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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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I. INTRODUCTION

This article reviews the most significant published criminal law decisions of Virginia appellate courts through June 10, 2004.[1] The article examines several decisions from the Supreme Court of the United States that will have a major impact on Virginia law. The article also reviews the most important legislative enactments of the Virginia General Assembly in the area of criminal law.

II. CONSTITUTIONAL LAW

A. *First Amendment*

In the latest chapter of this protracted litigation, the Supreme Court of Virginia, in *Commonwealth v. Hicks*,[2] affirmed the de-

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1. The reader should be aware that a number of key decisions from the Court of Appeals of Virginia are not discussed here because the Supreme Court of Virginia has agreed to review them. *See* Carter v. Commonwealth, 42 Va. App. 681, 695–96, 594 S.E.2d 284, 292 (Ct. App. 2004) (holding that actual ability to inflict harm is not required for a criminal assault conviction); Hunt v. Commonwealth, 42 Va. App. 537, 537, 592 S.E.2d 789, 789 (Ct. App. 2004) (withdrawing an earlier panel decision regarding propriety of search under Virginia Code section 19.2-74 and affirming the defendant's conviction); Nelson v. Commonwealth, 41 Va. App. 716, 729, 735, 589 S.E.2d 23, 29, 32 (Ct. App. 2003) (holding that the trial court did not err in (1) refusing the defendant access to subpoenaed documents and (2) failing to excuse a juror during the trial); Peyton v. Commonwealth, 41 Va. App. 356, 360, 585 S.E.2d 345, 347 (Ct. App. 2003) (holding that a suspended sentence is properly revoked when the defendant is unable to complete a detention center program).

2. 267 Va. 573, 596 S.E.2d 74 (2004).

fendant's conviction for trespassing.[3] In 2003, the Supreme Court of the United States reversed the Supreme Court of Virginia on the technical issue of the standard of review for facial overbreadth challenges under the First Amendment.[4] The Court then remanded the case to the Supreme Court of Virginia for a determination concerning any other bases for challenging the conviction.[5]

On remand, the Supreme Court of Virginia first declined to examine whether the Housing Authority's policy banning Hicks from the property could improperly apply to other persons in different circumstances because Hicks's conduct clearly fell within the prohibitions of the policy.[6] Second, the court found inapt Hicks's comparison of the trespass policy at issue to an anti-loitering criminal statute found unconstitutional in *Chicago v. Morales*.[7] Finally, the court held that the policy did not violate Hicks's right to have an intimate association with his family under the Fourteenth Amendment to the United States Constitution.[8] At trial, Hicks contended he was bringing diapers to his child.[9] The court noted that Hicks had not established the existence of any intimate relationship between himself and the child or his mother, and, moreover, the right to such associations is not unlimited.[10] Furthermore, "Hicks does not have the constitutional right to visit either his mother or his child at the Housing Authority's private property where he has been barred because of his prior criminal conduct."[11]

In another case remanded from the Supreme Court of the United States, the Supreme Court of Virginia, in *Elliott v. Commonwealth*,[12] affirmed the defendants' convictions under the

3. *Id.* at 585, 596 S.E.2d at 81.

4. *See* Virginia v. Hicks, 539 U.S. 113, 118–24 (2003) (plurality opinion). For further discussion of this case, see Marla G. Decker & Stephen R. McCullough, *Annual Survey of Virginia Law: Criminal Law*, 38 U. RICH. L. REV. 87, 114 (2003).

5. *Id.* at 124.

6. *See Hicks*, 267 Va. at 581, 596 S.E.2d at 78.

7. *Id.* at 582–83, 596 S.E.2d at 78–79 (discussing reasons why the Court's decision in *City of Chicago v. Morales*, 527 U.S. 41 (1999) is inapplicable to Hicks's case).

8. *Id.* at 583, 596 S.E.2d at 79.

9. *Id.* at 585, 596 S.E.2d at 80.

10. *Id.*

11. *Id.*

12. 267 Va. 464, 593 S.E.2d 263 (2004).

cross-burning statute found in Virginia Code section 18.2-423.[13] The Supreme Court of the United States remanded the case on three issues: the proper interpretation of the statutory provision which provided that burning a cross constituted prima facie evidence of an intent to intimidate, whether this provision could be severed from the statute, and the disposition of the cases against the defendants.[14] On remand, the Supreme Court of Virginia reaffirmed its earlier holding that the prima facie provision was unconstitutional.[15] At Elliott's trial, however, the trial court had not relied on this provision in its jury instructions.[16] The defendants contended "the unconstitutional prima facie evidence provision cannot be severed from the remainder of the statute."[17] Under Virginia Code section 1-17.1, statutory provisions "are severable unless the statute specifically provides its provisions are not severable" or the provisions of the statute must operate in accord with one another.[18] The court held that neither exception to the general rule applied and, therefore, the statutory provisions were severable.[19] The court also declared without elaboration that "Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment."[20]

In *Boyd v. County of Henrico*,[21] the Court of Appeals of Virginia, sitting en banc, examined whether a county ordinance banning public nudity violated the First Amendment.[22] The County charged two owners and an erotic dancer of the Gold City Showgirls strip club with violating the ordinance, a misdemeanor.[23] In its examination of the changes, the court of appeals noted that while semi-nude dancing at strip clubs benefits from "some measure" of First Amendment protection, the right "is hardly a robust

13. *Id.* at 476, 593 S.E.2d at 270. Jonathan O'Mara pled guilty to attempted cross-burning and conspiracy to do so, and Richard J. Elliot was convicted of attempted cross-burning. *Id.* at 467–68, 593 S.E.2d at 265; *see also* VA. CODE ANN. § 18.2-423 (Repl. Vol. 2004).

14. *See* Virginia v. Black, 538 U.S. 343, 367–68 (2003).

15. *Elliot*, 267 Va. at 471, 593 S.E.2d at 267.

16. *Id.* at 474, 593 S.E.2d at 269.

17. *Id.* at 471, 593 S.E.2d at 267.

18. VA. CODE ANN. § 1-17.1 (Repl. Vol. 2001 & Cum. Supp. 2004).

19. *Elliot*, 267 Va. at 471–72, 593 S.E.2d at 267–68.

20. *Id.* at 473–74, 593 S.E.2d at 269.

21. 42 Va. App. 495, 592 S.E.2d 768 (Ct. App. 2004).

22. *Id.* at 507–17, 592 S.E.2d at 774–79.

23. *Id.* at 504, 504 n.3, 592 S.E.2d at 772–73, 773 n.3.

one."[24] Second, the ordinance "regulates conduct—not the content of anyone's speech," because it bans all public nudity "regardless of whether that nudity is accompanied by expressive activity."[25] The court rejected the defendants' argument that the existence of an exemption for theatrical performances in the ordinance transformed the ordinance into a content-based restriction.[26] The court found this exemption "does nothing more than ensure that the ordinance incidentally restricts the least amount of expressive conduct, and thus, protects the ordinance against an overbreadth challenge."[27] The ordinance was also content-neutral, the court reasoned, because of the interest in combating the "unique secondary effects associated with erotic clubs."[28]

Having concluded that the ordinance was content-neutral, the court applied the following test for such laws. The ordinance is constitutional if it:

> (i) falls within "the constitutional power" of the county, (ii) furthers an "important or substantial government interest," (iii) furthers that interest in a manner "unrelated to the suppression of free expression," and (iv) imposes no greater incidental restriction on protected speech "than is essential to the furtherance of that [sic] interest.[29]

The court held that the Henrico County ordinance satisfied this test.[30]

The court further held that the ordinance was not unconstitutionally vague and that the County was not required to provide the club with specific notice of the ordinance.[31] The court held that the County had not engaged in selective prosecution and had acted within its authority in enacting the ordinance.[32] Finally, the evidence was sufficient to sustain the trial court's factual findings

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24. *Id.* at 507–08, 592 S.E.2d at 774 (citing Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion)).

25. *Id.* at 509, 592 S.E.2d at 775 (quoting *Erie*, 529 U.S. at 290).

26. *Id.* at 510, 592 S.E.2d at 776.

27. *Id.* at 512, 592 S.E.2d at 776.

28. *Id.*

29. *Id.* at 513, 592 S.E.2d at 777 (quoting *Erie*, 529 U.S. at 296–301).

30. *Id.* at 513–16, 592 S.E.2d at 777–79.

31. *Id.* at 517–21, 592 S.E.2d at 779–81. The court declined to speculate about whether the ordinance could be applied to "short-shorts" or "contemporary swimwear." *Id.* at 520, 592 S.E.2d at 780. The court disagreed with the appellant's contention that vagueness should be considered in terms of the ordinance's application to other violators. *Id.* at 519, 592 S.E.2d at 780.

32. *Id.* at 521–25, 592 S.E.2d at 781–83.

that the club was not a theater and the performers were not engaged in a theatrical performance.[33]

B. *Fourth Amendment*

The 2004 term of the Supreme Court of the United States resulted in several significant Fourth Amendment cases that reaffirm the manner in which the Fourth Amendment has been applied in similar situations by Virginia courts.

In *Illinois v. Lidster*,[34] a highway checkpoint was set up one week after a hit-and-run accident and at the same location and time of night as the accident under investigation.[35] The Supreme Court of the United States found that the checkpoint was reasonable and did not violate the Fourth Amendment.[36] The Court held that the defendant, who, "as he approached the checkpoint, swerved, nearly hitting one of the officers," was properly stopped.[37] The Court further held that once the officer smelled alcohol on or about the defendant's person and conducted a field sobriety test, the defendant was properly arrested for driving under the influence of alcohol.[38] The Supreme Court specifically held that its decision in *City of Indianapolis v. Edmond*[39] did not govern the constitutionality of the checkpoint at issue here, which was intended to solicit help from motorists and passengers in obtaining information about an unsolved recent crime.[40] The Court applied the traditional test established in *Brown v. Texas*,[41] which examines "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty,"[42] to conclude that the checkpoint was wholly reasonable and met constitutional standards.[43]

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33. *Id.* at 525–26, 592 S.E.2d at 783.
34. 124 S. Ct. 885 (2004).
35. *Id.* at 888.
36. *Id.* at 891.
37. *Id.* at 888, 891.
38. *See id.*
39. 531 U.S. 32 (2000).
40. *Lidster*, 124 S. Ct. at 888–89.
41. 443 U.S. 47 (1979).
42. *Id.* at 51.
43. *Lidster*, 124 S. Ct. at 890–91.

The Supreme Court's decision in *United States v. Banks*[44] involved a question that has plagued Virginia's courts and criminal law practitioners for a very long time. With this decision, the Supreme Court of the United States has provided guidance on the length of time considered "reasonable" for the waiting period before police may enter a private residence in a "knock and announce" execution of a search warrant.[45] *Banks* addresses the situation wherein the risk of losing evidence—in this case, cocaine—arose shortly after the police knocked on a door and announced their presence with a warrant.[46] The Court ruled that after waiting "15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they [waited] any longer" before entering the residence.[47] The Court opined that the important fact is not how long it takes for the individual inside to get to the door, but how long it takes to destroy the evidence.[48] While each case will depend upon its particular facts, in this case, the Court found that the police entry after a fifteen- to twenty-second waiting period was proper.[49]

Another Fourth Amendment decision, *Maryland v. Pringle*,[50] arguably alters the manner in which some state courts have viewed occupants' presence in a car with drugs. In *Pringle*, a police officer stopped a car for speeding.[51] There were three occupants in the car.[52] The officer requested the driver's license and registration[53] and when the driver opened the glove compartment to retrieve the registration, the officer saw a large wad of money.[54] The officer took the license and registration back to the police car and ran a records check on the driver's license, finding no violations.[55] The officer returned to the car, gave the driver an oral warning, and then asked if he could search the car; the

44. 124 S. Ct. 521 (2003).
45. *Id.* at 523–24.
46. *Id.* at 526.
47. *Id.*
48. *Id.* at 527.
49. *Id.*
50. 124 S. Ct. 795 (2003).
51. *Id.* at 798.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

driver gave his consent to a search.[56] The officer found five baggies of cocaine behind the backseat armrest and all three occupants were arrested for possession of cocaine.[57] Subsequently, Pringle admitted that the drugs belonged to him alone.[58] The Supreme Court found that

> it [is] an entirely reasonable inference . . . that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly [with others in the vehicle].[59]

The final Supreme Court case relating to the Fourth Amendment is one which originated in the United States Court of Appeals for the Fourth Circuit. In *Thornton v. United States*,[60] the Supreme Court addressed the issue of whether the search of an automobile subsequent to the custodial arrest of an occupant of that vehicle, as approved in *New York v. Belton*,[61] extends to situations where the officer first comes into contact with the arrestee when the arrestee is outside the vehicle.[62] The Court held that "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle."[63] Consequently, a contemporaneous search of the vehicle is proper.[64] In short, the Court held that *Belton* allows police to search a car's passenger compartment incident to a lawful custodial arrest of both an actual occupant or "recent" occupant of the car.[65] Chief Justice Rehnquist, writing for the majority, noted:

> [W]hile an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.[66]

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 800–01.
60. 124 S. Ct. 2127 (2004).
61. 453 U.S. 454 (1981).
62. *Thornton*, 124 S. Ct. at 2129.
63. *Id.*
64. *Id.* at 2132.
65. *Id.*
66. *Id.* at 2131–32.

