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## Criminal Law and Procedure

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# 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 to the law enacted by the Virginia General Assembly in the areas of criminal law and procedure.

## II. CRIMINAL PROCEDURE

### A. *Circuit Court Jurisdiction Over Bail Hearings After a Notice of Appeal is Filed*

In *Askew v. Commonwealth*, the Court of Appeals of Virginia addressed the timing and procedure for seeking bail while an appeal is being litigated.<sup>1</sup> The defendant was convicted of possession of a firearm after having been convicted of a felony.<sup>2</sup> He filed his notice of appeal and then, several days later, asked the trial court to allow him to post bail while his appeal was pending.<sup>3</sup> The trial court concluded that it lacked jurisdiction to consider the bail motion because the filing of the notice of appeal divested the court of

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1. 49 Va. App. 127, 129, 638 S.E.2d 118, 119 (Ct. App. 2006).

2. *Id.*

3. *Id.* at 130, 638 S.E.2d at 119.

jurisdiction.<sup>4</sup> The Court of Appeals of Virginia reversed. The court first noted that under Virginia Code section 19.2-319, a precondition to obtain bail while an appeal is pending is that the trial court suspend or postpone the execution of a defendant's sentence.<sup>5</sup> The court held that a defendant has thirty days to ask for the suspension of his sentence, not twenty-one days as argued by the Commonwealth.<sup>6</sup> Under Virginia Code section 19.2-319, a trial court must suspend the sentence for the length of time necessary to enable the defendant to prepare his petition for appeal.<sup>7</sup> Under a separate statute, Virginia Code section 19.2-322.1, a trial court has discretion to suspend the defendant's sentence during the pendency of the appeal.<sup>8</sup> The court concluded that once the sentence has been suspended, the trial court retains ancillary jurisdiction to set, according to its discretion, the terms of bail at any time during the pendency of the appeal.<sup>9</sup>

### B. *Confrontation Clause*

An issue that courts must address in the wake of the Supreme Court of the United States's decision in *Crawford v. Washington*<sup>10</sup> involves the admissibility of statements made by crime victims who are not present to testify in court. The Supreme Court of Virginia addressed this issue in *Hodges v. Commonwealth*.<sup>11</sup> In *Hodges*, the prosecution's theory was that the defendant committed the murder because he feared that the victim would testify about his involvement in drug distribution.<sup>12</sup> In support of this theory, the prosecution adduced a number of statements made by the murder victim prior to her death.<sup>13</sup>

First, the prosecution adduced a written statement the victim had provided to the police in which she claimed that she sold marijuana on the defendant's behalf.<sup>14</sup> The court held that these

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4. *Id.*

5. *Id.* at 132, 638 S.E.2d at 120.

6. *Id.* at 132-33, 638 S.E.2d at 120-21.

7. *Id.* at 134, 638 S.E.2d at 121.

8. *Id.* at 135, 638 S.E.2d at 122.

9. *Id.* at 137, 638 S.E.2d at 123.

10. 541 U.S. 36 (2004).

11. 272 Va. 418, 423, 634 S.E.2d 680, 682 (2006).

12. *Id.* at 426, 634 S.E.2d at 683.

13. *Id.*, 634 S.E.2d at 683-84.

14. *Id.* at 423-24, 634 S.E.2d at 682.

statements implicated neither the hearsay rule nor the Confrontation Clause because they were admitted to show motive rather than for the truth of the matter asserted.<sup>15</sup> The court noted that in *Crawford*, the Supreme Court explicitly held that the Confrontation Clause did not apply to such statements.<sup>16</sup>

The prosecution also introduced oral statements the victim had made to friends and family members.<sup>17</sup> With respect to the Confrontation Clause, the court observed that the parties correctly conceded that the victim's statements, made in an informal setting to family members and friends, were "nontestimonial."<sup>18</sup> The court further held that if a statement is nontestimonial, trial courts need not apply the framework of *Ohio v. Roberts* to determine whether the statements bear indicia of reliability.<sup>19</sup>

Resolving the admissibility of the statements under the Confrontation Clause, however, does not end the inquiry. The statements must also satisfy state law rules of evidence. The Commonwealth argued that these statements were admissible to show the victim's state of mind.<sup>20</sup> In one of these statements, the victim's cousin was permitted to testify that two days before her disappearance, the victim said that she planned to testify against the defendant.<sup>21</sup> The court held that it would be "pure speculation" to conclude that the defendant was aware of this statement.<sup>22</sup> Therefore, the statement was irrelevant to show the defendant's motive to murder and should have been excluded.<sup>23</sup> The court noted that "an individual cannot be induced to act by a fact or circumstance that he did not know."<sup>24</sup> The court also held that admitting this statement was critical to the Commonwealth's case and was not harmless error.<sup>25</sup>

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15. *Id.* at 432–33, 634 S.E.2d at 687–88.

16. *Id.* at 429, 634 S.E.2d at 685 (quoting *United States v. Crawford*, 541 U.S. 36, 59 n.9 (2004)).

17. *See id.* at 424–26, 634 S.E.2d at 682–84.

18. *Id.* at 433, 634 S.E.2d at 688.

19. *See id.*, 634 S.E.2d at 688–89 (discussing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

20. *See id.* at 435–36, 634 S.E.2d at 689.

21. *See id.* at 424, 634 S.E.2d at 683.

22. *Id.* at 438, 634 S.E.2d at 691.

23. *Id.* at 439, 634 S.E.2d at 691.

24. *Id.*

25. *Id.* at 439–40, 634 S.E.2d at 692.

The court proceeded to examine two other statements. First, a cousin of the victim testified that the victim met with the defendant on the day before the preliminary hearing and spoke with the defendant's wife.<sup>26</sup> The defendant did not speak with the victim but was walking around nearby.<sup>27</sup> The court held that this statement was admissible under the state of mind exception and was relevant to show that the defendant was aware of the victim's accusations against him.<sup>28</sup> The victim had also told her babysitter that she planned to meet the defendant on the day of her disappearance.<sup>29</sup> The court sustained the admissibility of this statement under the state of mind exception to the hearsay rule and because it was relevant to show that the victim likely did meet the defendant that day.<sup>30</sup>

*Hodges* illustrates the need to address several parallel lines of legal authority when seeking to admit a statement in a criminal case by a declarant who is not available to testify. The prosecution must not only convince the court that the statement satisfies the Confrontation Clause, but also that it meets an exception to the hearsay rules, or that it is not hearsay, and finally, that it is relevant.

### C. *Speedy Trial*

The increased role of the United States in prosecuting crime can occasionally create spillover effects for state criminal prosecutions. In *Jiron-Garcia v. Commonwealth*, the general district court certified drug charges against the defendant on July 6, 2004.<sup>31</sup> He was held without bond in a local regional jail.<sup>32</sup> On October 19, 2004, the United States District Court for the Eastern District of Virginia issued a writ of habeas corpus *ad prosequendum*, ordering the jail to surrender the defendant to the United States Marshall for a court proceeding.<sup>33</sup> Jiron-Garcia was not present for his state trial, which was scheduled for November 4,

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26. *See id.* at 424, 634 S.E.2d at 682.

27. *Id.*

28. *Id.* at 441, 634 S.E.2d at 692.

29. *Id.* at 425, 634 S.E.2d at 683.

30. *See id.* at 441-42, 634 S.E.2d at 693.

31. 48 Va. App. 638, 643, 633 S.E.2d 744, 746 (Ct. App. 2006).

32. *Id.*

33. *Id.*

2004.<sup>34</sup> The prosecutor informed the court that the defendant was being housed at a different local jail because he had been “picked up” by the federal authorities.<sup>35</sup> After several additional continuances, the defendant, relying on the speedy trial statute, moved to dismiss the state charges.<sup>36</sup> The critical issue on the speedy trial motion was whether he was in state custody or in federal custody for the period between October 20, 2004 and November 4, 2004.<sup>37</sup> The trial court denied his motion to dismiss, finding that he had been in federal custody during this time and, therefore, the delay was not attributable to the state.<sup>38</sup> Jiron-Garcia was ultimately convicted of possession of cocaine and forging a public document.<sup>39</sup>

The Court of Appeals of Virginia reversed. First, the court noted that the Commonwealth retains continual custody over a defendant who is “on loan” to the federal authorities.<sup>40</sup> The federal authorities’ failure to return the defendant did not alter the fact that his ultimate custody remained with the state.<sup>41</sup> Because the defendant was deemed to be in continuous state custody, the speedy trial statute required that his trial occur within five months of the finding of probable cause by the general district court.<sup>42</sup> Second, the court noted that “the brief period of time the federal *ad prosequendum* writ was in effect, as well as any other time directly attributable to its execution,” tolled the running of the speedy trial statute.<sup>43</sup> Clearly, a defendant is unavailable during this time and this unavailability is a circumstance beyond the control of the trial judge or the parties.<sup>44</sup> In this instance, the record supported the tolling of the speedy trial period for only one day.<sup>45</sup> The court observed that the sparse record did not support any additional tolling.<sup>46</sup> There was no evidence in the record that

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34. *Id.*

35. *See id.*, 633 S.E.2d at 746–47.

36. *See id.* at 643–44, 633 S.E.2d at 747; *see also* VA. CODE ANN. § 19.2-243 (Cum. Supp. 2007).

37. *See Jiron-Garcia*, 48 Va. App. at 644, 633 S.E.2d at 747.

38. *Id.*

39. *Id.* at 643–44, 633 S.E.2d at 746–47.

40. *See id.* at 648, 633 S.E.2d at 749.

41. *Id.*

42. *Id.* at 648–49, 633 S.E.2d at 749.

43. *Id.* at 649, 633 S.E.2d at 749–50.

44. *Id.*

45. *See id.* at 650, 633 S.E.2d at 750.

46. *See id.*

the remaining time could be attributable to federal custody.<sup>47</sup> The court concluded that because the defendant was not brought to trial within five months of the finding of probable cause by the general district court, his motion to dismiss on speedy trial should have been granted.<sup>48</sup> This decision will require prosecutors to carefully monitor inmates who testify in federal cases or who have federal charges. The case also demonstrates the importance of making a record on the issue.

#### D. "Three Strikes" Law

Under Virginia Code section 19.2-297.1, commonly known as the "three strikes" law, a person who has previously been convicted of two specified violent felonies faces a mandatory sentence of life in prison upon conviction of a third specified felony.<sup>49</sup> In *Washington v. Commonwealth*, the defendant contended that the evidence of his prior crimes should be adduced during the sentencing phase of his trial rather than during the guilt phase.<sup>50</sup> The Supreme Court of Virginia disagreed. The court held that the plain language of the statute required the Commonwealth to present evidence of the prior crimes during the guilt phase.<sup>51</sup> Additionally, the court observed that, in other recidivist contexts, the prosecution has been required to establish the prior convictions during the guilt phase.<sup>52</sup> The court rejected the defendant's argument that Virginia Code section 19.2-295.1, which establishes bifurcated criminal trials, required that the evidence of prior crimes be presented during the sentencing phase.<sup>53</sup> Finally, the court found this procedure was not unduly prejudicial for a defendant, given the limiting instruction provided to the jury.<sup>54</sup>

#### E. Guilty Pleas

In *Justus v. Commonwealth*, the Supreme Court of Virginia examined the standard a trial court must apply in considering

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47. *See id.* at 650–51, 633 S.E.2d at 750.

48. *Id.* at 653, 633 S.E.2d at 751.

49. VA. CODE ANN. § 19.2-297.1 (Repl. Vol. 2004 & Cum. Supp. 2007).

50. 272 Va. 449, 452, 634 S.E.2d 310, 311–12 (2006).

51. *Id.* at 458, 634 S.E.2d at 315.

52. *See id.* at 459, 634 S.E.2d at 316.

53. *Id.* at 458–59, 634 S.E.2d at 315–16.

