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## Annual Survey of Virginia Law: Virginia Criminal Procedure

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# VIRGINIA CRIMINAL PROCEDURE\*

Ronald J. Bacigal\*\*

## I. FOURTH AMENDMENT

### A. Search and Seizure

Reversing a recent trend, the past year was relatively quiet with respect to search and seizure cases. The United States Supreme Court decided two cases dealing with open fields and the curtilage of a dwelling. *Dow Chemical Co. v. United States*<sup>1</sup> held that the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance; such an industrial complex "is more comparable to an open field and as such is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras."<sup>2</sup> In *California v. Ciraolo*,<sup>3</sup> the Court explained that even areas within the curtilage are not protected from all police observation. While erecting ten-foot fences around the defendant's backyard may have shielded the yard from ground surveillance, the fences did not protect the yard from aerial observation.<sup>4</sup>

The previous term, in *Winston v. Lee*,<sup>5</sup> the United States Supreme Court recognized that certain intrusions upon privacy (surgery to remove a bullet) are so serious that they require a higher level of probable cause. This term, *New York v. P.J. Video, Inc.*<sup>6</sup> held that the seizure of materials presumptively protected by the

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\* This article addresses significant legislative changes, decisions of the United States and Virginia Supreme Courts, and decisions of the Virginia Court of Appeals. A more extensive consideration of this material as well as recent decisions of the Court of Appeals for the Fourth Circuit and federal district courts is contained in R. BACIGAL, VIRGINIA CRIMINAL PROCEDURE (Supp. 1986).

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1. 106 S. Ct. 1819 (1986).

2. *Id.* at 1827.

3. 106 S. Ct. 1809 (1986).

4. *Id.* at 1813.

5. 470 U.S. 753 (1985).

6. 106 S. Ct. 1610 (1986).

first amendment does not require a higher standard. The Court went on to state that probable cause requires only "a fair probability" or "substantial chance" of criminal activity, not an actual showing of such activity.<sup>7</sup>

With respect to the fourth amendment exclusionary rule, the Virginia Court of Appeals held that a casual visitor lacks standing to contest the search of a residence.<sup>8</sup> The visitor failed to show "a possessory interest in the place searched, a right to exclude others from the premises, the right to use the premises in the absence of the rightful tenants, the possession of a key or the presence of clothes, or any other property inside the apartment searched."<sup>9</sup> In *Kimmelman v. Morrison*,<sup>10</sup> the United States Supreme Court discussed the overlap of fourth and sixth amendment claims raised in a federal writ of habeas corpus. *Stone v. Powell*<sup>11</sup> bars federal habeas corpus review of a fourth amendment claim if the state has provided an opportunity for a full and fair litigation of that claim. However, *Stone* does not bar sixth amendment ineffective assistance of counsel claims, even when such claims are founded primarily on incompetent representation with respect to fourth amendment issues.<sup>12</sup> Thus, counsel's incompetence in failing to file a suppression motion could be litigated in a federal habeas corpus proceeding.<sup>13</sup>

The 1986 Virginia General Assembly enacted provisions relating to the search of an attorney's office.<sup>14</sup> Search warrants for evidence of any crime solely involving a client of the attorney must be issued by a circuit court judge. Any evidence seized must be sealed by the issuing judge, who shall conduct an in-camera inspection of the evidence in the presence of the attorney from whom the evidence was seized. The judge shall return any evidence determined to be within the scope of the attorney-client privilege and not otherwise subject to seizure. The General Assembly also provided for forfeiture of property used in connection with sexually explicit visual material, which material contains a person less than eighteen

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7. *Id.* at 1616.

8. *McCoy v. Commonwealth*, 2 Va. App. 309, 343 S.E.2d 383 (1986).

9. *Id.* at 312, 343 S.E.2d at 385.

10. 106 S. Ct. 2574 (1986).

11. 428 U.S. 465, 494-95 (1976).

12. *Kimmelman*, 106 S. Ct. at 2582.

13. *Id.* at 2574.