This interpretation of *Belton* is consistent with previous Virginia decisions.[67]

In addition to Supreme Court cases, Virginia state courts have ruled on a number of important Fourth Amendment cases during the past year.

An important case from the Supreme Court of Virginia, reversing a decision of the Court of Appeals of Virginia, is *Jackson v. Commonwealth*.[68] *Jackson* dealt with information provided to the police by an unidentified source.[69] A police officer received a dispatched call, based on a tip from an anonymous caller.[70] The officer was told that about three African-American males in a car, which was described by make and color and was reported as being at a specific intersection.[71] The complainant told the dispatcher that the three men had been disorderly, and that one of them had brandished a firearm.[72] The officer assigned to the call approached the specified intersection, observed that the car was occupied by three African-American males, and executed a traffic stop.[73] The defendant, a passenger, had his hands folded across his stomach.[74] Another officer who arrived on the scene ordered the defendant out of the car and a gun was removed from the waistband of defendant's pants.[75] He was searched and rocks of cocaine were found in his pants pocket.[76]

The defendant moved to suppress based on the claim that the police lacked a reasonable, articulable suspicion of criminal activity prior to the stop, but the motion was denied.[77] The Court of Appeals of Virginia affirmed the defendant's conviction for the drug and firearms offenses.[78] The Supreme Court of Virginia, however, following *Florida v. J.L.*,[79] reversed the convictions.[80]

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67. *See, e.g.*, Glasco v. Commonwealth, 257 Va. 433, 513 S.E.2d 137 (1999).
68. 267 Va. 666, 594 S.E.2d 595 (2004).
69. *Id.* at 669, 594 S.E.2d at 596.
70. *Id.* at 670, 594 S.E.2d at 597.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 671, 594 S.E.2d at 597.
75. *Id.*
76. *Id.*
77. *Id.* at 670, 594 S.E.2d at 596.
78. *Id.*, 594 S.E.2d at 597; *see* Jackson v. Commonwealth, 39 Va. App. 624, 576 S.E.2d 206 (Ct. App. 2003).
79. 529 U.S. 266 (2000).

The court held that "[u]nder the totality of the circumstances, . . . the anonymous tip lacked sufficient indicia of reliability to justify the investigatory stop of the vehicle," which meant "the stop was illegal as well as the subsequent search of Jackson's person."[81]

In the area of what constitutes a lawful "arrest," a case worthy of note is *Hudson v. Commonwealth*.[82] In *Hudson,* the defendant was driving erratically and was detained by an off-duty, uniformed police officer who was outside of his jurisdictional boundary.[83] The officer detained Hudson until another officer, within proper jurisdiction, arrived.[84] The original officer did not collect any evidence, but merely held the defendant.[85] Subsequently, the second officer asked Hudson to submit to a breath test for alcohol, but Hudson repeatedly failed to provide a valid sample.[86] He was ultimately convicted for an "unreasonable refusal to submit to a blood or breath test" in violation of Virginia Code section 18.2-268.3.[87] The Court of Appeals of Virginia initially reversed, but the Supreme Court of Virginia upheld the conviction, finding that the first officer, acting outside his jurisdiction, did not attempt to gather any evidence and merely made a valid citizen's arrest for a breach of the peace.[88]

In *Jarrett v. Commonwealth*,[89] the Court of Appeals of Virginia was faced with the question of whether a computer hacker, who had previously provided credible information to authorities and provided information to the police which aided in the apprehension of this defendant, was acting as a government agent when he conducted his search of the defendant's computer.[90] The computer hacker, who was located in Turkey, provided the police with information about the defendant which led to his convictions for "sodomy, object sexual penetration, and aggravated sexual battery."[91] The court of appeals found that the computer hacker,

80. *Jackson*, 267 Va. at 681, 594 S.E.2d at 603.
81. *Id.* at 681, 594 S.E.2d at 603.
82. 266 Va. 371, 585 S.E.2d 583 (2003).
83. *Id.* at 373, 585 S.E.2d at 584.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*; *see also* VA. CODE ANN. § 18.2-268.3 (Repl. Vol. 2004).
88. *Hudson*, 266 Va. at 382–83, 585 S.E.2d at 590.
89. 42 Va. App. 702, 594 S.E.2d 295 (Ct. App. 2004).
90. *Id.* at 705, 594 S.E.2d at 297.
91. *Id.* at 702, 709–11, 594 S.E.2d at 299.

identified as "Unknown user," was not acting as a government agent when he obtained the incriminating information about the defendant which he provided to the police.[92] Thus, there was no unlawful search.[93] To reach this result, the court applied a two-part test: "'(1) whether the government knew of and acquiesced in the search, and (2) whether the search was conducted for the purpose of furthering the private party's ends.'"[94] Additionally, the court analyzed "whether the private party acted at the request of the government and whether the government offered a reward."[95]

In *Commonwealth v. Jones*,[96] the Supreme Court of Virginia, reversing the court of appeals, refashioned the test being used in Virginia with regard to application of the "inevitable discovery" exception to the exclusionary rule.[97] In *Jones*, the police were on patrol at night, near a residence where there had been numerous complaints of drug sales.[98] "Officers approached the residence [from the rear] and [saw] a group of men standing on the sidewalk in front of the [house]."[99] The men fled as soon as the officers arrived.[100] One of the officers aimed his flashlight at the defendant and saw a gun in his hand.[101] The officer alerted the other officers of the danger and directed the defendant to "[g]et on the ground."[102] He then "wrestled [the defendant] to the ground and heard [the] gun hit the pavement."[103] Another officer retrieved the weapon and the defendant was placed under "investigative detention," handcuffed, and searched.[104] A substance believed to be cocaine was found on the defendant's person and he was transported to the police station.[105] During a routine criminal history

92. *Id.* at 717, 594 S.E.2d at 302.

93. *See id.* at 717, 594 S.E.2d at 303.

94. *Id.* at 713, 594 S.E.2d at 300–01 (quoting Mills v. Commonwealth, 14 Va. App. 459, 463–64, 418 S.E.2d 718, 720 (Ct. App. 1992)).

95. *Id.* at 713, 594 S.E.2d at 301 (quoting Sabo v. Commonwealth, 38 Va. App. 63, 75, 561 S.E.2d 761, 767 (Ct. App. 2002)).

96. 267 Va. 532, 593 S.E.2d 204 (2004).

97. *Id.* at 538, 593 S.E.2d at 208.

98. *Id.* at 534, 593 S.E.2d at 205.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

check at the station, the officer found that the defendant "had been found guilty as a juvenile of an offense that would be a felony if committed by an adult."[106] The defendant was charged with a firearms offense.[107] After the defendant had been advised of his rights, he admitted that the contraband on his person was cocaine.[108]

In considering the defendant's motion to suppress the cocaine, the trial court held that the detention was proper, as a pat-down for weapons would have been authorized, but a full search of the defendant's person was not appropriate because the officer lacked probable cause at the time of the search.[109] Nevertheless, the trial court determined that "discovery of the drugs [on the defendant's person] would have been inevitable" under the circumstances and, consequently, denied the motion to suppress the cocaine.[110] The trial court relied on the testimony of the officer that whenever a firearm is involved he would, in the ordinary course of business, check for outstanding warrants or convictions.[111]

The Court of Appeals of Virginia reversed the trial court's decision,[112] relying on the three-part test articulated in *Walls v. Commonwealth*.[113] The *Walls* court embraced and adopted the test first developed in *United States v. Cherry*, a decision by the Court of Appeals for the Fifth Circuit.[114] The *Cherry* test requires the police to be in active pursuit of an alternative line of investigation prior to misconduct.[115] Based on this test, the court of appeals ruled that inevitable discovery was inapplicable, and the trial court improperly admitted the evidence.[116]

The Supreme Court of Virginia reversed the decision of the court of appeals, ruling that the three-part test was not based on Supreme Court of the United States precedent set by *Nix v. Wil-*

106. *Id.* at 535, 593 S.E.2d at 206.
107. *Id.*
108. *Id.* at 534–35, 593 S.E.2d at 206. Upon analysis, the substance turned out to be aspirin. *Id.* at 535 n.3, 593 S.E.2d at 206 n.3.
109. *Id.* at 535, 593 S.E.2d at 206.
110. *Id.*
111. *Id.*
112. *Id.* at 536, 593 S.E.2d at 206.
113. 2 Va. App. 639, 347 S.E. 2d 175 (Ct. App. 1986).
114. 759 F.2d 1196 (5th Cir. 1985).
115. *Id.* at 536, 593 S.E.2d at 207.
116. *Id.* at 536–37, 593 S.E.2d at 207.

liams.[117] Specifically, the court found that the third component, requiring that, prior to the misconduct the police were actively pursuing an alternative line of investigation, was too stringent and would "tip the scales against the prosecution and put it in a worse position than it would have been in had no illegality transpired."[118]

According to the court, "inevitable discovery" depends on the application of a two-part test: 1) reasonable probability that "but for" the police misconduct the evidence would have been discovered and 2) the leads making discovery inevitable were possessed by the police at the time of the misconduct.[119] The supreme court concluded that, because a preponderance of the evidence showed that the cocaine "ultimately and inevitably would have been discovered by lawful means," it was admissible and the decision of the trial court was affirmed.[120]

A final case worth noting for purposes of Fourth Amendment analysis is *Fisher v. Commonwealth*.[121] In *Fisher*, the Court of Appeals of Virginia held that the defendant's operation of his vehicle without a valid inspection sticker, under the circumstances of the case, provided the police with lawful grounds to impound the vehicle and conduct an inventory search pursuant to that police department's policy.[122] Contrary to the defendant's suggestion, the police were neither required to determine the basis for the vehicle's rejection after inspection, nor were they required to ask the defendant if he wished to make alternative towing arrangements before the officer enforced his department's procedure with regard to impoundment of defective vehicles.[123]

C. *Fifth Amendment*

In *Powell v. Commonwealth*,[124] a case unusual even by the standards of capital litigation, the Supreme Court of Virginia ad-

117. *See id.* at 538, 593 S.E.2d at 208 (applying *Nix*, 467 U.S. 431 (1984)).
118. *Id.*
119. *Id.* at 538, 593 S.E.2d at 208.
120. *Id.* at 538, 593 S.E.2d at 208 (quoting *Nix*, 467 U.S. at 444).
121. 42 Va. App. 395, 592 S.E.2d 377 (Ct. App. 2004).
122. *Id.* at 403, 592 S.E.2d at 381.
123. *Id.* at 401, 405, 592 S.E.2d at 379, 381.
124. 267 Va. 107, 590 S.E.2d 537 (2004).

dressed several Fifth Amendment issues. Powell was originally convicted of the capital murder of Stacey Reed and the attempted capital murder of Stacey's sister, Kristie Reed.[125] In his first trial, the predicate for capital murder was that Powell raped Kristie before or during the murder of Stacey.[126] On appeal, the court found there was no evidence that Powell had sexually assaulted Stacey "before or during her murder" and "that the rape of Kristie did not occur until after the murder of her sister."[127] Since the Commonwealth had to prove the rape of Kristie occurred before or during the murder of Stacey, the Commonwealth failed to establish the predicate for capital murder.[128] After the court handed down its decision, the defendant wrote a taunting letter to the Commonwealth's Attorney detailing his attempt to rape Stacey before he killed her.[129] Relying on this letter, the Commonwealth obtained a new indictment for capital murder.[130] The new charge relied on Powell's attempt to rape Stacey, rather than her sister Kristie.[131] Powell was subsequently convicted and sentenced to death.[132]

On appeal, the supreme court framed the issue as one of collateral estoppel, "whether the jury in Powell's first trial considered whether Powell attempted to rape Stacey Reed and concluded that he did not."[133] In resolving the question, the court examined the indictment in conjunction with the Commonwealth's response to the bill of particulars.[134] In its response, the government "clearly limited the prosecution of the capital murder of Stacey . . . to proof of the rape or attempted rape of Kristie."[135] The court again relied on the bill of particulars to reject the defendant's double jeopardy argument concluding:

> [W]here, prior to the attachment of jeopardy, the Commonwealth limits the prosecution of a capital murder, undifferentiated in the

125. *Id.* at 116, 590 S.E.2d at 543.
126. *Id.* at 117, 590 S.E.2d at 543.
127. *Id.*
128. *Id.*
129. *See id.* at 117–18, 590 S.E.2d at 544.
130. *Id.* at 118, 590 S.E.2d at 544.
131. *Id.*
132. *Id.* at 126, 590 S.E.2d at 549.
133. *Id.* at 131, 590 S.E.2d at 551.
134. *Id.* at 131, 590 S.E.2d at 552.
135. *Id.*

> indictment by the identity of the victim of the gradation offense, by naming a specific victim of the gradation offense in a bill of particulars, jeopardy will attach only to the capital murder charge as made specific by the bill of particulars.[136]

In *J.D. v. Commonwealth*,[137] the Court of Appeals of Virginia considered whether statements made by a student to an assistant principal of his school should be suppressed because the defendant did not receive any *Miranda*[138] warnings.[139] In response to questioning by the assistant principal, the defendant admitted his involvement in the theft of a video camera.[140] Citing the "weight of authority" from other states, the court concluded the statements should not be suppressed because the assistant principal who questioned the defendant "was not a law enforcement officer, nor was he acting as an agent of a law enforcement governmental agency [and] . . . did not act at the direction of the police."[141] Furthermore, since J.D. was not "in custody," or "otherwise deprived of his freedom,"[142] the strictures of the *Miranda* decision did not apply.[143] Finally, the court declined to extend the exclusionary rule to such situations on the policy ground of fostering an environment of cooperation in the school, stating that such policy decisions "are more appropriately addressed to the legislature."[144]

The Court of Appeals of Virginia held in *Hudgins v. Commonwealth*[145] that the Double Jeopardy Clause forbids a reprosecution for larceny from the person when the defendant has been previously acquitted of robbery for the same theft.[146] After examining the elements of the two offenses, the court held that "larceny from the person . . . is a lesser-included offense of robbery."[147] Because it is a lesser-included offense, an acquittal on the greater offense

136. *Id.* at 135, 590 S.E.2d at 554.

137. 42 Va. App. 329, 591 S.E.2d 721 (Ct. App. 2004). For additional discussion of this case, see Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Family and Juvenile Law*, 39 U. RICH. L. REV. 241, 264 (2004).

138. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

139. *J.D.*, 42 Va. App. at 332, 591 S.E.2d at 723.

140. *Id.* at 333, 591 S.E.2d at 723.

141. *Id.* at 336, 591 S.E.2d at 725.

142. *Miranda*, 384 U.S. at 445.

143. *Id.* at 337, 591 S.E.2d at 725.

144. *Id.* at 337–38, 591 S.E.2d at 725–26.

145. 43 Va. App. 219, 597 S.E.2d 221(Ct. App. 2004).

146. *Id.* at 240, 597 S.E.2d at 231.

147. *Id.*

precludes a prosecution on the lesser charge.[148] To the extent the court's prior decision in *Graves v. Commonwealth*[149] holds otherwise, that decision was overruled.[150]

D. *Sixth Amendment*

1. Confrontation Clause

The Supreme Court of the United States handed down a decision with a major impact on Virginia criminal trials. At issue in *Crawford v. Washington*[151] was whether the trial court properly admitted a statement made to the police by the defendant's wife.[152] The statement undermined the defendant's explanation that he stabbed the victim in self-defense.[153] The defendant's wife did not testify at trial because of the marital privilege.[154] Prior to *Crawford*, such statements were deemed to satisfy the Confrontation Clause if they bore an "adequate indicia of reliability."[155] Following a lengthy historical analysis, the Court concluded that the only way to ensure the reliability of "testimonial" statements is by subjecting them to cross-examination.[156] The Court held that "[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[157] The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'"[158] The opinion specifies, however, that "testimonial" certainly covers evidence of "testimony at a preliminary hearing, before a grand jury, or at a former trial;

148. *Id.* at 239, 597 S.E.2d at 230.

149. 21 Va. App. 161, 462 S.E.2d 902 (Ct. App. 1995), *aff'd on reh'g en banc*, 22 Va. App. 262, 468 S.E.2d 710 (Ct. App. 1996).

150. *Hudgins*, 43 Va. App. at 240, 597 S.E.2d at 231.

151. 124 S. Ct. 1354 (2004).

152. *Id.* at 1359.

153. *Id.* at 1358.

154. *Id.* at 1357.

155. *Id.* at 1359 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). *Crawford* explicitly overrules *Roberts*. *Id.* at 1374. The Court said that "the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable." *Id.* at 1374 n.10.

156. *Id.* at 1365.

157. *Id.* at 1369.

158. *Id.* at 1374.

and to police interrogations."[159] Statements that are not testimonial are not affected by the Court's holding.[160]

2. Juries

The Court of Appeals of Virginia addressed an issue of juror bias in *Brooks v. Commonwealth*.[161] In *Brooks*, the defendant was charged with various sex crimes against minors.[162] During the trial, a juror informed the court clerk that her brother-in-law was the victim's great uncle, but that she did not know the victim.[163] The court examined the juror, and determined, over the defendant's objection, that she was impartial and should remain on the jury.[164] On appeal, the court of appeals examined whether the rules of consanguinity or affinity required the exclusion of the juror.[165] First, consanguinity is defined as a "'relation by blood.'"[166] The court noted the juror "was not related by blood to her sister's husband and, by extension, she was not related by blood to the victims or their fathers."[167] Second, affinity "'is the relation of one spouse to the other spouse's kindred.'"[168] The court held "the relationship at issue did not involve [the juror] and her husband's blood relatives. Rather, it involved a relationship between her sister's husband and his blood relatives."[169] Therefore, "the relationship does not fall within the definition of affinity."[170] The record supported the trial court's conclusion that the juror would be impartial.[171] The court also concluded that allowing the juror to hear the case would not affect the public confidence in the judicial process.[172]

159. *Id.*
160. *Id.*
161. 41 Va. App. 454, 585 S.E.2d 852 (Ct. App. 2003).
162. *Id.* at 457, 585 S.E.2d at 853.
163. *Id.*
164. *Id.* at 459, 585 S.E.2d at 854.
165. *Id.* at 460, 585 S.E.2d at 854.
166. *Id.* (quoting Doyle v. Commonwealth, 100 Va. 808, 810, 40 S.E. 925, 926 (1902)).
167. *Id.* at 460, 585 S.E.2d at 854–55.
168. *Id.*, 585 S.E.2d at 855 (quoting *Doyle*, 100 Va. at 810, 40 E.S.2d at 926).
169. *Id.* at 461, 585 S.E.2d at 855.
170. *Id.*
171. *Id.* at 462, 585 S.E.2d at 855.
172. *Id.* at 463–64, 585 S.E.2d at 856.

In *Blevins v. Commonwealth*,[173] the Supreme Court of Virginia examined whether a juror's failure to accurately answer a question during voir dire required a mistrial.[174] During voir dire, the trial court asked the members of the venire if they "ha[d] ever been the victim[s] of a serious offense."[175] The members of the venire answered in the negative.[176] Following the conclusion of the trial and the conviction of the defendant, one juror told a deputy that she did not park in the parking garage because she had been the victim of an armed robbery in a parking garage.[177] The deputy brought this fact to the attention of the Commonwealth's Attorney, who notified defense counsel.[178] Upon the defendant's motion for a mistrial as a result of this discovery, the court conducted a hearing.[179] Based on the juror's answers, the court concluded that the juror's false answer during voir dire was inadvertent and that she had been unbiased and impartial.[180] The Supreme Court of Virginia affirmed the court of appeals' conclusion that the defendant had suffered no violation of his right to an impartial jury.[181]

Deferring to the factual findings of the trial court the supreme court applied the test in *McDonough Power Equipment, Inc. v. Greenwood*.[182] The McDonough test requires the moving party to "first demonstrate that a juror failed to answer honestly a material question on *voire dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause."[183] Relying on this test, the supreme court held that the juror was not dishonest and, moreover, there was no evidence of actual bias on her part.[184]

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173. 267 Va. 291, 590 S.E.2d 365 (2004).
174. *Id.* at 293, 590 S.E.2d at 366.
175. *Id.*
176. *Id.*
177. *Id.* at 294, 590 S.E.2d at 366–67.
178. *Id.*, 590 S.E.2d at 367.
179. *Id.*
180. *Id.* at 295, 590 S.E.2d at 367.
181. *Blevins*, 267 Va. at 297, 590 S.E.2d at 369.
182. *Id.* at 296–97, 590 S.E.2d at 368 (applying the two-part test of *McDonough*, 464 U.S. 548, 556 (1984)).
183. *McDonough*, 464 U.S. at 556.
184. *Id.* at 297, 590 S.E.2d at 369.

E. *Fourteenth Amendment*

In *Luttrell v. Commonwealth*,[185] the defendant's plea agreement specified that he was to be sentenced in accord with the applicable sentencing guidelines.[186] At his sentencing, the defendant claimed the court should employ the sentencing guidelines in effect at the time of the commission of the offense.[187] Instead, the court used the harsher guidelines in effect at the time of sentencing.[188] The Court of Appeals of Virginia examined whether this practice violated the defendant's Due Process rights or whether the use of the new guidelines constituted an ex post facto application of the law.[189] The court rejected the analogy to Florida's legislatively enacted guidelines discussed in *Miller v. Florida*,[190] which require a judge to articulate by clear and convincing evidence any departure from the presumptive range.[191] The Florida court's decision is then reviewed on appeal.[192] In contrast, Virginia's discretionary sentencing guidelines constitute "merely procedural tools to assist and guide a judge in the exercise of the judge's sentencing discretion."[193] The trial court is not bound by the guidelines' presumptive range, and its decision is not subject to appellate review.[194] The Virginia guidelines are not enacted by the legislature, and the legislature need not approve the changes to the guidelines.[195] Therefore, use of the new guidelines was not an ex post facto application of the law, and the defendant suffered no violation of due process when the court considered them.[196]

185. 42 Va. App. 461, 592 S.E.2d 752 (Ct. App. 2004).
186. *Id.* at 463, 592 S.E.2d at 753.
187. *Id.*
188. *Id.*
189. *Id.* at 465–67, 592 S.E.2d at 754.
190. 482 U.S. 423 (1987).
191. *Id.* at 426.
192. *Id.* at 434–35.
193. *Luttrell*, 42 Va. App. at 468, 592 S.E.2d at 755.
194. *Id.* at 467, 592 S.E.2d at 755.
195. *Id.* at 468, 592 S.E.2d at 755.
196. *Id.*

III. CRIMINAL PROCEDURE AND TRIALS

A. *Trial Court Jurisdiction*

The defendant in *Jones v. Commonwealth*[197] pled "no contest" to charges of distribution of cocaine.[198] Afterwards, the Commonwealth presented the testimony of a police officer regarding the street address where the drug sale took place.[199] Jones argued on appeal that the circuit court "lacked jurisdiction because the evidence [did] not establish that the [sale] occurred in Virginia"—a prerequisite to the court's subject matter jurisdiction.[200] The Court of Appeals of Virginia held that Jones's no contest plea admitted as true all the facts contained in the indictment.[201] The indictment specified "City of Petersburg, Commonwealth of Virginia" and that Jones sold cocaine in "said city."[202] The reference to "said city," the court concluded, "can only logically and grammatically be the 'City of Petersburg, Commonwealth of Virginia.'"[203] Therefore, "the required jurisdictional facts were proved."[204]

The acquisition of jurisdiction by circuit courts over juvenile defendants has occasioned frequent litigation in the Commonwealth. In *Cook v. Commonwealth*,[205] the juvenile had faced prior charges that were certified to the circuit court but were then nolle prosequied.[206] When the Commonwealth later brought further charges, the defendant argued he should be tried in juvenile court rather than circuit court.[207] The Supreme Court of Virginia disagreed, holding that Virginia Code section 16.1-271 is unambiguous: once a juvenile is "treated as an adult," the juvenile and do-

197. 42 Va. App. 142, 590 S.E.2d 572 (Ct. App. 2004).
198. *Id.* at 144, 590 S.E.2d at 573.
199. *Id.* at 145, 590 S.E.2d at 574.
200. *Id.*
201. *Id.* at 148, 590 S.E.2d at 575.
202. *Id.* at 145, 590 S.E.2d at 573–74.
203. *Id.* at 148, 590 S.E.2d at 575.
204. *Id.*
205. 268 Va. 111, 597 S.E.2d 84 (2004). For additional information on juveniles tried as adults, see Shepherd, *supra* note 137, at 267–68.
206. *Id.* at 113, 597 S.E.2d at 85. "The effect of a nolle prosequi is to discontinue the prosecution relative to the charges." *Id.* at 114, 597 S.E.2d at 85–86.
207. *Id.* at 113, 597 S.E.2d at 85.