54. *See id.* at 460, 634 S.E.2d at 317.

whether to grant a motion to withdraw a guilty plea when the motion is made before sentencing has occurred.<sup>55</sup> Following a typical colloquy, the defendant pled guilty to breaking and entering, malicious wounding, and destruction of property.<sup>56</sup> The charges stemmed from allegations that Justus had broken into a home and assaulted her former husband and another person with a hammer.<sup>57</sup> Following the guilty plea colloquy and the Commonwealth's proffer of the evidence, Justus noted that she had been residing at the victim's home.<sup>58</sup> The court inquired about this fact, and counsel confirmed she had been residing there.<sup>59</sup> Justus obtained new counsel before her sentencing and moved to withdraw her guilty plea.<sup>60</sup> She asserted, among other things, that the attorney initially appointed to represent her had not properly investigated the facts of the case and that she actually had permission to enter the dwelling because she resided there.<sup>61</sup> Justus further claimed that she had acted in self-defense.<sup>62</sup> The trial court denied the motion to withdraw her guilty pleas.<sup>63</sup>

The Supreme Court of Virginia reversed, concluding that the defendant should have been permitted to withdraw her guilty plea.<sup>64</sup> At the outset, the court concluded that the defendant's statements during her plea colloquy and the absence of evidence regarding what she told her first lawyer about any defenses were not relevant to the motion to withdraw the guilty plea.<sup>65</sup> The court next noted that trial courts are vested with discretion in determining whether to grant a motion to withdraw a guilty plea.<sup>66</sup> The court held that the standard for withdrawing guilty pleas before sentencing should be more lenient than the "manifest injustice" standard for withdrawing guilty pleas after sentencing has occurred.<sup>67</sup> Although there was no fraud or coercion in the case at

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55. 274 Va. 143, 146, 634 S.E.2d 284, 284 (2007).

56. *See id.* at 147–48, 150, 645 S.E.2d at 285–87.

57. *See id.* at 147–48, 645 S.E.2d at 285.

58. *Id.* at 149, 645 S.E.2d at 286.

59. *Id.*

60. *See id.*

61. *See id.* at 149–50, 645 S.E.2d at 285.

62. *Id.* at 150, 645 S.E.2d at 286.

63. *Id.* at 151, 645 S.E.2d at 287.

64. *Id.* at 155–56, 645 S.E.2d at 290.

65. *See id.* at 154, 645 S.E.2d at 289.

66. *Id.* at 153, 645 S.E.2d at 288.

67. *Id.*



bar, a motion to withdraw the plea “should be granted even if the guilty plea was merely entered ‘inadvisedly’ when the evidence supporting the motion shows that there is a reasonable defense to be presented” to the fact finder.<sup>68</sup> Along with her motion to withdraw her guilty plea, Justus presented affidavits attesting to the fact that she resided at the dwelling and could not, therefore, be convicted of breaking into the dwelling.<sup>69</sup> She had also presented affidavits in support of a claim for self-defense.<sup>70</sup> Finally, the court observed that the motion to withdraw the guilty plea was made in good faith, based on viable defenses and not for the purpose of delay.<sup>71</sup>

### III. SEARCH AND SEIZURE

#### A. Arrest

Under settled law, an arrest occurs when a suspect is physically restrained, or the suspect submits to the officer’s assertion of authority.<sup>72</sup> In *Bristol v. Commonwealth*, the defendant, who had been drinking, drove his motorcycle into a pedestrian, injuring the pedestrian and himself.<sup>73</sup> An officer spoke with the defendant at the hospital, told him he was under arrest, and informed him of the implied consent provisions of Virginia law.<sup>74</sup> The defendant agreed to have a blood sample drawn, and the officer left without taking any steps to restrain the defendant’s freedom.<sup>75</sup> Another officer arrived and attempted to speak with the defendant.<sup>76</sup> The officer found that the defendant was in no condition to talk, however, and the officer left.<sup>77</sup> The defendant was discharged from the hospital later that day.<sup>78</sup> At trial, the defendant sought unsuccessfully to suppress the evidence of the blood test,

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68. *Id.* at 154, 645 S.E.2d at 289.

69. *See id.* at 150, 645 S.E.2d at 286.

70. *Id.*

71. *Id.* at 155–56, 645 S.E.2d at 290.

72. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

73. *See* 272 Va. 568, 571–72, 636 S.E.2d 460, 462 (2006).

74. *Id.* at 572, 636 S.E.2d at 462.

75. *Id.*

76. *Id.*

77. *See id.*

78. *Id.*

contending that the officer did not validly arrest him within three hours of the offenses.<sup>79</sup>

The Supreme Court of Virginia reversed the defendant's conviction. The court reasoned that because the police took no steps to physically restrain the defendant, the arrest was valid "only if his consent to the blood test constituted a complete surrender of his personal liberty in submission to [the officer's] assertion of authority."<sup>80</sup> In this instance, the court held that the defendant's actions did not.<sup>81</sup> The defendant made no statements that would indicate he was surrendering his personal liberty to the officer, nor did any of his actions signal such a submission.<sup>82</sup> The court then rejected the Commonwealth's assertion that the blood tests were admissible under the "exigent circumstances" exception to the search warrant requirement,<sup>83</sup> concluding that the mere possibility that blood alcohol may dissipate, which is present in every DUI arrest, is insufficient to invoke the exception. The court also rejected the court of appeals' reasoning in *Tipton v. Commonwealth*, where evidence of the defendant's blood alcohol level was admitted under the exigent circumstances exception when the defendant had not been arrested within the time period specified by the implied consent statute.<sup>84</sup> The court held that applying exigent circumstances to the facts at bar would undermine the structures of the implied consent laws.<sup>85</sup>

### B. *Entry into the Curtilage*

In *Robinson v. Commonwealth*, the Supreme Court of Virginia considered whether the police violated the defendants' Fourth Amendment rights by conducting a warrantless search of the defendants' backyard.<sup>86</sup> In response to a number of telephone reports of underage drinking, a police officer drove up the driveway to the Robinsons' home and observed young persons holding beer

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79. *See id.* at 573, 636 S.E.2d at 462–63.

80. *Id.* at 574, 636 S.E.2d at 463.

81. *Id.*

82. *Id.*

83. *Id.* at 575, 636 S.E.2d at 464.

84. *Id.* at 575–76, 636 S.E.2d at 464 (discussing *Tipton v. Commonwealth*, 18 Va. App. 370, 444 S.E.2d 1 (Ct. App. 1994)).

85. *Id.* at 575, 636 S.E.2d at 464.

86. 273 Va. 26, 30–32, 639 S.E.2d 217, 219–20 (2007).

bottles.<sup>87</sup> The drinkers dropped their bottles, yelled "cops," and ran away.<sup>88</sup> The officer parked his car in the garage area of the driveway and approached the back of the house, where he and other officers observed four trash cans filled with alcoholic beverages, as well as empty bottles.<sup>89</sup> The trial evidence showed that the defendants had supplied alcohol to a party attended by approximately thirty juveniles.<sup>90</sup> The defendants were ultimately convicted of multiple counts of contributing to the delinquency of a minor.<sup>91</sup>

The Robinsons claimed that the investigating officer violated their Fourth Amendment rights because he had improperly invaded the cartilage of their home at the time he observed illegal activity.<sup>92</sup> The court first held that a homeowner impliedly consents to an officer's entry into the cartilage to contact the dwelling's residents.<sup>93</sup> This implied consent may "be negated by obvious indicia of restricted access, such as posted 'no trespassing' signs, gates, or other means that deny access to uninvited persons."<sup>94</sup> The court noted that the officer's subjective intent in entering the curtilage is irrelevant.<sup>95</sup> Turning to the facts at bar, the court held that the officer acted with probable cause and under exigent circumstances when he decided to continue his investigation.<sup>96</sup> The officer had probable cause to believe a crime was occurring because he observed what appeared to be juveniles holding beer bottles.<sup>97</sup> Exigent circumstances were also present because the juveniles began to run when he arrived, and the evidence would likely have been destroyed by the time the officer returned with a warrant.<sup>98</sup> Finally, the fact that inebriated juveniles might drive away further demonstrated the existence of exigent circumstances.<sup>99</sup> Thus, the court concluded that no war-

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87. *See id.* at 31, 639 S.E.2d at 219–20.

88. *Id.*, 639 S.E.2d at 220.

89. *Id.* at 31–32, 639 S.E.2d at 220.

90. *Id.* at 30, 639 S.E.2d at 219.

91. *Id.* at 33, 639 S.E.2d at 221.

92. *See id.* at 32, 639 S.E.2d at 220.

93. *Id.* at 34, 639 S.E.2d at 222.

94. *Id.* at 34–35, 639 S.E.2d at 222.

95. *See id.* at 35–36, 639 S.E.2d at 222.

96. *Id.* at 39, 639 S.E.2d at 225.

97. *See id.* at 40, 639 S.E.2d at 225.

98. *Id.* at 42, 639 S.E.2d at 226.

99. *Id.*

rant was required, and the Robinsons' Fourth Amendment rights were not violated.<sup>100</sup>

### C. *Good Faith Exception*

The good faith exception to the exclusionary rule can often salvage evidence for the prosecution despite problems with a search warrant.<sup>101</sup> A pair of decisions from the Court of Appeals of Virginia provides some guidance regarding the applicability of the good faith exception. In *Cunningham v. Commonwealth*, the defendant was arrested following an automobile pursuit.<sup>102</sup> In the search incident to arrest, police found marijuana, a razor blade, a torn plastic bag, a lighter, \$133 in cash, and several screens used to smoke marijuana.<sup>103</sup> In the affidavit in support of the search warrant for the defendant's residence, the officer listed the items seized during the defendant's arrest and averred, based on his experience, that those who "use marijuana often keep marijuana as well as devices used to ingest marijuana in their residences."<sup>104</sup> The officer also noted his experience of twelve years as a police officer and his police work investigating narcotics violations.<sup>105</sup> Although the arresting officer had learned from the defendant that more marijuana could be found in his house, that information was not conveyed in the application for a search warrant.<sup>106</sup> The defendant sought to suppress the marijuana and drug paraphernalia seized from his home.<sup>107</sup> He argued that the warrant was invalid because the affidavit in support of the warrant did not establish any connection between the drugs seized on his person and his residence.<sup>108</sup> He further contended that the good faith exception did not apply.<sup>109</sup>

First, the court observed that "[t]he existence of probable cause to arrest an individual does not ipso facto give rise to probable

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100. See *id.* at 43–44, 639 S.E.2d at 227.

101. See *Anzualda v. Commonwealth*, 44 Va. App. 764, 779–80, 607 S.E.2d 749, 756–57 (Ct. App. 2005) (en banc).

102. 49 Va. App. 605, 608–09, 643 S.E.2d 514, 516 (Ct. App. 2007).

103. *Id.* at 609, 643 S.E.2d at 516.

104. *Id.* at 609–10, 643 S.E.2d at 516–17.

105. *Id.* at 610, 643 S.E.2d at 517.

106. See *id.* at 609–10, 643 S.E.2d at 516–17.

107. See *id.* at 611, 643 S.E.2d at 517.

108. *Id.*

109. *Id.*

cause to search that individual's residence."<sup>110</sup> The affidavit in support of a search warrant must establish a link between contraband sought and the residence to be searched.<sup>111</sup> In the case at bar, the generalization that some drug users will keep drugs at home did not obviate the need for the police to show that this particular defendant was likely to harbor drugs at his home.<sup>112</sup> Furthermore, the affidavit in support of a search warrant did not list any circumstances tending to show that the defendant was a drug dealer and therefore more likely to store drugs in his home.<sup>113</sup> In light of these circumstances, the court held that "[t]he magistrate did not have a substantial basis to find probable cause existed to believe that [the defendant], simply by virtue of being a drug user, kept a supply of illegal narcotics or related paraphernalia at home."<sup>114</sup>

The court also held that the good faith exception did not save the search.<sup>115</sup> The affidavit in support of the warrant did not list any factual allegations that would show the presence of drugs at the defendant's residence.<sup>116</sup> Moreover, no facts supported the proposition that the defendant was a drug dealer.<sup>117</sup> For example, the affidavit did not detail the quantity of marijuana initially seized from the defendant.<sup>118</sup> Therefore, the "affidavit was so lacking in probable cause as to render official belief in the warrant objectively unreasonable."<sup>119</sup>

In *Sowers v. Commonwealth*, the court similarly concluded that the warrant was not supported by probable cause, but ultimately sustained the admission of the fruits of the search based on the good faith exception.<sup>120</sup> The police stopped Sowers' vehicle on suspicion that he was driving on a suspended license.<sup>121</sup> After a

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110. *Id.* at 613, 643 S.E.2d at 518.

