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Marla G. Decker
Deputy Attorney General, Public Safety and Enforcement Division, Office of the Attorney General, Commonwealth of Virginia

Stephen R. McCullough
Assistant Attorney General, Criminal Litigation Section, Office of the Attorney General, Commonwealth of Virginia

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CRIMINAL LAW AND PROCEDURE

Marla G. Decker *
Stephen R. McCullough **

I. INTRODUCTION

This article examines the most significant cases from the Supreme Court of Virginia and the Court of Appeals of Virginia over the past year. The article also outlines some of the most consequential changes to the law enacted by the Virginia General Assembly during the 2005 Session in the field of criminal law and procedure.

II. CRIMINAL PROCEDURE

A. *Appeals*

1. Appeals from Juvenile and Domestic Relations Courts

The complex interplay of jurisdiction between circuit courts and juvenile and domestic relations courts is a frequent source of confusion and litigation. In *Lampkins v. Commonwealth*,[1] the police determined that the defendant, a juvenile involved in a drive-by murder, had not fully cooperated as required by his "Contingency Agreement for Consideration."[2] Accordingly, the Commonwealth filed petitions in the juvenile and domestic relations court

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* Deputy Attorney General, Public Safety and Enforcement Division, Office of the Attorney General, Commonwealth of Virginia. B.A., 1980, Gettysburg College; J.D., 1983, University of Richmond School of Law.

** Assistant Attorney General, Criminal Litigation Section, Office of the Attorney General, Commonwealth of Virginia. B.A., 1994, University of Virginia, with high distinction; J.D., 1997, University of Richmond School of Law, *cum laude*.

1. 44 Va. App. 709, 607 S.E.2d 722 (Ct. App. 2005).
2. *See id.* at 713–14, 607 S.E.2d at 724.

for charges related to the murder.[3] The juvenile court dismissed the petitions, holding that the juvenile had not breached the agreement.[4] After the Commonwealth obtained direct indictments in the circuit court, the defendant contended that the circuit court lacked jurisdiction because he had not been afforded a transfer hearing or a preliminary hearing.[5] The court disagreed and he was convicted.[6] The Court of Appeals of Virginia examined Virginia Code section 16.1-269.1(D), which provides that the Commonwealth "is not required to appeal an adverse decision but can seek a direct indictment: (1) where the juvenile court does not find probable cause; or (2) where the petition or warrant is terminated by dismissal in the juvenile court."[7] The court concluded that the plain terms of this provision authorized the Commonwealth to proceed as it did.[8] The court further held that Virginia Code section 16.1-269.6(B) did not apply.[9] That section requires the court to examine the record from the juvenile court to ensure substantial compliance with the transfer provisions and either advise the Commonwealth that it may seek a direct indictment or remand the case to the juvenile court.[10] That statute, the court concluded, applies only to an appeal of a transfer decision.[11] In this case, there was no transfer decision.[12]

The court further clarified circuit court jurisdiction in an appeal from a juvenile court decision in *Overdorff v. Commonwealth*.[13] The Commonwealth moved to transfer Overdorff's case from the juvenile and domestic relations court to the circuit court based upon the nature of the offenses.[14] The juvenile court found probable cause but denied the Commonwealth's motion to transfer the charges.[15] The Commonwealth appealed the refusal to

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3. *Id.* at 714, 607 S.E.2d at 725.
4. *See id.*
5. *See id.* at 714–15, 607 S.E.2d at 725.
6. *See id.* at 714, 607 S.E.2d at 725.
7. *Id.* at 716, 607 S.E.2d at 726 (citing VA. CODE ANN. § 16.1-269.1(D) (Repl. Vol. 2003 & Cum. Supp. 2005)).
8. *See id.* at 718, 607 S.E.2d at 726.
9. *See id.*, 607 S.E.2d at 726–27 (citing VA. CODE ANN. § 16.1-269.6(B) (Cum. Supp. 2005)).
10. *See id.* (citing VA. CODE ANN. § 16.1-269.6(B) (Cum. Supp. 2005)).
11. *Id.*, 607 S.E.2d at 727.
12. *Id.*
13. 45 Va. App. 222, 609 S.E.2d 626 (Ct. App. 2005).
14. *See id.* at 224, 609 S.E.2d at 627.
15. *Id.*

transfer the charges to the circuit court.[16] At the transfer hearing on August 26, 2002, the parties advised the circuit court "that they had just received a copy of an order from the juvenile court" outlining the reasons for its decision.[17] That order was dated "'August 26, 2002 *nunc pro tunc* July 18, 2002.'"[18]

The defendant argued that the juvenile court had failed to comply with Virginia Code section 16.1-269.6(A), which requires that all orders, including the order setting forth the reasons for the court's decision, be sent to the circuit court within seven days after the filing of the notice of appeal.[19] The defendant claimed that because the juvenile court had failed to comply with the time requirement, the circuit court lacked jurisdiction over the transfer hearing.[20] The circuit court rejected the argument, finding that under Virginia Code section 16.1-269.6(B), the juvenile court had been in "'substantial compliance'" with the procedural requirements of Virginia Code section 16.1-269.1(A) and, therefore, the circuit court had jurisdiction over the appeal.[21] The circuit court then went on to authorize the Commonwealth to seek indictments.[22] Ultimately, the defendant was convicted of the criminal offenses and appealed to the court of appeals, alleging that all of the proceedings in the circuit court were null and void because that court lacked jurisdiction.[23]

The Court of Appeals of Virginia affirmed the convictions.[24] The court, citing Virginia Code section 16.1-269.1(E), noted that "'[a]n indictment in the circuit court cures any error or defect in any proceeding held in the juvenile court except with respect to the juvenile's age.'"[25] Thus, once the grand jury returned the indictment, any alleged defect was cured.[26]

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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 224–25, 609 S.E.2d at 627 (citing VA. CODE ANN. § 16.1-269.6(A) (Cum. Supp. 2005)).
20. *Id.* at 225, 609 S.E.2d at 627.
21. *Id.* (citing VA. CODE ANN. § 16.1-269.6(B) (Cum. Supp. 2005)).
22. *Id.*
23. *See id.* at 226, 609 S.E.2d at 628.
24. *See id.* at 228, 609 S.E.2d at 629.
25. *Id.* at 226, 609 S.E.2d at 628 (quoting VA. CODE ANN. § 16.1-269.1(E) (Repl. Vol. 2003 & Cum. Supp. 2005)).
26. *Id.*

2. Appeals from Deferred Disposition

In 2005, the Court of Appeals of Virginia addressed a unique jurisdictional question relating to deferred disposition. In *Randolph v. Commonwealth*,[27] the defendant appealed his conviction for possession of cocaine.[28] However, because the circuit court elected to defer disposition under the first offender statute, Virginia Code section 18.2-251, the court ordered the parties to address the issue of whether the appellate court had jurisdiction to consider an appeal.[29] The court ultimately ruled that a circuit court order deferring disposition of the charges is not a final judgment of conviction.[30] Consequently, the court dismissed the appeal for lack of jurisdiction.[31]

B. *Arrest on a Summons*

Virginia Code section 19.2-74 establishes that, subject to certain exceptions, a suspect in a misdemeanor case is to be released with a summons rather than a full custodial arrest.[32] An unresolved issue is whether the evidence must be suppressed if the officer ignores or misapplies this statute.[33] Two cases addressed the statute in the past year.

In *Moore v. Commonwealth*,[34] police stopped the defendant and determined that he was driving on a suspended license.[35] The officers, based on what they deemed their "prerogative," effected a full custodial arrest and searched the defendant incident to the arrest.[36] They found crack cocaine in his jacket.[37] A panel of the Court of Appeals of Virginia held that the evidence must be sup-

27. 45 Va. App. 166, 609 S.E.2d 84 (Ct. App. 2005).

28. *See id.* at 167, 609 S.E.2d at 85.

29. *See id.* (citing VA. CODE ANN. § 18.2-251 (Repl. Vol. 2004)).

30. *See id.*

31. *Id.*

32. *See* VA. CODE ANN. § 19.2-74(A) (Repl. Vol. 2004 & Cum. Supp. 2005).

33. In *Hunt v. Commonwealth*, a panel of the Court of Appeals of Virginia held that the evidence should be suppressed. *See* 41 Va. App. 404, 407, 585 S.E.2d 827, 829 (Ct. App. 2003). The en banc court of appeals divided evenly on the issue. *See* Hunt v. Commonwealth, 42 Va. App. 537, 537, 592 S.E.2d 789, 789 (Ct. App. 2004). The Supreme Court of Virginia then disposed of the case by unpublished order, holding that the issue was procedurally defaulted. *See* Hunt v. Commonwealth, No. 040614 (Va. Oct. 8, 2004).

34. 45 Va. App. 146, 609 S.E.2d 74 (Ct. App. 2005).

35. *Id.* at 149, 609 S.E.2d at 76.

36. *See id.* at 150, 609 S.E.2d at 76.

37. *Id.*

pressed due to the failure of the officer to release the defendant on a summons.[38] However, the panel decision has been stayed and the court will hear the case en banc.[39]

In *Fox v. Commonwealth*,[40] the police recovered a gun that the defendant had discarded while fleeing.[41] The serial number of the gun was obliterated.[42] Possession of a concealed gun and obliterating the serial number on a firearm are both Class 1 misdemeanors.[43] Police made a full custodial arrest rather than releasing the defendant on a summons.[44] A search of his person at the police station yielded cocaine.[45] Fox contended that Virginia Code section 19.2-74 creates a wholly subjective test concerning whether one of the exceptions applies to the general rule requiring release on a summons.[46] However, the Commonwealth had not adduced any testimony at his trial concerning the arresting officer's reason for the custodial arrest.[47] The Court of Appeals of Virginia rejected this argument, noting that objective criteria will determine the existence of one of the exceptions found in the statute.[48] In this instance, the evidence established that the defendant could reasonably be deemed a danger to others.[49] Therefore, the officer properly made a full custodial arrest rather than releasing the defendant on a summons.[50]

C. *Color of Office*

Virginia statutes generally limit the authority of law enforcement officers to their jurisdiction.[51] Under the "color of office" doc-

38. *See id.* at 157, 609 S.E.2d at 80.

39. Moore v. Commonwealth, 45 Va. App. 279, 279, 610 S.E.2d 326, 326 (Ct. App. 2005).

40. 43 Va. App. 446, 598 S.E.2d 770 (Ct. App. 2004).

41. *See id.* at 448, 598 S.E.2d at 770.

42. *See id.*, 598 S.E.2d at 770–71.

43. *See id.* (citing VA. CODE ANN. § 18.2-308 (Cum. Supp. 2005); VA. CODE ANN. § 18.2-311.1 (Repl. Vol. 2004)).

44. *See id.*, 598 S.E.2d at 771.

45. *Id.*

46. *See id.* at 449, 598 S.E.2d at 771 (citing VA. CODE ANN. § 19.2-74 (Repl. Vol. 2004 & Cum. Supp. 2005)).

47. *See id.* at 450, 598 S.E.2d at 771.