14. VA. CODE ANN. § 19.2-56.1 (Cum. Supp. 1986).

years of age as a subject.<sup>15</sup>

Finally, in the area of search and seizure, the Virginia Supreme Court chilled attempts to give an expansive reading to the Virginia constitutional prohibition of unreasonable searches. Although most of the provisions of the Virginia Bill of Rights<sup>16</sup> closely parallel the Bill of Rights in the United States Constitution, Virginia courts have authority to interpret the state constitution to confer greater rights than those minimum rights guaranteed by the United States Constitution.<sup>17</sup> Some credence was given to this approach in *Mosher Steel-Virginia v. Teig*,<sup>18</sup> where the court went beyond United States Supreme Court precedent and noted that a general inspection warrant "comes uncomfortably close" to violating article I, section 10 of the Virginia Constitution.<sup>19</sup> However, in *Lowe v. Commonwealth*,<sup>20</sup> the court noted that "the Virginia requirements, under our constitution and the statutes implementing the constitutional provision, are 'substantially the same as those contained in the Fourth Amendment.'"<sup>21</sup>

## B. Arrest, Stop and Frisk

*Horne v. Commonwealth*<sup>22</sup> recognized that failure to take a suspect before a magistrate without unnecessary delay violates statutory procedures,<sup>23</sup> but does not render the arrest unconstitutional. Only when the delay results in the loss of exculpatory evidence has the court recognized a violation of the defendant's due process rights.<sup>24</sup> In *Verez v. Commonwealth*,<sup>25</sup> the court held that, even when the police have an adequate opportunity to obtain an arrest warrant in advance, they are not required to do so if an emergency

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15. *Id.* § 18.2-374.2.

16. VA. CONST. art. I.

17. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

18. 229 Va. 95, 327 S.E.2d 87 (1985).

19. *Id.* at 102, 327 S.E.2d at 92.

20. 230 Va. 346, 337 S.E.2d 273 (1985), *cert. denied*, 106 S. Ct. 1464 (1986).

21. *Id.* at 348 n.1, 337 S.E.2d at 274-75 n.1 (quoting 1 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 182 (1974)).

22. 230 Va. 512, 339 S.E.2d 186 (1986); see also *Frye v. Commonwealth*, 231 Va. \_\_\_, 345 S.E.2d 267 (1986).

23. VA. CODE ANN. § 19.2-76 (Repl. Vol. 1983).

24. *Winston v. Commonwealth*, 188 Va. 386, 49 S.E.2d 611 (1948). In *Horne*, the court refused to examine the officer's subjective motivation for the delay. *Horne*, 230 Va. at 517, 339 S.E.2d at 189.

25. 230 Va. 405, 337 S.E.2d 749 (1985).

exists at the time of a warrantless entry of a dwelling. The opinion contains a helpful list of ten forms of exigent circumstances which justify a warrantless entry of a dwelling:

(1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit.<sup>26</sup>

The neglected area of extradition received further clarification in two recent cases. The Virginia Court of Appeals held that habeas corpus is not a proper proceeding in which to try the question of alibi, or any other question as to guilt or innocence. "Only when it is conclusively proved that no question can be made, that the person was not within the demanding state when the crime is said to have been committed . . . is he to be released."<sup>27</sup> Traditionally, a habeas corpus proceeding is limited to an examination of: "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."<sup>28</sup> However, in *Plaster v. United States*,<sup>29</sup> the Court of Appeals for the Fourth Circuit recognized that extradition may also be resisted on grounds that the government previously agreed not to extradite the defendant in return for his agreement to testify against others.

In the area of stop and frisk, the Virginia Supreme Court made

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26. *Id.* at 410-11, 337 S.E.2d at 753.

27. *Manning v. Commonwealth*, 1 Va. App. 60, 62, 334 S.E.2d 151, 153 (1985).

28. *Michigan v. Doran*, 439 U.S. 282, 289 (1978). *Manning v. Commonwealth*, 1 Va. App. 60, 61, 334 S.E.2d 151, 152 (1985), defined a fugitive as one who leaves the demanding state after having incurred guilt there.

29. 789 F.2d 289 (4th Cir. 1986).

its first ruling upon the question of roadblocks.<sup>30</sup> The court recognized that *Delaware v. Prouse*<sup>31</sup> prohibited law enforcement personnel from stopping motorists in a "wholly random and discretionary manner."<sup>32</sup> *Prouse* was distinguished, however, in situations where fixed roadblocks are operated "pursuant to a practice embodying neutral criteria."<sup>33</sup> The court noted that "[t]he officers at the checkpoint had no discretion regarding which vehicles to stop: every southbound vehicle was halted."<sup>34</sup> When an automobile is lawfully stopped, the motorist has no reasonable expectation of privacy in a Vehicle Identification Number (VIN) generally visible from outside the automobile.<sup>35</sup> A limited intrusion into the vehicle to view the VIN is constitutionally permissible and, once inside the vehicle, the officer may seize objects found in plain view.<sup>36</sup>