111. *Id.*

112. *See id.* at 616–17, 643 S.E.2d at 520.

113. *See id.* at 618, 643 S.E.2d at 520. The court noted that a drug dealer's home is much more likely to contain contraband because ongoing activities will require records and a renewal of supplies. *Id.* at 617, 643 S.E.2d at 520.

114. *Id.* at 615, 643 S.E.2d at 519.

115. *Id.* at 621–22, 643 S.E.2d at 522.

116. *Id.* at 620, 643 S.E.2d at 522.

117. *Id.*, 643 S.E.2d at 521.

118. *Id.*, 643 S.E.2d at 521–22.

119. *Id.* at 621, 643 S.E.2d at 522.

120. 49 Va. App. 588, 604, 643 S.E.2d 506, 514 (Ct. App. 2007).

121. *Id.* at 592, 643 S.E.2d at 508.

trained dog alerted to the car, police searched it and found two bags of cocaine, a cellular telephone, and \$1263 in cash.<sup>122</sup> At the police station, Sowers said, among other things, that he did not use cocaine.<sup>123</sup> Based on these facts, the police obtained a warrant to search the defendant's house, where they found more drugs.<sup>124</sup> As in *Cunningham*, Sowers challenged the validity of the warrant and the applicability of the good faith exception.<sup>125</sup>

The court agreed with Sowers that the facts set forth in the affidavit did not establish probable cause.<sup>126</sup> The court noted that while the affidavit did not contain specific allegations of drug dealing, it did contain "some facts" that "support[ed] the inference that Sowers possessed the cocaine with the intent to distribute."<sup>127</sup> At most, these facts showed a single drug transaction, which

does not by itself raise the inference that the suspect has evidence of illegal drug activity at home. . . . In contrast, evidence that a person is engaged in an ongoing drug scheme or conducting multiple drug sales can permissibly raise the inference that the person keeps evidence of that illicit business in his or her residence.<sup>128</sup>

Nevertheless, the court sustained the search based on the good faith exception.<sup>129</sup> The court noted that the affidavit was not a "bare bones" affidavit because it contained facts that supported inferences regarding drug dealing by the defendant.<sup>130</sup> The court answered in the affirmative the "pivotal question" whether "a reasonable police officer could have believed the warrant was valid based on the facts in the affidavit."<sup>131</sup>

#### D. Misdemeanor Stop and Release Statute

Under Virginia Code section 19.2-74, officers must, subject to certain exceptions, issue a summons for misdemeanor crimes

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122. *Id.*

123. *Id.* at 593, 643 S.E.2d at 508.

124. *See id.* at 592-93, 643 S.E.2d at 508.

125. *Id.* at 594, 643 S.E.2d at 509.

126. *Id.* at 601, 643 S.E.2d at 512.

127. *Id.* at 599-600, 643 S.E.2d at 512.

128. *Id.* at 599, 643 S.E.2d at 511 (citation omitted).

129. *Id.* at 604, 643 S.E.2d at 514.

130. *Id.* at 603, 643 S.E.2d at 513.

131. *Id.* at 604, 643 S.E.2d at 514.

rather than effecting a full custodial arrest of the suspect.<sup>132</sup> In *Moore v. Commonwealth*, the Supreme Court of Virginia addressed whether a violation of this provision is a matter of state law, for which suppression is generally not required,<sup>133</sup> or whether a violation of this provision of the Virginia Code also results in a violation of the defendant's constitutional rights, thus requiring suppression.<sup>134</sup> Moore was arrested for driving on a suspended license, a Class 1 misdemeanor.<sup>135</sup> Rather than releasing him on a summons, as provided under Virginia Code section 19.2-74, the police arrested him.<sup>136</sup> The search incident to arrest yielded cocaine.<sup>137</sup> At trial, the defendant argued unsuccessfully that his custodial arrest on the misdemeanor offense was unlawful and violated his Fourth Amendment rights.<sup>138</sup> The court of appeals concluded that "although the arrest violated the express provisions of Code § 19.2-74, the arrest and resulting search did not violate Moore's constitutional—as opposed to statutory—rights."<sup>139</sup> The Supreme Court of Virginia reversed. The court relied on the Supreme Court of the United States's decision in *Knowles v. Iowa*, wherein the Court held that the Fourth Amendment prohibits a search incident to citation.<sup>140</sup> The court also relied on *Lovelace v. Commonwealth*.<sup>141</sup> In that case, the police arrested the defendant for drinking in public rather than issuing a summons.<sup>142</sup> The court in *Lovelace* concluded that the trial court should have suppressed the evidence seized from the defendant.<sup>143</sup> The *Lovelace* court reasoned that under Virginia Code

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132. VA. CODE ANN. § 19.2-74 (Repl. Vol. 2004 & Cum. Supp. 2007).

133. See, e.g., *Tronsoco v. Commonwealth*, 12 Va. App. 942, 944, 407 S.E.2d 349, 350 (Ct. App. 1991) (noting that "[h]istorically, searches or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression unless the statute supplies that right" but that, in contrast, "evidence obtained in violation of constitutional proscriptions against unreasonable searches and seizures may not be used against an accused") (citations omitted).

134. 272 Va. 717, 636 S.E.2d 395 (2007).

135. *Id.* at 719, 636 S.E.2d at 396.

136. See *id.*

137. *Id.*

138. *Id.*

139. *Moore v. Commonwealth*, 47 Va. App. 55, 61–62, 622 S.E.2d 253, 256 (Ct. App. 2005) (en banc).

140. *Moore*, 272 Va. at 725, 636 S.E.2d at 400 (discussing *Knowles v. Iowa*, 525 U.S. 113, 116, 118–19 (1998)).

141. *Id.*, 636 S.E.2d at 399–400 (discussing *Lovelace v. Commonwealth*, 258 Va. 588, 522 S.E.2d 856 (1999)).

142. See *Lovelace*, 258 Va. at 596, 522 S.E.2d at 860.

143. See *id.* at 597, 522 S.E.2d at 860.

section 19.2-74, the officer should have issued a summons and lacked the authority to arrest.<sup>144</sup> In the absence of this authority, the arrest was invalid, and the court in *Moore* concluded that the search incident to arrest violated Moore's Fourth Amendment rights.<sup>145</sup> The Supreme Court of the United States has agreed to hear the Commonwealth's appeal.<sup>146</sup>

### E. *Protective Sweep*

The propriety of a protective sweep was at issue in *Williams v. Commonwealth*.<sup>147</sup> When police arrived at the apartment to arrest the defendant, they could see someone inside the apartment, but because it was dark, they could not identify the person.<sup>148</sup> The defendant eventually informed the police that he was heavily armed and would shoot if they attempted to enter.<sup>149</sup> In response, the police called a SWAT team.<sup>150</sup> After several hours of negotiation, the defendant walked out of the apartment and surrendered.<sup>151</sup> Immediately upon the surrender, the police ran into the apartment to conduct a protective sweep.<sup>152</sup> During this sweep, they found a loaded gun in plain view.<sup>153</sup> The defendant was charged with possessing a gun as a felon.<sup>154</sup> At trial, he sought without success to suppress the gun on the basis that the protective sweep was improper.<sup>155</sup>

In upholding the denial of the motion to suppress, the Court of Appeals of Virginia observed that the location of the arrest, outside of the defendant's residence, did not necessarily render the protective sweep improper.<sup>156</sup> Based on the defendant's statements, the police had reason to believe there were weapons in the

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144. *Id.* at 596, 522 S.E.2d at 860 (citing VA. CODE ANN. § 19.2-74 (Repl. Vol. 2004 & Cum. Supp. 2007)).

145. *Moore*, 272 Va. at 725, 636 S.E.2d at 400.

146. *Virginia v. Moore*, 272 Va. 717, 636 S.E.2d 395 (2006), *cert. granted*, 75 U.S.L.W. 3410 (U.S. Sept. 25, 2007) (No. 06-1082).

147. 49 Va. App. 439, 642 S.E.2d 295 (Ct. App. 2007).

148. *See id.* at 444, 642 S.E.2d at 297.

149. *Id.* at 445, 642 S.E.2d at 297.

150. *Id.*

151. *See id.*, 642 S.E.2d at 298.

152. *Id.*

153. *Id.* at 445-46, 642 S.E.2d at 298.

154. *See id.* at 442, 642 S.E.2d at 296.

155. *See id.* at 446, 642 S.E.2d at 298.

156. *Id.* at 449, 642 S.E.2d at 299.



house.<sup>157</sup> Moreover, the officers could have concluded based on the facts available to them that others might still be present inside the house.<sup>158</sup> Therefore, the sweep was justified to protect the officers or others from danger.<sup>159</sup> Finally, the court held that the officers properly seized the gun because they observed it in plain view.<sup>160</sup>

#### IV. EVIDENTIARY ISSUES

##### A. *Computerized Inventories*

The growing use of computers inevitably requires courts to adapt longstanding evidentiary rules to new practices. In *McDowell v. Commonwealth*, the defendant and several accomplices were observed in a Rite-Aid store stuffing merchandise into their clothes.<sup>161</sup> The thieves managed to escape from the store, and police did not recover any of the missing merchandise.<sup>162</sup> At trial, the prosecution adduced into evidence a "Box-List Sheets Report" prepared by a store detective, which detailed merchandise missing from the store by comparing an inventory report conducted several hours before the theft and an inventory report conducted after the theft.<sup>163</sup> An outside contractor conducted the first inventory.<sup>164</sup> Based on these reports, the prosecution established that the value of the missing items exceeded \$1000.<sup>165</sup> The Supreme Court of Virginia concluded that the "Box-List Sheets Report" was admissible as a business record because the report was regularly prepared in the ordinary course of business.<sup>166</sup> The court further held that no evidence was needed from the outside contractor who performed the first inventory because the store detective was fully qualified to testify about the inventory.<sup>167</sup>

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157. *Id.* at 451–52, 642 S.E.2d at 301.

158. *See id.* at 453, 642 S.E.2d at 301.

159. *Id.* at 454, 642 S.E.2d at 302.

160. *Id.* at 456, 642 S.E.2d at 303.

161. 273 Va. 431, 641 S.E.2d 507 (2007).

162. *Id.*

163. *See id.* at 433–34, 641 S.E.2d at 508.

164. *Id.* at 433, 641 S.E.2d at 508.

165. *Id.* at 433–44, 641 S.E.2d at 508.

166. *See id.* at 435–36, 641 S.E.2d at 509–10.

167. *Id.*, 641 S.E.2d at 509.

## B. *Expert Witnesses*

In *Conley v. Commonwealth*, the trial court permitted testimony by a licensed clinical social worker that the victim of a sexual crime suffered from post-traumatic stress disorder (“PTSD”).<sup>168</sup> The defendant had objected to the diagnosis at trial on the basis that such diagnoses could only be made by a medical doctor.<sup>169</sup> On appeal, the Supreme Court of Virginia rejected this argument and concluded the evidence was properly admitted.<sup>170</sup> The court noted that PTSD is a mental disorder, and the diagnosis of mental disorders, unlike physical injury, is not the exclusive province of medical doctors.<sup>171</sup> By statute, licensed clinical social workers are authorized to make diagnoses of mental health.<sup>172</sup> Of course, in each individual case, the trial court must still “determine whether a particular licensed clinical social worker has the skill, knowledge, and experience regarding the pertinent subject matter to qualify as an expert.”<sup>173</sup>

In a companion case, *Fitzgerald v. Commonwealth*, the court employed the same reasoning to hold that a licensed clinical counselor can similarly testify as an expert concerning a mental health diagnosis.<sup>174</sup> Like licensed clinical social workers, licensed clinical counselors are statutorily permitted to make a mental health diagnosis.<sup>175</sup>

## C. *Hearsay and Certificates of Analysis*

The first round of appeals went to the defendant in *Bell v. Commonwealth*, when the Court of Appeals of Virginia concluded that the prosecution’s failure to timely file the certificate of analysis of drugs in the circuit court precluded the use of the certificate at trial.<sup>176</sup> On remand, the prosecutor called the forensic analyst

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168. 273 Va. 554, 556–57, 643 S.E.2d 131, 132 (2007).