48. *See id.*

49. *See id.* at 451, 598 S.E.2d at 772.

50. *See id.*

51. *See, e.g.*, VA. CODE ANN. § 19.2-250 (Repl. Vol. 2004).

trine, police officers operating outside their jurisdiction may not use "'the indicia of [their] official position to collect evidence that a private citizen would be unable [to] gather.'"[52] However, officers in such circumstances may make a citizen's arrest.[53] The application of the "color of office" doctrine was at issue in *Wilson v. Commonwealth*.[54] In *Wilson*, an off-duty deputy sheriff from Loudoun County, who was traveling in Culpeper County, almost collided with a convertible that improperly veered into the opposing lane of travel.[55] The deputy followed the car to neighboring Spotsylvania County.[56] The deputy flashed his lights at the convertible in a vain effort to stop the car.[57] The convertible continued driving erratically and eventually turned into a gas station.[58]

The deputy, who was in civilian clothing and in his private vehicle, placed his badge and his service weapon on his belt and approached the defendant.[59] The officer identified himself as a deputy from Loudoun County and asked the defendant to step out of the vehicle.[60] The deputy noticed the odor of alcohol emanating from Wilson.[61] He also observed Wilson's slurred speech, deficient memory, and his glassy eyes.[62] The deputy obtained consent to conduct a pat-down search for weapons.[63] While the deputy did not tell Wilson he could not leave, he questioned him about his drinking and asked the defendant to perform field sobriety tests.[64] Wilson refused.[65] At that point, a Spotsylvania County deputy arrived and arrested Wilson for being drunk in public.[66]

Wilson asserted that the off-duty deputy "'[went] far beyond' what 'a citizen could or would [have] achieve[d] in the context of a citizen's arrest'" and, therefore, the evidence gathered by the

52. Wilson v. Commonwealth, 45 Va. App. 193, 203, 609 S.E.2d 612, 617 (Ct. App. 2005) (quoting Hudson v. Commonwealth, 266 Va. 371, 377, 585 S.E.2d 583, 586 (2003)).
53. *See id.* at 204, 609 S.E.2d at 617.
54. *See id.* at 195–96, 609 S.E.2d at 613.
55. *See id.* at 196, 609 S.E.2d at 613.
56. *See id.*
57. *See id.*
58. *See id.* at 196–97, 609 S.E.2d at 613.
59. *Id.*, 609 S.E.2d at 613–14.
60. *Id.* at 197, 609 S.E.2d at 614.
61. *Id.* at 197–98, 609 S.E.2d at 614.
62. *Id.*
63. *Id.* at 198, 609 S.E.2d at 614.
64. *See id.* at 198–99, 609 S.E.2d at 614–15.
65. *See id.* at 199, 609 S.E.2d at 615.
66. *Id.* at 199–200, 609 S.E.2d at 615.

deputy should be suppressed.[67] The trial court denied the suppression motion.[68] The Court of Appeals of Virginia affirmed, holding that the off-duty deputy did not stop the defendant's car and did not arrest him.[69] The court observed that while the deputy identified himself as a law enforcement officer, he clearly indicated that he was from a different jurisdiction and that local authorities had been notified.[70] The court also noted that the deputy's observations of the defendant's drunken behavior could have been gathered by any citizen.[71] The court assumed, without deciding, that administering field sobriety tests could implicate the color of office doctrine.[72] The defendant in this instance, however, refused to perform the tests, so there was no such evidence to suppress.[73]

D. *Detention Center*

In *Charles v. Commonwealth*,[74] the defendant was sentenced to serve five years in prison for a drug conviction.[75] Four years of the sentence were suspended.[76] He served his one-year sentence and was released on probation.[77] After he violated the terms of his probation, the trial court revoked the suspended sentence, resuspended it, and placed him on probation.[78] One of the conditions for placing Charles on probation was that he complete the Detention Center Incarceration Program (the "Program").[79] He did so.[80] He later, however, violated other conditions of his probation.[81] The court again revoked his probation and imposed four years of his original five-year sentence.[82] Although he had not raised the

67. *Id.* at 201–02, 609 S.E.2d at 615–16.
68. *See id.* at 201, 609 S.E.2d at 616.
69. *See id.* at 205–06, 609 S.E.2d at 618.
70. *Id.* at 205, 609 S.E.2d at 618.
71. *Id.* at 205–06, 609 S.E.2d at 618.
72. *Id.* at 206, 609 S.E.2d at 618.
73. *See id.*
74. 270 Va. 14, 613 S.E.2d 432 (2005).
75. *Id.* at 16–17, 613 S.E.2d at 433.
76. *Id.* at 16, 613 S.E.2d at 433.
77. *Id.* at 17, 613 S.E.2d at 433.
78. *Id.*
79. *Id.* at 16–17, 613 S.E.2d at 432–33.
80. *Id.* at 17, 613 S.E.2d at 433.
81. *Id.*
82. *Id.*

issue at trial, the defendant contended on appeal that his time spent in the Program was "incarceration" that should have been credited towards his overall sentence.[83]

The Supreme Court of Virginia first rejected the Commonwealth's argument that participation in the Program was a condition of probation and did not constitute incarceration.[84] The court held that the designation of the activity as a condition of probation "is not a description of the nature of the activity."[85] The statutes at issue, the court noted, "are dispositive" and establish the fact that the Program constitutes "'incarceration.'"[86] Because the Program constitutes incarceration, the time spent by the defendant in the program must be credited toward his overall sentence.[87] The court concluded that "the trial court did not have the authority or the discretion to enter a second sentencing order that extended the period of incarceration beyond that imposed" in the original sentencing order.[88] Such an order is "void" and would impose a "grave injustice" upon the defendant and, therefore, the ends of justice exception to the rules of default enabled the court to grant the defendant relief.[89]

E. *Discovery*

Virginia courts have long reviewed sensitive records in camera to determine whether the contents of these records should be disclosed to a defendant in discovery. The Supreme Court of Virginia, interpreting its own Rule 3A:12, approved of this practice in *Nelson v. Commonwealth*.[90] In *Nelson*, the defendant obtained a subpoena duces tecum for the mental and physical records of the child he sexually molested.[91] The trial court reviewed the records in camera, concluded there was nothing material in the documents, and declined to disclose them to the defendant.[92] Nel-

83. *See id.*
84. *See id.* at 18, 613 S.E.2d at 433–34.
85. *Id.*, 613 S.E.2d at 433.
86. *Id.*, 613 S.E.2d at 433–34.
87. *See id.*, 613 S.E.2d at 434.
88. *Id.* at 19, 613 S.E.2d at 434.
89. *Id.* at 20, 613 S.E.2d at 435.
90. 268 Va. 665, 604 S.E.2d 76 (2004).
91. *Id.* at 668, 604 S.E.2d at 77.
92. *Id.*

son objected, arguing that once the subpoena was issued, he had an absolute right to examine the documents.[93] On appeal, the court concluded that when documents "'are of such nature or content that disclosure to other parties would be unduly prejudicial,'" the plain language of Rule 3A:12 permits the reviewing court to examine the documents in camera to determine whether they are material to the party that has requested them.[94] If they are not material, the court can limit disclosure.[95]

F. *Dismissal versus "Nol Pros"*

In *Roe v. Commonwealth*,[96] the defendant was charged with abduction and a number of associated firearm charges.[97] The defendant was not present when the case was called because he was in federal custody.[98] After the trial court denied the prosecution's motion for a continuance, the Commonwealth made a motion to dismiss the charges.[99] The court granted the motion, but the written order did not specify whether the dismissal was with prejudice.[100] Following the issuance of new indictments on the offenses, the defendant argued that the prosecution was barred by the earlier dismissal.[101] The trial court interpreted the prior dismissal order as meaning a dismissal without prejudice.[102] On appeal, the Court of Appeals of Virginia affirmed.[103] First, the court reasoned that it should give deference to a court's reasonable interpretation of its own order.[104] This is so even where a different judge of the same court interprets the order.[105] Second, the court noted that, historically, indictments dismissed on motion of the prosecution were permitted and that such dismissals were without

93. *See id.* at 669, 604 S.E.2d at 78.
94. *See id.* at 670, 604 S.E.2d at 78 (quoting VA. SUP. CT. R. 3A:12(b) (Repl. Vol. 2005)).
95. *See id.*
96. 45 Va. App. 240, 609 S.E.2d 635 (Ct. App. 2005).
97. *See id.* at 243, 609 S.E.2d at 636.
98. *Id.*
99. *Id.*
100. *Id.*
101. *See id.* at 243–44, 609 S.E.2d at 636.
102. *See id.* at 244, 609 S.E.2d at 636.
103. *See id.* at 249, 609 S.E.2d at 639.
104. *Id.* at 245, 609 S.E.2d at 637 (quoting Albert v. Albert, 38 Va. App. 284, 298, 563 S.E.2d 389, 396 (Ct. App. 2002)).
105. *See id.* at 244 n.1, 609 S.E.2d at 637 n.1.

prejudice.[106] Finally, the court observed that the terms "dismissal" and *"nolle prosequi"* are used interchangeably.[107]

G. *Double Jeopardy*

The Supreme Court of Virginia considered whether the crime of grand larceny from the person is a lesser-included offense of robbery for purposes of violation of the constitutional protection against double jeopardy. In *Commonwealth v. Hudgins*,[108] the court overruled the Court of Appeals of Virginia and held that grand larceny from the person is not a lesser-included offense of robbery.[109] Applying the test established in *Blockburger v. United States*,[110] the *Hudgins* court found that "proof of violence or intimidation is required in a prosecution for robbery but not for grand larceny from the person. And proof of the value of the property stolen is required in a prosecution for grand larceny from the person but not for robbery."[111]

H. *Fifth Amendment*

In *Dixon v. Commonwealth*,[112] the police arrived at the scene of a motor vehicle accident.[113] They found the defendant "'upset,'" and "'unruly'" and he had a "'strong odor'" of alcohol about his person.[114] He was placed in the front passenger seat of the patrol car.[115] The police told him he was not under arrest but was being detained for investigative reasons and for officer safety.[116] When questioned by the officers, Dixon said "he had consumed four or five beers about an hour earlier, and that he had 'pulled' his car

106. *See id.* at 247, 609 S.E.2d at 638.
107. *Id.*
108. 269 Va. 602, 611 S.E.2d 362 (2005).
109. *Id.* at 608, 611 S.E.2d at 366.
110. 284 U.S. 299, 304 (1932).
111. *Hudgins*, 269 Va. at 606, 611 S.E.2d at 365.
112. 270 Va. 34, 613 S.E.2d 398 (2005).
113. *Id.* at 37, 613 S.E.2d at 399.
114. *Id.*
115. *Id.* at 38, 613 S.E.2d at 399.
116. *Id.*

over to the side of the road because the car was malfunctioning."[117] He was later formally arrested.[118]

