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## Criminal Law and Procedure

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# ARTICLES

## CRIMINAL LAW AND PROCEDURE

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### I. INTRODUCTION

The authors have endeavored to select from the many appellate cases those that have the most significant precedential value. The article also outlines some of the most consequential changes enacted by the General Assembly in the areas of criminal law and procedure.

### II. CRIMINAL PROCEDURE

#### A. *Disclosure of Exculpatory Evidence*

The defendant in *Deville v. Commonwealth*<sup>1</sup> was convicted in a bench trial of conspiring to commit grand larceny by false pretenses.<sup>2</sup> After trial, he filed a motion asserting that the Commonwealth failed to disclose inconsistent statements from one of its chief witnesses.<sup>3</sup> The trial court denied the motion, noting that

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1. 47 Va. App. 754, 627 S.E.2d 530 (Ct. App. 2006).

2. *Id.* at 755, 627 S.E.2d at 531.

3. *Id.* at 756, 627 S.E.2d at 531.

the defendant failed to show any prejudice.<sup>4</sup> The Court of Appeals of Virginia affirmed.<sup>5</sup> The court held that, unless a finding of no prejudice by the trial court in a bench trial is “patently unreasonable,” a finding of no prejudice by that court will negate any showing of materiality for the undisclosed evidence.<sup>6</sup> The court reasoned that unlike a jury trial, where the trial and appellate court must hypothesize about the impact of the non-disclosure on a reasonable juror, in a bench trial setting, the appellate court “know[s] with certitude, from the factfinder himself, that the outcome of the proceeding would not have been different had the evidence been disclosed earlier.”<sup>7</sup>

### B. *Everybody Loves Raiment—Trial in Prison Clothes*

In *Jackson v. Washington*,<sup>8</sup> a habeas corpus case, the Supreme Court of Virginia ordered a new trial for a defendant who was tried before a jury in his prison jumpsuit.<sup>9</sup> Jail personnel had misplaced the petitioner’s clothes and trial counsel raised no objection.<sup>10</sup> The court reasoned that trying a defendant in prison clothes before a jury tends to undermine the presumption of innocence and undermines the fact-finding process.<sup>11</sup> Moreover, the record did not establish any tactical choice on the part of counsel for proceeding to trial without civilian clothes.<sup>12</sup> Finally, the court found that the evidence of the petitioner’s guilt was not so overwhelming as to erase the taint caused by the petitioner’s appearance.<sup>13</sup>

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4. *Id.*, 627 S.E.2d at 531–32.

5. *Id.* at 758, 627 S.E.2d at 533.

6. *Id.* at 757–58, 627 S.E.2d at 532.

7. *Id.* at 757, 627 S.E.2d at 532.

8. 270 Va. 269, 619 S.E.2d 92 (2005).

9. *Id.* at 280, 619 S.E.2d at 97–98.

10. *Id.* at 273, 619 S.E.2d at 93.

11. *Id.* at 276, 619 S.E.2d at 95 (citing *Estelle v. Williams*, 425 U.S. 501, 504–05 (1976)).

12. *Id.* at 278, 619 S.E.2d at 96.

13. *Id.* at 279–80, 619 S.E.2d at 97 (noting that the Commonwealth’s case was based primarily on the circumstantial evidence of the defendant being in possession of stolen property).

### C. *Guilty Pleas*

Two decisions from the Court of Appeals of Virginia highlight the need to obtain the consent of the prosecution where a defendant wishes to enter a conditional guilty plea. In *Hill v. Commonwealth*,<sup>14</sup> the defendant argued on appeal that the search warrant used to search his home was totally lacking any indicia of probable cause.<sup>15</sup> The court declined to reach the issue, noting that the record did not show any assent by the prosecution to a conditional guilty plea.<sup>16</sup> The conditional guilty plea statute, Virginia Code section 19.2-254, clearly requires the “consent of the Commonwealth” for such pleas.<sup>17</sup> Furthermore, under longstanding precedent, a voluntary guilty plea waives all non-jurisdictional issues.<sup>18</sup> Therefore, the court dismissed the appeal.<sup>19</sup>

Similarly, in *Witcher v. Commonwealth*,<sup>20</sup> the defendant sought to enter a conditional guilty plea that would enable him to challenge the validity of his consent to a search.<sup>21</sup> The Commonwealth objected to any conditional guilty plea.<sup>22</sup> The defendant nevertheless pled guilty and appealed.<sup>23</sup> The Court of Appeals of Virginia dismissed the appeal, noting that the consent of the Commonwealth was a prerequisite to any such plea under the conditional guilty plea statute.<sup>24</sup>

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14. 47 Va. App. 667, 626 S.E.2d 459 (Ct. App. 2006).

15. *Id.* at 670, 626 S.E.2d at 461.

16. *Id.* at 672, 626 S.E.2d at 462.

17. *Id.* at 671, 626 S.E.2d at 461 (citing VA. CODE ANN. § 19.2-254 (Repl. Vol. 2004 & Cum. Supp. 2006)).

18. *Id.* at 673–74, 626 S.E.2d at 462–63 (quoting *Savino v. Commonwealth*, 239 Va. 534, 539, 391 S.E.2d 276, 278 (1990)).

19. *Id.* at 676, 626 S.E.2d at 464.

20. 47 Va. App. 273, 623 S.E.2d 432 (Ct. App. 2005).

21. *Id.* at 274, 623 S.E.2d at 432.

22. *Id.* at 274–75, 623 S.E.2d at 432.

23. *Id.*

24. *Id.* at 275, 623 S.E.2d at 432–33 (citing VA. CODE ANN. § 19.2-254 (Repl. Vol. 2004 & Cum. Supp. 2006)).

#### D. *Judicial Recusal*

In *Wilson v. Commonwealth*,<sup>25</sup> the Supreme Court of Virginia reversed the defendant's conviction for possession of cocaine with the intent to distribute because the trial judge failed to recuse himself.<sup>26</sup> The attorney for the defendant had requested a jury trial once he learned the identity of the judge who would preside over the case.<sup>27</sup> The trial court sought to remove defense counsel from the case and from the court appointed list, referenced defense counsel's actions as "shenanigans," and stated that the court did not want defense counsel appearing in the building as a court appointed attorney.<sup>28</sup> Finally, the trial court had refused to accept a plea agreement, holding that it was untimely.<sup>29</sup> The Supreme Court of Virginia concluded that these "actions reflected a personal bias and prejudice against Wilson's counsel and raised concerns about the judge's impartiality in the case and about the public's perception of his fairness in the case."<sup>30</sup>

#### E. *Sentencing—Prior Convictions*

Virginia Code section 19.2-295.1 allows a jury to consider a defendant's prior convictions during the sentencing phase of a trial.<sup>31</sup> The Court of Appeals of Virginia held in *Oliver v. Commonwealth*<sup>32</sup> that prior convictions under the Code of Military Justice can be considered by a Virginia jury.<sup>33</sup> Such convictions unquestionably constitute prior "convictions . . . 'under the laws of . . . the United States'" under section 19.2-295.1.<sup>34</sup> The court reserved for another day the issue of whether such convictions might be subject to a collateral attack when they are based on violations of the Federal Constitution. The court noted that the

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25. 272 Va. 19, 630 S.E.2d 326 (2006).

26. *Id.* at 30, 630 S.E.2d at 332.

27. *Id.* at 23, 630 S.E.2d at 328.

28. *Id.* at 23-24, 630 S.E.2d at 328.

29. *Id.* at 25, 630 S.E.2d at 329.

30. *Id.* at 30, 630 S.E.2d at 332.

31. VA. CODE ANN. § 19.2-295.1 (Repl. Vol. 2004 & Cum. Supp. 2006).

32. 46 Va. App. 613, 620 S.E.2d 567 (Ct. App. 2005).

33. *Id.* at 617, 620 S.E.2d at 569.

34. *Id.* at 615-16, 620 S.E.2d at 568 (quoting VA. CODE ANN. § 19.2-295.1 (Repl. Vol. 2004 & Cum. Supp. 2006)).

defendant did not point to any such defects with regard to his conviction.<sup>35</sup>

In a similar vein, the Court of Appeals of Virginia concluded that a conviction under a municipal ordinance was admissible during the sentencing part of a jury trial. In *Auer v. Commonwealth*,<sup>36</sup> the court of appeals reviewed whether the trial court erred by allowing the Commonwealth to introduce a prior conviction for driving under the influence during the sentencing phase of the trial.<sup>37</sup> The conviction was based on a local ordinance.<sup>38</sup> The defendant objected on the basis that such ordinances did not constitute laws of a “state” under Virginia Code section 19.2-295.1.<sup>39</sup> The court disagreed, noting that while the text of section 19.2-295.1 was ambiguous, its purpose was not.<sup>40</sup> The statute clearly seeks to allow the jury to assess an appropriate punishment. A defendant’s complete criminal record, including municipal ordinances, was therefore appropriately submitted for the jury’s consideration.<sup>41</sup>

### III. SEARCH AND SEIZURE

The law regarding search and seizure is extremely dependant upon application of facts to basic legal principles. This year, there were many published and unpublished opinions addressing Fourth Amendment claims. There were also some significant decisions by the Supreme Court of United States. We have selected a few significant Virginia cases to highlight these changes.

#### A. *Entry Into the Curtilage*

Although the Supreme Court of Virginia will review the case in the fall, its importance warrants discussion here. In *Robinson v. Commonwealth*,<sup>42</sup> the Court of Appeals of Virginia, sitting en

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35. *Id.* at 616, 620 S.E.2d at 569.

36. 46 Va. App. 637, 621 S.E.2d 140 (Ct. App. 2005).

37. *Id.* at 642, 621 S.E.2d at 142.

38. *Id.*

39. *Id.* at 644, 621 S.E.2d at 143.

40. *Id.* at 646–48, 621 S.E.2d at 144.

41. *Id.* at 650–51, 621 S.E.2d at 146.