mestic relations court is divested of jurisdiction.[208] The nolle prosequi did not "erase the fact that Cook was treated as an adult for those proceedings."[209]

In *Austin v. Commonwealth*,[210] following an appeal from the juvenile and domestic relations court, the circuit court ordered Austin committed to the Department of Juvenile Justice; she was later paroled.[211] Several months later, her parole officer filed a petition with the circuit court seeking to revoke her parole.[212] The circuit court agreed and revoked her parole.[213] On appeal, Austin argued that the circuit court lacked jurisdiction over her and the proceedings should have been conducted in the juvenile and domestic relations court.[214] The Court of Appeals of Virginia disagreed.[215] Relying on Virginia Code section 16.1-297, the court held that "[o]nce the circuit court acquires jurisdiction, it retains jurisdiction over the juvenile proceedings until it remands the matter to the juvenile court, dismisses the proceedings or discharges the juvenile."[216] Since the circuit court did none of these things, it retained jurisdiction to revoke Austin's parole.[217]

B. *Appeals from General District Court*

The Supreme Court of Virginia resolved a complex issue regarding revocations of suspended time following an appeal to circuit court from general district court in *Commonwealth v. Diaz*.[218] On June 27, 2000, the defendant was convicted in general district court of driving as an habitual offender—a misdemeanor offense—and given a sentence of ninety days, with seventy days suspended.[219] The sentence was suspended conditional on the de-

208. *Id.* at 114, 597 S.E.2d at 85–86.
209. *Id.*, 597 S.E.2d at 86.
210. 42 Va. App. 33, 590 S.E.2d 68 (Ct. App. 2003).
211. *Id.* at 35–36, 590 S.E.2d at 69–70.
212. *Id.* at 36, 590 S.E.2d at 70.
213. *Id.*
214. *Id.*
215. *Id.* at 37, 590 S.E.2d at 70.
216. *Id.* at 38, 590 S.E.2d at 71.
217. *Id.* at 39, 590 S.E.2d at 71.
218. 266 Va. 260, 585 S.E.2d 552 (2003).
219. *Id.* at 262, 585 S.E.2d at 553.

fendant's good behavior.[220] On his way home from court—not wasting any time—he was arrested for driving after having been declared an habitual offender, a felony offense.[221] On July 5, 2000, he appealed the district court judgment but withdrew the appeal on August 1, 2000.[222] Three days after Diaz withdrew the appeal, the circuit court entered an order confirming the misdemeanor conviction of the general district court.[223] Diaz later pled guilty to the felony charge.[224] Following a revocation hearing, the circuit court also revoked the suspended sentence for the misdemeanor offense.[225] Diaz argued that when the circuit court entered its order affirming the misdemeanor conviction, it abrogated the prior judgment of the district court.[226] Since the period of "good behavior" did not begin until the entry of the circuit court order, he reasoned, he could not be subject to revocation for an event that occurred before the entry of the misdemeanor conviction order in the circuit court.[227] The Supreme Court of Virginia held that the revocation was proper.[228] The court relied on the unambiguous language of Virginia Code section 16.1-133, which provides that "[i]f the appeal [from general district court] is withdrawn more than ten days after conviction, the circuit court shall forthwith enter an order affirming the judgment of the lower court . . . ."[229] The word "affirm" signifies that a "general district court judgment in the withdrawn appeal remains in effect and is ratified by the circuit court order."[230] Because the general district court order remained in effect, the defendant's suspended time could be revoked for violating the good behavior condition of his suspended sentence.[231]

220. *Id.*
221. *Id.* at 262–63, 585 S.E.2d at 553.
222. *Id.* at 263, 585 S.E.2d at 553.
223. *Id.*
224. *Id.*
225. *Id.*, 585 S.E.2d at 553–54.
226. *Id.*
227. *Id.* at 264, 585 S.E.2d at 553–54.
228. *Id.* at 266, 585 S.E.2d at 555.
229. *Id.* at 263, 585 S.E.2d at 553.
230. *Id.* at 265, 585 S.E.2d at 555.
231. *Id.* at 265–66, 585 S.E.2d at 555.

C. *Indictments*

The Supreme Court of Virginia laid to rest an issue regarding indictments and proof in cases involving legal persons rather than natural persons. In *Commonwealth v. Nuckles*,[232] the indictment charged the defendant with grand larceny of goods belonging to Breeden Mechanical, Inc.[233] The defendant contended that the failure of the Commonwealth to prove that Breeden Mechanical was incorporated was fatal to its case.[234] The Supreme Court of Virginia disagreed, holding that "[p]roof that Breeden was incorporated at the time of the offense was not necessary to identify Breeden as the victim of this larceny, nor was Breeden's corporate status an element of the offense."[235] Finally, the evidence at trial established that Breeden Mechanical was indeed the victim.[236]

D. *Contemporaneous Objection*

It is well established that a defendant must object in a timely and specific manner to preserve an issue for appellate review.[237] In *Elliott v. Commonwealth*,[238] the capital defendant's first trial ended in a mistrial.[239] At his retrial, he did not renew a number of objections raised in his first trial regarding jury instructions on the "vileness" aggravating factor.[240] The Supreme Court of Virginia concluded that the rulings of a trial court in a first trial do not apply in the second trial unless the court adopts them anew.[241] Therefore, a defendant must renew his objections to trial court rulings in a second trial to preserve the issues for an appeal.[242]

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232. 266 Va. 519, 587 S.E.2d 695 (2003).
233. *Id.* at 520, 587 S.E.2d at 695.
234. *Id.* at 522, 587 S.E.2d at 696.
235. *Id.* at 523, 587 S.E.2d at 697.
236. *Id.*
237. *See* VA. SUP. CT. R. 5:25 & 5A:18 (Repl. Vol. 2004).
238. 267 Va. 396, 593 S.E.2d 270 (2004).
239. *Id.* at 407, 593 S.E.2d at 278.
240. *Id.* at 408, 593 S.E.2d at 278.
241. *Id.* at 428, 593 S.E.2d at 290.
242. *Id.*

In *Edwards v. Commonwealth*,[243] the Commonwealth charged the defendant with attempted capital murder of a police officer.[244] At trial, the court granted the motion to strike the attempted capital murder charge but convicted the defendant of assault and battery.[245] On appeal, Edwards argued she could not be convicted of the battery of a law enforcement officer because the offense is not a lesser-included offense of attempted capital murder on a police officer.[246] The Court of Appeals of Virginia first held that the defendant's argument on appeal was defaulted because she raised a different ground for reversal than the one argued below.[247] Edwards contended, however, that she could raise the error for the first time on appeal because the trial court had exceeded its authority by erroneously convicting her of a lesser-included offense that was *not* actually a lesser-included offense.[248] She relied on *Lowe v. Commonwealth*[249] and *Fontaine v. Commonwealth*,[250] two decisions reversing convictions under similar circumstances. After analyzing the reasoning in *Lowe* and *Fontaine*, the court held that *Lowe* and *Fontaine* erroneously equate "the authority to exercise jurisdiction with basic jurisdictional requirements."[251] That distinction, the court held, was abolished in *Nelson v. Warden of the Keen Mountain Correctional Center*.[252] Therefore, the court said it was "required to overrule those decisions to the extent that they conclude a conviction of an offense that is not a lesser-included offense of the indicted charge renders the judgment void, i.e., it can be raised at any time in any court."[253] Accordingly, the contemporaneous objection rule barred appellate review, and the court affirmed the defendant's conviction.[254]

243. 41 Va. App. 752, 589 S.E.2d 444 (Ct. App. 2003).
244. *Id.* at 756, 589 S.E.2d at 446.
245. *Id.* at 758–59, 589 S.E.2d at 446–47.
246. *Id.* at 759, 589 S.E.2d at 252.
247. *Id.* at 760, 589 S.E.2d at 447.
248. *Id.* at 761, 589 S.E.2d at 448.
249. 33 Va. App. 583, 535 S.E.2d 689 (Ct. App. 2000).
250. 25 Va. App. 156, 487 S.E.2d 241 (Ct. App. 1997).
251. *Edwards*, 41 Va. App. at 765, 589 S.E.2d at 450.
252. *Id.* (citing *Nelson*, 262 Va. 276, 281, 552 S.E.2d 73, 75 (2001)).
253. *Id.*
254. *Id.* at 767, 589 S.E.2d at 451.

E. *Disqualifying a Commonwealth's Attorney*

In *Powell v. Commonwealth*,[255] following his first trial for capital murder, the defendant wrote a taunting, offensive letter to the Commonwealth's Attorney.[256] In his second trial, he filed a motion to disqualify the Commonwealth's Attorney and his office, arguing the letter created a conflict of interest.[257] The trial court denied the motion.[258] On appeal, the Supreme Court of Virginia framed the issue as "whether, on the facts of a particular case, the adversarial nature of the judicial process has resulted in such enmity toward the defendant on the part of the prosecutor that it will overbear his professional judgment in seeking fairly and impartially to see justice done."[259] "One-sided acrimony," the court noted, does not "establish a conflict."[260] To prevail, "[t]he evidence must reflect that the prosecutor is acting not within the dictates of the law, but has strayed outside those parameters in furtherance of a personal animus against the defendant."[261] In this instance, the trial court could properly credit the prosecutor's assurance that the letter "had [no] . . . effect on his professional judgment."[262] Moreover, the court observed that "nothing in the Commonwealth's Attorney's conduct of the trial evinces any lack of such professional judgment on his part."[263]

F. *Trial Court Recusal*

The defendant in *Commonwealth v. Jackson*[264] contended that the trial judge should have recused himself from a probation revocation hearing because he was the Commonwealth's Attorney when the defendant was originally tried and convicted for the underlying offense.[265] The defendant cited the canons of judicial

255. 267 Va. 107, 590 S.E.2d 537 (2004).

256. *Id.* at 117–18, 590 S.E.2d at 544. For further discussion of this case, see *supra* notes 124–36 and accompanying text.

257. *Powell*, 267 Va. at 138, 590 S.E.2d at 556.

258. *Id.*

259. *Id.* at 139, 590 S.E.2d at 556.

260. *Id.*, 590 S.E.2d at 557.

261. *Id.*.

262. *Id.*

263. *Id.*

264. 267 Va. 226, 590 S.E.2d 518 (2004).

265. *Id.* at 228, 590 S.E.2d at 519.

conduct in support of his motion.[266] The Supreme Court of Virginia first held that a violation of the canons of judicial conduct, while significant, does not compel recusal.[267] The court also reiterated that a probation revocation is not a stage of a criminal proceeding.[268] Therefore, the judge did not in fact successively function as both accuser and trier-of-fact.[269] The court refused to adopt a per se rule that a former Commonwealth's Attorney appointed to the bench must recuse himself or herself "in any matter involving individuals who had committed a crime or been prosecuted at the time that the judge was Commonwealth's Attorney."[270] Instead, the moving party must prove bias or prejudice, which the defendant failed to do.[271] Without evidence of bias or prejudice, the decision for recusal is one within the discretion of the judge.[272] The record in *Jackson* showed no abuse of that discretion.[273]

G. *Trial Court Conduct*

In *Via v. Commonwealth*,[274] the defendant complained that the trial court erred "'by prompting and soliciting evidentiary objections from the Commonwealth in front of the jury and by berating and belittling defense counsel in her efforts to present proper defense evidence.'"[275] The Court of Appeals of Virginia found no prejudice from the comments of the trial court, noting that "the trial court specifically instructed the jury, at the beginning of trial, that his comments and demeanor should not be interpreted as indicative of his opinion."[276] The court further held that considering "the trial court's statements in their proper context, it is clear that the trial court, while obviously impatient and abrupt on occasions, was equally so with both parties."[277] The court of ap-

266. *Id.* at 228, 590 S.E.2d at 519.
267. *Id.* at 228–29, 590 S.E.2d at 519.
268. *Id.* at 229, 590 S.E.2d at 519.
269. *Id.*
270. *Id.*, 590 S.E.2d at 519.
271. *Id.*, 590 S.E.2d at 519–20.
272. *Id.*, 590 S.E.2d at 520.
273. *Id.* at 230, 590 S.E.2d at 520.
274. 42 Va. App. 164, 590 S.E.2d 583 (Ct. App. 2004).
275. *Id.* at 180, 590 S.E.2d at 591.
276. *Id.* at 182, 590 S.E.2d at 592.
277. *Id.*

peals did not "condone certain comments and the occasional lapse in the judicial demeanor of the trial court," but nevertheless, the court found "no evidence of substantial bias on the part of the judge."[278]