169. *Id.* at 557, 643 S.E.2d at 132.

170. *Id.* at 563, 643 S.E.2d at 136.

171. *See id.* at 561, 643 S.E.2d at 135.

172. *Id.* at 562, 643 S.E.2d at 135 (citing VA. CODE ANN. § 54.1-3700 (Repl. Vol. 2005)).

173. *Id.*

174. 273 Va. 596, 602–03, 643 S.E.2d 162, 165 (2007).

175. *Id.* (citing VA. CODE ANN. § 54.1-3500 (Repl. Vol. 2005 & Cum. Supp. 2007)).

176. 47 Va. App. 126, 132, 139, 622 S.E.2d 751, 753, 757 (Ct. App. 2005) (applying VA. CODE ANN. § 19.2-187 (Repl. Vol. 2004)).

as a witness to testify about the analysis.<sup>177</sup> Unsurprisingly, the analyst could not recall the details of the specific analysis at issue.<sup>178</sup> The analyst, however, was able to testify after refreshing his recollection with the certificate.<sup>179</sup> The defendant's objection was overruled, and he appealed.<sup>180</sup>

On appeal for a second time, the Virginia Court of Appeals decided in favor of the prosecution. The court of appeals first held that the analyst's testimony was properly admitted.<sup>181</sup> The law does not require that the analyst be able to testify from "independent memory" prior to refreshing his recollection.<sup>182</sup> Next, the court observed that its prior decision, which was based on the statutory hearsay exception for certificates of analysis, did not preclude live testimony by the analyst on remand.<sup>183</sup> Finally, the court held that the analyst was not required to possess first-hand knowledge about the calibration of the spectrometer that was employed in testing the drugs.<sup>184</sup> The analyst's extensive testimony regarding the procedures employed to calibrate the machine was sufficient to establish an adequate factual foundation regarding the reliability of the spectrometer.<sup>185</sup>

## V. SPECIFIC CRIMES AND DEFENSES

### A. Abduction

After the Supreme Court of Virginia found that Virginia Code section 18.2-47 superceded the common law requirement that the prosecution prove asportation during an abduction,<sup>186</sup> the court concluded in *Brown v. Commonwealth* that where a detention is intrinsic to a crime—for example in cases of robbery or rape—a

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177. See *Bell v. Commonwealth*, 49 Va. App. 570, 574, 643 S.E.2d 497, 499 (Ct. App. 2007).

178. See *id.* at 575, 643 S.E.2d at 500.

179. *Id.*

180. *Id.* at 575–76, 643 S.E.2d at 500.

181. *Id.* at 577, 643 S.E.2d at 501.

182. See *id.* at 576–77, 643 S.E.2d at 500–01.

183. See *id.* at 577–79, 643 S.E.2d at 501–02.

184. *Id.* at 579–80, 643 S.E.2d at 502.

185. *Id.* at 580, 643 S.E.2d at 502.

186. See *Scott v. Commonwealth*, 228 Va. 519, 526, 323 S.E.2d 572, 576 (1984) (discussing VA. CODE ANN. § 18.2-47 (Repl. Vol. 2004 & Cum. Supp. 2007)).

defendant cannot be convicted of both abduction and the related crime where the detention is incidental to the other crime.<sup>187</sup> Over the years, Virginia courts have worked out the implications of this holding, known as the “incidental detention” doctrine.

In *Walker v. Commonwealth*, the defendant pulled out a gun and threatened a “repo-man” who was present to repossess an automobile.<sup>188</sup> As a result, the defendant was charged with, among other things, robbery and abduction.<sup>189</sup> He was acquitted of the robbery charge but convicted of abduction.<sup>190</sup> The defendant relied on *Brown* to argue that his acquittal on the robbery precluded his conviction for abduction.<sup>191</sup> The Supreme Court of Virginia disagreed. The court reasoned that the holding in *Brown* was based on the court’s concern that a defendant should not be convicted of “two or more crimes arising out of the same factual episode,” a scenario that implicates Double Jeopardy principles.<sup>192</sup> That concern is not present where, as here, the defendant was acquitted of one of the offenses and, therefore, does not incur a risk of multiple convictions based on the same acts.<sup>193</sup>

### B. Attempted Murder

In *Baldwin v. Commonwealth*, the defendant challenged his conviction for attempted murder, contending that the evidence was insufficient.<sup>194</sup> A police officer had stopped Baldwin’s car for speeding.<sup>195</sup> The officer tapped on the window to get Baldwin’s attention.<sup>196</sup> Baldwin then sped off, forcing the officer to push off from the car to avoid having his feet run over by the rear tires.<sup>197</sup> The Supreme Court of Virginia agreed with the defendant that this evidence did not suffice to establish attempted murder.<sup>198</sup> The court distinguished other cases in which the defendant had

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187. 230 Va. 310, 313–14, 337 S.E.2d 711, 713–14 (1985).

188. 272 Va. 511, 513–15, 636 S.E.2d 476, 477–78 (2006).

189. *Id.* at 512, 636 S.E.2d at 477.

190. *Id.* at 512–13, 636 S.E.2d at 477.

191. *Id.* at 515, 636 S.E.2d at 478.

192. *Id.* at 516, 636 S.E.2d at 479.

193. *Id.*

194. 274 Va. 276, 278, 645 S.E.2d 433, 433 (2007).

195. *See id.*

196. *Id.*, 645 S.E.2d at 434.

197. *Id.*

198. *Id.* at 282, 645 S.E.2d at 435–36.

tried to run over an officer with his vehicle.<sup>199</sup> The court concluded that, given the clear evidence of the officer's position—that he was standing next to the car rather than in its path—the evidence failed to show any attempt to murder.<sup>200</sup>

### C. Burglary

Virginia's confusing scheme for burglary lists several offenses, including "statutory" burglary and "common law" burglary.<sup>201</sup> In *Wright v. Commonwealth*, the defendant was charged with common law burglary, that is, breaking and entering a dwelling in the nighttime with the intent to commit a felony or larceny in the dwelling.<sup>202</sup> At trial, the evidence showed that the burglary occurred in the daytime, a fact conceded by the Commonwealth on appeal.<sup>203</sup> The Court of Appeals of Virginia noted that this evidence was fatal to the conviction for common law burglary because the word "night" is defined as "the time from sunset to sunrise."<sup>204</sup> In response, the Commonwealth contended that statutory burglary was a lesser-included offense of common law burglary.<sup>205</sup> The court agreed. After analyzing the elements of the two offenses, the court held that the only difference between common law burglary and statutory burglary was the requirement that the prosecution prove that the burglary occurred at night.<sup>206</sup> Since the prosecution had proven all the elements of the statutory burglary offense, the court remanded the case for resentencing on that charge.<sup>207</sup>

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199. *Id.* at 281–82, 281 n.3, 645 S.E.2d at 435 & n.3 (distinguishing *Coles v. Commonwealth*, 270 Va. 585, 621 S.E.2d 109 (2005); *Holley v. Commonwealth*, 44 Va. App. 228, 604 S.E.2d 127 (Ct. App. 2004); *Stevens v. Commonwealth*, 38 Va. App. 528, 567 S.E.2d 537 (Ct. App. 2002); *Moody v. Commonwealth*, 28 Va. App. 702, 508 S.E.2d 354 (Ct. App. 1998)).

200. *Id.* at 281–82, 645 S.E.2d at 435–36.

201. VA. CODE ANN. §§ 18.2-89 to -91 (Repl. Vol. 2004 & Cum. Supp. 2007).

202. 49 Va. App. 312, 314, 641 S.E.2d 119, 120 (Ct. App. 2007) (citing VA. CODE ANN. § 18.2-89 (Repl. Vol. 2004 & Cum. Supp. 2007)).

203. *Id.* at 319, 641 S.E.2d at 122.

204. *Id.* at 318–19, 641 S.E.2d at 122 (quoting BLACK'S LAW DICTIONARY 1071 (8th ed. 2004)).

205. *Id.* at 319, 641 S.E.2d at 122.

206. *Id.* at 320, 641 S.E.2d at 123.

207. *Id.* at 321, 641 S.E.2d at 123.

### D. *Capital Murder*

In *Gray v. Commonwealth*, the defendant was convicted of capital murder based on, among other things, “[t]he willful, deliberate and premeditated killing of a person under the age of fourteen by a person age twenty-one or older.”<sup>208</sup> Gray argued that this statute violated his rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.<sup>209</sup> He noted that Virginia’s capital murder predicate exposes certain defendants to the death penalty, while allowing others who are similarly situated to avoid this punishment.<sup>210</sup> The Supreme Court of Virginia rejected the argument. The court first noted that classifications based on age do not trigger a strict scrutiny analysis.<sup>211</sup> Furthermore, the classification at issue did not implicate a fundamental right.<sup>212</sup> Therefore, the statute would be reviewed under the deferential “rational basis” standard.<sup>213</sup> The court sustained the classification, holding that the General Assembly could rationally “distinguish[ ] between criminal defendants based on both the age of the defendant and the span in age between a victim and the defendant.”<sup>214</sup>

### E. *Concealed Weapons*

Virginia Code section 18.2-308(A) prohibits the carrying of guns and certain knives, including “any dirk, bowie knife, switchblade knife, ballistic knife, machete, razor, slingshot, spring stick, metal knucks, or blackjack” or a “weapon of like kind.”<sup>215</sup> The Supreme Court of Virginia clarified the scope of the “weapon of like kind” provision in *Farrakhan v. Commonwealth*.<sup>216</sup> The defendant had brandished a kitchen knife from his jacket when he was confronted by a store manager about stealing

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208. 274 Va. 290, 294, 305, 645 S.E.2d 448, 451, 457 (2007).

209. *Id.* at 305, 645 S.E.2d at 457.

210. *Id.*

211. *Id.* at 306, 645 S.E.2d at 458 (citing *Kimel v. Bd. of Regents*, 528 U.S. 62, 83–84 (2000)).

212. *Id.* at 307, 645 S.E.2d at 459.

213. *Id.*

214. *Id.* at 312, 645 S.E.2d at 462.

215. VA. CODE ANN. § 18.2-308(A) (Repl. Vol. 2004 & Cum. Supp. 2007).

216. 273 Va. 177, 639 S.E.2d 227 (2007).

a pair of boots.<sup>217</sup> Police apprehended the defendant soon after he ran out of the store.<sup>218</sup> Farrakhan was convicted of robbery and of carrying a concealed weapon, in violation of section 18.2-308(A), after having been previously convicted of a felony offense.<sup>219</sup> In affirming the conviction, the court of appeals had examined the characteristics of the weapon and the “circumstances surrounding its use.”<sup>220</sup> The Supreme Court of Virginia reversed. The court observed that all of the items listed in the statute are “weapons.”<sup>221</sup> The court reasoned that for an item to qualify as a “weapon of like kind,” a court must first satisfy itself that the item is, in fact, a weapon.<sup>222</sup> If it is a weapon, a court can then examine the physical characteristics of the weapon and compare those to the weapons listed in the statute.<sup>223</sup> Otherwise, the court noted, a chef who carries his knives on the way to work, or a person who purchases a letter opener and “conceals” it in the store bag would violate the statute.<sup>224</sup> The court concluded that the General Assembly could not have intended this outcome.<sup>225</sup> In light of this analysis, the court held that the defendant’s kitchen knife was “not designed for fighting purposes nor is it commonly understood to be a ‘weapon.’”<sup>226</sup>

#### F. *Destruction of Property*

In *McDuffie v. Commonwealth*, the Court of Appeals of Virginia addressed whether a husband who destroys his wife’s car in a fit of anger can be charged with unauthorized use and destruction of property “not his own.”<sup>227</sup> After a violent argument, the defendant seized the keys to an automobile that was titled exclusively in his

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217. *See id.* at 179, 639 S.E.2d at 228–29.