Before trial, he sought to suppress those statements on the basis that the statements were obtained in violation of his *Miranda* rights.[119] The circuit court denied the motion, concluding that the detention was an investigative one rather than a custodial arrest.[120] The Supreme Court of Virginia reversed.[121] The court observed that *Miranda* warnings must be provided when an individual's freedom is restricted to a "'degree associated with formal arrest.'"[122] The key for the court was the combination of handcuffing and being locked in a police car.[123] The court noted that "either of these factors, in the absence of the other, may not result in a curtailment of freedom ordinarily associated with a formal arrest."[124] However, "the presence of both factors compels the conclusion that a reasonable person subjected to both restraints would conclude that he was in police custody."[125] Because he was in custody, he should have been provided with *Miranda* warnings; therefore, the court held that the statements should have been suppressed.[126]

I. *Statutory Speedy Trial*

In *Schwartz v. Commonwealth*,[127] the Court of Appeals of Virginia found that Virginia Code section 19.2-243(2), which allows for tolling of the speedy trial statute when a prosecution witness is "prevented from attending" the trial due to "sickness or accident," includes when a witness is recovering from medically necessary back surgery.[128] The court determined that the weakened

117. *Id.*
118. *See id.*, 613 S.E.2d at 400.
119. *Id.*
120. *Id.*
121. *See id.* at 41, 613 S.E.2d at 402.
122. *Id.* at 39, 613 S.E.2d at 400 (quoting Berkemer v. McCarty, 468 U.S. 420, 440 (1984)).
123. *See id.* at 40–41, 613 S.E.2d at 401.
124. *Id.* at 41, 613 S.E.2d at 401.
125. *Id.*
126. *See id.*, 613 S.E.2d at 402.
127. 45 Va. App. 407, 611 S.E.2d 631 (Ct. App. 2005).
128. *Id.* at 423–26, 611 S.E.2d at 639–41 (quoting VA. CODE ANN. § 19.2-243(2) (Cum. Supp. 2005)).

condition of the witness while he recovered from the major back surgery rendered him unable to attend the trial due to "sickness" and that the time for calculating speedy trial was properly tolled during the continuance necessitated by the witness's condition.[129]

J. *Immunity / Cooperation Agreements*

Cooperation agreements between defendants and the prosecution are often used for the benefit of both parties. Occasionally, however, the parties disagree concerning the level of cooperation provided by the defendant. Such was the situation in *Hood v. Commonwealth*,[130] where the defendant was charged with first degree murder and abduction for his role in the stabbing death of an elderly woman.[131] He agreed to cooperate with the prosecution.[132] As part of the agreement, Hood made a very detailed factual proffer implicating himself and another person named Billy Madison in the murder.[133] The agreement provided that the proffer was not to be used against him in a criminal prosecution.[134] However, the agreement also stated "that if Hood 'offers testimony or presents evidence different from any statement made or other information provided during the proffer,'" the government "could use his statements for impeachment, cross-examination, and rebuttal."[135]

At his trial, the defendant cross-examined the medical examiner concerning the similarity of the murder to other elderly women that occurred around the same time; murders widely known in the community as the "Golden Years' Murders."[136] The Commonwealth argued that this line of cross-examination contradicted the statements Hood made in his proffer.[137] The trial

129. *Id.* at 425–26, 611 S.E.2d at 640–41.
130. 269 Va. 176, 608 S.E.2d 913 (2005).
131. *Id.* at 178, 608 S.E.2d at 914.
132. *See id.*
133. *See id.* at 178–79, 608 S.E.2d at 914.
134. *Id.* at 178, 608 S.E.2d at 914.
135. *Id.*
136. *See id.* at 180, 608 S.E.2d at 915.
137. *Id.*

court agreed and permitted the admission of the statements made by the defendant to the Commonwealth.[138]

On appeal to the Supreme Court of Virginia, the court first held that these "'cooperation/immunity' agreements . . . unlike plea agreements, involve only the contracting parties and are not subject to the filing and acceptance procedures applicable to plea agreements."[139] Such cooperation/immunity agreements "implicate a defendant's due process rights and are generally governed by the law of contracts."[140] On appeal, "the trial court's interpretation of the agreement is a matter of law subject to *de novo* review, while a clearly erroneous standard of review is applied to the trial court's factual findings."[141] Furthermore, a trial court's finding that the defendant breached the agreement is reviewed under the same highly deferential standard employed for reviewing factual determinations.[142] In this case, the court held that the trial court did not clearly err in its factual finding that the defendant breached the agreement.[143] The evidence that the defendant sought to adduce during his cross-examination of the medical examiner, which implicated someone other than Madison in the murder, was different from the statement he provided in the proffer.[144]

The Court of Appeals of Virginia examined a different issue involving cooperation/immunity agreements in *Lampkins v. Commonwealth*.[145] Lampkins agreed to cooperate with the police in exchange for complete immunity from prosecution.[146] The record showed that the defendant followed the letter of the instructions given to him by law enforcement, but the lead detective found him "'tough to talk to'" and the defendant occasionally expressed frustration and anger with police questioning.[147] The Commonwealth informed Lampkins that he was not being truthful.[148] De-

138. *Id.*
139. *Id.* at 181, 608 S.E.2d at 915.
140. *Id.*, 608 S.E.2d at 916 (citing Lampkins v. Commonwealth, 44 Va. App. 709, 722, 607 S.E.2d 722, 728–29 (Ct. App. 2005)).
141. *Id.*
142. *See id.* at 182, 608 S.E.2d at 916.
143. *See id.*
144. *Id.*
145. 44 Va. App. 709, 607 S.E.2d 722 (Ct. App. 2005).
146. *See id.* at 713, 607 S.E.2d at 724.
147. *See id.* at 713–14, 607 S.E.2d at 724.
148. *Id.* at 714, 607 S.E.2d at 724.

spite Lampkins' objection that the Commonwealth was bound by the cooperation/immunity agreement, he was charged with, and convicted of, murder.[149] On appeal, the court held that it was the Commonwealth's burden to establish the defendant's breach of a cooperation/immunity agreement and that it had not met that burden.[150] Furthermore, the court found that unlike plea agreements, the defendant need not show any prejudice for the agreement to be enforced.[151] Therefore, the defendant must be given the benefit of his agreement, which is immunity from prosecution.[152]

K. *Immunity from Testimony*

Virginia Code section 19.2-270 provides that "[i]n a criminal prosecution, other than for perjury, . . . evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, in a criminal or civil action, unless such statement was made when examined as a witness in his own behalf."[153] The scope of the exception to this statute was at issue in *Frazier v. Commonwealth*.[154] Frazier's boyfriend, Ampazzio Warren, was tried for drug-related offenses.[155] He fled while the jury was deliberating.[156] At Warren's subsequent trial for failing to appear, Frazier testified that she had encouraged him to leave the area.[157]

She was later charged with aiding and abetting his failure to appear.[158] Relying on Virginia Code section 19.2-270, she moved to exclude any evidence of her prior testimony in her boyfriend's case.[159] The trial court held the prior testimony admissible because she was testifying on her own behalf as well as for her boy-

149. *See id.*, 607 S.E.2d at 725.
150. *Id.* at 722–23, 607 S.E.2d at 729.
151. *See id.* at 723–24, 607 S.E.2d at 729.
152. *Id.* at 724, 607 S.E.2d at 729.
153. VA. CODE ANN. § 19.2-270 (Repl. Vol. 2004 & Cum. Supp. 2005).
154. 268 Va. 412, 601 S.E.2d 624 (2004).
155. *See id.* at 414–15, 601 S.E.2d at 625.
156. *See id.* at 415, 601 S.E.2d at 625.
157. *Id.*
158. *Id.* at 414, 601 S.E.2d at 625.
159. *Id.* at 415, 601 S.E.2d at 626.

friend.[160] The Supreme Court of Virginia agreed, reasoning that a witness testifies on their own behalf "when, as here, there exists between the parties interests of a personal, familial, and financial nature and the issue is whether the accused was testifying in her own behalf at an earlier trial."[161] In *Frazier*, the court explained that there was "no doubt that a personal and familial interest existed between Frazier and Warren. They were girlfriend and boyfriend and she was carrying his child, both when she urged him to flee from his drug/weapons trial and when she testified at his trial for failure to appear."[162] In addition, the court noted that financial interests tied Warren and Frazier.[163] Therefore, the court held that the trial court properly permitted the Commonwealth to adduce her prior testimony because it was in her "own behalf" and the statutory exclusion did not apply.[164]

L. *Capital Murder Indictments*

In *Muhammad v. Commonwealth*,[165] the Supreme Court of Virginia examined whether the defendant's capital murder indictments were defective for failing to allege the aggravating factors in support of the death penalty.[166] Muhammad, relying on *Ring v. Arizona*,[167] contended that the aggravating factors were "the functional equivalent of elements of the offense of capital murder."[168] The court rejected the argument, holding that, unlike the Arizona statute examined in *Ring*, "the existence of one or both aggravating factors of vileness or future dangerousness is submitted to a jury."[169] Moreover, the court noted that the Grand Jury Clause of the Fifth Amendment has not been incorporated through the Fourteenth Amendment.[170] Therefore, Muhammad could not es-

160. *Id.* at 416, 601 S.E.2d at 626.
161. *Id.* at 417, 601 S.E.2d at 626.
162. *Id.*, 601 S.E.2d at 626–27.
163. *Id.*, 601 S.E.2d at 627.
164. *See id.* at 418, 601 S.E.2d at 627.
165. 269 Va. 451, 611 S.E.2d 537 (2005).
166. *See id.* at 491, 611 S.E.2d at 560.
167. 536 U.S. 584 (2002).
168. *Muhammad*, 269 Va. at 491, 611 S.E.2d at 560.
169. *Id.*
170. *See id.* at 492, 611 S.E.2d at 560–61 (quoting Apprendi v. New Jersey, 530 U.S. 466, 477 n.3 (2000)).

tablish that he was deprived of any right under the federal constitution.[171]

M. *Statute of Limitations*

In *Foster v. Commonwealth*,[172] the Court of Appeals of Virginia held that the circuit court correctly applied a five-year statute of limitations for petit larceny, rather than the general one-year statute of limitations reserved for misdemeanor offenses, such as uttering a bad check.[173] The court reasoned that because the legislature "define[s] uttering a bad check as larceny . . . [Virginia] Code § 18.2-181 makes the misdemeanor grade of the offense a form of larceny."[174] As such, it should be treated as a petit larceny subject to the five-year statute of limitations.[175]

III. SEARCH AND SEIZURE

A. *Exclusionary Rule*

The Court of Appeals of Virginia addressed two important issues relating to the exclusionary rule in *Brown v. City of Danville*.[176] In *Brown*, police responded to a call concerning a domestic disturbance.[177] When they arrived, the defendant was combative.[178] As police began to frisk him for weapons, he repeatedly thrust his hands in his pockets.[179] Police told Brown that he was under arrest.[180] A struggle ensued.[181] Ultimately, Brown was subdued and arrested.[182] The search incident to arrest yielded co-

171. *See id.* at 493, 611 S.E.2d at 561.

172. 44 Va. App. 574, 606 S.E.2d 518 (Ct. App. 2004). The Supreme Court of Virginia has granted Foster's petition for appeal. *See* Foster v. Commonwealth, No. 050510 (Va. July 18, 2005).