In *Jones v. Commonwealth*,<sup>37</sup> the Virginia Supreme Court distinguished *Kolendar v. Lawson*,<sup>38</sup> another leading United States Supreme Court case in the stop and frisk area. *Kolendar* had demonstrated the United States Supreme Court's willingness to strike down a "stop and identify" statute as unconstitutionally vague under the due process clause of the fourteenth amendment. In *Jones*, however, the defendant was stopped on reasonable suspicion that criminal activity was afoot, and the defendant then refused to identify himself, as required by an Arlington County ordinance. The police officer detained the defendant and "patted down" both his person and his duffel bag. The Virginia Supreme Court stated that "[n]othing in *Terry* or its progeny indicates that the authority of a police officer to make 'reasonable inquiries,' to 'determine [a suspect's] identity,' and to obtain 'more information' from or about a suspect depends in any way upon whether a pat-down reveals weapons or evidence of a crime."<sup>39</sup> In addition to the pat-down, the police may make reasonable inquiries to determine

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30. *Lowe v. Commonwealth*, 230 Va. 346, 337 S.E.2d 273 (1985), cert. denied, 106 S. Ct. 1464 (1986).

31. 440 U.S. 648 (1979).

32. *Lowe*, 230 Va. at 349, 337 S.E.2d at 275.

33. *Id.* at 350, 337 S.E.2d at 276.

34. *Id.* at 352, 337 S.E.2d at 277.

35. *New York v. Class*, 106 S. Ct. 960 (1986).

36. *Id.* at 962. In *Class*, the officer saw the handle of a gun protruding from underneath the driver's seat and seized the gun.

37. 230 Va. 14, 334 S.E.2d 536 (1985).

38. 461 U.S. 352 (1983).

39. *Jones*, 230 Va. at 19, 334 S.E.2d at 540.

identity, and may maintain the status quo momentarily while obtaining more information.

## II. FIFTH AND SIXTH AMENDMENTS

### A. Confessions

In *Moran v. Burbine*,<sup>40</sup> the defendant's sister telephoned the public defender's office to obtain legal assistance for the defendant. The public defender then phoned the police department and stated that she would act as defendant's legal counsel for any lineup or interrogation. She was informed that the police were "through with" the defendant for the night, and he would not be questioned. Less than an hour later the police interrogated the defendant after obtaining a waiver of his *Miranda* rights. The United States Supreme Court held that a voluntary waiver is not vitiated either by the failure of the police to inform the defendant that an attorney retained by a third party is attempting to reach him, or by misleading information furnished to the attorney by the police. "[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident."<sup>41</sup>

Once the accused asserts his right to counsel "at an arraignment or similar proceeding,"<sup>42</sup> any subsequent waiver of the defendant's right to counsel for a police-initiated interrogation is invalid.<sup>43</sup> When the right to counsel has been exercised, the police may not interfere with the efforts of a defendant's attorney to act as a "medium" between the state and the accused. *Maine v. Moulton*<sup>44</sup> recognized that "knowing exploitation by the State of an opportunity to confront the accused without counsel being present"<sup>45</sup> is a violation of the sixth amendment. In *Moulton*, the police used an in-

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40. 106 S. Ct. 1135 (1986).

41. *Id.* at 1142.

42. The right to counsel attaches at the commencement of adversary judicial proceedings and the court has "never held that the right to counsel attaches at the time of arrest." *United States v. Gouveia*, 467 U.S. 180, 190 (1984).

43. *Michigan v. Jackson*, 106 S. Ct. 1404, 1411 (1986).

44. 106 S. Ct. 477 (1985). *Moulton* was applied in *Frye v. Commonwealth*, 231 Va. \_\_\_, 345 S.E.2d 267 (1986).