218. *See id.* at 180, 639 S.E.2d at 229.

219. *Id.*

220. *Farrakhan v. Commonwealth*, Record No. 1804-04-4, 2005 Va. App. LEXIS 477, at \*8–9 (Va. Ct. App. Nov. 29, 2005).

221. *See Farrakhan*, 273 Va. at 182, 639 S.E.2d at 230.

222. *See id.*

223. *See id.*

224. *Id.*

225. *Id.*

226. *Id.* at 183, 639 S.E.2d at 230.

227. 49 Va. App. 170, 173, 638 S.E.2d 139, 140 (Ct. App. 2006); VA. CODE ANN. § 18.2-102 (Repl. Vol. 2004 & Cum. Supp. 2007) (prohibiting the unauthorized use of a motor vehicle “not his own” without the owner’s consent); VA. CODE ANN. § 18.2-137 (Repl. Vol. 2004 & Cum. Supp. 2007) (prohibiting, *inter alia*, the destruction of property “not his own”).

wife's name and drove away.<sup>228</sup> He soon jumped a curb, went airborne, and destroyed the car by colliding with another vehicle.<sup>229</sup> The defendant contended that, as the husband of the vehicle owner, he had a vested property right in the automobile and, therefore, could not be convicted of destroying, or of using without authorization, a vehicle "not his own."<sup>230</sup> The court disagreed, noting that the simple fact of marriage does not give a husband any legal interest in his wife's tangible personal property.<sup>231</sup> For example, the court observed, a husband can be convicted of larceny of his wife's property.<sup>232</sup> The court further reasoned that the equitable distribution statutes do not affect the result in this case.<sup>233</sup> In the case at bar, the parties were not divorcing, and no equitable distribution order had been entered.<sup>234</sup> Therefore, the defendant "had only an inchoate and unvested interest, if any, in [his] wife's automobile."<sup>235</sup>

### G. *Driving Under the Influence*

In *Turner v. Commonwealth*, the court of appeals addressed the complex interplay of general district court and circuit court jurisdiction.<sup>236</sup> The defendant was arrested for DUI.<sup>237</sup> Before trial on this charge, he was charged with another DUI.<sup>238</sup> The defendant was convicted on the first charge, and he appealed that case to the circuit court.<sup>239</sup> While the *de novo* retrial in circuit court was pending, he proceeded to trial in general district court on the second DUI arrest, which was charged as a DUI, second offense.<sup>240</sup> In his second general district court trial, he was convicted of "simple" DUI, rather than DUI, second offense.<sup>241</sup> He also appealed

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228. *McDuffie*, 49 Va. App. at 174–75, 638 S.E.2d at 141.

229. 49 Va. App. at 174, 638 S.E.2d at 141.

230. *Id.* at 175, 638 S.E.2d at 141.

231. *Id.* at 176, 638 S.E.2d at 142 (quoting *Stewart v. Commonwealth*, 219 Va. 887, 889, 252 S.E.2d 329, 331 (1997)).

232. *Id.* (quoting *Stewart*, 219 Va. at 891, 252 S.E.2d at 332).

233. *Id.*

234. *Id.* at 176–77, 638 S.E.2d at 142.

235. *Id.* at 177, 638 S.E.2d at 142.

236. 49 Va. App. 381, 385–87, 641 S.E.2d 771, 773–74 (Ct. App. 2007).

237. *Id.* at 384, 641 S.E.2d at 772.

238. *Id.*

239. *Id.*

240. *Id.*

241. *See id.*



that conviction, and then withdrew his appeal of the first DUI conviction, thus affirming his conviction from the general district court.<sup>242</sup> He proceeded to trial on the appeal from his other DUI conviction, where the prosecution moved to amend the charge to DUI, second offense.<sup>243</sup> The defendant objected on double jeopardy grounds, arguing that his acquittal below precluded the amendment.<sup>244</sup> The trial court overruled the objection, and he was ultimately convicted of DUI, second offense.<sup>245</sup>

The Court of Appeals of Virginia concluded that the trial court should not have permitted the prosecution to amend the charge in circuit court from DUI to DUI, second offense.<sup>246</sup> The court reasoned that the defendant's conviction in the general district court of a DUI rather than DUI, second offense, was necessarily an acquittal of the charge of DUI, second offense.<sup>247</sup> In light of this acquittal, the Double Jeopardy Clause mandated that the defendant could be convicted of no higher offense than simple DUI.<sup>248</sup> The court remanded the case for resentencing on a conviction for simple DUI.<sup>249</sup>

The DUI statutes contain several rebuttable presumptions based on the blood alcohol level of a driver.<sup>250</sup> The defendant in *Yap v. Commonwealth* argued that these rebuttable presumptions are unconstitutional because they shift the burden of proving an element of the offense away from the prosecution and on to the defendant.<sup>251</sup> The court of appeals held that the presumptions in the DUI statutes, consistent with other statutory presumptions, should be construed as permissive inferences.<sup>252</sup> The court observed that permissible inferences, unlike mandatory presumptions, do not unconstitutionally shift the burden of proving one of the elements of the offense to the defendant because the jury can, but is not required to, draw a particular inference.<sup>253</sup> The record

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242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.* at 384–85, 641 S.E.2d at 772.

246. *Id.* at 389, 641 S.E.2d at 775.

247. *Id.* at 386, 641 S.E.2d at 773.

248. *See id.* at 388–89, 641 S.E.2d at 774–75.

249. *Id.* at 389, 641 S.E.2d at 775.

250. *See* VA. CODE ANN. §§ 18.2-266 to -269 (Cum. Supp. 2007).

251. 49 Va. App. 622, 629, 643 S.E.2d 523, 526 (Ct. App. 2007).

252. *See id.* at 633, 636, 643 S.E.2d at 528, 530.

253. *Id.* at 632–34, 643 S.E.2d at 527 (citing *Francis v. Commonwealth*, 471 U.S. 307,

demonstrated that the trial court properly construed the presumptions as permissive inferences, and therefore the defendant suffered no violation of his constitutional rights.<sup>254</sup> Finally, concluding that the defendant had not properly raised the issue, the court declined to address the defendant's arguments that the presumptions at issue are irrational, because there is no relation between the blood alcohol at the time of testing and the blood alcohol level at the time of driving.<sup>255</sup>

#### H. *Felony Child Neglect*

The quantum of evidence that suffices for a conviction of felony child neglect has attracted the attention of Virginia's appellate courts in recent years. Two cases from the Supreme Court of Virginia illustrate the court's attempts to draw the line between bad parenting or errors in judgment and outright criminal behavior. In *Jones v. Commonwealth*, police, wearing body armor and with weapons drawn, executed an "immediate-entry" search warrant.<sup>256</sup> Police had obtained the warrant after learning about extensive drug trafficking at a residence; they also expected to find weapons.<sup>257</sup> During the search, the police found an eight-year-old child on a bed, working on his homework.<sup>258</sup> Near this bed, police found a bottle containing fourteen capsules of heroin in a "child-proof" container.<sup>259</sup> Police also found, under the bed, a plate with a dusting of cocaine and drug packaging materials.<sup>260</sup> Seven other children, ranging in age from infancy to seven or eight-years-old, were present in the next bedroom.<sup>261</sup> The evidence at trial showed that the defendant was dealing drugs out of the apartment.<sup>262</sup> At trial and on appeal, the defendant contended that her drug dealing activities in the apartment and the close proximity of her child to the drugs were insufficient to show a "gross, wanton, and

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314 (1984)).

254. *Id.* at 633–34, 643 S.E.2d at 528.

255. *See id.* at 634, 643 S.E.2d at 528–29.

256. 272 Va. 692, 695, 636 S.E.2d 403, 404 (2006).

257. *See id.* at 695, 636 S.E.2d at 404.

258. *See id.* at 696, 636 S.E.2d at 404–05.

259. *Id.*, 696 S.E.2d at 405.

260. *Id.*

261. *Id.* at 695, 636 S.E.2d at 404.

262. *Id.* at 696, 636 S.E.2d at 405.

willful disregard for human life,” as required by Virginia Code section 18.2-371.1(B)(1).<sup>263</sup>

The Supreme Court of Virginia upheld her conviction. The court examined persuasive authority from other states;<sup>264</sup> and concluded that “the dangers inherent in such a situation could be inferred by the fact finder as a matter of common knowledge.”<sup>265</sup> The court found it significant that the drugs were “within arm’s reach of an unattended young child.”<sup>266</sup> The fact that the drugs were in a childproof container did not compel a different result since the child could easily follow the directions on the bottle to open it.<sup>267</sup> Finally, the court agreed with the defendant’s argument that the prosecution must establish “more than a mere possibility of harm.”<sup>268</sup> In this instance, however, under an objective standard, the defendant “knew or should have known that her continuous and illegal drug activity at the apartment when her young child was present also created a substantial risk of serious injury from the dangers inherent in the illicit drug trade.”<sup>269</sup>

Conversely, in *Morris v. Commonwealth*, the court found the evidence insufficient for a conviction of felony child neglect.<sup>270</sup> After receiving a report that a child was not in school, a family support worker found two children, one five-and-a-half years old and the other two-and-a-half years old, playing in a wooded area near a road.<sup>271</sup> The younger child was naked and dirty, and he had dried fecal matter on his leg.<sup>272</sup> Two police officers arrived and questioned the mother,<sup>273</sup> who initially stated that she was the

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263. *Id.* at 697, 636 S.E.2d at 405. Under Virginia Code section 18.2-371.1(B)(1), any parent or guardian who, in their care for a child, is “so gross, wanton and culpable as to show a reckless disregard for human life” is guilty of a Class 6 misdemeanor. VA. CODE ANN. § 18.2-371.1(B)(1) (Cum. Supp. 2007).

264. *Jones*, 272 Va. at 699–700, 636 S.E.2d at 406–07 (citing *State v. Padva*, 869 A.2d 192 (Conn. 2005) (affirming conviction of defendants who kept marijuana in close proximity to two young children); *State v. Graham*, 109 P.3d 285 (N.M. 2005) (upholding child abuse conviction against parents who left drugs and drug paraphernalia in the immediate vicinity of small children)).

265. *Id.* at 700, 636 S.E.2d at 407 (quoting *Commonwealth v. Duncan*, 267 Va. 377, 386, 593 S.E.2d 210, 215 (2004)).

266. *Id.*

267. *See id.*

268. *Id.* at 701, 636 S.E.2d at 408.

269. *Id.* at 701–02, 636 S.E.2d at 408.

270. 272 Va. 732, 740, 636 S.E.2d 436, 440 (2006).

271. *See id.* at 734–35, 636 S.E.2d at 437.

272. *Id.* at 735, 636 S.E.2d at 437.