IV. EVIDENCE

A. *Attorney-Client Privilege*

In *Via v. Commonwealth*,[279] the defendant was charged with sodomy of a child under the age of thirteen.[280] The defendant hired an expert, Dr. Joseph C. Conley, "to assist him in evaluating the complainant, suggest defense theories, and method of presentations of those theories at trial."[281] The prosecution issued a subpoena duces tecum to Dr. Conley demanding the production of medical and counseling notes relating to the complaining witness.[282] The trial court denied the defendant's motion to quash the subpoena on the grounds that the attorney-client privilege and Rule 3A:11 of the Rules of the Supreme Court of Virginia did not preclude disclosure of the records.[283] The Court of Appeals of Virginia affirmed,[284] holding the records were not protected by the attorney-client privilege.[285] First, the court noted that while "'[t]he privilege attaches to communications of the client made to the attorney's agents . . . when such agent's services are indispensable to the attorney's effective representation of the client,'"[286] the privilege is "strictly construed," and the defendant bears the burden of demonstrating its applicability.[287] In this case, the defendant proffered no evidence to demonstrate the "indispensability" of Dr. Conley's records.[288] Second, the plain language of Rule

278. *Id.*
279. 42 Va. App. 164, 590 S.E.2d 583 (Ct. App. 2004).
280. *Id.* at 169, 590 S.E.2d at 585–86.
281. *Id.* at 188, 590 S.E.2d at 595.
282. *Id.* at 170, 590 S.E.2d at 586.
283. *Id.* at 170–71, 590 S.E.2d at 586.
284. *Id.* at 180, 590 S.E.2d at 591.
285. *Id.* at 188–89, 590 S.E.2d at 595.
286. *Id.* at 188, 590 S.E.2d at 595 (quoting Commonwealth v. Edwards, 235 Va. 499, 508–09, 370 S.E.2d 296, 301 (1988)).
287. *See id.* at 188–89, 590 S.E.2d at 595 (quoting *Edwards*, 235 Va. at 508–09, 370 S.E.2d at 301).
288. *Id.* at 189, 590 S.E.2d at 595.

3A:11 limits its application to documents in the hands of the defendant, whereas the documents at issue were held by a third party.[289] Therefore, the rule did not apply to the Commonwealth's subpoena.[290]

B. *Business Records*

Criminal prosecutions frequently invoke the business records exception to the hearsay rule. In *Parker v. Commonwealth*,[291] the Court of Appeals of Virginia addressed whether medical records, authenticated through the custodian of the records, were properly admitted in a malicious wounding case.[292] The records in question consisted of statements recorded by a doctor and two nurses concerning how the defendant had sustained an injury.[293] The records corroborated the Commonwealth's theory that the defendant had injured his hand while attacking the victim with a glass bottle.[294] The defendant asserted the prosecution failed to establish a proper foundation for the documents because the Commonwealth failed to prove that the doctor and two nurses were unavailable.[295] The court held that under the facts of this case, these witnesses were commercially unavailable, because "'the practical inconvenience of producing'" the doctor and two nurses "'outweigh[ed] the probable utility of doing so.'"[296]

C. *Identity of Person Listed in Prior Conviction Orders*

As a part of its burden of proving that John Anthony Holmes was previously convicted of domestic assault, the prosecution in

289. *Id.* at 189–90, 590 S.E.2d at 595.

290. *Id.* at 190, 590 S.E.2d at 595–96.

291. 41 Va. App. 643, 587 S.E.2d 749 (Ct. App. 2003).

292. *Id.* at 646, 587 S.E.2d at 750. For further discussion of the use of medical records in other contexts see Michael L. Goodman, Kathleen M. McCauley & Suzanne S. Duvall, *Annual Survey of Virginia Law: Discovery Divide: Virginia Code Section 8.01-581's Quality Assurance Privilege and its Protection of Healthcare Provider Policies and Incident Reports*, 39 U. RICH. L. REV. 61 (2004).

293. *Id.* at 648, 587 S.E.2d at 751.

294. *Id.*

295. *Id.* at 648–9, 587 S.E.2d at 751.

296. *Id.* at 653, 587 S.E.2d at 753–54 (quoting French v. Virginian Ry. Co., 121 Va. 383, 386, 93 S.E. 585, 585 (1917)).

Holmes v. Commonwealth[297] introduced certified copies of conviction orders from a different jurisdiction.[298] Holmes argued that the prosecution had failed to establish he was the person named in these orders, but offered no supporting evidence.[299] The Court of Appeals of Virginia held that the fact that the defendant's name was the same as the name listed on the orders created a permissible inference that the defendant was the person named in the orders.[300] This inference was supported by additional factors: the defendant's name is not a common one and the offenses all occurred in an adjoining jurisdiction by adult males of like age.[301] Accordingly, the fact-finder could reasonably conclude that the defendant was the person named in the conviction orders.[302]

D. *Dog Trailing*

In *Pelletier v. Commonwealth*,[303] the Court of Appeals of Virginia concluded that the trial court properly admitted evidence from a dog trailing expert.[304] The Commonwealth adduced evidence showing a bloodhound started following a trail from the scene where the victim's body was recovered and followed it to the defendant's residence.[305] The defendant objected to this testimony on the basis that it lacked the scientific foundation that must precede all expert testimony.[306] The court concluded that a scientific foundation is not required in every area of expert testimony.[307] With certain kinds of evidence, "experience and observation in a special calling" will provide a proper foundation.[308] To admit expert testimony on dog trailing, the "dog trailing evidence must be empirically shown to be reliable from experience."[309] In this case, the court held that "[t]he showing of reliability is met by testi-

297. 41 Va. App. 690, 589 S.E.2d 11 (Ct. App. 2003).
298. *Id.* at 692, 589 S.E.2d at 12.
299. *Id.*
300. *Id.*
301. *Id.* at 693, 589 S.E.2d at 12.
302. *Id.*
303. 42 Va. App. 406, 592 S.E.2d 382 (Ct. App. 2004).
304. *Id.* at 422–23, 592 S.E.2d at 390.
305. *Id.* at 415–16, 592 S.E.2d at 386–87.
306. *Id.* at 419, 592 S.E.2d at 388.
307. *Id.*
308. *Id.*
309. *Id.* at 420, 592 S.E.2d at 389.

mony from the handler establishing that he 'was qualified to work with the dog and to interpret its responses' and that 'the dog was a sufficiently trained and proven tracker of human scent.'"[310] The court also held that Virginia law "does not require definitive proof of the defendant's presence at a particular place on the trail" as a prerequisite to the admission of dog trailing evidence.[311] Rather, the evidence must establish "a nexus with the defendant's location and the commission of the crime under investigation."[312] That nexus was present in this case because direct and circumstantial evidence placed the defendant in the area where the trail began.[313]

E. *Expert Assistance*

The Supreme Court of Virginia, in *Commonwealth v. Sanchez*,[314] reversed the court of appeals decision that the defendant had shown the required "particularized need" for a DNA expert.[315] In response to a request for funds to employ a DNA expert, the court originally granted Sanchez $3,000.[316] Before trial, Sanchez sought additional funds.[317] He explained that the expert he hired had depleted the allotted funds in reviewing extensive documentation at the state laboratory.[318] Sanchez said he needed additional funds to pay for the expert's trial testimony.[319] He also proffered that the expert had identified errors in the state procedures employed to process his DNA and in the way the examination was performed.[320] The supreme court stated that "[a] review of Sanchez' proffer reflects that it rests only on conclusory assertions; nothing in his proffer is particularized."[321] His arguments, the court noted, reflected nothing more than his "hope or suspicion"

310. *Id.* (quoting Epperly v. Commonwealth, 224 Va. 214, 233, 294 S.E.2d 882, 893 (1982)).
311. *Id.* at 422, 592 S.E.2d at 390.
312. *Id.*
313. *Id.* at 422–23, 592 S.E.2d at 390.
314. 268 Va. 161, 597 S.E.2d 197 (2004).
315. *Id.* at 167, 597 S.E.2d at 200.
316. *Id.* at 163, 597 S.E.2d at 198.
317. *Id.*
318. *Id.* at 163–64, 597 S.E.2d at 198.
319. *Id.*
320. *Id.* at 164, 597 S.E.2d at 198.
321. *Id.* at 166, 597 S.E.2d at 200.

that he could adduce favorable evidence with regard to the DNA evidence.[322] Consequently, the trial court committed no error in denying Sanchez's request for additional funds.[323]

F. *Polygraph Evidence*

The Supreme Court of Virginia has long held that polygraph evidence is inadmissible in criminal trials due to its unreliability.[324] In *White v. Commonwealth*,[325] the court of appeals held that polygraph evidence, which demonstrated untruthful responses on behalf of a probationer, is also inadmissible at a hearing to revoke a suspended portion of a probationer's sentence.[326]

G. *Prior Crimes*

Virginia Code section 19.2-295.1 permits the Commonwealth to introduce evidence of a defendant's "prior criminal convictions" during the sentencing phase of a jury trial.[327] In *Jaccard v. Commonwealth*,[328] the defendant complained that the Commonwealth improperly introduced evidence of a probation revocation.[329] The Supreme Court of Virginia agreed, holding that probation revocations do not constitute prior convictions under the statute.[330]

H. *Rape Shield*

The Court of Appeals of Virginia held in *Pilcher v. Commonwealth*[331] that the rape shield law, which excludes certain evidence of a victim's prior sexual conduct, does not constitute an unconstitutional ex post facto law as applied to this defendant.[332]

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322. *Id.*
323. *Id.* at 167, 597 S.E.2d at 200.
324. *See* Robinson v. Commonwealth, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986).
325. 41 Va. App. 191, 583 S.E.2d 771 (Ct. App. 2003).
326. *Id.* at 194, 583 S.E.2d at 772.
327. VA. CODE ANN. § 19.2-295.1 (Repl. Vol. 2004).
328. 268 Va. 56, 597 S.E.2d 30 (2004).
329. *Id.* at 57, 597 S.E.2d at 30.
330. *Id.* at 59, 597 S.E.2d at 31.
331. 41 Va. App. 158, 583 S.E.2d 70 (Ct. App. 2003).
332. *Id.* at 169, 583 S.E.2d at 75; *see also* U.S. CONST. art. I, § 10; VA. CONST. art. 1, §

The defendant, who was convicted of raping a child, complained that the law changed the rules of evidence in effect at the time he committed the crime in a manner that prejudiced his defense.[333] The court noted that rules of evidence and procedure which do not affect the "'quantum of evidence necessary to sustain a conviction'" do not implicate the Ex Post Facto Clause.[334]

I. *Sex Crime Victim Impeachment*

In general, "a witness' character may not be impeached by showing specific acts of untruthfulness or bad conduct."[335] However, "the complaining witness [in sex offense cases] may be cross-examined about prior false accusations, and if the witness denies making the statement, the defense may submit proof of such charges."[336] Such accusations are admissible "only if a court makes a threshold determination that a reasonable probability of falsity exists."[337]

In *Richardson v. Commonwealth*,[338] the defendant sought to impeach the testimony of the complaining witness, alleging she had previously made false allegations of sexual misconduct against another person.[339] These prior allegations were false, he claimed, because the person against whom she made the allegations denied them.[340] The Court of Appeals of Virginia held that such "inherently self-serving" denials do not, by themselves, establish a reasonable probability of falsity.[341] Therefore, the trial court properly exercised its discretion in excluding this testimony.[342]

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333. *Pilcher*, 41 Va. App. at 164, 583 S.E.2d at 73.

334. *Id.* at 167–68, 583 S.E.2d at 74–75 (quoting Carmell v. Texas, 529 U.S. 513, 529 (2000)).

335. Clinebell v. Commonwealth, 235 Va. 319, 323–24, 368 S.E.2d 263, 265 (1988).

336. *Id.* at 325, 368 S.E.2d at 266 (citing State v. Mikula, 269 N.W.2d 195, 198–99 (Mich. Ct. App. 1978)).

337. *Id.*

338. 42 Va. App. 236, 590 S.E.2d 618 (Ct. App. 2004).

339. *Id.* at 238, 590 S.E.2d at 619.

340. *Id.* at 239, 590 S.E.2d at 619.

341. *Id.* at 242, 590 S.E.2d at 621.