42. 47 Va. App. 533, 625 S.E.2d. 651 (Ct. App. 2006) (en banc).

banc, considered whether the police violated the defendants' Fourth Amendment rights when the officer drove up the driveway to the Robinsons' home, parked, and ultimately entered their backyard after observing criminal activity.<sup>43</sup> The court affirmed the defendants' multiple convictions for contributing to the delinquency of a minor and found that the police did not violate the Robinsons' Fourth Amendment rights.<sup>44</sup>

The police had been dispatched to the Robinsons' home late in the evening to investigate complaints that there was a party on the premises and minors were being served alcohol.<sup>45</sup> The responding officer saw a number of cars parked on the street and in the driveway.<sup>46</sup> Flood lights were illuminating the driveway and house.<sup>47</sup> Once the officer pulled his marked police car into the driveway and began driving toward the back of the house, two individuals, both of whom appeared to be underage, looked at the police car, yelled "cops," dropped the beer bottles that they were holding, and ran towards the nearby woods.<sup>48</sup> The officer parked his police car in the driveway and got out.<sup>49</sup> He ordered everyone to stop running and radioed to his backup officers, who were waiting off property, to advise them that individuals were running through the woods.<sup>50</sup>

Mrs. Robinson claimed that because the investigating officer was located in the curtilage of their home without their express permission when he saw the illegal activity, the resulting search violated her Fourth Amendment rights.<sup>51</sup> Mr. Robinson argued that although the officer's initial entry onto the property was lawful, his further intrusion on the property was unlawful because he lacked exigent circumstances to enter the backyard.<sup>52</sup> The court rejected both arguments. First, the court found that based upon the circumstances of the night in question, the Robinsons had impliedly consented to allow the public, which includes the police,

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43. *Id.* at 540-41, 625 S.E.2d at 654-55.

44. *Id.* at 562, 625 S.E.2d at 665.

45. *Id.* at 540, 625 S.E.2d at 654.

46. *Id.*

47. *Id.*

48. *Id.* at 540-41, 625 S.E.2d at 654.

49. *Id.* at 541, 625 S.E.2d at 654.

50. *Id.*

51. *Id.* at 544, 625 S.E.2d at 656.

52. *Id.* at 543, 625 S.E.2d at 656.

to enter the premises through use of the driveway in order to contact them.<sup>53</sup> Further, the officer did not exceed the scope of the consent because he observed the criminal activity while proceeding up the driveway.<sup>54</sup> Second, the court rejected the notion that once the officer confirmed his suspicion that underage individuals were being served alcoholic beverages, he should have immediately secured a search warrant before proceeding to the backyard.<sup>55</sup> The court found that the facts of the case supported the conclusion that the officer had probable cause to believe that crimes were being committed and that exigent circumstances supported a warrantless entry into the backyard.<sup>56</sup>

### B. *Lawfulness of a Stop*

In *Shiflett v. Commonwealth*,<sup>57</sup> a game warden observed the defendant leave a market, “get into a vehicle, and drive onto a public highway.”<sup>58</sup> The officer proceeded to follow the defendant’s vehicle and stop it.<sup>59</sup> Five months earlier, the officer had issued the defendant a summons and, at that time, the officer had determined from checking the defendant’s driving record that his driving privilege was revoked because he had been adjudicated an habitual offender.<sup>60</sup> The officer discussed the defendant’s habitual offender status with him when he issued the summons.<sup>61</sup> Thus, at the time of the traffic stop, five months later, the officer had reason to believe that the defendant was driving without a license after having been adjudicated an habitual offender.<sup>62</sup> Further, the officer “observed objects ‘dangling’ from the rearview mirror of [defendant’s] vehicle.”<sup>63</sup> The defendant challenged the stop, alleging that the officer lacked “reasonable, articulable suspicion of

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53. *Id.* at 545, 626 S.E.2d at 656–57.

54. *Id.* at 551, 625 S.E.2d at 659.

55. *Id.* at 556, 625 S.E.2d at 662.

56. *Id.* at 559, 625 S.E.2d at 663 (“Officer Cox could reasonably have believed that multiple, underage individuals had . . . consumed significant quantities of alcohol. . . . [T]hese individuals . . . may have attempted to drive home, placing both themselves and the general public at risk of significant harm.”).

57. 47 Va. App. 141, 622 S.E.2d 758 (Ct. App. 2005).

58. *Id.* at 144, 622 S.E.2d at 759.

59. *Id.*, 622 S.E.2d at 759–60.

60. *Id.*, 622 S.E.2d at 759.

61. *Id.*

62. *Id.* at 147, 622 S.E.2d at 761.

63. *Id.* at 144, 622 S.E.2d at 759.



unlawful conduct to justify an investigatory traffic stop.”<sup>64</sup> The Court of Appeals of Virginia found that the trial court correctly ruled that the investigatory stop was proper.<sup>65</sup> It held that:

Because of [the officer’s] recent knowledge of [defendant’s] habitual offender status and his discussion with [defendant] about that status, [the officer] possessed a reasonable, articulable suspicion at the time of the stop that criminal activity was “afoot,” i.e. that Shiflett was driving on a public highway without the privilege to do so, after having been declared an habitual offender.<sup>66</sup>

The court rejected the defendant’s arguments that the officer was merely acting on a “hunch” and that the stop was unlawful because less intrusive means of verifying his driving status was available.<sup>67</sup>

### C. Misdemeanor Stop and Release Statute

In another case that will be reviewed by the Supreme Court of Virginia, *Moore v. Commonwealth*,<sup>68</sup> the Court of Appeals of Virginia, sitting en banc, affirmed the defendant’s conviction for possession of cocaine with intent to distribute.<sup>69</sup> The court of appeals held that the trial court properly denied the defendant’s motion to suppress evidence.<sup>70</sup> The defendant was arrested for driving on a suspended license.<sup>71</sup> Despite the fact that it was a misdemeanor offense and, under Virginia Code section 19.2-74, he should have been released on a summons,<sup>72</sup> the defendant was arrested.<sup>73</sup> Crack-cocaine and cash were later found on the defendant’s person, and he was charged with the drug offense.<sup>74</sup> The defendant argued that the custodial arrest on the misdemeanor offense was unlawful and violated his Fourth Amendment rights.<sup>75</sup> The court of appeals held that “although the arrest violated the express

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64. *Id.* at 143, 622 S.E.2d at 759.

65. *Id.* at 149–50, 622 S.E.2d at 762.

66. *Id.* at 147, 622 S.E.2d at 761.

67. *Id.* at 147–49, 622 S.E.2d at 761–62.

68. 47 Va. App. 55, 622 S.E.2d 253 (Ct. App. 2005) (en banc).

69. *Id.* at 60–61, 622 S.E.2d at 256, *appeal granted*, No. 052619 (Va. May 31, 2006).

70. *Id.* at 69, 622 S.E.2d at 260.

71. *Id.* at 59, 622 S.E.2d at 255.

72. VA. CODE ANN. § 19.2-74(A)(1) (Repl. Vol. 2004 & Cum. Supp. 2006).

73. *Moore*, 47 Va. App. at 59, 622 S.E.2d at 255.

74. *Id.* at 60, 622 S.E.2d at 255.

75. *Id.* at 61, 622 S.E.2d at 256.

provisions of Code § 19.2-74, the arrest and resulting search did not violate [defendant]’s constitutional—as opposed to statutory—rights.”<sup>76</sup> The court further reasoned that because section 19.2-74 does not provide for the remedy of exclusion of evidence, the trial court’s ruling, denying the motion to suppress, was correct.<sup>77</sup>

#### D. *Probable Cause*

In *Brown v. Commonwealth*,<sup>78</sup> the Supreme Court of Virginia reversed the defendant’s convictions for possession of cocaine and possession of heroin based upon a finding that the police officer lacked probable cause to arrest and search the defendant.<sup>79</sup> The police officer was patrolling an area associated with recent shootings and homicides.<sup>80</sup> He saw a vehicle parked in an alley in a manner that would obstruct access by emergency vehicles.<sup>81</sup> The officer approached the parked car on foot.<sup>82</sup> Four men who were standing near the car quickly walked away.<sup>83</sup> The officer looked into the vehicle and saw the defendant asleep in the front passenger’s seat.<sup>84</sup> He was holding a hand-rolled, partially burnt cigarette in one hand and a lighter in the other.<sup>85</sup> Based upon his knowledge and experience, the officer suspected that the cigarette might contain an illegal substance.<sup>86</sup> Consequently, he woke up the defendant, “took the items out of his hands, and asked him to step out of the vehicle.”<sup>87</sup> The defendant was arrested and searched.<sup>88</sup> Tests later confirmed that the cigarette and a folded five dollar bill from defendant’s pocket “contained traces of cocaine and heroin, respectively.”<sup>89</sup> The supreme court found that despite the officer’s strong, reasonable suspicion that the hand-

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76. *Id.* at 61–62, 622 S.E.2d at 256.

77. *Id.* at 62, 622 S.E.2d at 256.

78. 270 Va. 414, 620 S.E.2d 760 (2005).

79. *Id.* at 417, 422, 620 S.E.2d at 761, 764.

80. *Id.* at 417, 620 S.E.2d at 761.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

rolled cigarette contained contraband, that alone did not support probable cause to arrest.<sup>90</sup> Based upon the totality of the circumstances, the court held that at the time of the arrest and search, the officer lacked probable cause and the motion to suppress the evidence should have been granted.<sup>91</sup>

### E. *Scope of Search*

In *Dotson v. Commonwealth*,<sup>92</sup> the Court of Appeals of Virginia held that the trial court correctly denied the defendant's motion to suppress evidence and affirmed his convictions for drug offenses.<sup>93</sup> Police had secured a warrant to search the defendant's home "for drugs and items related to the possession or manufacture of drugs."<sup>94</sup> During the search, in addition to seizing drug paraphernalia and other drug related items, the police seized a small, locked safe which they were unable to open at the residence.<sup>95</sup> The officers took the safe to the Narcotics Task Force office and had a locksmith open it fifteen days after the search.<sup>96</sup> Marijuana was found inside the safe.<sup>97</sup> The court of appeals rejected the defendant's arguments that the police unlawfully seized the safe because it was not named in the warrant and drugs were not likely to be found inside.<sup>98</sup> It also rejected the defendant's contention that in order to open the safe, the police needed the owner's permission or a second warrant.<sup>99</sup> The court held that the seizure of the safe was reasonable and within the scope of the warrant.<sup>100</sup> It also concluded that, based upon the record, the search of the safe fifteen days after it was seized was reasonable.<sup>101</sup>

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90. *Id.* at 421, 620 S.E.2d at 764.