273. *See id.* at 735–36, 636 S.E.2d at 438.

children's aunt. Eventually she admitted to being the children's mother and said that she had locked both locks on the door before falling asleep.<sup>274</sup> The mother acknowledged that she had a substance abuse problem, but said she had not abused drugs during the previous three days.<sup>275</sup>

In reversing, the court noted that she had double locked her door before going to sleep and, moreover, there was no evidence she was under the influence of drugs or alcohol at the time.<sup>276</sup> In sum, the evidence did not show that the defendant committed any "willful act or omission in the care of her children that was so gross, wanton, and culpable as to show a reckless disregard for their lives."<sup>277</sup> However, illustrating the difficulty in this area, three of the justices dissented.<sup>278</sup>

### I. *Felony Failure to Stop at the Scene of an Accident*

The defendant in *Robinson v. Commonwealth* contended that he could not be convicted of leaving the scene of an accident because he was not "involved" in the accident.<sup>279</sup> The evidence at trial showed that Robinson, who had the right-of-way, noticed that another car was about to cut him off where two lanes merged into one.<sup>280</sup> He accelerated "briskly" to prevent the other vehicle from surging ahead.<sup>281</sup> The driver of the other car, a mother with her young child in the car, accelerated to over seventy-five miles per hour.<sup>282</sup> The posted speed limit was forty miles per hour.<sup>283</sup> Shortly afterwards, Robinson reduced his speed to allow the other driver to enter his lane of travel.<sup>284</sup> The other vehicle spun out of

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274. *Id.* at 736, 636 S.E.2d at 438.

275. *Id.* at 737, 636 S.E.2d at 438.

276. *Id.* at 740, 636 S.E.2d at 440.

277. *Id.*

278. *See id.* at 740-43, 636 S.E.2d at 441-42.

279. 274 Va. 45, 51, 645 S.E.2d 470, 473 (2007); *see also* VA. CODE ANN. § 46.2-894 (Repl. Vol. 2005 & Cum. Supp. 2007) (requiring a driver involved in an accident resulting in injury, death, or property damage to stop as near the accident scene as possible and report it to the police).

280. *See Robinson*, 274 Va. at 49, 645 S.E.2d at 471-72.

281. *Id.* at 50, 645 S.E.2d at 472.

282. *Id.* at 48, 50, 645 S.E.2d at 471, 472.

283. *Id.* at 48-49, 645 S.E.2d at 471.

284. *See id.* at 50, 645 S.E.2d at 472.

control and struck a tree, killing the mother and her child.<sup>285</sup> Robinson's vehicle never made contact with the other car.<sup>286</sup>

In construing the statute, the court noted that the dictionary contained many different definitions of the word "involved."<sup>287</sup> Such a wide range of definitions, the court reasoned, would be inconsistent with the strict construction of penal statutes.<sup>288</sup> The court held that

in order for a driver of a vehicle to be involved in an accident within the intendment of the statute, there must be physical contact between the driver's vehicle and another vehicle, person, or object, or the driver of a motor vehicle must have been a proximate cause of an accident.<sup>289</sup>

The court found that neither of these two circumstances was present and reversed the defendant's conviction.<sup>290</sup>

### *J. Involuntary Manslaughter*

In *O'Connell v. Commonwealth*, a drag race between two Corvette enthusiasts ended in tragedy when one of the cars spun out of control, killing both occupants.<sup>291</sup> The defendant, who had participated in the drag race, was charged and convicted of a number of offenses, including involuntary manslaughter.<sup>292</sup> He challenged this conviction on the ground that it was the victim's negligence, rather than his own, that was the proximate cause of the accident.<sup>293</sup> He noted that the two racing vehicles never came into contact.<sup>294</sup> The Court of Appeals of Virginia rejected this contention. First, the court noted that "[t]here can be more than one proximate cause [of an incident] and liability attaches to each person whose negligent act results in the victim's injury or

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285. *Id.* at 50–51, 645 S.E.2d at 472–73.

286. *Id.* at 50, 645 S.E.2d at 472.

287. *Id.* at 52, 645 S.E.2d at 473 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1191 (1993)).

288. *Id.*, 645 S.E.2d at 473–74 (quoting *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983)).

289. *Id.* at 53, 645 S.E.2d at 474.

290. *Id.* at 53–54, 645 S.E.2d at 474.

291. 48 Va. App. 719, 724, 634 S.E.2d 379, 381–82 (Ct. App. 2006).

292. *Id.* at 722–23, 634 S.E.2d at 381.

293. *Id.* at 728, 634 S.E.2d at 383.

294. *Id.*

death.”<sup>295</sup> The court also noted that the defense of contributory negligence did not apply in a criminal prosecution for involuntary manslaughter.<sup>296</sup> The court held that the defendant would be absolved only where the actions of the deceased constituted “an independent and intervening act that alone caused the fatal accident.”<sup>297</sup> Intervening acts that are reasonably foreseeable “cannot be relied upon as breaking the chain of causal connection between an original act of negligence and subsequent injury.”<sup>298</sup> The fact that a driver might lose control and crash is a “reasonably foreseeable” result of a drag race.<sup>299</sup> Therefore, the defendant was properly convicted of involuntary manslaughter, regardless of the concurring negligence of the deceased.<sup>300</sup>

### K. *Obstruction of Justice*

The obstruction of justice statute, Virginia Code section 18.2-460, contains two very similar provisions, one a misdemeanor and the other a felony. The additional language found in the felony version is highlighted in italics:

If any person by threats of *bodily harm or force* knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, attorney for the Commonwealth, witness, or any law-enforcement officer, lawfully engaged in the discharge of his duty, or to obstruct or impede the administration of justice in any court *relating to a violation of or conspiracy to violate § 18.2-248 or subdivision (a)(3), (b) or (c) of § 18.2-248.1, or § 18.2-46.2 or § 18.2-46.3, or relating to the violation of or conspiracy to violate any violent felony offense listed in subsection C of § 17.1-805, he shall be guilty of a Class 5 felony.*<sup>301</sup>

In *Washington v. Commonwealth*, the Supreme Court of Virginia addressed what the prosecution must prove to secure a felony conviction under the statute.<sup>302</sup> Washington’s charges stemmed from his threat to kill two sheriff deputies who were es-

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295. *Id.* (quoting *Gallimore v. Commonwealth*, 246 Va. 441, 447, 436 S.E.2d 421, 425 (1993)).

296. *Id.*, 634 S.E.2d at 383–84 (quoting *Banks v. Commonwealth*, 41 Va. App. 539, 549, 586 S.E.2d 876, 880 (Ct. App. 2003)).

297. *Id.* at 729, 634 S.E.2d at 384.

298. *Id.* (quoting *Delawder v. Commonwealth*, 214 Va. 55, 58, 196 S.E.2d 913, 915 (1973)).

299. *Id.*

300. *See id.* at 732, 634 S.E.2d at 385.

301. VA. CODE ANN. § 18.2-460(C) (Cum. Supp. 2007) (emphasis added).

302. 273 Va. 619, 622, 643 S.E.2d 485, 486 (2007).

corting him back to the jail from the courthouse.<sup>303</sup> He contended that he could not be convicted of felony obstruction of justice because the Commonwealth had failed to prove an element of the offense: that the duties the deputies were discharging “relat[ed] to a violation of or conspiracy to violate” one of the felony offenses specified” in the statute.<sup>304</sup> The court noted that the Court of Appeals of Virginia had reached inconsistent results in construing the statute.<sup>305</sup>

The court observed that from a strict grammatical standpoint, the statute created two offenses: (1) intimidating or impeding a law-enforcement officer lawfully engaged in the discharge of his duty and (2) obstructing or impeding the administration of justice in any court relating to a violation of or conspiracy to violate one of the specified statutes.<sup>306</sup> However, the court proceeded to note that the “true meaning” of the statute should prevail, “though contrary to the apparent grammatical construction.”<sup>307</sup> The court reasoned that one problem with a strict grammatical construction is that it eliminates the distinction between the misdemeanor version and the felony version<sup>308</sup> because subsection (C) contains a harsher punishment. “[T]here must be a difference in the elements of the two offenses . . . .”<sup>309</sup> The court held that the difference is the phrase “relating to a violation of or conspiracy to violate” one of the listed felony offenses.<sup>310</sup> Thus, to prove felony obstruction of justice, the Commonwealth was required to prove that when the defendant made threats of bodily harm to the officers, the officers were engaged in the performance of duties that “relat[ed] to a violation of or conspiracy to violate” one of the listed felony offenses.<sup>311</sup> Because the prosecution adduced no such proof, it failed to prove an element of the offense.<sup>312</sup>

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303. *See id.*, 643 S.E.2d at 486–87.

304. *Id.* at 622–23, 643 S.E.2d at 487.

305. *Id.* at 625–26, 643 S.E.2d at 488 (comparing *Garcia v. Commonwealth*, 40 Va. App. 184, 578 S.E.2d 97 (Ct. App. 2003), with *Turner v. Commonwealth*, 20 Va. App. 713, 460 S.E.2d 605 (Ct. App. 1995)).

306. *Id.* at 627, 643 S.E.2d at 489.

307. *Id.* (quoting *Harris v. Commonwealth*, 142 Va. 620, 624, 128 S.E. 578, 579 (1925)).

308. *See id.*

309. *Id.* at 628, 643 S.E.2d at 490.

310. *Id.*

311. *Id.*

312. *Id.*

In *Jordan v. Commonwealth*, the defendant was charged with felony obstruction of justice.<sup>313</sup> The charge stemmed from two separate circumstances. First, police discovered that, while handcuffed in the police cruiser, Jordan had taken a roll of cash the officer had seized and placed it in his pants.<sup>314</sup> The court held that this conduct did not involve the use of force and, therefore, did not satisfy the plain language of the obstruction of justice statute.<sup>315</sup>

Second, while in the magistrate's office, the defendant continually tried to pull away from the officer, forcing the officer to pin the defendant against a wall or a door on several occasions.<sup>316</sup> He also stopped repeatedly while walking, making the officer bump into him.<sup>317</sup> Instead of cooperating with the police during the intake process, the defendant "put his hands 'down the front of his pants and began playing with his genitalia.'"<sup>318</sup> The defendant "refused to answer questions in a timely fashion" during the intake process.<sup>319</sup> The court noted that merely rendering an officer's task more difficult does not suffice for conviction if the actions do not "impede or prevent" the officer from performing the task.<sup>320</sup> The court reasoned that while the defendant was "less than cooperative" and his conduct made it "more difficult" for the officer to discharge his duties, nevertheless, the defendant's conduct did not involve the use of force and did not "impede or prevent" the officer from performing his duties.<sup>321</sup> Therefore, the court concluded that the evidence was insufficient and reversed his conviction.<sup>322</sup>

#### L. *Sex Crimes*

In *Molina v. Commonwealth*, the defendant challenged the sufficiency of the evidence for his rape and forcible sodomy conviction.

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313. 273 Va. 639, 642, 643 S.E.2d 166, 168 (2007).

314. *See id.* at 643, 643 S.E.2d at 168.

315. *See id.* at 648, 643 S.E.2d at 171-72.

316. *See id.* at 643-44, 643 S.E.2d at 169.

317. *Id.* at 644, 643 S.E.2d at 169.

318. *Id.*

319. *Id.*

320. *Id.* at 648, 643 S.E.2d at 171 (quoting *Ruckman v. Commonwealth*, 28 Va. App. 428, 429, 505 S.E.2d 388, 389 (Ct. App. 1998)).

321. *Id.* at 649, 643 S.E.2d at 172.

322. *Id.*



tions.<sup>323</sup> The victim, who had a history of seizures accompanied by blackouts, met the defendant near a convenience store.<sup>324</sup> She was standing near a wall, drinking wine.<sup>325</sup> The two began to talk and soon afterwards were kissing.<sup>326</sup> It is unclear whether the victim fell and struck her head or was struck and then fell; police found her partially unclothed behind a dumpster.<sup>327</sup> The defendant acknowledged having intercourse with the victim, but contended that the intercourse was consensual.<sup>328</sup> The victim, who had a substantial amount of alcohol in her bloodstream as well as cocaine and benzodiazepines, denied that she ever consented to having sexual intercourse with the defendant.<sup>329</sup> The defendant was convicted of rape based on the victim's "mental incapacity or physical helplessness."<sup>330</sup> He argued that the term "mental incapacity" should be limited "to a permanent mental condition such as retardation rather than a transitory condition such as voluntary intoxication."<sup>331</sup> The Supreme Court of Virginia rejected this narrow construction of the statute and held that the definition of the term provided in the statute does not so limit mental incapacity.<sup>332</sup> Indeed, the mental incapacity need only exist "at the time of an offense."<sup>333</sup> The court concluded that "the term 'mental incapacity' may extend to a transitory circumstance such as intoxication if the nature and degree of the intoxication has gone beyond the stage of merely reduced inhibition and has reached a point where the victim does not understand 'the nature or consequences of the sexual act.'"<sup>334</sup>

In *Davis v. Commonwealth*, the defendant was arrested for being drunk in public.<sup>335</sup> He struggled during the arrest and continued his obstreperous behavior in the lockup, as well as when po-

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323. 272 Va. 666, 669, 636 S.E.2d 470, 472 (2006).