173. *See id.* at 582, 606 S.E.2d at 522.

174. *Id.*

175. *Id.*

176. 44 Va. App. 586, 606 S.E.2d 523 (Ct. App. 2004).

177. *Id.* at 592, 606 S.E.2d at 526.

178. *See id.*

179. *Id.* at 593, 606 S.E.2d at 527.

180. *Id.*

181. *Id.* at 593–94, 606 S.E.2d at 527.

182. *See id.* at 594, 606 S.E.2d at 527.

caine.[183] Brown was charged with possession of cocaine and obstruction of justice.[184]

Brown filed a motion to suppress the drugs, arguing that the officers lacked a basis to frisk him for weapons.[185] The circuit court agreed and granted the motion to suppress.[186] The court declined, however, to strike the obstruction of justice charge based on Brown's conduct after the illegal search and seizure.[187] Brown was convicted of obstructing justice.[188] At his sentencing, the court considered, over his objection, the evidence that had been suppressed.[189]

The Court of Appeals of Virginia affirmed.[190] The court reasoned that while the exclusionary rule applies to oral statements, "the testimony that is generally prohibited by this rule is derivative evidence relating to the suppressed tangible physical objects or verbal statements."[191] However, "[t]he exclusionary rule does not . . . extend further and also prohibit testimony describing the defendant's own illegal actions following an unlawful search or seizure."[192] The authority for this view, the court noted, was overwhelming.[193]

Finally, the court upheld the trial court's decision to consider the suppressed evidence in the sentencing phase of the trial.[194] The court, along with most other jurisdictions, concluded that a court may, in its discretion, consider suppressed evidence at a sentencing hearing.[195] The court reasoned that the application of the exclusionary rule is "'restricted to those areas where its remedial objectives are thought most efficaciously served.'"[196] The sentencing phase is not an area where such objectives would be

183. *See id.*
184. *See id.*
185. *See id.*, 606 S.E.2d at 527–28.
186. *Id.*, 606 S.E.2d at 528.
187. *See id.* at 595, 606 S.E.2d at 528.
188. *Id.*
189. *See id.*
190. *See id.*
191. *Id.* at 599, 606 S.E.2d at 530.
192. *Id.*
193. *Id.* at 600, 606 S.E.2d at 530.
194. *See id.* at 606, 606 S.E.2d at 533.
195. *See id.* at 609–10, 606 S.E.2d at 535–36.
196. *Id.* at 607, 606 S.E.2d at 534 (quoting United States v. Leon, 468 U.S. 897, 908 (1984)).

served because the rule would run counter to the "'traditional judicial prerogative of sentencing an offender based upon all the relevant and reliable information that is available.'"[197] Finally, the court concluded that permitting such evidence to be considered would not likely encourage police misconduct.[198]

B. *Scope of Pat-Down Searches*

In *El-Amin v. Commonwealth*,[199] the police received an anonymous tip about a group of young men who were smoking marijuana on the street.[200] When they arrived at the scene, the police did not observe any illegal activity.[201] The officers asked to speak with two of the individuals, whereupon one of the young men shoved his hand into his waistband.[202] The officer ordered this person to face him, but he did not comply.[203] When the young man began to reach for his waistband, a struggle ensued.[204] Police retrieved a pellet gun from the suspect's waistband.[205] The officers proceeded to pat-down the other members of the group.[206] In so doing, police recovered a handgun from the defendant.[207] He was then arrested.[208] In the search incident to arrest, the police found marijuana and cocaine in his pockets.[209]

El-Amin contended that the pat-down search was illegal.[210] He argued that he could not be the subject of a pat-down based on his mere proximity to the gun-carrying youth.[211] The Supreme Court of Virginia upheld the search.[212] The court reasoned that once the

197. *Id.* at 608, 606 S.E.2d at 534 (quoting United States v. Tauil-Hernandez, 88 F.3d 576, 581 (8th Cir. 1996)).
198. *See id.* at 609, 606 S.E.2d at 535.
199. 269 Va. 15, 607 S.E.2d 115 (2005).
200. *Id.* at 18, 607 S.E.2d at 116.
201. *Id.*
202. *Id.*
203. *Id.*
204. *See id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *See id.* at 19, 607 S.E.2d at 117.
211. *See id.* at 20, 607 S.E.2d at 117.
212. *See id.* at 22–23, 607 S.E.2d at 118–19.

police officer learned that one of the members of the defendant's group possessed a gun, the officer could reasonably infer that other members of the group presented a threat.[213] The court emphasized that companionship alone did not warrant a pat-down search.[214] Given, however, "[t]he totality of the facts in this case—place, time, discovery of a weapon, and group activity," the pat-down search was justified.[215]

C. *Exceptions to the Warrant Requirement*

In *Kyer v. Commonwealth*,[216] the Court of Appeals of Virginia, sitting en banc, rejected application of two exceptions to the Fourth Amendment warrant requirement.[217] The court found that neither the "emergency" exception nor the "community caretaker" exception applied to the situation where the police entered a residence without a warrant, based only on observing an open door on an August night.[218] The court further held, however, that despite the unlawful entry, because the police obtained permission from the defendant's mother to search her apartment, the subsequent search that produced evidence of a crime committed by the defendant was lawful.[219] The court ruled that any taint created by the entry was cured by the voluntary consent of the resident.[220]

In a panel decision, the Court of Appeals of Virginia upheld application of the "emergency" exception under a very different set of facts. In *Cherry v. Commonwealth*,[221] the court found that a warrantless entry into a residence by the police was lawful based upon the exigent circumstances surrounding the situation.[222] A police officer noticed a stolen truck in the driveway of a private residence.[223] He approached the house and knocked on the door.[224]

213. *See id.*, 607 S.E.2d at 119.
214. *Id.* at 23, 607 S.E.2d at 119.
215. *Id.*
216. 45 Va. App. 473, 612 S.E.2d 213 (Ct. App. 2005) (en banc).
217. *See id.* at 479, 612 S.E.2d at 216.
218. *Id.*, 481, 612 S.E.2d at 216–17.
219. *See id.* at 485, 612 S.E.2d at 219.
220. *Id.* at 476–77, 487, 612 S.E.2d at 215, 220.
221. 44 Va. App. 347, 605 S.E.2d 297 (Ct. App. 2004).
222. *See id.* at 352, 605 S.E.2d at 299.
223. *Id.* at 353, 605 S.E.2d at 300.
224. *Id.*

A woman opened the door and immediately notified the occupants of the home that the police were present.[225] The officer smelled the odor of marijuana emanating from the residence and heard people moving around inside.[226] The officer entered the house without invitation and saw drug paraphernalia.[227] He arrested the defendant and a search incident to arrest yielded additional contraband.[228] The court held that detection of the odor of marijuana by an officer who was familiar with its smell provided that officer with probable cause to believe that there was marijuana inside the house.[229]

Further, the court found that exigent circumstances justified the warrantless entry.[230] The officer had arrived at the door to investigate an unrelated crime.[231] When the woman opened the door, the officer saw a bed sheet hung inside the house in a manner that obscured anyone from seeing inside.[232] He also smelled "the unmistakable odor of burning marijuana."[233] When she saw him, the woman alerted those inside that the police were present and the officer then heard people moving around inside.[234] Based upon all of these facts, the court concluded that the officer acted reasonably in concluding that the drugs and occupants were likely to be gone by the time he obtained a warrant.[235] Thus, the court held that his warrantless entry was lawful.[236]

D. *Expectation of Privacy*

In a case involving the warrantless entry of police into a motel room, the Court of Appeals of Virginia held that the defendant failed to prove that he had a reasonable expectation of privacy in the room and, consequently, he did not have a basis to challenge

225. *Id.*
226. *Id.* at 353–54, 605 S.E.2d at 300.
227. *See id.* at 354, 605 S.E.2d at 300.
228. *See id.*
229. *Id.* at 357–58, 605 S.E.2d at 302.
230. *See id.* at 367, 605 S.E.2d at 307.
231. *Id.* at 362, 605 S.E.2d at 304.
232. *Id.* at 363, 605 S.E.2d at 304.
233. *Id.*
234. *Id.*
235. *Id.*, 605 S.E.2d at 305.
236. *See id.* at 367, 605 S.E.2d at 307.

the entry.[237] The officers went to the motel room to engage in a "'knock and talk'" to determine whether the occupants were engaged in illegal narcotics activities.[238] Prior to approaching the room, the detectives checked the motel registration information.[239] They knocked on the door to the room, announced their presence, and engaged in an initial encounter with a third-party occupant who was not the registered guest and did not have a key to the room.[240] The officers subsequently entered the room using a pass key.[241] The defendant was inside, sleeping in a bed.[242]

The court noted that whether the privacy interest afforded overnight guests extends to overnight guests of motel registrants is a matter of first impression in Virginia and has not been addressed by the Supreme Court of the United States.[243] However, the court found that a defendant claiming such a privacy interest must demonstrate that he is an invited guest of the renter or registered guest.[244] Here, beyond the defendant's mere presence in the room, there was absolutely no evidence that the defendant was present with the registrant's consent.[245] Neither the defendant nor the other occupant had a key to the room, nor were they registered as guests in the room.[246] Further, neither party claimed any connection to the motel guest.[247] Thus, the defendant failed to prove that he was an overnight guest of the renter and had no reasonable expectation of privacy in the room.[248]

E. *Warrants*

In *Anzualda v. Commonwealth*,[249] the Court of Appeals of Virginia, sitting en banc, found that although a search warrant ap-

237. Sharpe v. Commonwealth, 44 Va. App. 448, 455, 605 S.E.2d 346, 349 (Ct. App. 2004).
238. *Id.* at 450–51, 605 S.E.2d at 347.
239. *Id.* at 451, 605 S.E.2d at 347.
240. *Id.*, 605 S.E.2d at 347–48.
241. *See id.*, 605 S.E.2d at 348.
242. *See id.* at 452, 605 S.E.2d at 348.
243. *Id.* at 456, 605 S.E.2d at 350.
244. *Id.* (quoting United States v. Conway, 73 F.3d 975, 979 (10th Cir. 1995)).
245. *Id.* at 457, 605 S.E.2d at 350.
246. *Id.*
247. *Id.*
248. *See id.* at 457–58, 605 S.E.2d at 351.
249. 44 Va. App. 764, 607 S.E.2d 749 (Ct. App. 2005) (en banc).

peared to be stale, the evidence was properly admitted at trial based on application of the "good faith exception" to the warrant requirement.[250] The court opined that the warrant was "not so lacking in indicia of probable cause" as to render it such that no reasonable officer would have relied upon it.[251] The court noted that the affidavit in support of the warrant did not have facts to enable the magistrate to infer that the defendant still had the murder weapon and that he was keeping it in the target residence.[252] In any event, the majority found that the good faith exception to the exclusionary rule applied.[253] The court held that the record supported the conclusion that the officer acted in good faith and reasonably believed that the warrant was valid.[254] It added that clearly there were some indicia of probable cause and the document was not "'bare-bones.'"[255] The court concluded that "[b]ecause the officer possessed an objectively reasonable belief in the existence of probable cause[,] . . . the trial court did not err in admitting the seized evidence under the good faith exception to the exclusionary rule."[256]

IV. EVIDENCE

A. *Photographic Lineups*

In *Winston v. Commonwealth*,[257] the Supreme Court of Virginia made clear that the defendant bears the burden to show that an out-of-court identification is unduly suggestive so as to taint any in-court identifications.[258] The court recognized that the Supreme Court of the United States "established a two part analysis for determining whether an in-court identification should be excluded" based upon "an improper method for obtaining an out-of-court identification."[259] Relying upon a decision of the United

250. *See id.* at 770–71, 607 S.E.2d at 752.
251. *Id.* at 786, 607 S.E.2d at 760.
252. *Id.* at 777, 607 S.E.2d at 755.
253. *See id.* at 788, 607 S.E.2d at 761.
254. *Id.* at 780, 607 S.E.2d at 757.
255. *Id.* at 781–82, 607 S.E.2d at 758.
256. *Id.* at 788, 607 S.E.2d at 761.
257. 268 Va. 564, 604 S.E.2d 21 (2004).
258. *See id.* at 593–94, 604 S.E.2d at 38.
259. *Id.* at 593, 604 S.E.2d at 37.