342. *Id.*

V. SPECIFIC CRIMES

A. *Arson*

In *Schwartz v. Commonwealth*,[343] the defendant, accompanied by other high school students, went on a vandalism spree in Henrico County, Virginia.[344] The group set on fire a truck that was parked in the driveway.[345] The fire destroyed the truck, spread to another vehicle, and severely damaged the house.[346] Schwartz was ultimately convicted of three counts of arson.[347] The Supreme Court of Virginia affirmed, holding that the plain language of the statute permits multiple arson convictions for one act of ignition.[348] The court cautioned, however, that each item of property destroyed in the ensuing fire could not produce a separate conviction.[349] According to the court, to hold otherwise, would produce absurd results.[350]

B. *Carjacking*

In *Spencer v. Commonwealth*,[351] the victim left her car running and got out to drop off her rental check.[352] The defendant took advantage of the victim's absence to slide into the driver's seat.[353] Thinking it was a joke, the victim stood in front of the car for a moment.[354] The defendant "put the car in gear and bumped [the victim's] legs with the car."[355] She suffered bruising as a result and quickly moved out of the way to avoid being run over.[356]

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343. 267 Va. 751, 594 S.E.2d 925 (2004). For additional discussion of the case, see Shepherd, *supra* note, 137, at 268.

344. *Id.* at 752, 594 S.E.2d at 925.

345. *Id.* at 753, 594 S.E.2d at 926.

346. *Id.*

347. *Id.*

348. *Id.* at 754, 594 S.E.2d at 926.

349. *Id.* at 754–55, 594 S.E.2d at 927.

350. *Id.* at 755, 594 S.E.2d at 927.

351. 42 Va. App. 443, 592 S.E.2d 400 (Ct. App. 2004).

352. *Id.* at 446, 592 S.E.2d at 401.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*, 592 S.E.2d at 401–02.

At trial, the defendant was convicted of carjacking.[357] He argued on appeal that, since the victim no longer had possession of the car, he could not be convicted of carjacking.[358] The Court of Appeals of Virginia held that the evidence was sufficient to show that the victim still retained possession.[359] The court noted:

> The taking and asportation of [the victim's] vehicle was accomplished only when Spencer intimidated and forced her to move from the path of the vehicle as he attempted to take the car. At that juncture, and only then, did Spencer establish his "absolute control of the property" . . . and thereby sever [the victim's] control.[360]

C. *Child Abuse and Neglect*

The Supreme Court of Virginia decided two significant cases this term involving felony child neglect.[361] The first case, *Commonwealth v. Duncan*,[362] was an appeal by the Commonwealth from a decision of the Court of Appeals of Virginia, reversing the defendant's conviction for felony child neglect based upon a finding of insufficient evidence.[363] The supreme court reversed the decision of the court of appeals and held that the defendant's acts and omissions relating to the care of his six-month-old son constituted felony child neglect.[364] The supreme court agreed with the court of appeals that acts of simple negligence are insufficient to prove the offense under the applicable statute, but that the required "reckless disregard" for the child's life could be shown "by conduct that subjects a child to a substantial risk of serious injury, as well as to a risk of death, because exposure to either type of risk can endanger the child's life."[365] The supreme court concluded that the record demonstrated a "pattern of neglect over an extended period that ended in Duncan's knowing and reckless de-

357. *Id.* at 447, 592 S.E.2d at 402.
358. *Id.* at 450, 592 S.E.2d at 403.
359. *Id.*
360. *Id.* at 451, 592 S.E.2d at 404 (quoting Mason v. Commonwealth, 200 Va. 253, 256, 105 S.E.2d 149, 151 (1958)).
361. *See* Shepherd, *supra* note 137, at 276–77.
362. 267 Va. 377, 593 S.E.2d 210 (2004).
363. *Id.* at 379, 380, 593 S.E.2d at 211, 212.
364. *Id.* at 386, 593 S.E.2d at 215.
365. *Id.* at 385, 593 S.E.2d at 215.

cision to feed an alcoholic beverage to his baby who had been deprived of food and hydration for several hours."[366]

In *Barrett v. Commonwealth*,[367] the defendant returned at 6:00 a.m. after a night of extensive drinking and fell asleep, leaving her ten-month-old son with her two-year-old daughter.[368] The defendant awoke six hours later to find that the ten-month-old had drowned, apparently by being dragged into the bathtub by the two-year-old.[369] The two-year-old had previously demonstrated a violent jealousy by dragging the baby boy into the bathtub shortly before the incident at issue and had committed other acts of violence against the baby.[370] The trial court convicted the defendant of two counts of felony child neglect.[371] Under such circumstances, the Supreme Court of Virginia held the defendant's actions constituted more than "ordinary negligence."[372] Indeed, the factual scenario represented was a foreseeable "disaster just waiting to happen."[373] Not only was the boy clearly in danger, the court held, but the defendant had a duty to prevent her daughter from inflicting injury upon her son and also to protect her daughter from injury.[374]

D. *Contempt*

In *Robinson v. Commonwealth*,[375] the Court of Appeals of Virginia affirmed the defendant's sentence for contempt.[376] The court held that the defendant, an attorney, had "knowingly created a conflict in his schedule, setting cases on the same morning in two separate jurisdictions that were some distance apart" and then failed to appear on time for his case in one of the jurisdictions.[377]

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366. *Id.* at 386, 593 S.E.2d at 215.
367. 268 Va. 170, 597 S.E.2d 104 (2004).
368. *Id.* at 180, 597 S.E.2d at 108–09.
369. *Id.*
370. *Id.* at 180–81, 597 S.E.2d at 109–110.
371. *Id.* at 173–74, 597 S.E.2d at 105. She was convicted of a Class 4 felony for the death of her son and a Class 6 felony for the neglect of her daughter. *Id.*, 597 S.E.2d at 105.
372. *Id.* at 184, 597 S.E.2d at 111.
373. *Id.* at 185, 597 S.E.2d at 112.
374. *Id.*
375. 41 Va. App. 137, 583 S.E.2d 60 (Ct. App. 2003).
376. *Id.* at 139, 583 S.E.2d at 61.
377. *Id.* at 144, 583 S.E.2d at 63.

The court further held that the trial court could properly sentence the attorney in excess of the minimum prescribed by Virginia Code sections 18.2-456(1) and 18.2-457, as these statutes did not apply.[378] The court drew a distinction between statutory, "direct" contempt, and common law, "indirect," contempt.[379] The trial court in this case had appropriately relied on indirect contempt by proceeding via the formal process of issuing a show cause order.[380] The court provided the defendant with an opportunity to prepare for his defense and conducted a hearing.[381] Therefore, the court was not limited by the statutory provisions in imposing a sentence.[382]

E. *Felony Escape*

In *White v. Commonwealth,*[383] the defendant was stopped because his vehicle lacked a front license plate.[384] While he was being held, the officer performed a protective pat-down.[385] When the officer felt little rocks in the defendant's pocket, he asked him if the rocks were crack cocaine.[386] The defendant then attacked the officer and ran away.[387] The Supreme Court of Virginia examined whether the defendant was "in custody," a prerequisite to a conviction under Virginia Code section 18.2-479(B).[388] The Court held:

> [A]n individual is in the custody of a law enforcement officer only where there has been a clear and effective restraint of the individual by the officer, either by having the individual in his physical control or by the individual's voluntary submission to the officer's authority, such that the individual's freedom of movement is curtailed to a degree associated with a formal arrest.[389]

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378. *Id.* at 144–45, 583 S.E.2d at 63–64.
379. *Id.* at 145–46, 583 S.E.2d at 64.
380. *Id.* at 146, 583 S.E.2d at 64.
381. *Id.*
382. *Id.*
383. 267 Va. 96, 591 S.E.2d 662 (2004).
384. *Id.* at 99, 591 S.E.2d at 663.
385. *Id.* at 99, 591 S.E.2d at 664.
386. *Id.* at 99–100, 591 S.E.2d at 664.
387. *Id.* at 100, 591 S.E.2d at 664.
388. *Id.* at 102–06, 591 S.E.2d at 665–68.
389. *Id.* at 106, 591 S.E.2d at 667–68.

In the case under review, the defendant's investigative detention and the ensuing protective pat-down did not constitute "custody."[390] Therefore, his flight was not flight from "custody" as required by the statute, and the evidence was insufficient for a conviction.[391]

F. *Firearm Offenses*

In *Esteban v. Commonwealth*,[392] the Supreme Court of Virginia examined whether the statute forbidding the possession of a firearm on school grounds required any proof of a specified mental state.[393] The defendant, an art teacher, testified she simply forgot about the presence of the gun in the canvas bag she was carrying.[394] The court concluded the purpose of the statute was to assure a safe environment on school grounds and "[t]he fact that a person, under the circumstances of this case, innocently brings a loaded revolver onto school property does not diminish that danger."[395] The court reasoned that inserting a mens rea element into the statute would defeat the purpose of the law and add language to the statute that the General Assembly chose not to include.[396] Consequently, the offense was one of strict liability.[397]

The attraction of convicted felons towards firearms seems to be exceeded only by their propensity to be caught with them. Virginia appellate courts issued a number of decisions on this subject. The Supreme Court of Virginia affirmed a defendant's conviction for possessing a firearm as a convicted felon in *Kingsbur v. Commonwealth*.[398] The certificate of analysis for the gun in question stated that it could not be test-fired because there were ten missing parts.[399] The court held that despite the handgun's state of disrepair, it nevertheless constituted a firearm because it could

390. *Id.* at 105, 591 S.E.2d at 667.
391. *Id.* at 106, 591 S.E.2d at 668.
392. 266 Va. 605, 587 S.E.2d 523 (2003).
393. *Id.* at 606, 587 S.E.2d at 524.
394. *Id.* at 608, 587 S.E.2d at 525.
395. *Id.* at 609–10, 587 S.E.2d at 526.
396. *Id.*
397. *Id.*
398. 267 Va. 348, 593 S.E.2d 208 (2004).
399. *Id.* at 350, 593 S.E.2d at 209.

be repaired.[400] The defendant in *Alger v. Commonwealth*,[401] a convicted felon, contended she could lawfully possess a firearm in her home.[402] She relied on Virginia Code section 18.2-308.2, which prohibits a convicted felon from possessing or transporting "any (a) firearm or (b) stun weapon or taser as defined in § 18.2-308.1 except in such person's residence or the curtilage thereof . . . ."[403] The court disagreed with this interpretation, holding that the word "except" applied only to the clause "stun weapon or taser" and not to "firearm."[404] In *Quesenberry v. Commonwealth*,[405] the Court of Appeals of Virginia concluded that a flare gun met the definition of a firearm and, therefore, a convicted felon was properly precluded from possessing one.[406]

The defendant in *Branch v. Commonwealth*[407] claimed that he was confused about his status as a convicted felon due to statements by the trial court after his conviction and by the store clerk who sold him the gun.[408] Due to this confusion, he argued, he did not knowingly violate the law prohibiting him from possessing a firearm.[409] The Court of Appeals of Virginia held that the statute prohibiting the possession of a firearm after having been convicted of a felony, Virginia Code section 18.2-308.2, contained no scienter or mens rea elements.[410] Therefore, the defendant's confusion, his lack of intent to mislead, or his failure to knowingly violate the law were all of "no moment."[411] The court recognized a limited due process exception when a defendant reasonably relies on assurances by certain government officials that the conduct is lawful; however, that issue was not raised in this case.[412]

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400. *Id.* at 352, 593 S.E.2d at 210.
401. 267 Va. 255, 590 S.E.2d 563 (2004).
402. *Id.* at 256–57, 590 S.E.2d at 564.
403. *Id.* at 257, 590 S.E.2d at 564 (quoting VA. CODE ANN. § 18.2-308.2(A) (Repl. Vol. 2004)).
404. *Id.* at 260, 590 S.E.2d at 566.
405. 41 Va. App. 126, 583 S.E.2d 55 (Ct. App. 2003).
406. *Id.* at 129, 583 S.E.2d at 56.
407. 42 Va. App. 665, 593 S.E.2d 835 (Ct. App. 2004).
408. *Id.* at 667–68, 593 S.E.2d at 836.
409. *Id.* at 668, 593 S.E.2d at 836.
410. *Id.* at 669, 593 S.E.2d at 836–37.
411. *Id.* at 670, 593 S.E.2d at 837.
412. *Id.* at 671, 593 S.E.2d at 837–38.