91. *Id.* at 422, 620 S.E.2d at 764.

92. 47 Va. App. 237, 623 S.E.2d 414 (Ct. App. 2005).

93. *Id.* at 247, 623 S.E.2d at 419.

94. *Id.* at 241, 623 S.E.2d at 416.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 242-45, 623 S.E.2d at 416-18.

99. *Id.* at 245-46, 623 S.E.2d at 418.

100. *Id.* at 246, 623 S.E.2d at 418.

101. *Id.*

In *Rosa v. Commonwealth*,<sup>102</sup> the Court of Appeals of Virginia found that it was reasonable for an officer who was executing a search of a computer, pursuant to a warrant, to open computer files in order to determine whether they fell within the purview of the warrant.<sup>103</sup> In reaching this decision, the court relied heavily upon the content of the warrant and the specific facts of the case. The court concluded that the officer, acting upon a warrant that authorized a search of all “electronic processing and storage devices, computer and computer devices, [and] external storage devices,” without limitations, was permitted to inspect any section of the computer that might contain “objects of the search, including deleted files that had been re-created.”<sup>104</sup>

#### IV. EVIDENTIARY ISSUES

Virginia Courts addressed a number of evidentiary issues that arose in the criminal context.

##### A. *Adoptive Admissions and Burden of Proof for Hearsay Exceptions*

In *Lynch v. Commonwealth*,<sup>105</sup> three men perpetrated a robbery, during which one of the victims was shot and killed.<sup>106</sup> Soon after the crime, as one of the perpetrators discussed the robbery, the defendant arrived in the room and said “why is you telling them what we just done?”<sup>107</sup> The prosecution sought to admit this testimony at trial as an adoptive admission by the defendant.<sup>108</sup> The Supreme Court of Virginia held that, under these circumstances, the statement was properly admitted.<sup>109</sup> The court noted that adoptive admissions are admissible provided: “(1) the defendant must have heard the incriminating statements, (2) he must have understood that they accused him of complicity in a crime, (3) the circumstances afforded him a fair opportunity to deny or

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102. 48 Va. App. 93, 628 S.E.2d 92 (Ct. App. 2006).

103. *Id.* at 103, 628 S.E.2d at 96–97.

104. *Id.* (alteration in original).

105. 272 Va. 204, 630 S.E.2d 482 (2006).

106. *Id.* at 206, 630 S.E.2d at 483.

107. *Id.* at 207, 630 S.E.2d at 483.

108. *Id.* at 206, 630 S.E.2d at 483.

109. *Id.* at 209–10, 630 S.E.2d at 485.

object, and (4) the circumstances would naturally call for a reply.”<sup>110</sup>

The court held that the defendant’s statement satisfied these criteria.<sup>111</sup> The court acknowledged that, while the defendant was not initially a party to the conversation, “he obviously heard enough of it to propel him into the house and up the stairs to confront them.”<sup>112</sup>

The court further clarified that a party seeking to admit a statement as an exception to the hearsay rule must show by a preponderance of the evidence, rather than by clear and convincing evidence, that the statement is admissible.<sup>113</sup>

### B. *Certificates of Analysis*

In *Bell v. Commonwealth*,<sup>114</sup> the Court of Appeals of Virginia examined the requirements of Virginia Code section 19.2-187.<sup>115</sup> That statute provides an exception to the rules excluding hearsay evidence by allowing the prosecution to admit into evidence a certificate of analysis of drugs.<sup>116</sup> However, to be admissible, certain conditions must be satisfied.<sup>117</sup> The certificate must be filed with the clerk’s office at least seven days before trial and, upon request by the defendant’s attorney, a copy must be mailed to counsel either by the clerk or by the prosecution.<sup>118</sup> In *Bell*, the defendant had received a copy of the certificate in the general district court.<sup>119</sup> However, despite defense counsel’s request, neither the prosecution nor the clerk’s office had timely furnished him with a copy prior to the trial in circuit court.<sup>120</sup> The court of appeals concluded that strict construction of the penal statute required ex-

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110. *Id.* at 209, 630 S.E.2d at 484 (citing *Owens v. Commonwealth*, 186 Va. 689, 699, 43 S.E.2d 895, 899 (1947)).

111. *Id.* at 209–10, 630 S.E.2d at 485.

112. *Id.* at 209, 630 S.E.2d at 485.

113. *Id.* at 207–08 & n.\*, 630 S.E.2d at 484 & n.\*.

114. 47 Va. App. 126, 622 S.E.2d 751 (Ct. App. 2005).

115. *See id.* at 134–39, 622 S.E.2d at 754–57.

116. VA. CODE ANN. § 19.2-187 (Cum. Supp. 2006).

117. *Id.*

118. *Id.*

119. 47 Va. App. at 131, 622 S.E.2d at 753.

120. *Id.*

clusion of the certificate.<sup>121</sup> This is true even where, as in this case, the defendant had notice of the prosecution's intent to rely on the certificate.<sup>122</sup>

### C. *Certified Records*

The uncertainty surrounding the scope of the Supreme Court of the United States's decision in *Crawford v. Washington*<sup>123</sup> has led to a number of challenges to documents formerly deemed unobjectionable. In *Michels v. Commonwealth*,<sup>124</sup> the defendant hatched a scheme under which he promised to invest the victim's money in a particular Delaware corporation.<sup>125</sup> At trial, the prosecution adduced certified copies of statements from the Delaware Secretary of State in which the Secretary stated that a diligent search of government records showed that no such corporation existed.<sup>126</sup> The defendant contended that admitting these documents violated his constitutional right to confront witnesses.<sup>127</sup> The Court of Appeals of Virginia rejected the argument, holding that the records were not "testimonial."<sup>128</sup> The court reasoned that the exhibits at issue were not "accusatory" because they did not allege any criminal conduct on the part of the defendant.<sup>129</sup> Additionally, such documents do not resemble the type of documents found objectionable by the Court in *Crawford*.<sup>130</sup> Instead, the documents "are a neutral repository of information that reflects the objective results of a search of public records."<sup>131</sup> The court also cited precedent from other states holding that such documents were admissible.<sup>132</sup>

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121. *Id.* at 138–39, 622 S.E.2d at 757.

122. *See id.* at 139, 622 S.E.2d at 757.

123. 541 U.S. 36 (2004).

124. 47 Va. App. 461, 624 S.E.2d 675 (Ct. App. 2006).

125. *Id.* at 464, 624 S.E.2d at 677.

126. *Id.* at 465, 624 S.E.2d at 677.

127. *Id.*, 624 S.E.2d at 677–78.

128. *Id.* at 469, 624 S.E.2d at 680.

129. *Id.*

130. *See id.* at 470, 624 S.E.2d at 680.

131. *Id.* at 469, 624 S.E.2d at 680.

132. *Id.* at 467–69, 624 S.E.2d at 678–80 (citing *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004); *People v. Shreck*, 107 P.3d 1048, 1060–61 (Colo. Ct. App. 2004); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005)).

#### D. Court Ordered Psychiatric Examination of a Victim

In *Nobrega v. Commonwealth*,<sup>133</sup> the Supreme Court of Virginia reviewed a conviction for the rape and sexual assault of a child under the age of thirteen, in response to defendant's claim that the trial court erred in its denial of defendant's motion for an independent psychiatric or psychological examination of the complaining witness.<sup>134</sup> The Court of Appeals of Virginia concluded that the trial court had no authority to order such an examination.<sup>135</sup> The Supreme Court of Virginia agreed.<sup>136</sup> The supreme court reasoned that no statute provides for such an examination and that providing for such determinations would be a policy matter best left to the General Assembly.<sup>137</sup> Moreover, the court explained, the defendant's right to adduce evidence in his favor is not implicated by such a request.<sup>138</sup> The court also noted that while defendants are entitled to call for evidence in their favor, the Constitution of Virginia also mandates respect for the dignity of crime victims.<sup>139</sup> Finally, the court observed that a defendant's rights are safeguarded because he has an opportunity to conduct *voir dire* of a witness concerning the competency of the victim to testify, and a trial court must make a determination concerning the witness's competency.<sup>140</sup> Furthermore, a defendant can in appropriate cases seek to examine mental health records of the victim.<sup>141</sup> Such safeguards, the court held, are sufficient to protect the defendant's rights.<sup>142</sup>

#### E. Recent Complaint

At issue in *Wilson v. Commonwealth*<sup>143</sup> was whether a letter written by the victim qualified as a "recent complaint" under Vir-

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133. 271 Va. 508, 628 S.E.2d 922 (2006).

134. *Id.* at 512, 628 S.E.2d at 923.

135. *Id.* at 514, 628 S.E.2d at 924-25.

136. *Id.* at 517-18, 628 S.E.2d at 926.

137. *Id.* at 516, 628 S.E.2d at 925-26.

138. *Id.*, 628 S.E.2d at 926.

139. *Id.*

140. *Id.* at 517, 628 S.E.2d at 926.

141. *See id.*

142. *See id.*

143. 46 Va. App. 73, 615 S.E.2d 500 (Ct. App. 2005).

ginia Code section 19.2-268.2.<sup>144</sup> The defendant repeatedly molested his daughter beginning in the spring of 2000 and ending in the spring of 2003.<sup>145</sup> The victim's grandmother noticed peculiar behavior by the victim and suspected something was amiss.<sup>146</sup> The victim would not discuss the abuse but agreed to write a letter to her grandmother in August of 2003.<sup>147</sup> In the letter, the victim wrote about the abuse she had suffered.<sup>148</sup> At trial, the defendant argued that the letter should not be admitted as a "recent complaint" of sexual abuse because the abuse had started two years before the letter was written.<sup>149</sup> The Court of Appeals of Virginia disagreed. The court held that such statements are only inadmissible if the delay "is unexplained or is inconsistent with the occurrence of the offense."<sup>150</sup> The court noted that the trial court committed no abuse of discretion considering the "daughter's impressionable age, the ongoing nature of the abuse, and the family relationship between the parties."<sup>151</sup> The victim also testified about her fear of retaliation and her shame.<sup>152</sup> Under such circumstances, the delay was neither "unexplained," nor was it "inconsistent with the occurrence of the offense."<sup>153</sup>

## V. SPECIFIC CRIMES

### A. *Abduction*

After the General Assembly abolished the requirement that the prosecution prove asportation during an abduction, the Supreme Court of Virginia concluded in *Brown v. Commonwealth*<sup>154</sup> that where a detention is intrinsic to a crime, as in cases of robbery, rape, or assault, a defendant cannot be convicted of both abduc-

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144. *Id.* at 77, 615 S.E.2d at 502.