States Court of Appeals for the Fourth Circuit,[260] the court held that it is the defendant's burden to prove that the "'photographic lineup procedure was impermissibly suggestive.'"[261]

B. *Testimonial and Documentary Evidence of a Third Party's Mental State*

In an unusual case, the Court of Appeals of Virginia was asked to consider whether a criminal defendant was entitled to the mental health records of a third party and related witness testimony in a situation where the third party had been subject to a court-ordered mental health evaluation pursuant to Virginia Code section 19.2-169.5.[262] The court found that, despite the fact that the defendant was on trial for conspiracy to commit murder and the third party was charged with actually having committed the murder, the defendant was not entitled to materials produced during the course of the third party's mental health evaluation or the related testimony of the doctor who conducted the evaluation.[263] Thus, the trial court did not abuse its discretion when it found that all notes relating to the statutory mental health evaluation were protected and the doctor's testimony was inadmissible.[264]

V. JURIES

In *Riner v. Commonwealth*,[265] the defendant asserted that the trial court erred by denying his motion for a mistrial based on a claim of "'unauthorized third party contact'" by a juror.[266] In this case, a juror had unauthorized contact with his wife relating to newspaper headlines about the case.[267] That juror then attempted to communicate such information to other members of the jury.[268] The Supreme Court of Virginia found that the communication or

260. United States v. Wilkerson, 84 F.3d 692 (4th Cir. 1996).
261. 268 Va. at 593–94, 604 S.E.2d at 37–38 (quoting *Wilkerson*, 84 F.3d at 695).
262. Schwartz v. Commonwealth, 45 Va. App. 407, 611 S.E.2d 631 (Ct. App. 2005).
263. *See id.* at 448–54, 611 S.E.2d at 651–55.
264. *See id.* at 454, 611 S.E.2d at 655.
265. 268 Va. 296, 601 S.E.2d 555 (2004).
266. *Id.* at 317, 601 S.E.2d at 567.
267. *Id.* at 314–15, 601 S.E.2d at 565.
268. *Id.* at 313, 601 S.E.2d at 564–65.

attempted communication of the headlines to other jurors was analogous to the jurors reading or hearing about the case through the media reports.[269] The court conducted an analysis of the actions taken by the trial court, which included: (1) dismissing the offending juror from the case prior to any deliberations; (2) determining that only one juror heard or remembered hearing the offending juror discuss the newspaper article; and (3) questioning of the jurors, which revealed that they were not influenced by the offending juror and "actually attempted to avoid him."[270] After releasing the offending juror, the trial court also instructed the jury to disregard anything the juror might have told them, pointing out that some of his comments were actually incorrect.[271] Based upon all of the actions taken by the trial court, the court concluded that the motion for a mistrial was properly denied.[272]

VI. SPECIFIC CRIMES

A. *Assault and Battery*

Over the past few years, the precise contours of Virginia's law of assault remained unclear.[273] In *Carter v. Commonwealth*,[274] the Supreme Court of Virginia addressed the issue. In *Carter,* a police officer made a traffic stop at night and approached the driver.[275] The officer noticed that the defendant, who was the passenger in the car, had his right hand concealed by his right leg.[276] The defendant suddenly raised it, with his fingers formed in the fashion of a gun, and said "'Pow.'"[277] The officer experienced a brief mo-

269. *Id.* at 315, 601 S.E.2d at 565.

270. *Id.* at 316–17, 601 S.E.2d at 566.

271. *Id.* at 317, 601 S.E.2d at 566–67.

272. *Id.*, 601 S.E.2d at 567.

273. In *Epps v. Commonwealth*, a panel of the Court of Appeals of Virginia concluded that the common law tort definition of assault had "been incorporated into the definition of the crime of assault." 28 Va. App. 58, 62, 502 S.E.2d 140, 142 (Ct. App. 1998). The opinion, however, was later withdrawn and the conviction affirmed by an evenly divided court. *See* Epps v. Commonwealth, 29 Va. App. 169, 170, 510 S.E.2d 279, 279 (Ct. App. 1999) (en banc).

274. 269 Va. 44, 606 S.E.2d 839 (2005).

275. *Id.* at 45, 606 S.E.2d at 840.

276. *See id.* at 45–46, 606 S.E.2d at 840.

277. *Id.* at 46, 606 S.E.2d at 840.

ment of terror before he realized he was not in danger.[278] Carter was convicted of assault on a police officer.[279] He argued that his conviction was improper because he lacked the actual ability to inflict bodily harm.[280] The court disagreed, holding that

> a common law assault, whether a crime or tort, occurs when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm *or* engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim.[281]

To the extent there were any doubters, the Court of Appeals of Virginia confirmed in *Gilbert v. Commonwealth*[282] that spitting on someone, in this case a police officer, constituted a battery.[283]

B. *Burglary*

In *Hitt v. Commonwealth*,[284] the Court of Appeals of Virginia further defined the term "dwelling house" for purposes of the offense of statutory burglary.[285] In this case, the defendant was charged with burglary under Virginia Code section 18.2-91, based upon his actions of breaking a lock on a bedroom door in a house in which he was a guest.[286] The defendant broke the lock, entered the bedroom, and took cash that was on top of a dresser in the room.[287] The court found that the Commonwealth failed to prove that the defendant unlawfully broke into and entered a "dwelling house" as required by Virginia Code sections 18.2-90 and 18.2-91.[288] A locked bedroom within a home simply is not a separate "dwelling house" under the statute.[289] Consequently, the conviction was reversed.[290]

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278. *Id.*
279. *Id.*
280. *Id.* at 45, 606 S.E.2d at 840.
281. *Id.* at 47, 606 S.E.2d at 841.
282. 45 Va. App. 67, 608 S.E.2d 509 (Ct. App. 2005).
283. *See id.* at 71–72, 608 S.E.2d at 511.
284. 43 Va. App. 473, 598 S.E.2d 783 (Ct. App. 2004).
285. *See id.* at 481–82, 598 S.E.2d at 787.
286. *See id.* at 477, 598 S.E.2d at 784–85.
287. *Id.*
288. *Id.* at 479–83, 598 S.E.2d at 785–88.
289. *See id.* at 483, 598 S.E.2d at 788.
290. *Id.*

C. *Capital Murder*

The Supreme Court of Virginia addressed the meaning of the "'triggerman'" concept in *Muhammad v. Commonwealth*.[291] In *Muhammad*, the defendant asserted that he could not be convicted of capital murder because he was not the "'triggerman.'"[292] The court rejected this argument. The court first noted that the "'triggerman'" euphemism "is inadequate to describe the breadth of criminal responsibility subject to the death penalty in Virginia."[293] For this reason, the court has employed "the term 'immediate perpetrator' as the appropriate descriptive term."[294] The court held that "[i]t is the actual participation together in a unified act that permits two or more persons to be immediate perpetrators."[295]

In this case, an expert testified for the prosecution about sniper methodology and the distinct responsibilities of each member of the sniper team, including the shooter and the spotter.[296] The court held that "[t]he Commonwealth presented compelling evidence" that the defendant and his accomplice "acted together as a sniper team."[297] Therefore, the court concluded that the trial court did not err in instructing the jury regarding the defendant's criminal responsibility as a principal in the first degree who was eligible for the death penalty.[298]

D. *Driving Under the Influence*

Virginia law requires that, following a test to determine the alcohol content of a driver's breath, "[a] copy of the certificate [of analysis] shall be promptly delivered to the accused."[299] In *Shelton v. Commonwealth*,[300] the police officer who administered the breath test showed the defendant the results of the test but did

291. 269 Va. 451, 611 S.E.2d 537 (2005).
292. *Id.* at 481, 611 S.E.2d at 554.
293. *Id.* at 483, 611 S.E.2d at 555.
294. *Id.*
295. *Id.* at 484, 611 S.E.2d at 556.
296. *Id.* at 480–81, 611 S.E.2d at 553–54.
297. *Id.* at 481, 611 S.E.2d at 554.
298. *See id.* at 485, 611 S.E.2d at 557.
299. VA. CODE ANN. § 18.2-268.9 (Cum. Supp. 2005).
300. 45 Va. App. 175, 609 S.E.2d 89 (Ct. App. 2005).

not provide him with a copy.[301] At trial and on appeal, Shelton asserted that this failure was "fatal to its admission as evidence."[302] The Court of Appeals of Virginia rejected this contention, holding that the law requires only substantial compliance with the procedural requirements relating to blood and breath samples and that the officer had substantially complied.[303] The failure to provide the defendant with an actual copy of the results was "minor" and "trivial" and did not prejudice the defendant in any way.[304]

In *Henry v. Commonwealth*,[305] the defendant sought to suppress the results of his breath test on the basis that the testing equipment was not stored in compliance with applicable regulations.[306] Regulations require that the equipment be stored in "a clean, dry location that is only accessible to an authorized licensee."[307] The evidence showed that the machine was housed in the hallway of a secure area which "could not be entered without a jailor allowing the access."[308] The machine was stored "between the entrance to the jailor's office and another sheriff's office" that was used by other employees of the sheriff's office and visitors.[309] The equipment "was not in a partitioned space" and shared an electrical outlet with a photocopier.[310] The trial court denied the suppression motion and the Court of Appeals of Virginia affirmed.[311] The court held that the evidence showed substantial compliance and "in the absence of a showing of prejudice by the appellant, substantial compliance is sufficient for the admission of the test results."[312] The court held that the defendant could show no prejudice because "the machine has a self-correcting mechanism that informs the test administrator when it cannot provide an accurate result. The machine gave no such warning in this case."[313] Finally, the court observed that there was "no alle-