45. *Moulton*, 106 S. Ct. at 487.

former to confront an indicted defendant as part of an investigation of a new and different offense. The incriminating statements relating to the new offense were held admissible, but the statements relating to the pending charges were deemed inadmissible.<sup>46</sup> The holding in *Moulton* appears to overturn the Virginia Supreme Court's decision in *Hummel v. Commonwealth*.<sup>47</sup> *Moulton* itself was distinguished in *Kuhlmann v. Wilson*,<sup>48</sup> where the Court stated that its "primary concern" was secret interrogation by investigative techniques that are "the equivalent of direct police interrogation."<sup>49</sup> The sixth amendment does not forbid admission of a defendant's statements to a jailhouse informant who was "placed in close proximity but made no effort to stimulate conversations about the crime charged. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."<sup>50</sup>

Although *Miranda* considerations dominate present cases, the courts offered reminders that confessions must also be assessed in terms of voluntariness, credibility, and with regard to corroborating evidence. *Miller v. Fenton*<sup>51</sup> held that the issue of voluntariness is a legal question (not a wholly factual question) requiring independent judicial determination upon a federal writ of habeas corpus. Although the "voluntariness" of the confession is a legal question for the trial judge, the defendant also has the right to challenge the confession's "reliability" before the jury.<sup>52</sup> *Caminade v. Commonwealth*<sup>53</sup> recognized that if the defendant's statement falls short of an admission to all essential elements of a crime, there must be independent evidence of the corpus delicti. If neither the admission nor the independent evidence fully establish the corpus delicti, a conviction cannot be based upon the defendant's admission.

In *Wainwright v. Greenfield*,<sup>54</sup> the United States Supreme Court held that post-*Miranda* silence cannot be used to establish the de-

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46. *Id.* at 489-90.

47. 219 Va. 252, 247 S.E.2d 385 (1978), *cert. denied*, 440 U.S. 935 (1979).

48. 106 S. Ct. 2616 (1986).

49. *Id.* at 2630.

50. *Id.*

51. 106 S. Ct. 445 (1985).

52. *Crane v. Kentucky*, 106 S. Ct. 2142 (1986).

53. 230 Va. 505, 338 S.E.2d 846 (1986).

54. 106 S. Ct. 634 (1986).



fendant's sanity. In *Pierce v. Commonwealth*,<sup>55</sup> part of an oral confession related to the offense charged, while part of the confession related to defendant's status as a parolee. The Virginia Court of Appeals held that "when the part bearing on the issue can be separated from the parts relating to other offenses, only that part relevant and material to the issue is admissible."<sup>56</sup>

In *Cunningham v. Commonwealth*,<sup>57</sup> the Virginia Court of Appeals discussed an in-court assertion of the privilege against self-incrimination, and the form of immunity granted under Virginia Code section 19.2-270. While the holding of the court breaks no new ground, the lengthy majority and concurring opinions are a helpful summary of the law in this area. The United States Supreme Court also offered further interpretation of the fifth amendment privilege against self-incrimination. *Allen v. Illinois*<sup>58</sup> held that the privilege does not apply merely because the defendant is threatened with some deprivation of his liberty. Although the defendant was confined for treatment as a "sexually dangerous person," his compelled statements could not be used in future criminal proceedings, and his confinement was civil, not criminal, in nature. Thus, the privilege could not be asserted in the civil proceeding to determine his status as a sexually dangerous person.<sup>59</sup>

### B. *Right to Counsel*

The Virginia Supreme Court strictly construed the requirement that an indigent's voluntary waiver of counsel must appear on the record. In *Church v. Commonwealth*,<sup>60</sup> the court held that reversal is mandated even when there is a "fortuitous omission" of that part of the record which might have established voluntary waiver. *Church* also reiterated that "a defendant who represents himself is no less bound by the rules of procedure and substantive law than a defendant represented by counsel."<sup>61</sup>

In *Abney v. Warden, Mecklenberg Correctional Center*,<sup>62</sup> the Virginia Court of Appeals expounded on the United States Su-

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55. 2 Va. App. 383, 345 S.E.2d 1 (1986).

56. *Id.* at 391, 345 S.E.2d at 5.

57. 2 Va. App. 358, 344 S.E.2d 389 (1986).

58. 106 S. Ct. 2988 (1986).

59. *Id.* at 2995.

60. 230 Va. 208, 335 S.E.2d 823 (1985).

61. *Id.* at 213, 335 S.E.2d at 826.