145. *See id.* at 79, 615 S.E.2d at 502-03.

146. *See id.* at 79-80, 615 S.E.2d at 503.

147. *Id.* at 80, 615 S.E.2d at 503.

148. *See id.*

149. *See id.*

150. *Id.* at 84, 615 S.E.2d at 505 (quoting *Woodard v. Commonwealth*, 19 Va. App. 24, 27, 448 S.E.2d 328, 330 (Ct. App. 1994)).

151. *Id.* at 85, 615 S.E.2d at 506.

152. *See id.*, 615 S.E.2d at 505-06.

153. *Id.* at 84, 615 S.E.2d at 505.

154. 230 Va. 310, 337 S.E.2d 711 (1985).



tion and the related crime.<sup>155</sup> In *Pryor v. Commonwealth*,<sup>156</sup> the Court of Appeals of Virginia declined to extend this doctrine to a homicide case.<sup>157</sup> The court reasoned that “an abduction preceding a murder can never be said to be legally ‘inherent in the act’ of murder.”<sup>158</sup> Moreover, the abduction in the case occurred before the murder.<sup>159</sup> The victim was restrained and tied with tape while the defendant searched for a bag with which to suffocate her.<sup>160</sup> Therefore, the defendant was properly convicted of both abduction and murder.<sup>161</sup>

### B. *Aggravated Involuntary Manslaughter*

The distinction between involuntary manslaughter and aggravated involuntary manslaughter was at issue in *Wyatt v. Commonwealth*.<sup>162</sup> The Court of Appeals of Virginia summarized the evidence as follows:

Appellant—despite knowing he (a) was beneath the legal drinking age, (b) had consumed six or seven alcoholic beverages in under three hours, and (c) was “buzzed”—chose to get behind the wheel of his automobile. While driving home after dark on a clear, dry night on a straight, well-paved and clearly marked two-lane road, appellant failed to maintain proper control of his vehicle and drove so that it was entirely in the lane of oncoming traffic. Despite visibility of at least 100 yards, he also failed to see a car approaching from the opposite direction, in its proper lane of travel, until it was too late for him to avoid the impact or take any evasive action.<sup>163</sup>

The court affirmed the defendant’s conviction for aggravated involuntary manslaughter, holding this evidence was sufficient to show that the defendant exhibited “a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury,” and moreover, that the defendant “knew or should have known the probable results of his acts.”<sup>164</sup>

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155. See *id.* at 313–14, 337 S.E.2d at 713.

156. 48 Va. App. 1, 628 S.E.2d 47 (Ct. App. 2006).

157. *Id.* at 8, 628 S.E.2d at 50.

158. *Id.* at 6, 628 S.E.2d at 49 (citing *Brown*, 230 Va. at 314, 337 S.E.2d at 714).

159. *Id.* at 7, 628 S.E.2d at 50.

160. *Id.*

161. *Id.* at 8, 628 S.E.2d at 50.

162. 47 Va. App. 411, 624 S.E.2d 118 (Ct. App. 2006).

163. *Id.* at 422, 624 S.E.2d at 124.

164. *Id.* at 419, 624 S.E.2d at 122.

### C. *Aggravated Sexual Battery*

In *Martin v. Commonwealth*,<sup>165</sup> the fourteen-year-old defendant was convicted of aggravated sexual battery.<sup>166</sup> He had exposed his penis to the eight-year-old victim and successfully asked the victim to masturbate the defendant.<sup>167</sup> He sought to set his conviction aside, arguing that he had not committed “an overt act of actual force.”<sup>168</sup> The Supreme Court of Virginia rejected this argument, noting that “force” includes actual or constructive force, and constructive force “includes engaging in proscribed conduct with a victim who is under the legal age of consent.”<sup>169</sup> The court found nothing incongruous with the “use of a common set of facts for proof of differing elements of a crime,” i.e. the victim’s age and the element of force.<sup>170</sup>

### D. *Assault on a Police Officer*

In *South v. Commonwealth*,<sup>171</sup> the Court of Appeals of Virginia examined whether a Navy police officer serving on a naval base qualifies as a “law-enforcement officer” under Virginia Code section 18.2-57(E).<sup>172</sup> That Virginia Code provision defines “law-enforcement officer[s]” as employees “of a police department or sheriff’s office which is part of or administered by the Commonwealth or any political subdivision thereof.”<sup>173</sup> The court concluded that under the plain language of the statute, the Navy officers were not “police officers”<sup>174</sup> and, therefore, reversed the felony conviction for assault on a police officer.<sup>175</sup> The Supreme Court of Virginia subsequently reinstated the conviction for the lesser included offense of assault and battery, noting that “the Court of Appeals erred in remanding the case for a new trial, instead of simply remanding the case for a new sentencing proceed-

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165. 272 Va. 31, 630 S.E.2d 291 (2006).

166. *Id.* at 33, 630 S.E.2d at 291.

167. *Id.*

168. *Id.* at 34, 630 S.E.2d at 292.

169. *Id.* at 35, 630 S.E.2d at 292.

170. *Id.*, 630 S.E.2d at 293.

171. 47 Va. App. 247, 623 S.E.2d 419 (Ct. App. 2005).

172. *See id.* at 251, 623 S.E.2d at 420–21.

173. VA. CODE ANN. § 18.2-57(E) (Cum. Supp. 2006).

174. *South*, 47 Va. App. at 251, 623 S.E.2d at 421.

175. *Id.* at 256, 623 S.E.2d at 423.

ing on the lesser included offense for which the petitioner was validly convicted.”<sup>176</sup>

### E. *Attempted Capital Murder of a Police Officer*

The Supreme Court of Virginia found the evidence sufficient to affirm a conviction of attempted capital murder on a police officer in *Coles v. Commonwealth*.<sup>177</sup> There, the defendant initially appeared to acquiesce in a police stop of his vehicle.<sup>178</sup> However, he then accelerated in the direction of a police officer, struck the police cruiser, pushing it towards the officer, and drove away.<sup>179</sup> The court held this evidence sufficient to show premeditation, which need only exist for a moment, and a specific intent to kill.<sup>180</sup> Furthermore, the court concluded that the evidence, and in particular the positions of the defendant’s car and of the police officer, belied the defendant’s argument that he was merely trying to escape.<sup>181</sup>

### F. *Attempted Capital Murder for Hire*

In *Ashford v. Commonwealth*,<sup>182</sup> the defendant sought to have his wife killed.<sup>183</sup> He first asked an inmate, and later a police officer posing as a “hit man,” to carry out the murder.<sup>184</sup> Ashford gave the police officer money, a detailed map, and instructions to carry out the murder.<sup>185</sup> He was charged with attempted murder for hire.<sup>186</sup> At trial and on appeal, he asserted that he could be convicted of, at most, solicitation for murder, because the police officer did not make any actual attempt to kill his wife.<sup>187</sup> Therefore, he argued, the necessary overt act had not occurred.<sup>188</sup> The Court of Appeals of Virginia upheld his conviction, noting that

176. *Commonwealth v. South*, 272 Va. 1, 1, 630 S.E.2d 318, 319 (2006).

177. 270 Va. 585, 621 S.E.2d 109 (2005).

178. *Id.* at 588, 621 S.E.2d at 110.

179. *Id.* at 588–89, 621 S.E.2d at 110–11.

180. *Id.* at 590–91, 621 S.E.2d at 112.

181. *Id.*

182. 47 Va. App. 676, 626 S.E.2d 464 (Ct. App. 2006).

183. *Id.* at 679, 626 S.E.2d at 465.

184. *Id.* at 679–80, 626 S.E.2d at 465–66.

185. *Id.* at 680, 626 S.E.2d at 466.

186. *Id.*

187. *Id.* at 681–82, 626 S.E.2d at 466–67.

188. *Id.* at 681, 626 S.E.2d at 466.

the defendant's acts went well beyond mere preparation.<sup>189</sup> The court said the law should "not require the hit man to perform the useless act of pretending to actually shoot appellant's wife."<sup>190</sup> The court observed that "[t]o hold otherwise would be to render the offense 'attempted murder for hire' a nullity."<sup>191</sup>

### G. Carnal Knowledge

While the law has generally moved away from requiring "magic words," a level of linguistic precision is nevertheless required under certain circumstances. In *Welch v. Commonwealth*,<sup>192</sup> the defendant was convicted of carnal knowledge after the fourteen-year-old victim testified about her "sexual relationship" with him.<sup>193</sup> The victim did not further detail what this term comprised.<sup>194</sup> The Supreme Court of Virginia held this testimony did not suffice for a conviction.<sup>195</sup> The court explained that "carnal knowledge" is established only if the Commonwealth proves certain specified acts.<sup>196</sup> Vague terms, the court observed, "invite speculation that cannot suffice for proof beyond a reasonable doubt."<sup>197</sup>

### H. Crimes Against Nature

In a pair of related decisions, the Court of Appeals of Virginia examined the impact of the decision in *Lawrence v. Texas*<sup>198</sup> on Virginia's "crimes against nature" statute. In *Tjan v. Commonwealth*<sup>199</sup> and *Singson v. Commonwealth*,<sup>200</sup> the court of appeals reviewed the convictions of two individuals who were apprehended when they asked undercover detectives in a public de-

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189. *Id.* at 684, 626 S.E.2d at 467-68.