301. *Id.* at 177, 609 S.E.2d at 90.
302. *Id.* at 178, 609 S.E.2d at 90.
303. *See id.* at 178–81, 609 S.E.2d at 91–92.
304. *See id.* at 181, 609 S.E.2d at 92.
305. 44 Va. App. 702, 607 S.E.2d 140 (Ct. App. 2005).
306. *Id.* at 705, 607 S.E.2d at 141.
307. 6 VA. ADMIN. CODE § 20-190-40 (2003).
308. *Henry*, 44 Va. App. at 705, 607 S.E.2d at 141.
309. *Id.*
310. *Id.*
311. *Id.* at 705, 708, 607 S.E.2d at 141, 143.
312. *Id.* at 708, 607 S.E.2d at 142.
313. *Id.*, 607 S.E.2d at 143.

gation that the machine was tampered with or that the results were incorrect."[314]

In *Wilson v. Commonwealth*,[315] as noted above, Deputy Reed Partlow, an off-duty officer from Culpeper County, observed the defendant driving erratically.[316] When the defendant stopped his car at a gas station in Spotsylvania County, Partlow contacted the local police.[317] The Spotsylvania County deputy did not think he could arrest the defendant for driving under the influence because he had not seen him drive.[318] Following field sobriety tests, Wilson was arrested for being drunk in public.[319] The following morning, Partlow contacted the magistrate and, upon learning there was no obstacle to obtaining a warrant charging Wilson with driving under the influence, drove back to Spotsylvania County and swore out a criminal complaint.[320] About twelve hours after he was initially arrested, the driving under the influence warrant was served on the defendant.[321]

Wilson contended at trial that "his due process rights were violated because the implied consent law required the Commonwealth to procure or permit him to obtain blood or breath testing to determine his level of intoxication."[322] The Court of Appeals of Virginia disagreed.[323] The court first noted that the implied consent statute, Virginia Code section 18.2-268.2, by its plain language, applies only to arrests for certain driving violations.[324] This defendant was arrested for being drunk in public.[325] When the arrest did occur, it was not within the three hours provided "to bring the implied consent and testing provisions of Code § 18.2-268.2 into play."[326]

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314. *Id.*
315. 45 Va. App. 193, 609 S.E.2d 612 (Ct. App. 2005).
316. *See id.* at 196, 609 S.E.2d at 613.
317. *See id.* at 197, 609 S.E.2d at 614.
318. *Id.* at 200, 609 S.E.2d at 615.
319. *Id.*
320. *See id.* at 200–01, 609 S.E.2d at 615.
321. *Id.* at 207, 609 S.E.2d at 619.
322. *Id.* at 206–07, 609 S.E.2d at 618.
323. *See id.* at 207, 609 S.E.2d at 618.
324. *Id.*, 609 S.E.2d at 619 (analyzing VA. CODE ANN. § 18.2-268.2 (Cum. Supp. 2005)).
325. *See id.*
326. *Id.*

E. *Driving on a Suspended License*

The defendant argued in *Shreve v. Commonwealth*[327] that she could not be convicted for driving without a valid driver's license because, even though her license was suspended, it was still "valid."[328] The applicable statute provides that "[n]o person . . . shall drive any motor vehicle on any highway in the Commonwealth until such person has applied for a driver's license, as provided in this article, satisfactorily passed the examination required by § 46.2-325, and obtained a driver's license, *nor unless the license is valid.*"[329]

The defendant argued that her suspended license was valid because she had obtained her license following her application for it and that she had passed the required examination.[330] The Court of Appeals of Virginia rejected this argument, concluding that the statute recognized two distinct violations: "(1) driving after failing to apply for a driver's license, satisfactorily pass the examination, and obtain the license and (2) driving without a valid license."[331] Further, the court held that a suspended license is not "valid" because a suspended license is not "legally sufficient to meet its intended purpose, namely, authorizing the operator of the motor vehicle to drive on the highways of Virginia."[332]

F. *Escape*

The Court of Appeals of Virginia examined what constitutes "custody" for purposes of escaping from custody. In *Davis v. Commonwealth*,[333] the defendant pled guilty to several misdemeanor and felony charges.[334] He was allowed to remain on bond while awaiting sentencing but was ordered to report to the regional jail before his sentencing date.[335] When he failed to report,

327. 44 Va. App. 541, 605 S.E.2d 780 (Ct. App. 2004).
328. *Id.* at 544, 605 S.E.2d at 781.
329. VA. CODE ANN. § 46.2-300 (Repl. Vol. 2005) (emphasis added).
330. *See Shreve*, 44 Va. App. at 545, 605 S.E.2d at 782.
331. *Id.* at 547–48, 605 S.E.2d at 783.
332. *Id.* at 549, 605 S.E.2d at 783–84.
333. 45 Va. App. 12, 608 S.E.2d 482 (Ct. App. 2005).
334. *Id.* at 13, 608 S.E.2d at 483.
335. *Id.*

he was charged with escape from court custody under Virginia Code section 18.2-479(B).[336] The court agreed with the defendant that he was not in the custody of the court and dismissed the charge.[337] After examining other cases addressing the meaning of the term custody, the court held that "'the General Assembly must have intended that the term 'custody' would include a *degree of physical control or restraint* under circumstances other than those also necessary to constitute an actual custodial arrest.'"[338] When the defendant failed to report to the jail, "he was no longer in the physical custody or even presence of the court."[339]

G. *Firearms*

In *Morris v. Commonwealth*,[340] the Supreme Court of Virginia held that a flare gun is a "firearm" for purposes of the offense of possession of a firearm by a convicted felon, proscribed by Virginia Code section 18.2-308.2.[341] The Commonwealth proved that the flare gun was "an instrument that was designed, made, and intended to expel a projectile by means of an explosion."[342]

In another case, the Court of Appeals of Virginia considered a variety of double jeopardy challenges to firearms offenses based upon the claim that they were lesser-included offenses.[343] The court found that: (1) brandishing a firearm is not a lesser-included offense of robbery; (2) "possession of a firearm by a felon is not a lesser-included offense of brandishing a firearm;" and (3) possession of a firearm by a convicted felon is not a lesser-included offense of carrying a concealed weapon.[344] Thus, the court concluded that because the defendant had not been punished twice for the same offense, nor had he been punished for a crime that is a lesser offense of another, his multiple convictions

336. *Id.*

337. *Id.*

338. *Id.* at 15, 608 S.E.2d at 484 (quoting White v. Commonwealth, 267 Va. 96, 104, 591 S.E.2d 662, 667 (2004)) (emphasis added).

339. *Id.*

340. 269 Va. 127, 607 S.E.2d 110 (2005).

341. *See id.* at 131, 607 S.E.2d at 112 (citing Armstrong v. Commonwealth, 263 Va. 573, 584, 562 S.E.2d 139, 145 (2002)).

342. *Id.* at 132, 607 S.E.2d at 113.

343. Morris v. Commonwealth, 45 Va. App. 181, 609 S.E.2d 92 (Ct. App. 2005).

344. *See id.* at 189–90, 609 S.E.2d at 96.

did not violate the constitutional prohibition against double jeopardy.[345]

In *Powell v. Commonwealth*,[346] the Supreme Court of Virginia affirmed the defendant's conviction for possession of a firearm in the commission of a felony, in violation of Virginia Code section 18.2-53.1.[347] The court opined that despite the fact that the Commonwealth was required to prove that the defendant "possessed" a firearm, the trier of fact was entitled to resolve the conflicts in the evidence.[348] Although no gun was found, the defendant's statements and actions during the commission of the crimes suggested that he had a gun.[349] The court noted that the trier of fact determined that the defendant had a gun and that conclusion was supported by facts in the record.[350] The evidence that he possessed a gun included the defendant's representations to the victims that he had a gun and would hurt them, as well as his actions of keeping his hand in his pocket and being fidgety.[351] The court found that the conclusion that the defendant had a gun was entirely supported by the record.[352]

H. *Indecent Liberties*

In *Viney v. Commonwealth*,[353] the defendant "was convicted of two counts of taking indecent liberties with a child in violation of Code § 18.2-370."[354] The defendant contended on appeal that the Commonwealth failed to prove that he acted with "lascivious intent" when he exposed his penis to two young girls.[355] The Supreme Court of Virginia rejected his argument.[356] The court found that when the defendant "made eye contact with the girls and then directed their attention to his groin area by intentionally

345. *Id.*
346. 268 Va. 233, 602 S.E.2d 119 (2004).
347. *See id.* at 235–37, 602 S.E.2d at 120–21.
348. *Id.* at 237, 602 S.E.2d at 121.
349. *Id.*
350. *Id.*
351. *Id.*
352. *See id.*
353. 269 Va. 296, 609 S.E.2d 26 (2005).
354. *Id.* at 298, 609 S.E.2d at 27.
355. *Id.*
356. *See id.* at 302, 609 S.E.2d at 29–30.

glancing down," followed by his intentional act of pulling his shorts aside in order to expose his penis to the girls, his acts constituted a gesture made with lascivious intent.[357]

I. *Malicious Wounding by a Mob*

In *Hughes v. Commonwealth*,[358] the Court of Appeals of Virginia concluded that three brothers who assembled and decided to "crash" a party were properly convicted of malicious wounding by a mob and assault and battery by a mob based upon actions which occurred at the party.[359] The court found that the evidence supported the conclusion that the three defendants acted as members of a mob.[360] Specifically, the court found that:

> Appellants arrived at the party together, uninvited and armed. When asked to leave, they became angry and aggressive. Systematically, they attacked a number of the party's hosts and guests. Each brother assisted the other brothers in the attacks. Each brother fought off people who were trying to assist the victims. Appellants, agitated when asked to leave the party, collectively attacked a number of victims and did not act as independent aggressors. The jury properly found, based on this evidence[,] that appellants acted as a mob.[361]

J. *Perjury*

A prerequisite for a perjury conviction under Virginia Code section 18.2-434 is that the testimony must be "material."[362] The Court of Appeals of Virginia explained the meaning of materiality in *Fritter v. Commonwealth*.[363] Fritter, a suspect in a homicide investigation, told the police he had received a letter from another suspect, Nick Halteh.[364] In the letter, Halteh indicated that he wanted the complaining witness paid off or "[d]elt [sic] with some-

357. *See id.* at 301–02, 609 S.E.2d at 29.
358. 43 Va. App. 391, 598 S.E.2d 743 (Ct. App. 2004).
359. *See id.* at 395, 598 S.E.2d at 744–45.
360. *Id.* at 399, 598 S.E.2d at 747.
361. *Id.* at 402, 598 S.E.2d at 748.
362. *See* VA. CODE ANN. § 18.2-434 (Cum. Supp. 2005).
363. 45 Va. App. 345, 610 S.E.2d 887 (Ct. App. 2005).
364. *Id.* at 348–49, 610 S.E.2d at 888–89.

how."[365] When called as a witness in Halteh's trial, Fritter denied he had ever received the letter.[366] The Commonwealth was nevertheless able to authenticate the letter by other means.[367] Halteh was ultimately acquitted.[368] The Commonwealth then charged Fritter with perjury.[369] Fritter asserted, inter alia, that his testimony was not material and, therefore, his conviction could not stand.[370]