62. 1 Va. App. 26, 332 S.E.2d 802 (1985).

preme Court's recent approach to claims of ineffective assistance of counsel.<sup>63</sup> First, the defendant has the burden to show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense.<sup>64</sup> This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>65</sup> If a defendant alleges that his guilty plea was caused by inadequate representation of counsel, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>66</sup>

In the context of the sixth amendment right to counsel, the United States Supreme Court offered guidance in handling the troublesome problem of a client who intends to commit perjury. *Nix v. Whiteside*<sup>67</sup> held that defense counsel's threat to withdraw from defendant's representation, and to disclose the defendant's perjury, does not constitute attorney error. Nor is prejudice established when defense counsel's action causes the defendant to provide truthful rather than perjured testimony.

The 1986 General Assembly increased the compensation paid to court-appointed counsel.<sup>68</sup> In district court, maximum compensation was raised to \$86. In circuit court, the maximum was raised to \$460 for offenses punishable by confinement for more than twenty years; \$230 for other felony charges; and \$115 in misdemeanor cases.

### III. MISCELLANEOUS

#### A. *Indictments*

On an indictment for larceny, the defendant may demand that the Commonwealth's Attorney designate the particular form of larceny that he intends to prove, i.e., larceny, embezzlement, false

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63. *Strickland v. Washington*, 466 U.S. 668 (1984); see also *Kimmelman v. Morrison*, 106 S. Ct. 2574 (1986).

64. *Abney*, 1 Va. App. at 29, 332 S.E.2d at 804.

65. *Hill v. Lockhart*, 106 S. Ct. 366 (1985).

66. *Id.* at 372.

67. 106 S. Ct. 988 (1986).

68. VA. CODE ANN. § 19.2-163 (Cum. Supp. 1986); see also *id.* § 16.1-267.

pretenses, or receiving stolen property. A written designation shall be furnished to the defense no later than five days prior to trial provided the demand was made more than five days prior to such date.<sup>69</sup> If the defendant does not make timely demand, the Commonwealth's Attorney may orally designate, in open court, the particular larceny statute upon which he relies.<sup>70</sup> It is not fatal variance to erroneously state the ownership of property taken in a robbery. Robbery is a crime against the person and, so long as the property taken was in the care and custody of the victim, ultimate ownership is irrelevant. A mistaken allegation of ownership could not have caused the defendant harm in terms of a fair and impartial trial on the merits.<sup>71</sup>

In *Abney v. Warden, Mecklenberg Correctional Center*,<sup>72</sup> the Virginia Court of Appeals held that "as long as the indictments were not so defective as to deprive the court of jurisdiction to render judgments of conviction, a petitioner may not collaterally attack the sufficiency of the indictments by a petition for a writ of habeas corpus."<sup>73</sup>

## B. *Discovery*

The discovery provisions of Rule 3A:11 of the Rules of Virginia Supreme Court apply only to those records within the possession, custody, or control of the commonwealth.<sup>74</sup> Stating that "[t]he Commonwealth cannot disclose what it does not have," the court in *Robinson v. Commonwealth*<sup>75</sup> found no discovery violation when an expert witness changed her conclusions on the morning she was to testify, and the commonwealth revealed this change prior to her testimony.<sup>76</sup> When a discovery violation does occur, the undisclosed evidence may be admitted if it does not prejudice the substantial rights of the defendant.<sup>77</sup>

The defendant's constitutional right to discovery of exculpatory evidence was clarified by federal and Virginia cases. The courts

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69. *Id.* § 18.2-111 (Repl. Vol. 1982).

70. *Roberts v. Commonwealth*, 230 Va. 264, 337 S.E.2d 255 (1985).

71. *Hairston v. Commonwealth*, 2 Va. App. 211, 343 S.E.2d 355 (1986).

72. 1 Va. App. 26, 332 S.E.2d 802 (1985).

73. *Id.* at 29, 332 S.E.2d at 804.

74. *Barker v. Commonwealth*, 230 Va. 370, 337 S.E.2d 729 (1985).

75. 231 Va. 142, 341 S.E.2d 159 (1986).

76. *Id.* at 155, 341 S.E.2d at 167.