190. *Id.*, 628 S.E.2d at 468.

191. *Id.*

192. 271 Va. 558, 628 S.E.2d 340 (2006).

193. *Id.* at 560-62, 628 S.E.2d at 341-42.

194. *Id.* at 562, 628 S.E.2d at 342.

195. *Id.* at 565, 628 S.E.2d at 344.

196. *Id.* at 563-64, 628 S.E.2d at 342-43.

197. *Id.* at 564, 628 S.E.2d at 343.

198. 539 U.S. 558 (2003) (holding that the Due Process Clause protects voluntary sexual conduct by consenting adults in private).

199. 46 Va. App. 698, 621 S.E.2d 669 (Ct. App. 2005).

200. 46 Va. App. 724, 621 S.E.2d 682 (Ct. App. 2005).

partment store bathroom if they could perform fellatio on the officers.<sup>201</sup>

In *Singson*, the defendant first argued that the crimes against nature statute was facially invalid on Due Process grounds.<sup>202</sup> The Court of Appeals of Virginia held that the defendant had no standing to raise such a challenge, because his own conduct, which occurred “in a public place . . . not a private location” was not constitutionally protected.<sup>203</sup> The court explained that “the Supreme Court explicitly noted that [*Lawrence*] did not ‘involve public conduct or prostitution.’”<sup>204</sup> *Singson* also contended that the statute was overbroad because it chilled his First Amendment rights.<sup>205</sup> The court noted that the solicitation statute, in conjunction with the sodomy statute, was directed at non-expressive sexual conduct rather than speech.<sup>206</sup> The court further held that any effect the statute might have on speech proposing private acts of sodomy among consenting adults was hypothetical and incidental and did not justify invalidating the statute on its face.<sup>207</sup> Therefore, the court declined to hold that the statute was “substantially overbroad.”<sup>208</sup>

In *Tjan*, the Court of Appeals of Virginia again concluded the defendant lacked standing to challenge the statute on overbreadth grounds.<sup>209</sup> The court held that the defendant’s public conduct was not constitutionally protected, and he could not challenge the statute as it might be applied to others in hypothetical situations.<sup>210</sup> The court noted that the statute informed a reasonable person of the prohibited conduct, and it was, therefore, not void for vagueness.<sup>211</sup> Finally, the court found no equal protection violation because the statutory text did not draw any distinctions between homosexuals and heterosexuals and moreover, the stat-

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201. *Tjan*, 46 Va. App. at 703–04, 621 S.E.2d at 671–72; *Singson*, 46 Va. App. at 731, 621 S.E.2d at 685.

202. 46 Va. App. at 732, 621 S.E.2d at 685.

203. *Id.*

204. *Id.* at 736, 621 S.E.2d at 687 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

205. *Id.* at 743, 621 S.E.2d at 691.

206. *Id.* at 742–43, 621 S.E.2d at 690–91.

207. *Id.* at 747, 621 S.E.2d at 693.

208. *Id.* at 748, 621 S.E.2d at 693.

209. 46 Va. App. 698, 713, 621 S.E.2d 669, 676 (Ct. App. 2005).

210. *Id.* at 706, 621 S.E.2d at 672–73.

211. *Id.* at 708, 621 S.E.2d at 673.

ute permissibly draws distinctions based on behavior, not persons.<sup>212</sup> In short, the statute “does not create an impermissible classification between groups of people similarly situated.”<sup>213</sup>

### I. *Indecent Liberties*

In a case of first impression, the Court of Appeals of Virginia addressed whether the evidence was sufficient to show that the defendant was in a “supervisory” relationship with a child he sexually molested,<sup>214</sup> as that term is defined in Virginia Code section 18.2-370.1.<sup>215</sup> In *Gilbert v. Commonwealth*,<sup>216</sup> the defendant was the manager of a bagel store where the victim was an employee.<sup>217</sup> The defendant molested the fifteen-year-old victim at the store after his shift had ended.<sup>218</sup> The court held that the defendant, who was responsible for employment decisions, scheduling, and overseeing the employees, was clearly in a supervisory relationship over the victim and was therefore properly convicted.<sup>219</sup>

### J. *Larceny*

In a succinct decision, *McAlevy v. Commonwealth*,<sup>220</sup> the Supreme Court of Virginia held that the element of asportation in a larceny case can be established by proving that the defendant used an unwitting agent to transport the stolen goods.<sup>221</sup> In *McAlevy*, the defendant had falsely told a prospective buyer that the owner had granted the defendant permission to sell certain farm equipment.<sup>222</sup> McAlevy also told the buyer to retrieve the

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212. *Id.* at 712–13, 621 S.E.2d at 676.

213. *Id.* at 713, 621 S.E.2d at 676 (quoting *Branche v. Commonwealth*, 25 Va. App. 480, 487, 489 S.E.2d 692, 695 (Ct. App. 1997)).

214. *Gilbert v. Commonwealth*, 47 Va. App. 266, 268, 623 S.E.2d 428, 429 (Ct. App. 2005).

215. VA. CODE ANN. § 18.2-370.1 (Cum. Supp. 2006).

216. 47 Va. App. 266, 623 S.E.2d 428 (Ct. App. 2005).

217. *Id.* at 268, 623 S.E.2d at 429.

218. *Id.* at 268–69, 623 S.E.2d at 429–30.

219. *Id.* at 272–73, 623 S.E.2d at 431–32.

220. 270 Va. 378, 620 S.E.2d 758 (2005).

221. *See id.* at 380, 620 S.E.2d at 759.

222. *Id.* at 379, 620 S.E.2d at 759.

equipment after the “sale.”<sup>223</sup> In reliance on these false representations, the buyer removed the equipment, thereby satisfying the element of asportation.<sup>224</sup>

### K. *Lynching and Gang Crimes*

In *Corado v. Commonwealth*,<sup>225</sup> the Court of Appeals of Virginia reviewed a case from Arlington County in which the prosecution relied on the lynching statute to successfully prosecute a gang leader who participated in a fight that turned deadly.<sup>226</sup> The evidence showed that the defendant and his fellow gang members arrived at a hotel prepared to fight a rival gang and that the defendant participated in the fight.<sup>227</sup> Corado contended that under the lynching statutes, Virginia Code sections 18.2-38 and 18.2-39, “the ultimate victim of the mob violence [must be] the mob’s initial or specific, intended target.”<sup>228</sup> The court of appeals rejected this construction, holding that the plain language of the two statutes at issue only required an intent to commit an act of violence upon “any person.”<sup>229</sup> Therefore, the fact that the defendant did not intend to harm the specific person who was ultimately killed was of no relevance.<sup>230</sup>

### L. *Possession of a Firearm by a Convicted Felon*

In *Overbey v. Commonwealth*,<sup>231</sup> the Supreme Court of Virginia reversed the defendant’s conviction for possession of a firearm by a convicted felon due to the ambiguity in the predicate order from the juvenile and domestic relations court.<sup>232</sup> The order at issue showed that the defendant had faced two charges, a felony charge

223. *Id.*

224. *See id.* at 379–80, 620 S.E.2d at 759.

225. 47 Va. App. 315, 623 S.E.2d 452 (Ct. App. 2005).

226. *See id.* at 321–22, 623 S.E.2d at 455.

227. *Id.* at 321, 623 S.E.2d at 455.

228. *Id.* at 326, 623 S.E.2d at 457.

229. *Id.* (finding that Virginia Code section 18.2-38 “states that a mob can come into being if the individual members assemble with the intent of committing violence upon *any* person”).

230. *See id.* at 326–27, 623 S.E.2d at 457–58.

231. 271 Va. 231, 623 S.E.2d 904 (2006).

232. *Id.* at 234, 623 S.E.2d at 905–06.

for burglary and a misdemeanor charge for petit larceny.<sup>233</sup> The order reflected that the defendant was found guilty—but not for which offense—and that he had been sentenced to twelve months in prison.<sup>234</sup> The ambiguity inherent in the order, the court held, failed to establish that the defendant was convicted of a felony.<sup>235</sup> Without the felony predicate, he could not be convicted of possessing a firearm as a convicted felon.<sup>236</sup>

### M. *Sex Offender Registry*

The defendant, on appeal, in *Colbert v. Commonwealth*,<sup>237</sup> contended he could not be compelled to register as a sex offender because the person he had solicited for criminal sexual activity turned out to be an undercover police officer rather than a thirteen-year-old girl.<sup>238</sup> The defendant relied on Virginia Code section 9.1-902(A)(2), which requires registration when the victim of the applicable offense is a “minor.”<sup>239</sup> The Court of Appeals of Virginia rejected this interpretation, finding that a defendant is required to register regardless of the actual age of the target.<sup>240</sup> This construction, the court held, accords with the entire structure and purpose of the statute, is most “consistent with the Act’s manifest remedial purpose of protecting children from sex offenders,” and avoids an absurd result.<sup>241</sup>

## VI. DEFENSES

### A. *Double Jeopardy*

Over the past year, Virginia appellate courts addressed a number of aspects of the prohibition against double jeopardy. In *Roe v. Commonwealth*,<sup>242</sup> the Supreme Court of Virginia reviewed the

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233. *Id.* at 232, 623 S.E.2d at 904.

234. *See id.* at 233, 623 S.E.2d at 905.

235. *See id.* at 234, 623 S.E.2d at 905–06.

236. *See id.*, 623 S.E.2d at 906.

237. 47 Va. App. 390, 624 S.E.2d 108 (Ct. App. 2006).

238. *Id.* at 393, 624 S.E.2d at 109.

239. *Id.* at 394, 624 S.E.2d at 110.

240. *See id.* at 399, 624 S.E.2d at 113.

241. *Id.* at 400–01, 624 S.E.2d at 113.