324. *See id.* at 669-70, 636 S.E.2d at 472-73.

325. *Id.* at 669, 636 S.E.2d at 472.

326. *Id.*

327. *Id.* at 669-70, 636 S.E.2d at 472.

328. *See id.* at 670, 636 S.E.2d at 472.

329. *See id.* at 671, 636 S.E.2d at 473.

330. *See id.* at 671-72, 636 S.E.2d at 473 (quoting VA. CODE ANN. § 18.2-61(A) (Repl. Vol. 2004)).

331. *Id.* at 673, 636 S.E.2d at 474.

332. *Id.*

333. *Id.* (quoting VA. CODE ANN. § 18.2-67.10(3) (Repl. Vol. 2004)).

334. *Id.* (quoting § 18.2-67.10(3)).

335. 272 Va. 476, 477, 634 S.E.2d 322, 322 (2006).

lice attempted to move him to a single cell.<sup>336</sup> During this struggle, the defendant reached between the legs of a female officer and pushed his finger inside the front lips of her vagina.<sup>337</sup> At the time, the officer was wearing her standard uniform and undergarments.<sup>338</sup> The defendant contended that these facts did not suffice to convict him of object sexual penetration.<sup>339</sup> The Supreme Court of Virginia disagreed. First, the court observed that Virginia Code section 18.2-67.2(A) “only requires slight penetration.”<sup>340</sup> Second, nothing in the statute requires “skin-to-skin” contact.<sup>341</sup> The court reasoned that whether the penetration occurs directly or through clothing, the acts are “comparably invasive.”<sup>342</sup> The court observed that the presence and amount of the clothing may lead the factfinder to conclude that no penetration occurred.<sup>343</sup> In the final analysis, however, the “[e]xistence of such material does not . . . protect defendants from prosecution under the statute.”<sup>344</sup>

The Supreme Court of Virginia sustained Virginia’s “crimes against nature” statute, also known as the sodomy statute,<sup>345</sup> against an “as-applied” constitutional challenge in *McDonald v. Commonwealth*.<sup>346</sup> The defendant, who was in his mid-forties, engaged in consensual “oral sodomy” with two girls, one aged sixteen and one who was seventeen years old.<sup>347</sup> McDonald’s primary argument was that his conviction ran afoul of the court’s holding in *Martin v. Zihler*.<sup>348</sup> In rejecting this argument, the court also considered the Supreme Court of the United States’s decision in *Lawrence v. Texas*.<sup>349</sup> The court distinguished those decisions, which involved consenting adults, with the case at bar, which in-

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336. *See id.* at 477–78, 634 S.E.2d at 322–23.

337. *Id.* at 478, 634 S.E.2d at 323.

338. *Id.*

339. *Id.* at 477, 634 S.E.2d at 322.

340. *Id.* at 479, 634 S.E.2d at 323.

341. *Id.*

342. *Id.* at 479–80, 634 S.E.2d at 324 (quoting *United States v. Norman T.*, 129 F.3d 1099, 1103 (10th Cir. 1997)).

343. *Id.* (quoting *Norman T.*, 129 F.3d at 1103).

344. *Id.* at 480, 634 S.E.2d at 324 (quoting *Norman T.*, 129 F.3d at 1103).

345. VA. CODE ANN. § 18.2-361 (Cum. Supp. 2007).

346. 274 Va. 249, 260, 645 S.E.2d 918, 924 (2007).

347. *Id.* at 251, 645 S.E.2d at 919.

348. *See id.* at 256, 645 S.E.2d at 922 (citing *Martin v. Zihler*, 269 Va. 35, 607 S.E.2d 367 (2005)).

349. *See id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

volved minors.<sup>350</sup> The court declined to import into the sodomy statute the age restrictions found in other statutes criminalizing sexual conduct.<sup>351</sup> Finally, the court refused to address McDonald's facial challenge to the validity of the statute because he had not raised the issue in the trial court.<sup>352</sup>

### M. *Settled Insanity*

Like the cicadas who periodically emerge from obscurity, Virginia appellate courts address the defense of "settled insanity" approximately once every decade. This defense is an exception to the general rule that voluntary intoxication is no defense to a crime.<sup>353</sup> In *White v. Commonwealth*, the Supreme Court of Virginia reaffirmed the validity of the settled insanity defense.<sup>354</sup> However, the case illustrates the difficulty of obtaining a settled insanity instruction. The defense applies only "when prolonged, habitual, and chronic alcohol or drug abuse has created a mental disease or defect."<sup>355</sup>

In *White*, the defendant, who was charged with murder and assault on a police officer, contended that the trial court erred in refusing to instruct the jury on settled insanity.<sup>356</sup> At trial, he proffered evidence from a number of sources that he was hearing voices, that he believed God and the devil were speaking with him, that he had used cocaine "multiple times daily" for at least three months prior to his arrest, that he had abused other drugs, and that he had experienced psychosis at the time of the offenses.<sup>357</sup> The court held that the defendant's proffer failed to support an instruction because it did not meet the threshold requirement that the abuse of drugs or alcohol be "long-term, chronic, and habitual."<sup>358</sup>

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350. *Id.* at 260, 645 S.E.2d at 924.

351. *Id.* at 258-59, 645 S.E.2d at 923.

352. *Id.* at 255, 645 S.E.2d at 921.

353. *See White v. Commonwealth*, 272 Va. 619, 626, 636 S.E.2d 353, 357 (2006).

354. *See id.*

355. *Id.*

356. *See id.* at 621, 636 S.E.2d at 354.

357. *Id.* at 623-25, 636 S.E.2d at 355-56.

358. *Id.* at 629, 636 S.E.2d at 358.

### N. Uttering

In *Bennett v. Commonwealth*, the defendant challenged his convictions for uttering a forged public record.<sup>359</sup> Bennett had applied for a duplicate driver's license.<sup>360</sup> To do so, he had his photograph taken at the Department of Motor Vehicles, and when the digital photograph appeared on a screen, he signed a false name.<sup>361</sup> As a result of signing his name, the computer generated a driver's license under the false name.<sup>362</sup> The defendant left without the license.<sup>363</sup> On appeal, the Court of Appeals of Virginia framed the issue as: "whether the act of signing a false name on an electronic screen, which constitutes a forgery, is also an uttering since the act of signing the screen initiates the transaction to obtain the forged public document."<sup>364</sup> The court noted that while forgery and uttering are separate crimes with distinct elements, in this instance the nature of the driver's license application process meant that the "[u]ttering was completed simultaneously with the forgery."<sup>365</sup> When the defendant signed the false name on the screen, he "asserted to the DMV agent that the false name on the screen was good and valid, and he thereby instituted the process that produced the fraudulent license."<sup>366</sup>

## VI. WRITS OF ACTUAL INNOCENCE

The published decisions in this area demonstrate the rigor of the standard for obtaining a writ of actual innocence. In the case of *In re Carpitcher*, the defendant was convicted of aggravated sexual battery, taking indecent liberties with a minor, and object sexual penetration.<sup>367</sup> The convictions were based primarily on the testimony of the victim, the daughter of Carpitcher's girlfriend.<sup>368</sup> After trial, the victim recanted.<sup>369</sup> Relying on this recan-

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359. 48 Va. App. 354, 355, 631 S.E.2d 332, 332 (Ct. App. 2006).

360. *Id.* at 356, 631 S.E.2d at 333.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* at 355-56, 631 S.E.2d at 332.

365. *Id.* at 357-58, 631 S.E.2d at 333-34.

366. *Id.* at 358, 631 S.E.2d at 334.

367. 273 Va. 335, 339, 641 S.E.2d 486, 488-89 (2007).

368. *See id.* at 340, 641 S.E.2d at 489.

369. *Id.*

tation, Carpitcher filed a petition for a writ of actual innocence.<sup>370</sup> Following a remand from the court of appeals, the circuit court held a hearing, during which the victim said she had lied in her prior testimony.<sup>371</sup> The trial court, in answering the questions posed by the court of appeals, concluded that while the victim had obviously lied at some point, it was impossible to tell which version was the correct one.<sup>372</sup> The trial court also found that the victim was subjected to extensive and ongoing pressure from her mother to recant.<sup>373</sup> The court of appeals refused to grant the writ and Carpitcher appealed.<sup>374</sup>

The Supreme Court of Virginia held that it would review legal conclusions of the court of appeals *de novo*, but review its factual findings under a deferential standard because the court of appeals was exercising its original jurisdiction in adjudicating the petition for a writ of actual innocence.<sup>375</sup> The critical issue for the court was whether the recantation was "material."<sup>376</sup> Materiality in this context is synonymous with "true."<sup>377</sup> Thus, to obtain a writ of actual innocence, the petitioner must prove that the recantation is true. Otherwise, every recantation, even highly suspect ones, would require the court to grant the writ.<sup>378</sup> In this instance, the court of appeals did not err in concluding that Carpitcher failed to meet his burden of proving that the victim's recantation was true.<sup>379</sup> While the evidence showed the victim spoke falsely on one or more occasions, the petitioner failed to show that the recantation was true.<sup>380</sup>

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370. *Id.* at 340–41, 641 S.E.2d at 489.

371. *Id.* at 341, 641 S.E.2d at 489.

372. *See id.*, 641 S.E.2d at 489–90.

373. *See id.*, 641 S.E.2d at 490.

374. *Id.* at 342, 641 S.E.2d at 490.

375. *Id.* at 342–43, 641 S.E.2d at 490–91.

376. *See id.* at 344, 641 S.E.2d at 491.

377. *Id.* at 345, 641 S.E.2d at 492.

378. *Id.* at 345–46, 641 S.E.2d at 492.

379. *Id.* at 346, 641 S.E.2d at 493.

380. *See id.*

## VII. LEGISLATION

### A. *Criminal Procedure*

#### 1. Defense Counsel—Compensation

Counsel representing indigent defendants are now permitted to request a waiver of the low caps on fees for such representation.<sup>381</sup> The law allows counsel to seek, in addition to the standard capped fee, a modest supplement, ranging from \$120 in general district court to \$850 for felonies if the punishment may exceed twenty years in prison.<sup>382</sup> Factors which guide a court in determining whether the cap should be waived include the time reasonably necessary for representation, the effort expended, and the novelty and difficulty of the issues presented.<sup>383</sup> Additionally, counsel can request a further waiver beyond this supplement; however, all the fee cap waivers are subject to regulations promulgated by the Executive Secretary of the Supreme Court of Virginia.<sup>384</sup> Furthermore, once the money set aside for those waivers has been spent, no further waivers can be granted.<sup>385</sup>

#### 2. Defense Counsel—Subpoenas

Defense attorneys can now, like prosecutors, issue summons for witnesses in criminal cases.<sup>386</sup> When a summons is issued, counsel must file with the clerk of the court the names and addresses of the witnesses for whom a subpoena has been issued.<sup>387</sup>

#### 3. Driver's Licenses, Restricted Permits

Under existing law, a person whose license to drive has been suspended or revoked can obtain a restricted permit for "medi-

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381. VA. CODE ANN. § 19.2-163 (Cum. Supp. 2007).

382. *Id.*

383. *Id.*

384. *Id.* The Executive Secretary has posted information on the subject at [http://www.courts.state.va.us/news/news/2007\\_0626\\_waivers\\_of\\_statutory\\_fee\\_caps.html](http://www.courts.state.va.us/news/news/2007_0626_waivers_of_statutory_fee_caps.html) (last visited Oct. 24, 2007).