77. *Davis v. Commonwealth*, 230 Va. 201, 335 S.E.2d 375 (1985).

had previously recognized three separate standards which applied to the discovery of exculpatory evidence.<sup>78</sup> In *United States v. Bagley*,<sup>79</sup> Justice Blackmun formulated a single standard: whether failure to disclose creates a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. A reasonable probability was defined as "a probability sufficient to undermine confidence in the outcome."<sup>80</sup> It was unclear whether this new standard was constitutionally binding upon state courts,<sup>81</sup> but the Virginia Supreme Court followed *Bagley* in deciding *Robinson v. Commonwealth*.<sup>82</sup> *Robinson* also noted that impeachment value alone may render the information exculpatory.<sup>83</sup>

### C. Double Jeopardy

In *Smalis v. Pennsylvania*,<sup>84</sup> the Pennsylvania Supreme Court held that the trial court's dismissal of a criminal charge based on a defense demurrer to the prosecution's case did not constitute an acquittal. The United States Supreme Court reversed, holding that "a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause."<sup>85</sup> Presumably, a motion to strike in Virginia would be treated as was the Pennsylvania demurrer to the prosecution's case-in-chief.

The United States Supreme Court also held that the separate sovereigns doctrine<sup>86</sup> applies to two states. Thus "successive prosecutions by two states for the same conduct are not barred by the double jeopardy clause."<sup>87</sup> The Court also made a refinement in the double jeopardy principles applicable to lesser included offenses. The general rule is that a conviction of a lesser included offense at the first trial constitutes an implied acquittal of the greater offense, thus the defendant cannot be retried on the

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78. See *Dozier v. Commonwealth*, 219 Va. 1113, 253 S.E.2d 655 (1979).

79. 105 S. Ct. 3375 (1985).

80. *Id.* at 3384.

81. Two Justices fully endorsed the standard, but three concurring Justices expressed qualified approval.

82. *Robinson*, 231 Va. 142, 341 S.E.2d 159.

83. *Id.* at 150, 341 S.E.2d at 165.

84. 106 S. Ct. 1745 (1986).

85. *Id.* at 1747.

86. See *Bartkus v. Illinois*, 359 U.S. 121 (1959).

87. *Heath v. Alabama*, 106 S. Ct. 433, 437 (1985).

greater offense.<sup>88</sup> However, "when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy-barred, the burden shifts to defendant to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense."<sup>89</sup>

The Virginia Court of Appeals interpreted Wharton's Rule<sup>90</sup> as barring a conspiracy conviction only when the commission of the substantive offense *requires* the participation of two people.<sup>91</sup> Such a holding will have limited significance in light of the recent statutory change which bars a conspiracy conviction when the defendant has been convicted of the substantive offense.<sup>92</sup>

#### D. *Jury Trials*

Central to the right to a fair trial before a jury is the principle that the defendant's guilt or innocence not be affected by the conditions of his pretrial custody. Thus, it is unconstitutional to force the defendant to wear prison clothes before the jury because no "essential state policy" is served by compelling a defendant to dress in this manner.<sup>93</sup> However, legitimate government interests in security may justify certain restraints which do not unduly prejudice the jury. Perhaps because of the recent increase in terrorist activity, *Holbrook v. Flynn*<sup>94</sup> approved the use of additional security guards in the courtroom to maintain custody over defendants who have been denied bail. *Frye v. Commonwealth*<sup>95</sup> recognized that chains and handcuffs may be used in extraordinary cases where the defendant has a propensity for violent crime and escape. However, in an effort to diminish prejudice to the defendant, the Virginia Court of Appeals placed restrictions upon the introduction of "mug shots" of the defendant.<sup>96</sup> Such photographs are admissible if three conditions are met: (1) the prosecution

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88. See *Benton v. Maryland*, 395 U.S. 784 (1969); VA. CODE ANN. § 19.2-285 (Repl. Vol. 1983).

89. *Morris v. Mathews*, 106 S. Ct. 1032 (1986).

90. The classic Wharton's Rule offenses are adultery, incest, bigamy, and dueling, which necessarily involve at least two people.

91. *Ramsey v. Commonwealth*, 2 Va. App. 265, 343 S.E.2d 465 (1986).

92. VA. CODE ANN. § 18.2-23.1 (Cum. Supp. 1986).

93. *Estelle v. Williams*, 425 U.S. 501, 505 (1976).

94. 106 S. Ct. 1340 (1986).

95. 231 Va. \_\_\_, 345 S.E.2d 267 (1986).