242. 271 Va. 453, 628 S.E.2d 526 (2006).



case of a defendant charged with abduction, shooting into an occupied dwelling, and some attendant firearm charges.<sup>243</sup> When the trial date arrived, the Commonwealth moved for a continuance.<sup>244</sup> The trial court refused, whereupon the prosecution moved to “dismiss” the indictment.<sup>245</sup> The trial court granted the motion.<sup>246</sup> When the Commonwealth later re-indicted Roe, he argued that the earlier dismissal precluded the new prosecution.<sup>247</sup> The trial court rejected this argument, and, interpreting the order, concluded that the earlier dismissal was in fact a “*nol pros.*”<sup>248</sup> The Supreme Court of Virginia disagreed, holding that while a court may interpret its own orders, that interpretation must be reasonable.<sup>249</sup> In the first prosecution, the Commonwealth had moved to “dismiss” the charges and had not requested a *nolle presequi*.<sup>250</sup> The two procedures are distinct.<sup>251</sup> Therefore, the renewed indictments should have been dismissed on double jeopardy grounds.<sup>252</sup>

The complex jurisdictional interplay between general district courts and circuit courts is a frequent source of litigation and confusion. In *Painter v. Commonwealth*,<sup>253</sup> the defendant had been charged at the trial level with the felony offense of petit larceny, third offense.<sup>254</sup> At her preliminary hearing, the Rockingham County General District Court found that the Commonwealth’s tender of a report from the National Criminal Information Center (NCIC) did not suffice to establish the defendant’s prior criminal record.<sup>255</sup> The court convicted the defendant of misdemeanor petit larceny.<sup>256</sup> The defendant appealed to the Rockingham County Circuit Court.<sup>257</sup> Before her trial, the circuit court granted the prosecution’s motion to “*nol pros*” the misde-

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243. *Id.* at 455, 628 S.E.2d at 527.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 456, 628 S.E.2d at 527.

248. *Id.* at 456–57, 628 S.E.2d at 528.

249. *Id.* at 457–58, 628 S.E.2d at 528.

250. *Id.* at 458, 628 S.E.2d at 528–29.

251. *Id.*, 628 S.E.2d at 529.

252. *See id.* at 459, 628 S.E.2d at 529.

253. 47 Va. App. 225, 623 S.E.2d 408 (Ct. App. 2005).

254. *Id.* at 230, 623 S.E.2d at 411.

255. *See id.*

256. *Id.*

257. *Id.* at 231, 623 S.E.2d at 411.

meanor larceny charge.<sup>258</sup> The Commonwealth then obtained an indictment for petit larceny, third offense.<sup>259</sup> The defendant entered a conditional plea, arguing that double jeopardy and collateral estoppel barred the felony prosecution.<sup>260</sup> The Court of Appeals of Virginia held that the defendant's decision to appeal the judgment of the general district court rendered that judgment a complete nullity.<sup>261</sup> Moreover, since the circuit court never heard evidence on the charge, jeopardy did not attach in that court.<sup>262</sup> Therefore, the Commonwealth could obtain a "nol pros" of the misdemeanor charge in the circuit court and thereafter indict her for a felony offense.<sup>263</sup> Finally, the court concluded that collateral estoppel did not bar the felony prosecution.<sup>264</sup> A prerequisite to the invocation of collateral estoppel is that the defendant was previously acquitted of the offense.<sup>265</sup> Similarly, res judicata requires a judgment on the merits.<sup>266</sup> A finding that the NCIC report failed to establish probable cause of the prior larceny convictions was neither a judgment on the merits that the prior convictions did not exist, nor was it an acquittal.<sup>267</sup>

In *Peake v. Commonwealth*,<sup>268</sup> the Court of Appeals of Virginia reviewed a case in which the police found a small quantity of marijuana in the defendant's pocket.<sup>269</sup> During the same search, the police also uncovered a larger quantity of marijuana in a lockbox.<sup>270</sup> The defendant admitted that the drugs found in the lockbox were his.<sup>271</sup> Peake was convicted in general district court of possession of marijuana.<sup>272</sup> He was later convicted in the circuit court of possession with the intent to distribute based on the drugs found in the lockbox.<sup>273</sup> He argued that this second convic-

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258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 234, 623 S.E.2d at 412.

262. *Id.* at 234-35, 623 S.E.2d at 413.

263. *See id.*

264. *Id.* at 236, 623 S.E.2d at 413-14.

265. *Id.*, 623 S.E.2d at 413

266. *Id.* at 237, 623 S.E.2d at 414.

267. *Id.*

268. 46 Va. App. 35, 614 S.E.2d 672 (Ct. App. 2005).

269. *Id.* at 38, 614 S.E.2d at 674.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

tion was barred by double jeopardy.<sup>274</sup> The court of appeals disagreed, relying on the specific facts of the case.<sup>275</sup> The key to the analysis, the court held, was the defendant's intent with regard to the "separate stash[es]."<sup>276</sup> The court observed that the evidence showed that the marijuana found in the lockbox was for distribution, whereas the drugs found in the defendant's pocket were for personal use.<sup>277</sup> Therefore, he was not prosecuted for the "same offense" in violation of his double jeopardy rights.<sup>278</sup>

### B. *Impossibility*

The defendant in *Hix v. Commonwealth*,<sup>279</sup> following a sexually charged discussion in an Internet "chat room," set up a meeting with a person he believed to be a thirteen-year-old girl.<sup>280</sup> In fact, it was a special agent of the state police.<sup>281</sup> Hix was apprehended and charged with attempted indecent liberties and use of a communications system to solicit a minor.<sup>282</sup> He argued that he could not be convicted because it was impossible for him to consummate the charged offenses with an adult police officer.<sup>283</sup>

The Supreme Court of Virginia concluded the impossibility defense did not apply under such circumstances.<sup>284</sup> The court drew a distinction between factual impossibility and legal impossibility:

Legal impossibility occurs when a defendant's actions, even if fully carried out exactly as he intends, would not constitute a crime. Factual impossibility occurs when the actions intended by a defendant are proscribed by the criminal law, but a circumstance or fact unknown to the defendant prevents him from bringing about the intended result.<sup>285</sup>

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274. *Id.* at 39, 614 S.E.2d at 674.

275. *Id.* at 41, 614 S.E.2d at 675.

276. *Id.* (quoting *United States v. Smith*, 50 M.J. 813, 815 (A.F. Ct. Crim. App. 1999)).

277. *Id.* at 42, 614 S.E. 2d at 676.

278. *Id.*

279. 270 Va. 335, 619 S.E.2d 80 (2005).

280. *Id.* at 338-39, 619 S.E.2d at 81-82.

281. *Id.* at 338, 619 S.E.2d at 81.

282. *Id.* at 340, 619 S.E.2d at 83.

283. *Id.* at 341-42, 619 S.E.2d at 83-84.

284. *Id.* at 345, 619 S.E.2d at 86.

285. *Id.* at 342, 619 S.E.2d at 84 (quoting *Parham v. Commonwealth*, 2 Va. App. 633, 636, 347 S.E.2d 172, 173-74 (Ct. App. 1986)).

Legal impossibility is a valid defense, whereas factual impossibility is not.<sup>286</sup> The court noted that the true identity of the special agent with whom Hix interacted was “an extraneous circumstance unknown to him and beyond his control.”<sup>287</sup> Such factual circumstances provide no defense to the crime.<sup>288</sup>

### C. *Mental Retardation in Capital Cases*

The Supreme Court of the United States, after holding that the execution of a defendant who is mentally retarded would violate the Eighth Amendment of the United States Constitution, ordered a resentencing to determine whether the defendant, Deryl Atkins, was mentally retarded.<sup>289</sup> Following this proceeding, a jury again sentenced Atkins to death.<sup>290</sup> On appeal, the Supreme Court of Virginia examined whether the Commonwealth’s expert should have been admitted and whether the jury was properly informed that Atkins was previously sentenced to die.<sup>291</sup> The court answered both questions in the negative.<sup>292</sup> First, the court concluded that the Commonwealth’s expert, a clinical psychologist with extensive experience in assessing mental functioning, was not qualified to testify about the defendant’s mental retardation.<sup>293</sup> The statute required an expert “skilled in the administration, scoring and interpretation of . . . measures of adaptive behavior.”<sup>294</sup> The Commonwealth’s expert acknowledged he had never administered a standardized measure of adaptive behavior and, therefore, under the plain language of the statute, he was not “skilled” in the administration of such tests.<sup>295</sup> Finally, the court held it was prejudicial error for the jury who was sentencing Atkins anew to have been informed that a prior jury had sen-

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286. See *id.* (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *SUBSTANTIVE CRIMINAL LAW* § 11.5(a)(2), at 233 (2d ed. 2003)).

287. *Id.* at 346, 619 S.E.2d at 86.

288. *Id.*

289. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

290. *Atkins v. Commonwealth*, 272 Va. 144, 149, 631 S.E.2d 93, 95 (2006).

291. *Id.* at 149–50, 631 S.E.2d at 95.

292. *Id.* at 154, 157, 160, 631 S.E.2d at 98, 100, 102.

293. *Id.* at 154, 631 S.E.2d at 98.

294. *Id.* at 153, 631 S.E.2d at 97 (quoting VA. CODE ANN. § 19.2-264.3:1.2(A) (Repl. Vol. 2004 & Cum. Supp. 2006)).

295. *Id.*, 631 S.E.2d at 97–98.

tenced Atkins to death.<sup>296</sup> However, the trial court properly told the jury that the defendant was convicted of capital murder and that he would not be subject to the death penalty if he were found to be mentally retarded.<sup>297</sup>

#### D. *Restoration of Rights*

In *Farnsworth v. Commonwealth*,<sup>298</sup> the Supreme Court of Virginia granted review of a conviction for possession of a firearm by a convicted felon.<sup>299</sup> He had been convicted of a felony in West Virginia, but his civil rights were restored by the West Virginia Department of Corrections.<sup>300</sup> The Supreme Court of Virginia, in a *per curiam* opinion, held that the statute at issue, Virginia Code section 18.2-308.2, contained only two exemptions permitting a convicted felon to possess a firearm, and a restoration of civil rights by a neighboring state was not one of them.<sup>301</sup> Therefore, the court affirmed his conviction.<sup>302</sup>

#### E. *Statute of Limitations*

The statute of limitations specific to petit larceny is five years, whereas the general statute of limitations for misdemeanors is one year.<sup>303</sup> In *Foster v. Commonwealth*,<sup>304</sup> the Supreme Court of Virginia examined whether a prosecution for writing a bad check must be brought within one year or five years.<sup>305</sup> The court held that under Virginia Code section 18.2-181, writing a bad check is deemed larceny and, therefore, the five year statute of limitations for larceny applied rather than the general one year limitations period.<sup>306</sup>

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296. *Id.* at 158, 631 S.E.2d at 100.