G. *Driving While an Habitual Offender*

In *Norman v. Commonwealth*,[413] the defendant pled guilty in 1989 to driving while an habitual offender.[414] Ten years later, in 1999, the court entered an order granting his petition to have his license restored.[415] The court imposed certain conditions, however, such as prohibiting the defendant from possessing illegal drugs or alcohol.[416] In 2001, after the defendant was found driving while intoxicated, he was convicted of driving while an habitual offender, second or subsequent offense.[417] He argued that he could not be convicted of driving as an habitual offender because the 1999 order terminated his status as an habitual offender.[418] The en banc court of appeals agreed.[419] The court analyzed Virginia Code section 46.2-360(1) and noted that a court disposing of a petition for restoration of the privilege to drive has three options: "(1) deny the petition; (2) restore the person's privilege to drive, with or without conditions enforceable by the court; or (3) authorize the issuance of a restricted license."[420] The court observed that the statute draws no distinction between a "full restoration" and a "conditional restoration."[421] "The fact that the court prescribed certain conditions in restoring Norman's privilege to drive and, thus, retained authority to enforce those conditions, does not alter the conclusion that Norman's privilege to drive was restored."[422] Therefore, the 1999 order terminated Norman's status as an habitual offender, and the Commonwealth failed to prove that he was driving as an habitual offender in 2001.[423]

413. 41 Va. App. 628, 587 S.E.2d 742 (Ct. App. 2003).
414. *Id.* at 632, 587 S.E.2d at 743.
415. *Id.*, 587 S.E.2d at 743–44.
416. *Id.* at 632–33, 587 S.E.2d at 743–44.
417. *Id.* at 634, 587 S.E.2d at 744.
418. *Id.*
419. *Id.* at 639, 587 S.E.2d at 747.
420. *Id.* at 636, 587 S.E.2d at 745.
421. *Id.*
422. *Id.* at 637–38, 587 S.E.2d at 746.
423. *Id.* at 638–39, 587 S.E.2d at 746–47.

H. *Fraudulent Advance of Money*

In *Holsapple v. Commonwealth*,[424] the Supreme Court of Virginia affirmed the Court of Appeals of Virginia and addressed a number of issues relating to a charge of obtaining a fraudulent advance of money upon a promise to perform construction work.[425] Virginia Code section 18.2-200.1 requires the person who requested the construction work to prove she requested a return of funds advanced for the work by sending a notice via certified mail, return receipt requested.[426] The statute does not require proof, however, that the defendant actually received this notice.[427] Holsapple also argued that the court of appeals erred in concluding that faulty workmanship could constitute a failure to perform.[428] The supreme court disagreed,[429] finding that the defendant's conduct "reeks with fraud" and "[e]verything about the uninhabitable structure . . . displays a gross misperformance and corner-cutting on Holsapple's part . . . ."[430] Accordingly, the court affirmed Holsapple's conviction.[431]

I. *Failure to Stop at Scene of an Accident*

In *Edwards v. Commonwealth*,[432] the defendant eventually stopped her car after leading the police on a chase.[433] A police officer approached the car, reached in and grabbed the driver's arm.[434] At that moment, the defendant drove off, dragging the officer.[435] The officer managed to extricate himself but was injured in the process.[436] Edwards's car continued to move, striking two other vehicles, including a police car, and afterwards drifted

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424. 266 Va. 593, 587 S.E.2d 561 (2003), *aff'g en banc*, Holsapple v. Commonwealth, 39 Va. App. 522, 574 S.E.2d 756 (Ct. App. 2003).
425. *Id.* at 595, 604, 587 S.E.2d at 562, 567.
426. *Holsapple*, 266 Va. at 599, 587 S.E.2d at 564.
427. *Id.* at 599, 587 S.E.2d at 565.
428. *Id.* at 601, 587 S.E.2d at 565–66.
429. *Id.*, 587 S.E.2d at 566.
430. *Id.* at 602, 603, 587 S.E.2d at 566.
431. *Id.* at 604, 587 S.E.2d at 567.
432. 41 Va. App. 752, 589 S.E.2d 444 (Ct. App. 2003).
433. *Id.* at 757, 589 S.E.2d at 446.
434. *Id.* at 757–58, 589 S.E.2d at 446.
435. *Id.* at 758, 589 S.E.2d at 446.
436. *Id.*

along for 100 feet before stopping.[437] The Court of Appeals of Virginia held that "the evidence was sufficient to convict [Edwards] of leaving the scene of an accident involving personal injury."[438] The court said the statutory language requires affirmative action to "'immediately stop'" and "plainly does not allow a person to continue driving until circumstances stop the vehicle."[439] The court noted that the defendant "could have applied the brakes to stop the car."[440] Furthermore, the court rejected the defendant's argument that she did not leave the scene.[441] Edwards relied on *Smith v. Commonwealth*,[442] a case interpreting Virginia Code section 19.2-81, which permits an arrest without a warrant at the "scene of the accident."[443] In *Smith*, a defendant was held to be properly arrested, within 100 yards from the collision, because she was "at the scene of the accident."[444] The court in *Edwards* distinguished the two statutes, holding that the hit-and-run statute, "[b]y requiring a driver to stop immediately and as close to the 'scene' as possible . . . distinguishes and limits the area labeled 'the scene' in a manner that Code § 19.2-81 does not."[445]

J. *Robbery*

The Supreme Court of Virginia also addressed the issue of when a larceny becomes a robbery. In *Commonwealth v. Jones*,[446] the defendant walked out of a store with a pair of boots without paying for them.[447] When confronted by the store manager in the parking lot, Jones pulled out a gun and ordered the manager to back off.[448] The manager complied, allowing Jones to flee.[449] At trial, Jones was convicted of robbery.[450] He argued that he should

437. *Id.*
438. *Id.* at 770, 589 S.E.2d at 452–53.
439. *Id.* at 768–69, 589 S.E.2d at 452.
440. *Id.* at 769, 589 S.E.2d at 452.
441. *Id.*
442. 32 Va. App. 228, 527 S.E.2d 456 (Ct. App. 2000).
443. VA. CODE ANN. § 19.2-81 (Repl. Vol. 2004).
444. *Smith*, 32 Va. App. at 238, 527 S.E.2d at 461.
445. *Edwards*, 41 Va. App. at 770, 589 S.E.2d at 452.
446. 267 Va. 284, 591 S.E.2d 68 (2004).
447. *Id.* at 286, 591 S.E.2d at 69–70.
448. *Id.*, 591 S.E.2d at 70.
449. *Id.*
450. *Id.* at 285, 591 S.E.2d at 69.

have been convicted of larceny rather than robbery, because he had successfully taken the boots before he resorted to force.[451] The court held that Jones had mere custody, not possession, of the boots.[452] The store retained constructive possession of the goods.[453] Before Jones could successfully convert his custody into possession, he was confronted by the store manager.[454] Since Jones used force before he had gained possession, the court properly convicted him of robbery.[455]

K. *Using a Communications System to Solicit Sex with a Minor*

In *Brooker v. Commonwealth*,[456] the Court of Appeals of Virginia affirmed the defendant's three convictions for soliciting sex with a minor.[457] The defendant not only discussed, in graphic terms, sexual acts with the undercover detective posing as a minor, but he also sent live pictures of his genitals via web camera.[458] These actions constituted more than "words alone."[459] The court found it immaterial that the defendant and the purported victim were located in different cities while exchanging communications because solicitation can be "'completed before an attempt is made to complete the solicited crime.'"[460] The court also rejected the defendant's argument that his actions "constituted a single continuing offense" because the offenses occurred on three different dates with "distinct and separate communications."[461] Finally, the court held that a defendant can be convicted of exposing himself to a minor via web camera because the statutory language does not require a defendant to expose himself in a public location.[462]

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451. *Id.* at 287, 591 S.E.2d at 70.

452. *Id.* at 290, 591 S.E.2d at 72.

453. *Id.*

454. *Id.*

455. *Id.*

456. 41 Va. App. 609, 587 S.E.2d 732 (Ct. App. 2003). For a further discussion of this issue, see Shepherd, *supra* note 137, at 275.

457. *Id.* at 611, 587 S.E.2d at 733.

458. *Id.* at 612–13, 587 S.E.2d at 733–34.

459. *Id.* at 614, 587 S.E.2d at 735.

460. *Id.* at 615, 587 S.E.2d at 735 (quoting Pedersen v. City of Richmond, 219 Va. 1061, 1067–68, 254 S.E.2d 95, 99 (1979)).

461. *Id.*

462. *Id.* at 616, 587 S.E.2d at 735–36.

VI. POST TRIAL

A. *Detention Center Eligibility*

In *Word v. Commonwealth*,[463] the defendant was convicted of several felonies.[464] After he was found to be eligible for participation in the Detention Center Incarceration Program (the "Program"), the trial court imposed a mostly suspended sentence conditioned on the successful completion of the Program.[465] The Commonwealth's Attorney later contacted the Program when he learned that federal authorities were investigating the defendant for two 1993 murders and that indictments were "likely . . . forthcoming."[466] The Program then rescinded the petitioner's eligibility because the petitioner could be arrested and would thus be unable to complete the Program.[467] Following a show cause hearing, the trial court revoked a portion of the suspended sentence and also found that the defendant had violated the terms of his probation.[468] The Court of Appeals of Virginia affirmed the trial court's revocation of the suspended sentence.[469] The court held:

> [W]hen Word could no longer satisfy the prerequisite condition under which his sentence was suspended, i.e. that he enter and successfully complete two Department programs, the court had the authority to reconsider the suspended sentences . . . and to determine what portion of the suspended sentences or other alternatives to incarceration would be appropriate in lieu of the confinement that had been ordered in the community-based programs.[470]

The defendant, however, had not committed any willful acts that would justify the revocation of probation, and the crimes for which federal authorities were investigating the defendant occurred before the imposition of a term of probation.[471]

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463. 41 Va. App. 496, 586 S.E.2d 282 (Ct. App. 2003).
464. *Id.* at 499, 586 S.E.2d at 283.
465. *Id.* at 499–500, 586 S.E.2d at 283–84.
466. *Id.* at 500, 586 S.E.2d at 284.
467. *Id.* at 501, 586 S.E.2d at 284.
468. *Id.*
469. *Id.* at 508, 586 S.E.2d at 287.
470. *Id.* at 505, 586 S.E.2d at 286.
471. *Id.* at 507, 586 S.E.2d at 287.

B. *Writs of Actual Innocence*

In *Gaston v. Commonwealth*,[472] the petitioner invoked Virginia Code section 19.2-327.1 to seek post-trial DNA testing.[473] The trial court denied his request.[474] On appeal, the Supreme Court of Virginia found that it had no jurisdiction to consider the appeal under the plain language of the statute.[475]

VII. RECENT LEGISLATION AFFECTING CRIMINAL LAW

A. *Assault on a Family or Household Member*

The legislature expanded the list of predicate crimes that qualify a defendant for an enhanced penalty for assaulting a family or household member.[476] The "look back" time frame, under which a repeat offender can face enhanced punishment, was also expanded from ten to twenty years.[477] Finally, a defendant who is convicted of assaulting a family member need only have two prior qualifying offenses to face enhanced punishment, rather than the three offenses previously required.[478]

B. *Driving While Intoxicated*

On July 1, 2004, Virginia laws became harsher for drunk drivers. Under prior law, drivers apprehended with elevated levels of blood-alcohol, defined as at least 0.20 and 0.25, faced mandatory minimum penalties.[479] The General Assembly lowered those thresholds to 0.15 and 0.20.[480] The legislature also increased the

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472. 266 Va. 175, 585 S.E.2d 596 (2003).

473. *Id.* at 176, 585 S.E.2d at 597.

474. *Id.*

475. *Id.*

476. Act of Apr. 12, 2004, ch. 448, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-57.2(B) (Repl. Vol. 2004)). For additional discussion of these recent developments, see Shepherd, *supra* note 137, at 247–48.

477. Act of Apr. 12, 2004, ch. 738, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-57.2(B) (Repl. Vol. 2004)).

478. *Id.*

479. VA. CODE ANN. § 18.2-290(A) (Cum. Supp. 2003).

480. Act of Apr. 15, 2004, ch. 937, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-270(A) (Repl. Vol. 2004)).

mandatory jail time for certain repeat offenders.[481] A DUI defendant previously convicted of three DUI offenses within five years is now presumed ineligible for bail.[482] The stringent requirements of that section, however, will render its application infrequent. Defendants convicted of DUI who registered a blood-alcohol level of 0.15 or above are now required to use an ignition interlock device, which prevents a car from starting until the driver's breath is tested.[483] A driver who has a suspended, revoked, or restricted license for DUI and is driving with a 0.02 blood alcohol level or above is now guilty of a Class 1 misdemeanor.[484]

The court may now order a defendant, as a part of his restitution, to reimburse a locality up to $1,000 for rescue and firefighting services provided in a DUI incident.[485] A defendant who fails to pay these costs will see his driver's license suspended and his vehicle registration cancelled.[486] The driver of a car "solely owned and operated by the accused during the commission of a felony" DUI faces the possibility that the car will be forfeited.[487] Family members, however, can petition the court to keep the car if the forfeiture will result in a substantial hardship.[488]

Drivers who meet the blood-alcohol criteria and who are charged with a second or subsequent DUI offense will have their driver's license administratively suspended for sixty days.[489] For a third charge, the license is suspended until trial.[490]

The General Assembly has also authorized law-enforcement officers to arrest, without a warrant and in any place, intoxicated drivers who caused an accident, provided that the arrest is made with probable cause and within three hours of the accident.[491]

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481. *Id.* (codified as amended at VA. CODE ANN. § 18.2-270(B) (Repl. Vol. 2004)).