The court concluded that "'[t]estimony is material if it is relevant to a main or collateral issue on trial . . . . Evidence is relevant if it has any logical tendency, *however slight*, to establish a fact at issue in the case.'"[371] The ultimate issue in Halteh's case, the court noted, "was whether Halteh was the criminal actor. Any evidence that tended to prove or disprove Halteh's guilt was relevant . . . ."[372] The letter from Halteh, which sought to suppress or bribe testimony against him, "was inculpatory because it tended to show a consciousness of guilt."[373] Fritter's testimony regarding the letter's authenticity was therefore relevant and material.[374]

K. *Terrorism*

The Supreme Court of Virginia sustained Virginia's terrorism predicate for capital murder against a number of constitutional challenges in *Muhammad v. Commonwealth*.[375] The defendant contended that the statutes, Virginia Code sections 18.2-31(13) and 18.2-46.4, were unconstitutionally vague.[376] The court held that the terms employed by the statute provided sufficient notice "for ordinary people to understand what conduct it prohibits."[377]

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365. *See id.* at 349, 610 S.E.2d at 889.
366. *Id.* at 350, 610 S.E.2d at 889.
367. *See id.*
368. *Id.* at 351, 610 S.E.2d at 890.
369. *See id.*
370. *See id.*
371. *Id.* at 352, 610 S.E.2d at 890 (quoting Ragland v. Commonwealth, 16 Va. App. 913, 918, 434 S.E.2d 675, 678 (Ct. App. 1993); Sheard v. Commonwealth, 12 Va. App. 227, 232, 403 S.E.2d 178, 180 (Ct. App. 1991)).
372. *Id.*
373. *Id.* at 353, 610 S.E.2d at 890.
374. *Id.*, 610 S.E.2d at 891.
375. 269 Va. 451, 611 S.E.2d 537 (2005).
376. *Id.* at 496, 611 S.E.2d at 563.
377. *See id.* at 497–500, 611 S.E.2d at 563–65.

Furthermore, Muhammad's argument centered on hypothetical situations rather than his own conduct.[378] However, a defendant "who engages in conduct that is clearly proscribed and not constitutionally protected may not successfully attack a statute as void for vagueness based upon [the] hypothetical conduct of others."[379]

L. *Unauthorized Use*

In *Tucker v. Commonwealth*,[380] the Supreme Court of Virginia examined whether a defendant can be convicted for unauthorized use when he initially obtains the vehicle with the consent of the owner.[381] According to Tucker, he borrowed a car from an acquaintance to travel to a restaurant and a convenience store.[382] The owner of the car saw Tucker later and demanded that he return the car.[383] Tucker said he would return it, but did not.[384] Several days later, when the car's owner approached the defendant—who was still driving the borrowed car—the defendant sped away.[385] The damaged car was found several days later.[386] Tucker argued that he could not be convicted of unauthorized use because the taking was not initially "trespassory."[387] The Supreme Court of Virginia disagreed, holding that the plain language of Virginia Code section 18.2-102 criminalized a taking "'without the consent of the owner.'"[388] The court concluded that:

> When an owner consents to another person having temporary possession of the owner's vehicle, but does not consent to its use beyond a designated period of possession, the statute is violated when such use continues without the owner's consent and is accompanied by an intent to temporarily deprive the owner of possession of the vehicle.[389]

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378. *Id.* at 500, 611 S.E.2d at 565.
379. *Id.* at 501, 611 S.E.2d at 565–66.
380. 268 Va. 490, 604 S.E.2d 66 (2004).
381. *See id.* at 492, 604 S.E.2d at 67.
382. *See id.*
383. *See id.*
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.* at 493, 611 S.E.2d at 67.
388. *Id.* at 493–94, 604 S.E.2d at 67–68 (quoting VA. CODE ANN. § 18.2-102 (Repl. Vol. 2004)).
389. *Id.* at 494, 604 S.E.2d at 68. The Court of Appeals of Virginia had reached the

VII. POST-TRIAL/REVOCATION

In *Jefferson v. Commonwealth*,[390] the defendant was convicted of grand larceny.[391] Although an order was prepared, it was not signed or entered by the court.[392] The defendant served some time in prison and was released on probation.[393] After he was convicted of new offenses, the court held a revocation proceeding.[394] The defendant contended that he could not be convicted of violating an order that had never been signed or entered.[395] The trial court disagreed, and before revoking his suspended sentence, signed and entered the order nunc pro tunc.[396]

The Supreme Court of Virginia affirmed.[397] First, the court held that there was no issue regarding the correctness of the sentencing order entered nunc pro tunc.[398] Second, the court held that:

> The rendition of a judgment must be distinguished from its entry on the court records. The rendition of a judgment duly pronounced is the judicial act of the court, and the entry or recording of the instrument memorializing the judgment "does not constitute an integral part of, and should not be confused with, the judgment itself."[399]

Therefore, the court held, "[t]he absence of the judge's signature 'does not invalidate the judgment rendered.'"[400]

In *Peyton v. Commonwealth*,[401] the defendant was convicted of possession of cocaine with the intent to distribute.[402] After he was found suitable for participation in the Detention Center Incarceration Program, "the trial court suspended the balance of [his] sentence and placed him on probation conditioned upon his entry

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same result earlier in *Overstreet v. Commonwealth*, 17 Va. App. 234, 238, 435 S.E.2d 906, 909 (Ct. App. 1993).

390. 269 Va. 136, 607 S.E.2d 107 (2005).
391. *Id.* at 138, 607 S.E.2d at 108.
392. *Id.*
393. *Id.*, 607 S.E.2d at 109.
394. *Id.*
395. *See id.*
396. *Id.*
397. *Id.*, 607 S.E.2d at 108.
398. *See id.* at 139, 607 S.E.2d at 109.
399. *Id.* (quoting Rollins v. Bazile, 205 Va. 613, 617, 139 S.E.2d 114, 117 (1964)).
400. *Id.* (quoting *Rollins*, 205 Va. at 617–18, 139 S.E.2d at 118).
401. 268 Va. 503, 604 S.E.2d 17 (2004).
402. *Id.* at 506, 604 S.E.2d at 18.

into and successful completion of the program."[403] Peyton was unable to complete the program due to "'medical/psychological'" reasons.[404] The trial court then proceeded to revoke the entire suspended sentence, deeming that because the defendant had not completed the program, it was required to revoke the suspended sentence.[405] The defendant argued that the trial court abused its discretion in revoking his suspended sentence because his discharge from the detention center was not attributable to willful conduct on his part.[406] The Supreme Court of Virginia agreed.[407] The court reiterated that trial courts are vested with discretion in determining whether to revoke all or part of a defendant's sentence.[408] However, where the defendant's removal from the detention program is not the result of his behavior or conduct, the trial court must at least consider reasonable alternatives to imprisonment.[409] The court's failure to do so was an abuse of discretion.[410]

VIII. SEXUALLY VIOLENT PREDATOR LAW

The Supreme Court of Virginia, in *Shivaee v. Commonwealth*,[411] brushed aside a constitutional challenge to the law authorizing the commitment of certain sexual predators.[412] The court examined Virginia's statute against the statutes recently upheld by the Supreme Court of the United States in *Kansas v. Crane*[413] and *Kansas v. Hendricks*.[414] The court concluded that Virginia's statute contains the required procedures and evidentiary safeguards as well as the requirement of a finding of dangerousness to one's self or others.[415] The clear and convincing standard of proof found in the Virginia law satisfies due proc-

403. *Id.*
404. *Id.* at 506–07, 604 S.E.2d at 18.
405. *Id.* at 507, 604 S.E.2d at 18.
406. *Id.*, 604 S.E.2d at 19.
407. *See id.* at 511, 604 S.E.2d at 21.
408. *Id.* at 508, 604 S.E.2d at 19 (citing Hamilton v. Commonwealth, 217 Va. 325, 326, 228 S.E.2d 555, 556 (1976)).
409. *Id.* at 511, 604 S.E.2d at 21.
410. *Id.*
411. 270 Va. 112, 613 S.E.2d 570 (2005).
412. *See id.* at 123–26, 613 S.E.2d at 576–78.
413. 534 U.S. 407 (2002).
414. 521 U.S. 346 (1997).
415. *Shivaee*, 270 Va. at 123, 613 S.E.2d at 576.

ess.[416] The court further held that the Virginia law properly links the condition of the person with proof of dangerousness and lack of control.[417] The court also held that the law is not void for vagueness.[418] Finally, consistent with the jurisprudence of the Supreme Court of the United States, the court concluded that the Virginia law does not violate the Double Jeopardy Clause or the Ex Post Facto Clause.[419]

IX. LEGISLATION

A. *Speedy Trial—Double Jeopardy*

Defendants raising constitutional speedy trial or double jeopardy objections to a prosecution must now file their objections in writing seven days before trial or "at such time prior to trial as the grounds for the motion or objection shall arise, whichever occurs last."[420] The new law omits any mention of *statutory* rights. In addition, if a court dismisses a prosecution on such grounds, the Commonwealth now has a right to appeal.[421]

B. *Driving Offenses*

Filling a lacuna in the law, a defendant whose driver's license has been suspended following a conviction for certain reckless driving offenses can now be issued a restricted license by a court.[422]

Virginia has long recognized a "presumption" that a defendant is driving under the influence of alcohol if his blood or breath contains a certain level of alcohol.[423] The General Assembly established a similar scheme with respect to certain illegal drugs, which provides that persons driving with the specified level of

416. *Id.* at 126, 613 S.E.2d at 578.
417. *Id.* at 123, 613 S.E.2d at 576.
418. *Id.* at 124–25, 613 S.E.2d at 577.
419. *Id.* at 125, 613 S.E.2d at 577.
420. VA. CODE ANN. § 19.2-266.2 (Cum. Supp. 2005).
421. *See id.* § 19.2-398 (Cum. Supp. 2005).
422. *Id.* § 46.2-393 (Repl. Vol. 2005).
423. *See id.* § 18.2-269(A)(3) (Cum. Supp. 2005).

drugs will henceforth be "presumed" to be driving under the influence of the drug.[424]

C. *Drugs*

Given the growing problems associated with methamphetamine consumption and production, the General Assembly enacted a statute that targets methamphetamine manufacturers. The new law punishes the possession of two or more "precursor" substances with the intent to manufacture methamphetamine, methcathinone or amphetamine.[425] The General Assembly also increased the penalties for methamphetamine manufacture.[426] The penalties rise for subsequent offenses.[427] Finally, a person who maintains a custodial relationship over a child and permits the child to be present in a building or structure during the manufacture of methamphetamine now faces a felony conviction with a sentencing range of ten to forty years in prison.[428]

D. *Escape*

Previously, Virginia law punished the escape of a person in custody on a charge or conviction of a misdemeanor[429] or the escape with force or violence of a person in custody for a criminal offense.[430] However, it did not cover persons who were in custody for probation or parole violations and who had escaped without the use of force. The General Assembly has now provided a statute covering that situation.[431]

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424. Act of Mar. 23, 2005, ch. 616, 2005 Va. Acts 818 (codified as amended at VA. CODE ANN. §§ 18.2-266, -269 (Cum. Supp. 2005)).