297. *Id.*

298. 270 Va. 1, 613 S.E.2d 459 (2005) (*per curiam*), *cert denied*, 126 S. Ct. 1628 (2006).

299. *See id.* at 2, 613 S.E.2d at 460.

300. *Id.*

301. *See id.*

302. *Id.*

303. VA. CODE ANN. § 19.2-8 (Cum. Supp. 2006).

304. 271 Va. 235, 623 S.E.2d 902 (2006).

305. *Id.* at 236, 623 S.E.2d at 902.

306. *Id.* at 238, 623 S.E.2d at 903.

## VII. POST-TRIAL MOTIONS

A. *Motions to Modify or Reduce a Sentence*

A limited avenue for seeking reduction of a sentence beyond the narrow strictures of Rule 1:1 of the Rules of the Supreme Court of Virginia is found in Virginia Code section 19.2-303. That statute provides in relevant part that when a person has been sentenced for a felony to the Department of Corrections but has not actually been transferred to a receiving unit of the department, the court may at any time before the person is transferred to the department, suspend or otherwise modify the unserved portion of such a sentence.<sup>307</sup>

In *Commonwealth v. Neely*,<sup>308</sup> the Supreme Court of Virginia examined the case of a defendant who was originally sentenced to serve an entirely suspended sentence.<sup>309</sup> While on probation, he was arrested and prosecuted by the federal government and was ultimately sentenced to incarceration in the federal penitentiary.<sup>310</sup> After the federal proceeding, the circuit court revoked the entirety of his suspended sentence.<sup>311</sup> Almost four years later, while still in federal custody, Neely sought to modify his sentence.<sup>312</sup> The circuit court concluded it lacked jurisdiction to consider the motion.<sup>313</sup> The Supreme Court of Virginia disagreed. The court noted that under the plain language of the statute, so long as Neely had not been transferred to the custody of the Department of Corrections, the trial court could consider the motion.<sup>314</sup> As he was not so transferred, the trial court erred in holding that it lacked jurisdiction to grant or deny the motion.<sup>315</sup>

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307. VA. CODE ANN. § 19.2-303 (Cum. Supp. 2006).

308. 271 Va. 1, 624 S.E.2d 657 (2006).

309. *Id.* at 2, 624 S.E.2d at 657.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 2-3, 624 S.E.2d at 657.

315. *Id.*

## B. *Newly Discovered Evidence*

The Supreme Court of Virginia in *Orndorff v. Commonwealth*<sup>316</sup> examined whether a defendant should have been awarded a new trial on the basis of after-discovered evidence<sup>317</sup> and whether the trial court properly concluded that she was competent to be sentenced.<sup>318</sup> Orndorff was convicted of murdering her husband.<sup>319</sup> She claimed after trial to have discovered that she suffered from dissociative identity disorder (DID), which she said could support an insanity defense.<sup>320</sup> After she was evaluated, both parties offered evidence on the subject of her competency.<sup>321</sup> The trial court concluded that she was competent to be sentenced.<sup>322</sup> During the sentencing phase, Orndorff presented extensive expert evidence regarding her mental condition.<sup>323</sup> After the jury fixed her sentence, the court denied the motion for a new trial.<sup>324</sup> The court reasoned that the lengthy sentence imposed by the jury demonstrated that the jury had rejected the psychiatric evidence presented by the defendant at sentencing.<sup>325</sup>

Regarding the issue of competency, the supreme court affirmed.<sup>326</sup> The court reasoned that the trial court's factual finding on the issue of competency should not be disturbed because there was evidence in the record to support its finding of competency.<sup>327</sup>

On the second issue, the court reversed.<sup>328</sup> The court noted that newly discovered evidence will warrant a new trial if the evidence

(1) appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative

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316. 271 Va. 486, 628 S.E.2d 344 (2006).

317. *Id.* at 501, 628 S.E.2d at 352.

318. *Id.* at 499, 628 S.E.2d at 351.

319. *Id.* at 490, 628 S.E.2d at 346.

320. *Id.*

321. *See id.* at 496–97, 628 S.E.2d at 349–50.

322. *Id.* at 495, 628 S.E.2d at 349.

323. *Id.* at 496–97, 628 S.E.2d at 349–50.

324. *Id.* at 490, 628 S.E.2d at 346.

325. *See id.* at 498, 628 S.E.2d at 350.

326. *Id.* at 500, 628 S.E.2d at 352.

327. *See id.* at 500–01, 628 S.E.2d at 352.

328. *Id.* at 506–07, 628 S.E.2d at 355–56.

orative or collateral; and (4) is material, and such as should produce opposite results on the merits at another trial.<sup>329</sup>

The second and fourth parts of this test were at issue.<sup>330</sup>

The court concluded that the defendant had, in fact, exercised due diligence.<sup>331</sup> She sought expert assistance prior to trial.<sup>332</sup> However, the experts could not reach a diagnosis of DID until after trial, when certain “alter” personalities first manifested themselves.<sup>333</sup>

Furthermore, the court held that in examining the motion for a new trial, the trial court should not have relied on the jury’s rejection at sentencing of the defendant’s mitigation evidence in concluding that the new evidence would not have altered the outcome.<sup>334</sup> In effect, the trial court “substituted in place of its own judgment the reaction of a jury that had already resolved crucial credibility issues against” the defendant.<sup>335</sup> Instead, the trial court should have independently weighed the evidence.<sup>336</sup> In effect, the trial court’s role in weighing the materiality of newly discovered evidence “resembles that of the fact finder.”<sup>337</sup> The improper legal standard employed by the trial court mandated remand for a determination of materiality under the proper standard.<sup>338</sup>

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329. *Id.* at 501, 628 S.E.2d at 352 (quoting *Odum v. Commonwealth*, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983)).

330. *Id.*

331. *See id.* at 503, 628 S.E.2d at 353.

332. *See id.*

333. *Id.* at 503–04, 628 S.E.2d at 353–54.

334. *See id.* at 505, 628 S.E.2d at 354–55.

335. *Id.*

336. *See id.*, 628 S.E.2d at 355 (citing *Odum v. Commonwealth*, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983)).

337. *Id.*, 628 S.E.2d at 354 (citing *Zimmerman v. Commonwealth*, 167 Va. 578, 587, 189 S.E. 144, 148 (1937); *Holmes v. Commonwealth*, 156 Va. 963, 969, 157 S.E. 554, 556 (1931)).

338. *Id.*, 628 S.E.2d at 355 (citing *Thomas v. Commonwealth*, 263 Va. 216, 233, 559 S.E.2d 652, 661 (2002)).



## VIII. LEGISLATION

A. *Criminal Procedure*

In circuit court proceedings, a defendant must file certain dispositive motions seven days before trial: motions seeking suppression of evidence, motions for the dismissal of a warrant on speedy trial or double jeopardy grounds, and motions to dismiss based on the unconstitutionality of a statute.<sup>339</sup> The General Assembly clarified that such motions need not be filed in advance in general district court.<sup>340</sup> However, upon the filing of such a motion in the district court, the court must grant a continuance to the prosecution upon a showing of good cause.<sup>341</sup>

If a court not of record in any criminal or traffic case rules that a statute or ordinance is unconstitutional, the Commonwealth can now appeal to the circuit court.<sup>342</sup> The lower court must issue a written opinion, which is forwarded to the circuit court, and the lower court must stay any further proceedings.<sup>343</sup> If the circuit court agrees that the statute or ordinance is unconstitutional, the Commonwealth can appeal the circuit court's ruling to the Court of Appeals of Virginia and to the Supreme Court of Virginia.<sup>344</sup> On the other hand, if the circuit court disagrees and holds that the statute or ordinance is constitutional, the matter is remanded to the lower court for trial.<sup>345</sup>

B. *Dangerous Dogs*

Following several well publicized dog attacks, the General Assembly expanded the law covering dangerous animals. Now, law enforcement officers as well as animal control officers can petition the court for a finding that a dog is dangerous.<sup>346</sup> A dangerous dog

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339. VA. CODE ANN. § 19.2-266.2 (Cum. Supp. 2006).

340. Act of Apr. 5, 2006, ch. 578, 2006 Va. Acts \_\_ (codified as amended at VA. CODE ANN. § 19.2-266.2 (Cum. Supp. 2006)).

341. VA. CODE ANN. § 19.2-266.2(D) (Cum. Supp. 2006).

342. *Id.* § 16.1-131.1 (Cum. Supp. 2006).

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* § 3.1-796.93:1(B) (Cum. Supp. 2006).

must now be registered with a state registry.<sup>347</sup> Finally, the law provides graduated penalties against the owner of a dangerous dog that attacks another companion cat or dog, or another human being.<sup>348</sup>

### C. *Driving Offenses*

Virginia law previously provided for a number of enhanced penalties for a repeat DUI offense, provided the offense took place within either five years or ten years of a “first offense.”<sup>349</sup> The General Assembly amended the statute to allow these enhanced penalties for a DUI offense that occurs within five or ten years of any prior DUI.<sup>350</sup> In other words, the enhancement can be triggered by a new conviction occurring within five or ten years of any prior conviction rather than a “first” conviction.<sup>351</sup> A third conviction within ten years for driving after forfeiture of one’s driver’s license is now a Class 6 felony.<sup>352</sup>

The General Assembly also simplified the definition of reckless driving. Reckless driving now consists of driving in excess of twenty miles over the speed limit, or driving over eighty miles per hour regardless of the speed limit.<sup>353</sup>

### D. *Drug Crimes*

Existing law provides that a drug dealer or manufacturer who is convicted of possession or manufacture of a specified large quantity of certain drugs must be sentenced to a mandatory minimum of twenty years in prison.<sup>354</sup> The General Assembly enacted a similar statute with a lower mandatory minimum sentence if the prosecution proves possession, manufacture or distribution of specified quantities of drugs, including 100 grams or more of heroin, 500 grams or more of cocaine, and ten grams or

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347. *Id.* § 3.1-796.93:3 (Cum. Supp. 2006).