96. *Johnson v. Commonwealth*, 2 Va. App. 447, 345 S.E.2d 303 (1986).

demonstrates a need to introduce the photographs; (2) the photographs, if shown to the jury, must not imply that the defendant has a prior criminal record; and (3) the manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.<sup>97</sup>

The Virginia Supreme Court had previously recognized two situations which called for automatic disqualification of a juror: (1) veniremen related within the ninth degree of consanguinity or affinity to a party to the trial;<sup>98</sup> and (2) a juror with ownership of stock in a victim corporation.<sup>99</sup> *Baker v. Commonwealth*<sup>100</sup> added a third ground: a juror's knowledge of the accused's previous conviction of the same offense for which he is being retried. In these three situations, "automatic exclusions leave no room for judicial discretion."<sup>101</sup> *Wilson v. Commonwealth*<sup>102</sup> also recognized that it was reversible error for the trial judge to inform the jury that defense counsel had challenged the jury for cause and had made a motion to strike the entire jury panel.

In *Turner v. Murray*,<sup>103</sup> the United States Supreme Court announced separate rules for dealing with racial issues in capital and non-capital offenses. In non-capital offenses, the fact of interracial violence alone is not a "special circumstance"<sup>104</sup> entitling the defendant to have prospective jurors questioned about racial prejudice. However, "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."<sup>105</sup>

The Court also announced new rules with respect to peremptory challenges based upon race. *Batson v. Kentucky*<sup>106</sup> held that a defendant may establish a prima facie case of purposeful discrimina-

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97. *Id.* at 454, 345 S.E.2d at 307.

98. *Gray v. Commonwealth*, 226 Va. 591, 311 S.E.2d 409 (1984).

99. *Salina v. Commonwealth*, 217 Va. 92, 225 S.E.2d 199 (1976). *Salina* was distinguished in *Scott v. Commonwealth*, 1 Va. App. 447, 339 S.E.2d 889 (1986), where the Virginia Court of Appeals refused to adopt a per se rule disqualifying jurors employed by the victim of a crime.

100. 230 Va. 370, 337 S.E.2d 729 (1985).

101. *Id.* at 375, 337 S.E.2d at 733.

102. 2 Va. App. 134, 342 S.E.2d 65 (1986).

103. 106 S. Ct. 1683 (1986).

104. *See Ham v. South Carolina*, 409 U.S. 524 (1973).

105. *Turner*, 106 S. Ct. at 1688.

106. 106 S. Ct. 1712 (1986). *Batson* will not be applied retroactively on collateral review of convictions that became final before *Batson* was decided. *Allen v. Hardy*, 106 S. Ct. 2878, 2880 (1986) (per curiam).

tion in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case of discrimination, the defendant must show that: (1) he is a member of a cognizable racial group; (2) the prosecutor has exercised peremptory challenges to remove members of the defendant's race; and (3) facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race.<sup>107</sup> Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut the defendant's case merely by denying that he had a discriminatory motive or by affirming his good faith in individual selections. The prosecutor must articulate a neutral explanation related to the particular case to be tried.

Both the United States Supreme Court, in *Lockhart v. McCree*,<sup>108</sup> and the Virginia Supreme Court, in *Frye v. Commonwealth*,<sup>109</sup> reaffirmed that exclusion of jurors with unequivocal opposition to the death penalty does not violate a defendant's sixth amendment right to a representative and impartial jury.

The Virginia Court of Appeals recognized that there is "no absolute constitutional right" to withdraw a waiver of a jury trial, but the withdrawal is normally permitted upon a showing that it will not "unduly delay the trial or . . . otherwise impede justice."<sup>110</sup> The court also reversed a contempt citation for delaying the request for a jury until the day of trial. Contempt is not appropriate unless the delayed request was willfully made for the purpose of obstructing or interrupting the administration of justice.<sup>111</sup>

### E. Trial

The Virginia Court of Appeals recently interpreted the statutory provisions and due process considerations applicable to speedy trials. When a grand jury fails to return a true bill, the defendant is entitled to be discharged from custody. If the defendant is held in custody on an unrelated criminal conviction, such custody does not

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107. *Batson*, 106 S. Ct. at 1723.

108. 106 S. Ct. 1758 (1986); see also *Darden v. Wainwright*, 106 S. Ct. 2464 (1986).

109. 231 Va. \_\_\_, 345 S.E.2d 267 (1986).

110. *Carter v. Commonwealth*, 2 Va. App. 392, 399, 345 S.E.2d 5, 9 (1986).