425. VA. CODE ANN. § 18.2-248(J) (Cum. Supp. 2005).

426. *See* Act of Apr. 6, 2005, ch. 923, 2005 Va. Acts 1706 (codified as amended at VA. CODE ANN. § 18.2-248 (Cum. Supp. 2005)).

427. *See* VA. CODE ANN. § 18.2-248(C1) (Cum. Supp. 2005).

428. *Id.* § 18.2-248.02 (Cum. Supp. 2005).

429. *Id.* § 18.2-479 (Cum. Supp. 2005).

430. *Id.* § 18.2-478 (Repl. Vol. 2004 & Cum. Supp. 2005).

431. Act of Mar. 22, 2005, ch. 573, 2005 Va. Acts 761 (codified as amended at VA. CODE ANN. § 18.2-479 (Cum. Supp. 2005)).

E. *Evidence—Marital Privilege*

The General Assembly has expanded the scope of the privilege protecting confidential marital communications. The new statute provides that a defendant can refuse to disclose, as well as prevent anyone else from disclosing, any confidential communication between himself and his spouse.[432] This privilege applies "regardless of whether he is married to that spouse at the time he objects to disclosure."[433] A "confidential communication" is defined as "a communication made privately by a person to his spouse that is not intended for disclosure to any other person."[434]

F. *Gangs*

Building on its existing legislation, the General Assembly enacted a statute that provides for enhanced punishment for specified gang crimes that take place within a school zone.[435] The list of predicate crimes that the prosecution must show to prove the existence of a criminal street gang was also expanded to include crimes that are similar to those currently listed under the laws of other states or the United States.[436] Finally, the venerable civil nuisance statute was amended to include an area used for the activities of a criminal street gang.[437] A nuisance lawsuit against the gang can be brought in the same manner as a suit against an unincorporated association.[438]

G. *Insanity—Expert Reports*

In cases where a defendant obtains his own expert to evaluate his sanity, the expert must now prepare a written report.[439] The report, along with certain other medical records obtained in the process of evaluation, must be disclosed to the prosecution in felony cases.[440]

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432. VA. CODE ANN. § 19.2-271.2 (Cum. Supp. 2005).

433. *Id.*

434. *Id.*

435. Act of Mar. 26, 2005, ch. 813, 2005 Va. Acts 1347 (codified as amended at VA. CODE ANN. § 18.2-46.3:3 (Cum. Supp. 2005)).

436. *See* VA. CODE ANN. § 18.2-46.1 (Cum. Supp. 2005).

437. *See id.* § 48-8 (Repl. Vol. 2005).

438. *Id.*

439. *See id.* § 19.2-169.5(F) (Cum. Supp. 2005).

440. *See id.* § 19.2-169.5(E) (Cum. Supp. 2005).

H. *Juvenile Possession of Alcohol*

The General Assembly prohibited the consumption as well as the possession of alcohol by persons under the age of twenty-one.[441] Furthermore, anyone who provides or assists in the provision of alcohol to persons under twenty-one, subject to certain exceptions, is guilty of a Class 1 misdemeanor.[442]

I. *Perjury*

Virginia Code section 8.01-4.3 was amended to allow unsworn statements in certain cases, provided the declarant states under penalty of perjury that the statement is correct.[443] The perjury statute was therefore amended to permit a prosecution for one who willfully subscribes as true an unsworn statement made in the form permitted by Virginia Code section 8.01-4.3.[444]

J. *Photographic Lineups*

The state police and local law enforcement are now required to "establish a written policy and procedure for conducting in-person and photographic lineups."[445]

K. *Post-Conviction—Habeas Corpus*

The habeas corpus statute generally requires an inmate to raise all known claims in the habeas corpus petition.[446] With some degree of frequency, inmates filed a first petition raising a single claim regarding the denial of the right to appeal.[447] Following the resolution of the appeal, the inmate would then file a second peti-

441. *See* Act of Mar. 28, 2005, ch. 895, 2005 Va. Acts 1581 (codified as amended at VA. CODE ANN. § 4.1-305 (Cum. Supp. 2005)).

442. VA. CODE ANN. § 4.1-306 (Cum. Supp. 2005).

443. *See id.* § 8.01-4.3 (Cum. Supp. 2005).

444. *Id.* § 18.2-434 (Cum. Supp. 2005).

445. *Id.* § 19.2-390.02 (Cum. Supp. 2005).

446. *Id.* § 8.01-654(B)(2) (Cum. Supp. 2005).

447. *See, e.g.*, Dorsey v. Angelone, 261 Va. 601, 604, 544 S.E.2d 350, 352 (2001); Bonhom v. Angelone, 58 Va. Cir. 358, 362 (Cir. Ct. 2002) (Fairfax County).

tion raising other claims, only to have it dismissed under the statute prohibiting successive petitions.[448] The General Assembly had amended the statute to permit an inmate to file a petition that raises a single claim seeking a delayed appeal; thus, a subsequent petition will not be treated as an improper successive petition.[449] This change essentially aligns Virginia law with federal law in this circuit.[450] The inmate can also seek a delayed appeal by filing a motion in the Court of Appeals of Virginia.[451] This motion must be filed within six months of dismissal of the appeal or of the date the judgment became final, whichever is later.[452]

L. *Unlawful Refusal*

The General Assembly has clarified the refusal statute, specifying that a first offense of refusal is a civil offense.[453] Subsequent offenses are criminal.[454] The law also specifies the procedures to be used in charging a person with refusal.[455]

M. *Sentencing*

After July 1, 2004, a court can no longer impose a sentence to the Detention Center Incarceration Program "as an addition to an active sentence to a state correctional facility."[456]

Juvenile and domestic relations courts were formerly authorized to defer disposition of a juvenile delinquency case for twelve months.[457] The General Assembly changed the law to allow the court more flexibly in establishing a specific period to defer dispo-

448. *See, e.g., Dorsey*, 261 Va. at 604, 544 S.E.2d at 352.

449. *See* Act of Mar. 26, 2005, ch. 836, 2005 Va. Acts 1378 (codified as amended at VA. CODE ANN. § 8.01-654(B)(2) (Cum. Supp. 2005)).

450. *See* In re Goddard, 170 F.3d 435, 438 (4th Cir. 1999).

451. VA. CODE ANN. § 19.2-321.1 (Cum. Supp. 2005).

452. *Id.* § 19.2-321.1(A)(ii) (Cum. Supp. 2005).

453. Act of Mar. 26, 2005, ch. 840, 2005 Va. Acts 1427 (codified as amended at VA. CODE ANN. § 18.2-268.3(D) (Cum. Supp. 2005)).

454. VA. CODE ANN. § 18.2-268.3(D) (Cum. Supp. 2005).

455. *See id.* § 18.2-268.3 (Cum. Supp. 2005).

456. *Id.* § 19.2-316.2(A)(3) (Cum. Supp. 2005).

457. *Id.* § 16.1-278.8(A)(4) (Repl. Vol. 2003).

sition based on the gravity of the offense and the juvenile's history.[458]

The General Assembly also clarified the law on presentence reports and it now permits a defense attorney to provide a copy of the report to the defendant.[459]

N. *Sex Crimes*

Existing law prohibited nonconsensual filming in restrooms, tanning booths, and other situations where the victim was partially undressed.[460] However, the statute did not criminalize a situation where a person, using a device or advantageous location, peeked under the skirt or dress to photograph the undergarments of the victim. The law now prohibits filming or photographing under such circumstances.[461]

In addition, actual or "explicitly simulated" acts of masturbation that occur in a public place while others are present, with the intent that others see the acts, constitute the crime of obscene sexual display.[462]

Over the years, Virginia law has gradually eliminated the difference between sexual crimes committed against a spouse and against other victims. This past session, the General Assembly excised from the Virginia Code vestigial language relating to such now superseded differences.[463]

The age of the victim under the indecent liberties statute has been raised from thirteen years old or less to fourteen years old or less.[464]

Juveniles who are convicted in *circuit court* of a crime for which registration is required are now required, like adults, to register

458. *See* Act of Mar. 26, 2005, ch. 810, 2005 Va. Acts 1343 (codified as amended at VA. CODE ANN. § 16.1-278.8(A)(4) (Cum. Supp. 2005)).

459. Act of Mar. 20, 2005, ch. 188, 2005 Va. Acts 286 (codified as amended at VA. CODE ANN. § 19.2-299(A) (Cum. Supp. 2005)).

460. VA. CODE ANN. § 18.2-386.1 (Repl. Vol. 2004).

461. *See id.* § 18.2-386.1 (Cum. Supp. 2005).

462. *Id.* § 18.2-387.1 (Cum. Supp. 2005).

463. *See* Act of Mar. 23, 2005, ch. 631, 2005 Va. Acts 854 (codified as amended at VA. CODE ANN. § 18.2-61 (Cum. Supp. 2005)).

464. VA. CODE ANN. § 18.2-370(A) (Cum. Supp. 2005).

as sex offenders.[465] Juveniles *adjudicated delinquent* of the applicable offenses—as opposed to convicted of the crimes—who are above the age of thirteen at the time of the offense, may be required to register if the court finds that the juvenile meets the specified criteria.[466] In determining whether the juvenile should be required to register, the court must consider, among other factors: the age and maturity of the complaining witness and of the juvenile delinquent, the circumstances of the offense and whether force was used, the criminal history of the juvenile, and the relationship of the juvenile and the complaining witness.[467]

A parent, stepparent, grandparent, or step-grandparent who sexually abuses a child between the ages of thirteen and seventeen is now guilty of aggravated sexual battery.[468] In a similar vein, the definition of "parent" in the crimes against nature statute is expanded to cover stepparent, grandparent, or step-grandparent.[469] Finally, the indecent liberties statute now provides for enhanced punishment for crimes committed against children by parents, stepparents, grandparents, and step-grandparents.[470]

O. *Speedy Trial*

Virginia's speedy trial statute will now be tolled for natural disasters, civil disorders, or acts of God.[471] Furthermore, the General Assembly clarified that an arrest that begins the running of the speedy trial statute is "deemed to have occurred only when such indictment, warrant, information, or presentment or the summons or *capias* to answer such process is served or executed upon the accused . . . . The lodging of a detainer or its equivalent shall not constitute an arrest under this section."[472]

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465. *See id.* § 9.1-901(A) (Cum. Supp. 2005).
466. *See id.* § 9.1-902(C) (Cum. Supp. 2005).
467. *Id.*
468. *Id.* § 18.2-67.3(A) (Cum. Supp. 2005).
469. *Id.* § 18.2-361(C) (Cum. Supp. 2005).
470. *See id.* § 18.2-370(D) (Cum. Supp. 2005).
471. *Id.* § 19.2-243 (Cum. Supp. 2005).
472. Act of Mar. 23, 2005, ch. 650, 2005 Va. Acts 908 (codified as amended at VA. CODE ANN. § 19.2-243 (Cum. Supp. 2005)).

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