385. *Id.*

386. VA. CODE ANN. § 19.2-267 (Cum. Supp. 2007).

387. *Id.*

cally necessary transportation” for an elderly parent.<sup>388</sup> The General Assembly expanded the scope of this provision by allowing a court to issue a restricted license to transport “any person residing in the person’s household.”<sup>389</sup>

#### 4. Juvenile and Domestic Relations Courts—Jurisdiction

Under prior law, once a juvenile was treated as an adult, the juvenile court was forever divested of jurisdiction over the juvenile for subsequent cases.<sup>390</sup> The General Assembly changed this provision and juvenile court jurisdiction is now precluded only if the juvenile was actually convicted as an adult in circuit court.<sup>391</sup>

#### 5. Motions to Dismiss by the Prosecution

In *Roe v. Commonwealth*, the Supreme Court of Virginia held that an order dismissing an indictment, without more, constituted a dismissal with prejudice.<sup>392</sup> Responding to this outcome, the General Assembly provided that now, when the prosecution obtains the dismissal of a case, a future prosecution will not be precluded unless jeopardy had attached or the dismissal order explicitly states that the dismissal is with prejudice.<sup>393</sup>

#### 6. Rape Shield

The General Assembly expanded the scope of the rape shield statute to cover prosecutions under the several statutes that criminalize taking indecent liberties with children.<sup>394</sup>

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388. VA. CODE ANN. § 18.2-271.1(E) (Repl. Vol. 2004).

389. Act of Mar. 9, 2007, ch. 194, 2007 Va. Acts 277 (codified as amended at VA. CODE ANN. § 18.2-271.1(E) (Cum. Supp. 2007)).

390. See *Cook v. Commonwealth*, 268 Va. 111, 116, 597 S.E.2d 84, 87 (2004) (interpreting VA. CODE ANN. § 16.1-271 (Repl. Vol. 2003)).

391. Act of Mar. 9, 2007, ch. 221, 2007 Va. Acts 307 (codified as amended at VA. CODE ANN. § 16.1-271 (Cum. Supp. 2007)).

392. 271 Va. 453, 459, 628 S.E.2d 526, 529 (2006).

393. Act of Mar. 15, 2007, ch. 419, 2007 Va. Acts 589 (codified as amended at VA. CODE ANN. § 19.2-265.6 (Cum. Supp. 2007)).

394. Act of Apr. 4, 2007, ch. 890, 2007 Va. Acts 2424 (codified as amended at VA. CODE ANN. § 18.2-67.7 (Cum. Supp. 2007)).

## 7. Sentencing

Virginia Code section 19.2-295.1 sets forth the evidence a jury may hear at the sentencing phase of a non-capital felony or a Class 1 misdemeanor case.<sup>395</sup> The sentencing phase, like the guilt phase, is divided into three components: the prosecution's case-in-chief, any defense evidence, and, finally, the prosecution's rebuttal.<sup>396</sup> In *Gillespie v. Commonwealth*, the Supreme Court of Virginia construed this statute to limit the prosecution's presentation, during its case-in-chief, to evidence about the conviction itself.<sup>397</sup> "[I]nformation concerning proceedings subsequent to conviction, such as sentence, suspension, probation or other rehabilitative efforts" had to be redacted.<sup>398</sup> The General Assembly nullified this holding by permitting the prosecution to adduce, during its case-in-chief, evidence not only of the defendant's conviction, but also of the punishments imposed pursuant to those convictions.<sup>399</sup> The same amendment also confirmed that the Commonwealth can present victim impact testimony during its case-in-chief, and is not limited to presenting such evidence during the rebuttal portion of the sentencing hearing.<sup>400</sup> The legislation codified the result in *Washington v. Commonwealth*.<sup>401</sup>

## 8. Speedy Trial

Under prior law, the speedy trial clock was tolled during the pendency of a pre-trial appeal by the Commonwealth and this period of tolling ended upon the issuance of the mandate by the appellate court.<sup>402</sup> The General Assembly added sixty days of tolling to this time.<sup>403</sup> The General Assembly also clarified that the pro-

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395. VA. CODE ANN. § 19.2-295.1 (Cum. Supp. 2007).

396. *See id.*

397. 272 Va. 753, 759, 636 S.E.2d 430, 433 (2006).

398. *Id.* at 760, 636 S.E.2d at 433.

399. Act of Mar. 19, 2007, ch. 478, 2007 Va. Acts 649 (codified as amended at VA. CODE ANN. § 19.2-295.1 (Cum. Supp. 2007)).

400. *Id.*

401. *See* 48 Va. App. 486, 492, 632 S.E.2d 625, 628 (Ct. App. 2006).

402. VA. CODE ANN. § 19.2-409 (Repl. Vol. 2004).

403. Act of Mar. 15, 2007, ch. 414, 2007 Va. Acts 586 (codified as amended at VA. CODE ANN. § 19.2-409 (Cum. Supp. 2007)).



visions of the speedy trial statute apply to adults whose preliminary hearing occurs in general district court.<sup>404</sup>

## 9. Venue in Child Pornography Cases

The General Assembly enacted a broad venue provision for prosecutions charging the production of child pornography. In such cases, venue is proper where the unlawful act occurs or where the material is produced, reproduced, found, stored, or possessed.<sup>405</sup>

### B. *Specific Crimes*

#### 1. Abuse and Neglect of Incapacitated Adults

The General Assembly amended Virginia Code section 18.2-369, which generally punishes as a Class 5 felony the abuse or neglect of an incapacitated adult.<sup>406</sup> The amendment specifies that where the abuse or neglect results in death, the perpetrator is guilty of a Class 3 felony, a penalty more severe than that incurred for involuntary manslaughter.<sup>407</sup>

#### 2. Capital Murder

The General Assembly expanded the list of predicates that render a premeditated murderer eligible for the death penalty. First, the murder of a judge or justice, including substitute judges, may be charged with capital murder if the killing was “for the purpose of interfering with [the judge or justice’s] official duties as a judge.”<sup>408</sup> Second, the murderer of a witness is now also eligible for the death penalty if the murder occurs (1) in a criminal case, (2) where the witness was under subpoena, and (3) the

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404. Act of Apr. 10, 2007, ch. 944, Va. Acts 2654 (codified as amended at VA. CODE ANN. § 19.2-243 (Cum. Supp. 2007)).

405. VA. CODE ANN. § 18.2-374.1(E) (Cum. Supp. 2007).

406. Act of Mar. 19, 2007, ch. 562, 2007 Va. Acts 769 (codified as amended at VA. CODE ANN. § 18.2-369 (Cum. Supp. 2007)).

407. VA. CODE ANN. § 18.2-369 (Cum. Supp. 2007). Involuntary manslaughter is a Class 5 felony. *Id.* § 18.2-36 (Repl. Vol. 2004).

408. *Id.* § 18.2-31(14) (Cum. Supp. 2007).

killing was for the purpose of interfering with the witness's duties in the case.<sup>409</sup>

### 3. Driving Under the Influence

Under prior law, a person "convicted of three offenses [of DUI] within a 10-year period shall upon conviction of the third offense be guilty of a Class 6 felony."<sup>410</sup> Punishment as a Class 6 felony thus depended on whether *conviction* for a first offense occurred within ten years, rather than whether the drunk driving occurred within ten years. The General Assembly clarified this language to provide that any person convicted of "three violations of this section committed within a 10-year period is guilty of a Class 6 felony."<sup>411</sup>

### 4. Extortion of Immigrants

In an effort to protect immigrants, the General Assembly made it a Class 5 felony to destroy, remove, or confiscate certain documents, including passports or immigration documents, with the intent to extort money.<sup>412</sup>

### 5. Felony Obstruction of Justice

Prosecutors have been added to the list of persons protected by the felony obstruction of justice statute.<sup>413</sup>

### 6. Firearms

In reaction to a tactic employed by New York City, the General Assembly criminalized as a Class 6 felony any attempt to entice a firearms dealer to sell a firearm to someone other than an "actual buyer."<sup>414</sup> The provision does not apply to law enforcement officers.<sup>415</sup>

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409. *Id.* § 18.2-31(15) (Cum. Supp. 2007).

410. *Id.* § 18.2-270(C)(1) (Repl. Vol. 2004).

411. Act of Mar. 12, 2007, ch. 258, 2007 Va. Acts 347 (codified as amended at VA. CODE ANN. § 18.2-272(A) (Cum. Supp. 2007)).

412. Act of Mar. 19, 2007, ch. 547, 2007 Va. Acts 747 (codified as amended at VA. CODE ANN. § 18.2-59 (Cum. Supp. 2007)).

413. VA. CODE ANN. § 18.2-460(C) (Cum. Supp. 2007).

414. Act of Mar. 19, 2007, ch. 509, 2007 Va. Acts 691 (codified as amended at VA. CODE

## 7. Protective Orders—Repeat Offenders

Violating a protective order is a Class 1 misdemeanor.<sup>416</sup> Mindful of the problems associated with recurring violations, the General Assembly established an enhanced punishment for second and third offenses. An offender who violates a protective order anew within five years of a prior conviction faces a mandatory minimum of sixty days in jail if the violation is accompanied by an act or threat of violence.<sup>417</sup> A third violation within twenty years of the first conviction is a Class 6 felony if any one of the offenses is or was based on an act or a threat of violence.<sup>418</sup>

## 8. Gang Related or Inspired Crimes

The list of predicate crimes for criminal street gangs has been expanded to include the use or display of a firearm during the commission of a felony.<sup>419</sup>

## 9. Sexual Crimes

Under a new provision of the code, it is now a Class 1 misdemeanor to commit an act of “sexual abuse” against a child who is between the ages of thirteen and fifteen.<sup>420</sup> Sexual abuse is defined as forcing a child to touch the defendant’s, the child’s, or another’s “intimate parts” combined with the intent to sexually molest, arouse, or gratify.<sup>421</sup>

## 10. Sex Offender Registry

Those previously convicted of a “sexually violent offense” are prohibited from entering on school or child day center property, unless the person is voting, is enrolled at the school, or has obtained a court order allowing entry on the property.<sup>422</sup>

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ANN. § 18.2-308.2:2(L1) (Cum. Supp. 2007)).

415. *Id.*

416. VA. CODE ANN. § 16.1-253.2 (Cum. Supp. 2007).

417. *Id.*

418. *Id.*

419. *Id.* § 18.2-46.1 (Cum. Supp. 2007).

420. *Id.* § 18.2-67.4:2 (Cum. Supp. 2007).

421. *See id.* § 18.2-67.10(6)(a)–(b) (Repl. Vol. 2004).

422. *Id.* § 18.2-370.5(A) (Cum. Supp. 2007).

Convicted sex offenders who are required to register with the Virginia State Police for inclusion in the sex offender registry must now register their e-mail address and instant messaging screen name.<sup>423</sup> Changes in such names must be updated with the State Police within thirty minutes.<sup>424</sup>

In addition, following a mandatory registration with the Virginia State Police, nursing homes will receive automatic updates of sex offenders within the same or a contiguous zip code.<sup>425</sup> Nursing homes must also ascertain whether a potential patient is a registered sex offender if the home anticipates that the patient will stay more than three days or he does, in fact, stay more than three days.<sup>426</sup> Nursing homes are further required to inform patients about the sex offender registry and, if requested, to assist them in obtaining information from the registry.<sup>427</sup>

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423. *Id.* § 9.1-903(B) (Cum. Supp. 2007).

424. *Id.* § 9.1-903(G) (Cum Supp. 2007).

425. *Id.* §§ 9.1-914 & 32.1-127(B)(13) (Cum. Supp. 2007).

426. *Id.* §§ 9.1-914 & 32.1-127(B)(14) (Cum. Supp. 2007).

427. *Id.* § 32.1-138(A)(16) (Cum Supp. 2007).

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