348. *See id.* § 3.1-796.93:1(J) (Cum. Supp. 2006).

349. *Id.* § 18.2-270(B)(2) (Repl. Vol. 2004).

350. Act of Mar. 23, 2006, ch. 82, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-270(B)(2) (Cum. Supp. 2006)).

351. *See* VA. CODE ANN. § 18.2-270(B)(2) (Cum. Supp. 2006).

352. *Id.* § 18.2-272(A) (Cum. Supp. 2006).

353. *Id.* § 46.2-862 (Supp. 2006).

354. *Id.* § 18.2-248(H) (Cum. Supp. 2006).

more of methamphetamine.<sup>355</sup> The court may decline to apply the mandatory minimum if the defendant cooperates with law enforcement, it is his first offense, the defendant was not a leader or an organizer, or the offense did not result in death or serious bodily injury.<sup>356</sup>

### E. *Identity Crimes*

A person who is lawfully detained and who is asked to identify himself by the police is now guilty of a Class 1 misdemeanor if he falsely identifies himself with the intent to deceive the officer.<sup>357</sup>

Identity theft is generally a Class 1 misdemeanor.<sup>358</sup> The General Assembly created enhanced penalties where the identifying information of five or more persons is obtained in the same transaction or occurrence, in which case the offense is a Class 6 felony.<sup>359</sup> If the identities of fifty or more persons are concerned, the offense is a Class 5 felony.<sup>360</sup>

### F. *Evidence*

Properly authenticated copies of breath test records from the Department of Forensic Science are now admissible into evidence.<sup>361</sup>

To reduce the burden on the Department of Forensic Science, a police officer is now permitted to testify concerning the results of field tests for marijuana, but the test employed must be approved by the Department of Forensic Science.<sup>362</sup> However, a defendant has the option of requesting a "full chemical analysis."<sup>363</sup>

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355. Act of Apr. 5, 2006, ch. 759, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-248(C) (Cum. Supp. 2006)).

356. VA. CODE ANN. § 18.2-248(C) (Cum. Supp. 2006).

357. *Id.* § 19.2-82.1 (Cum. Supp. 2006).

358. *Id.* § 18.2-186.3(D) (Cum. Supp. 2006).

359. Act of Mar. 31, 2006, ch. 455, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-186.3(D) (Cum. Supp. 2006)).

360. VA. CODE ANN. § 18.2-186.3(D) (Cum. Supp. 2006).

361. *Id.* § 18.2-268.9 (Cum. Supp. 2006).

362. *Id.* § 19.2-188.1(B) (Cum. Supp. 2006).

363. *Id.*

The General Assembly modified the law to allow for compensation of employees of the commonwealth who testify as experts in cases involving an insanity defense or an offense indicative of sexual abnormality.<sup>364</sup> A number of strictures limit the scope of this statute.<sup>365</sup>

### G. *Gang Related Crimes*

A new statute provides that brandishing a machete with the intent to intimidate is a Class 1 misdemeanor.<sup>366</sup> If the offense occurs within 1,000 feet of a school, the offense is a Class 6 felony.<sup>367</sup>

The list of predicate crimes for criminal street gangs has been expanded to include threats to bomb and receiving money for procuring a prostitute.<sup>368</sup>

### H. *Methamphetamine Precursors*

To combat the growing problem of methamphetamine, the General Assembly imposed restrictions on the manner and quantity of sales of "precursors" to methamphetamine.<sup>369</sup> In general, sellers are required to place the drugs behind the counter, keep a log of purchasers, and demand a photo identification for sales.<sup>370</sup> Violation of these provisions is a Class 1 misdemeanor.<sup>371</sup>

### I. *Sexual Crimes*

This year, sex offenders fared even worse in the General Assembly than in the courts.

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364. Act of Mar. 23, 2006, ch. 114, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 19.2-175 (Cum. Supp. 2006)).

365. VA. CODE ANN. § 19.2-175 (Cum. Supp. 2006).

366. *See id.* § 18.2-282.1 (Cum. Supp. 2006).

367. *Id.*

368. *See id.* § 18.2-46.1 (Cum. Supp. 2006).

369. Act of Apr. 19, 2006, ch. 865, 2006 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 18.2-248.8 (Cum. Supp. 2006)).

370. VA. CODE ANN. § 18.2-248.8(A)(3)(a)–(c) (Cum. Supp. 2006).

371. *Id.* § 18.2-248.8(D) (Cum. Supp. 2006).

## 1. Sentencing Enhancements

Defendants convicted of rape, forcible sodomy, or object sexual penetration now face hefty mandatory minimum sentences of twenty-five years if certain aggravating circumstances are present. Those circumstances include a disparity in age between a young victim and the perpetrator, or the commission of the crime in conjunction with burglary, breaking and entering, or abduction.<sup>372</sup> In addition, the court must impose a sentence of no less than forty years suspended for life upon the defendant's release from confinement.<sup>373</sup> Finally, such convicts are forever barred from work or volunteer activities on elementary or secondary schools and child day centers.<sup>374</sup> A violation of this provision is a Class 6 felony.<sup>375</sup> A forty-year suspended sentence also applies in cases of abduction with the intent to obtain money, abduction with the intent to defile, or abduction of a child under the age of sixteen for purposes of concubinage or prostitution.<sup>376</sup>

A person who is convicted of rape, carnal knowledge of a child between the ages of thirteen and fifteen, forcible sodomy, aggravated sexual battery, object sexual penetration, taking indecent liberties, or abduction with the intent to extort money or with the intent to defile, and whose sentence includes a suspended period of incarceration, must have that sentence suspended for at least the same period of time as the maximum sentence for the offense.<sup>377</sup> Moreover, the defendant must be on probation for this entire time.<sup>378</sup>

## 2. Leaving a Child with a Violent Sexual Offender

A child is now deemed abused or neglected when a parent or caretaker creates a risk of physical or mental injury by knowingly leaving a child with a person (1) who is not a relative by blood or by marriage and (2) who is known by the parent or caretaker to

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372. *Id.* §§ 18.2-61(A)(ii)-(iii), -61(B), -67.1(A)(1)-(2), -67.1(B), -67.2(A)(1)-(2), -67.2(B) (Cum. Supp. 2006).

373. *Id.* § 18.2-48 (Cum. Supp. 2006).

374. *Id.* § 18.2-370.4(A) (Cum. Supp. 2006).

375. *Id.* § 18.2-370.3(A) (Cum. Supp. 2006).

376. *Id.* § 18.2-98 (Cum. Supp. 2006).

377. *Id.* § 19.2-303 (Cum. Supp. 2006).

378. *Id.*

have been convicted of an offense against a minor for which registration as a violent sexual offender is required.<sup>379</sup>

### 3. Registry

The General Assembly enacted a sweeping package of reforms to strengthen registration requirements for sex offenders. The list of crimes requiring registration has been expanded to include possession of child pornography, even for a first offense, using a communications system with a view to commit certain sexual acts with children, murder of a child under the age of fifteen, murder of a child in connection with an enumerated crime, and burglary with the intent to commit one of the enumerated felonies.<sup>380</sup>

Sex offenders are required to be photographed and provide a DNA sample when they register.<sup>381</sup> The registrant must provide information about his place of employment, and registration is required within three days of release from confinement, or upon arrival in Virginia, rather than the previous period of ten days.<sup>382</sup> Registration is also required for those convicted of similar offenses in other countries.<sup>383</sup> The registrant must inform law enforcement within three days of any change in employment.<sup>384</sup> The statute provides for periodic re-registration and new photographs every two years.<sup>385</sup> Law enforcement must verify a registrant's information at regular intervals.<sup>386</sup> After the passage of three to five years, depending on the offense, the registrant can petition a court for relief from the regular re-registration requirement.<sup>387</sup>

Under the new statute, a second or subsequent conviction for failing to register as a sex offender is a Class 6 felony and requires global positioning system (GPS) monitoring while on supervised probation, and a second or subsequent conviction of fail-

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379. *Id.* § 16.1-228 (Cum. Supp. 2006).

380. *Id.* § 9.1-902 (Repl. Vol. 2006).

381. *Id.* § 9.1-903(B) (Repl. Vol. 2006).

382. *Id.*

383. *Id.* § 9.1-902(B) (Repl. Vol. 2006).

384. *Id.* § 9.1-903(E) (Repl. Vol. 2006).

385. *Id.* § 9.1-904(B) (Repl. Vol. 2006).

386. *Id.* § 9.1-907(C) (Repl. Vol. 2006).

387. *Id.* § 9.1-909(A) (Repl. Vol. 2006).

ing to register as a violent sex offender or murderer is a Class 5 felony and requires mandatory GPS monitoring.<sup>388</sup>

The legislation expands the list of offenses that qualify as sexually violent offenses for the purposes of civil commitment. The new predicates are abduction with intent to defile, abduction of a child under sixteen years of age for the purpose of prostitution, carnal knowledge of a child between thirteen and fifteen years of age, and carnal knowledge of minors in custody of the court or the state.<sup>389</sup> The requirement that the complaining witness be under thirteen years of age for aggravated sexual battery to qualify as a predicate has been removed.<sup>390</sup> A felony conviction for conspiracy to commit or attempt to commit any of the qualified offenses is also added as a qualifying offense.<sup>391</sup>

A third conviction for peeping or spying into a dwelling will now constitute a Class 6 felony.<sup>392</sup>

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388. *Id.* § 18.2-472.1(A)–(B) (Cum. Supp. 2006).

389. *Id.* § 37.2-900 (Supp. 2006).

390. *See* Act of Mar. 20, 2005, ch. 185, 2005 Va. Acts 281 (codified as amended at VA. CODE ANN. § 18.2-67.3 (Cum. Supp. 2006)).

391. VA. CODE ANN. § 37.2-900 (Supp. 2006).

392. *Id.* § 18.2-67.5:1 (Cum. Supp. 2006).