393</sup>

Presumably in response to the September 11th attacks, the legislature provided that obtaining a Virginia driver's license or identification card for any purpose other than engaging in an age limited activity such as obtaining alcohol underage, is a Class 6 felony.<sup>394</sup> The legislature also designated murder in the furtherance of terrorism to be a capital crime, added search and rescue and emergency medical services personnel to the section that provides enhanced penalties for malicious bodily injury to law-enforcement officers and fire-fighters, expanded wiretap capabilities in response to terrorist activities, and restricted bail of a person charged with a terrorist crime.<sup>395</sup>

The legislature provided that "any person who knowingly and willfully makes any materially false statement or representation to a law-enforcement officer who is in the course of conducting an investigation of a crime by another is guilty of a Class 2 misdemeanor."<sup>396</sup>

The legislature has created a first offender program for underage violators for the possession of alcoholic beverages, similar to that for possession of marijuana.<sup>397</sup> Finally, the legislature also provided that a criminal trial is commenced at the point at which "[double] jeopardy would attach or when a plea of guilty or nolo contendere is tendered by the defendant."<sup>398</sup>

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393. *Id.* § 18.2-52.1(B).

394. *See id.* §§ 46.2-105.2, -308, -323.1, -324, -341.11, -341.15, -342, -345 (Repl. Vol. 2002).

395. *See id.* §§ 2.2-511, 15.2-1716.1, 18.2-18, -31, -46.4, -46.10, -51.1, -52.1, -60, -85, 19.2-61, -66, -70.2, -120, -215.1, -294, -386.1 to -386.5, 24.2-233 (Cum. Supp. 2002); *see also id.* § 52-8.5 (Repl. Vol. 2002).

396. *Id.* § 18.2-460 (Cum. Supp. 2002).

397. *Id.* § 4.01-305 (Cum. Supp. 2002). A judge, "if the facts . . . justify a finding of guilty . . . without entering a judgment of guilt and with the consent" of the underage first-time offender, may "defer further proceedings and place [the defendant] on probation." *Id.* § 4.01-305(F).

398. *Id.* § 19.2-243(5) (Cum. Supp. 2002).

### E. *Changes to Existing Law*

Sex offenders convicted of a second or subsequent violation for an offense for which registration on the sex-offender registry is required must continue to register for their lifetime.<sup>399</sup> This provision was required to bring Virginia into compliance with the Jacob Wetterling Act and to avoid the loss of federal funds under that act.<sup>400</sup>

In the domestic violence arena, the legislature redefined the definition of domestic abuse to include reasonable apprehension of any bodily injury rather than serious bodily injury as under current law.<sup>401</sup> The legislature also removed the provision that marital rape cannot occur unless the spouses were living apart or there was serious bodily injury caused by force or violence.<sup>402</sup>

The General Assembly increased the penalty for soliciting another person to commit a murder from the current Class 6 felony to a "term of not less than five years nor more than forty years."<sup>403</sup>

The legislature stepped up the penalty for animal cruelty to a Class 6 felony if the individual causes the death of an animal by torture or willfully inflicting inhumane injury or pain, or cruelly beating, maiming, or mutilating such animal regardless of whether the animal belongs to the person or another.<sup>404</sup>

In response to the recent case, *Black v. Commonwealth*,<sup>405</sup> in which Virginia's cross-burning statute was found to violate the First Amendment,<sup>406</sup> the legislature added a new section to the cross-burning statute to create a Class 6 felony for any person

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399. *Id.* §§ 19.2-298.1, -298.2, -298.4, 46.2-323 (Cum. Supp. 2002).

400. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1786, 2038 (codified at 42 U.S.C. § 14071 (2000)).

401. VA. CODE ANN. § 16.1-228 (Repl. Vol. 1999). For further discussion of this amendment, see Elizabeth P. Coughter & Ronald R. Tweel, *Annual Survey of Virginia Law: Family Law*, 37 U. RICH. L. REV. 155, 196 (2002).

402. VA. CODE ANN. § 18.2-61(C) (Cum. Supp. 2002). For further discussion of this issue, see Coughter & Tweel, *supra* note 401, at 195-96.

403. VA. CODE ANN. § 18.2-29 (Cum. Supp. 2002).

404. *Id.* § 3.1-796.122(B) (Cum. Supp. 2002).

405. 262 Va. 764, 553 S.E.2d 738 (2001).

406. *Id.* at 779, 553 S.E.2d at 746.

who “with the intent to intimidate another . . . burns any object on the private property of another without permission.”<sup>407</sup>

#### F. DNA

Effective January 1, 2003, a new law will require every person arrested for a violent felony to submit a saliva or tissue sample for DNA analysis.<sup>408</sup> However, if the court finds the individual not guilty, or dismisses the case, the government must destroy the sample upon written request or a court order to that effect.<sup>409</sup>

### IX. CONCLUSION

Those who practice criminal law are on the front lines of the battle to protect the constitutional rights that we all hold so dear. Because these rights are at stake every time a case is heard in criminal court, questions as to what behavior should be criminalized and what conduct by law enforcement should be countenanced are hotly debated in the courts and in the legislature. This year was no exception.

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407. See VA. CODE ANN. §§ 18.2-423.01, 19.2-398 (Cum. Supp. 2002).

408. *Id.* § 19.2-310.2:1 (Cum. Supp. 2002).

409. See *id.* §§ 19.2-310.2, -310.2:1, -310.2, -310.3:1, -310.4, -310.5, -310.7. (Cum. Supp. 2002).

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