482. VA. CODE ANN. § 19.2-120(B)(9) (Repl. Vol. 2004).

483. VA. CODE ANN. § 18.2-270.1(B) (Repl. Vol. 2004).

484. VA. CODE ANN. § 18.2-272(A) (Repl. Vol. 2004). Since driving on a suspended or revoked license is presently a Class 1 misdemeanor, VA. CODE ANN. § 46.2-391(D) (Repl. Vol. 2004), as a practical matter, the chief effect of the new law is to prohibit those with restricted licenses from driving after drinking even small amounts of alcohol.

485. VA. CODE ANN. § 15.2-1716(B) (Cum. Supp. 2004).

486. VA. CODE ANN. § 46.2-417(A) (Cum. Supp. 2004).

487. VA. CODE ANN. § 18.2-270(C)(3) (Repl. Vol. 2004).

488. *Id.*

489. VA. CODE ANN. § 46.2-391.2(A) (Cum. Supp. 2004).

490. *Id.*

491. Act of Apr. 15, 2004, ch. 949, 2004 Va. Acts ___ (codified as amended at VA. CODE

A driver convicted of unreasonable refusal within ten years of a prior conviction for either DUI or unreasonable refusal is now guilty of a Class 2 misdemeanor.[492] A conviction for an unreasonable refusal after two prior convictions for DUI or unreasonable refusal constitutes a Class 1 misdemeanor.[493] The legislature also eliminated the requirement that a magistrate advise a suspect of the law regarding the refusal to take a blood test.[494]

Finally, the General Assembly limited the applicability of Virginia Code section 19.2-294.1, which addresses a situation where a driver is charged with both reckless driving and DUI "growing out of the same act or acts."[495] Once a driver is convicted of one of the charges, the other charge must be dismissed.[496] In practice, the provision provides an incentive for drivers charged with both DUI and reckless driving to plead guilty to reckless driving at the earliest opportunity so as to obtain the dismissal of the DUI charge. The General Assembly limited the scope of this provision by limiting the term "reckless driving" to "reckless driving in violation of § 46.2-852" or any ordinance "incorporating § 46.2-852."[497] Virginia Code section 46.2-852 prohibits driving a vehicle on any highway "recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person."[498] Therefore, other violations termed "reckless driving" are now excluded from section 19.2-294.1.[499]

ANN. § 19.2-81(7) (Repl. Vol. 2004)).

492. VA. CODE ANN. § 18.2-268.4(B) (Repl. Vol. 2004).

493. *Id.* § 18.2-268.4(C) (Repl. Vol. 2004).

494. Act of May 21, 2004, ch. 1022, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-268.3(A) (Repl. Vol. 2004)). The same amendment also eliminates the provision that the declaration of refusal or the certificate of the magistrate at a medical facility constitutes prima facie evidence that the defendant refused to allow a blood or breath sample to be taken. *Id.* (codified as amended at VA. CODE ANN. § 18.2-268.3(C) (Repl. Vol. 2004)).

495. Act of Apr. 15, 2004, ch. 937, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 19.2-294.1 (Repl. Vol. 2004)).

496. VA. CODE ANN. § 19.2-294.1 (Repl. Vol. 2004).

497. Act of Apr. 15, 2004, ch. 937, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 19.2-294.1 (Repl. Vol. 2004)).

498. VA. CODE ANN. § 46.2-852 (Repl. Vol. 2002 & Cum. Supp. 2004).

499. *See* VA. CODE ANN. §§ 46.2-829, 46.2-862 to -869 (Repl. Vol. 2002 & Cum. Supp. 2004).

C. *Firearms*

Anyone who is not a citizen and who is illegally present in the United States is now prohibited from possessing or transporting a firearm in Virginia.[500] A violation of this statute constitutes a Class 6 felony.[501] The General Assembly has also forbidden, as a Class 1 misdemeanor, the possession of firearms, certain gun parts, and other dangerous weapons in the Commonwealth's airport terminals.[502]

D. *Fetal Homicide*

The General Assembly enacted a new statute that punishes to the same extent as murder the unlawful, willful, deliberate, and malicious killing of a fetus.[503] When such killings are premeditated, they are punishable as first-degree murder, otherwise they are punishable as second-degree murder.[504]

E. *Gang Legislation*

Given the rising prominence of gang violence, it is not surprising that the General Assembly should address this issue. This year, the General Assembly streamlined the definition of a gang; to establish the existence of a gang, the prosecution need not prove a "pattern of criminal gang activity."[505] Instead, the government must establish two or more violations of predicate criminal acts, one of which must be an act of violence.[506] The list of predicates is now longer, with drug and property crimes supplementing the existing predicates.[507] The legislature added gang

500. VA. CODE ANN. § 18.2-308.1:1 (Repl. Vol. 2004).

501. *Id.*

502. Act of Apr. 15, 2004, ch. 894, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-287.01 (Repl. Vol. 2004)).

503. Act of May 12, 2004, ch. 1026, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-32.2 (Repl. Vol. 2004)).

504. *Id. See also* Shepherd, *supra* note 137, at 277.

505. Act of Apr. 12, 2004, ch. 396, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-46.1 (Repl. Vol. 2004)). For a discussion of Virginia's recent gang legislation in the juvenile law context, see Shepherd, *supra* note 137, at 270.

506. VA. CODE ANN. § 18.2-46.1 (Repl. Vol. 2004).

507. *Id.*

crimes to the list of offenses under which the accused is presumed ineligible for bail.[508] Furthermore, probation officers must now include in their presentence reports information concerning the defendant's membership or participation in a gang.[509]

The General Assembly increased penalties for adults who recruit gang members, eliminated the requirement that recruits must be juveniles, and added an enhanced penalty for repeat offenders.[510] An obstruction of justice charge connected with a gang crime will result in an enhanced penalty.[511] The General Assembly also authorized the civil forfeiture of assets for gang-related crimes.[512] Multijurisdictional grand juries are now authorized to investigate gang crimes.[513] Finally, the wiretap statute was amended to permit the Attorney General to apply for a wiretap order to investigate crimes committed by gangs and mobs.[514]

F. *Mandatory Minimums*

After July 1, 2004, anywhere the term "mandatory minimum" appears in the Virginia Code, the court must impose the "entire term of confinement, the full amount of the fine and the complete requirement of community service prescribed by law."[515] "The court shall not suspend in full or in part any punishment described as mandatory minimum punishment."[516]

G. *Misdemeanor Discovery in Circuit Court*

A defendant appealing from general district court to circuit court can now obtain discovery under Virginia Supreme Court

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508. Acts of Mar. 31, 2004, ch. 308, 2004 Va. Acts ___ and Apr. 14, 2004, ch. 819, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 19.2-120(D)(2) (Repl. Vol. 2004)).

509. VA. CODE ANN. § 19.2-299(A) (Repl. Vol. 2004).

510. Act of Apr.12, 2004, ch. 396, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 18.2-46.3, -46.3:1 (Repl. Vol. 2004)).

511. VA. CODE ANN. § 18.2-460(C) (Repl. Vol. 2004)).

512. Act of Apr. 12, 2004, ch. 396, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-46.3:2 (Repl. Vol. 2004)).

513. VA. CODE ANN. § 19.2-215.1(1)(q) (Repl. Vol. 2004).

514. Act of Mar. 15, 2004, ch. 122, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 19.2-66 (Repl. Vol. 2004)).

515. VA. CODE ANN. § 18.2-12.1 (Repl. Vol. 2004).

516. *Id.*

Rule 7C:5.[517] Such discovery was previously unavailable for misdemeanor appeals to circuit court.[518]

H. *State RICO*

Virginia prosecutors are now equipped with a version of the Racketeer Influenced and Corrupt Organization Act (RICO).[519] Unlike its federal analogue, the Virginia legislation does not contain a civil component.[520] The law details a list of predicate crimes and provides that a violation of two or more of these crimes constitutes criminal "racketeering activity."[521] The predicate crimes include any offenses involving obstruction of justice or criminal street gangs, as well as certain enumerated felonies.[522] The law prohibits the receipt by any person or entity of "any proceeds known to have been derived directly from racketeering activity."[523] Furthermore, the law criminalizes the transmission of money knowingly derived from or traceable to racketeering activity.[524] In addition to severe criminal penalties, the RICO statute contains asset forfeiture provisions.[525] The law also permits a court to order the persons or entities involved in racketeering activity to divest themselves of tainted property or to order the dissolution or reorganization of tainted enterprises.[526]

I. *Writs of Actual Innocence*

In a significant departure from Virginia's rules governing the finality of criminal convictions, convicted felons will now be able to seek a writ of actual innocence for nonbiological evidence.[527]

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517. *Id.* § 19.2-265.4(A) (Repl. Vol. 2004); *see also* VA. SUP. CT. R. 7C:5 (Repl. Vol. 2004).

518. Act of Apr. 8, 2004, ch. 348, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 19.2-265.4(A) (Repl. Vol. 2004)).

519. Acts of Apr. 15, 2004, ch. 883, 2004 Va. Acts ___ and Apr. 21, 2004, ch. 996, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-512 to -516 (Repl. Vol. 2004)).

520. *See* 18 U.S.C. § 1964(c) (2000).

521. VA. CODE ANN. § 18.2-513 (Repl. Vol. 2004).

522. *Id.*

523. *Id.* § 18.2-514 (Repl. Vol. 2004).

524. *Id.* § 18.2-516 (Repl. Vol. 2004).

525. *Id.* § 18.2-515(B) (Repl. Vol. 2004)).

526. *Id.* § 18.2-514(A) (Repl. Vol. 2004).

527. *Id.* § 19.2-327.10 (Repl. Vol. 2004).

The law applies only to convicted felons who pled not guilty and permits only one such challenge.[528] The writ must be filed in the Court of Appeals of Virginia.[529] The court will examine the record and direct a response from the Attorney General if necessary.[530] If a petition is not summarily dismissed, the petitioner will be entitled to counsel.[531] There is no statute of limitations for seeking the writ.[532]

The standard for a writ of actual innocence is a rigorous one; the petitioner must allege, *inter alia*, that the newly discovered evidence was not previously known and is not cumulative.[533] A petitioner must establish that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[534] The petitioner must also attach all relevant documents, including affidavits and test results.[535]

The Attorney General can proffer evidence that was not adduced at trial, including evidence that was suppressed.[536] The Court of Appeals of Virginia may order an evidentiary hearing, which is to be held in the circuit court where the case was originally tried.[537]

At the hearing, the burden of proof is upon the petitioner, who must establish by "clear and convincing evidence" that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[538] Following the hearing, the trial court must make factual findings and file these findings with the court of appeals.[539] A petitioner who meets this burden of proof will have his conviction vacated.[540] If the evidence shows, however, that the petitioner is nevertheless guilty of a lesser-included offense, the

528. *Id.*
529. *Id.*
530. *Id.* § 19.2-327.12 (Repl. Vol. 2004).
531. *Id.* § 19.2-327.11(E) (Repl. Vol. 2004).
532. *See id.* § 19.2-327.10 (Repl. Vol. 2004).
533. *Id.* § 19.2-327.11(A) (Repl. Vol. 2004).
534. *Id.* § 19.2-327.11(A)(vii) (Repl. Vol. 2004).
535. *Id.* § 19.2-327.11(B) (Repl. Vol. 2004).
536. *Id.* § 19.2-327.11(C) (Repl. Vol. 2004).
537. *Id.* § 19.2-327.12 (Repl. Vol. 2004).
538. *Id.* § 19.2-327.13 (Repl. Vol. 2004).
539. *Id.* § 19.2-327.12 (Repl. Vol. 2004).
540. *Id.* § 19.2-327.13 (Repl. Vol. 2004).

court will remand the case for a new sentencing hearing.[541] Finally, the losing party may appeal to the Supreme Court of Virginia.[542]

J. *Appointment of Counsel Before Detention Hearing*

The General Assembly provided for the appointment of counsel before a juvenile's detention hearing, unless an attorney is retained and enters an appearance on the child's behalf.[543]

541. *Id.*

542. *Id.* § 19.2-327.10 (Repl. Vol. 2004).

543. Act of Apr. 12, 2004, ch. 437, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 16.1-266(B) (Cum. Supp. 2004)). *See also* Shepherd, *supra* note 137.