111. *Id.*

violate due process nor does it trigger the statutory time periods applicable to speedy trials.<sup>112</sup> The Virginia Court of Appeals also held that speedy trial considerations do not apply to probation revocation hearings.<sup>113</sup>

*Massey v. Commonwealth*<sup>114</sup> recognized that where a witness's testimony is merely cumulative, its introduction may be limited by the trial court. However, a witness's testimony cannot be excluded merely because it is corroborative in nature. The court defined cumulative testimony as "repetitive testimony that restates what has been said already and adds nothing to it."<sup>115</sup> Corroborative evidence was defined as that which "does not emanate from the defendant's mouth, does not rest wholly upon the defendant's credibility, but is evidence that adds to, strengthens, and confirms defendant's testimony."<sup>116</sup>

When the commonwealth offers a witness for the purpose of proving that he has no recollection of the incident, the defendant has an absolute right to cross-examine the witness respecting his memory and all other relevant matters.<sup>117</sup> The privilege of an accused to prevent his spouse from testifying terminates upon proof of a final divorce; however, the interspousal confidential communication privilege survives the dissolution of marriage.<sup>118</sup> The Virginia Court of Appeals recognized that defense witnesses may testify to the defendant's reputation within the work community or any area where the defendant is well known.<sup>119</sup> The appropriate "community" is not limited to the geographic area where the defendant resides.<sup>120</sup> The court also noted that the defendant's reputation may be established by negative inferences, e.g., where the witness has not heard any negative comments on the defendant's good character.<sup>121</sup>

The United States Supreme Court limited the authority of the federal courts to subpoena state prisoners. Absent exceptional circumstances, a federal district court lacks authority to order mar-

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112. *Presley v. Commonwealth*, 2 Va. App. 348, 344 S.E.2d 195 (1986).

113. *Atkins v. Commonwealth*, 2 Va. App. 329, 343 S.E.2d 385 (1986).

114. 230 Va. 436, 337 S.E.2d 754 (1985).

115. *Id.* at 442, 337 S.E.2d at 758.

116. *Id.* at 443, 337 S.E.2d at 758.

117. *Barnett v. Commonwealth*, 231 Va. 102, 108, 341 S.E.2d 190, 194 (1986).

118. *Church v. Commonwealth*, 230 Va. 208, 214-15, 335 S.E.2d 823, 826 (1985).

119. *Byrdson v. Commonwealth*, 2 Va. App. 400, 345 S.E.2d 528 (1986).

120. *Id.* at 403, 345 S.E.2d at 530.

121. *Id.* at 408, 345 S.E.2d at 532.



shals to transport state prisoners to the federal courthouse to testify in a section 1983 action brought by a state prisoner.<sup>122</sup> The Court also recognized that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."<sup>123</sup> An improper denial of a defendant's opportunity to impeach a witness for bias is subject to harmless-error analysis.<sup>124</sup> The confrontation clause does not require that a co-conspirator be unavailable to testify at trial, so long as there are sufficient indicia of reliability.<sup>125</sup> However, *Lee v. Illinois*<sup>126</sup> recognized that a co-defendant's confession inculcating the accused is inherently unreliable. To overcome the weighty presumption against the admission of such uncrossed-examined evidence, there must exist "sufficient 'indicia of reliability,' flowing from either the circumstances surrounding the confession or the 'interlocking' character of the confessions."<sup>127</sup>

*Hopkins v. Commonwealth*<sup>128</sup> recognized that the admissibility of the testimony of a previously hypnotized witness is within the discretion of the trial court. The trial judge must determine whether the hypnosis affected the witness's capacity to observe, remember, and communicate facts so as to render the witness incompetent. *Hopkins* also held that only statements of fact contained within reports of the chief medical examiner are admissible under a statutory exception to the hearsay rule.<sup>129</sup> Expressions of opinion are not admissible, merely because they are included within such reports. The Virginia Court of Appeals held that photographs which are properly authenticated by testimony are admissible even when the requirements of the statute are not satisfied.<sup>130</sup> The court also approved the use of a toy doll for demonstrative purposes,<sup>131</sup> and recognized that the competency of a juvenile witness is to be determined on the same basis as all other witnesses: capacity to observe events, capacity to recollect and communicate them, and ability to understand questions and to frame and make intelligent

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122. *Pennsylvania Bureau of Corrections v. United States Marshals*, 106 S. Ct. 355 (1985).

123. *Delaware v. Fensterer*, 106 S. Ct. 292, 295 (1985).

124. *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1438 (1986).

125. *United States v. Inadi*, 106 S. Ct. 1121, 1129 (1986).

126. 106 S. Ct. 2056, 2065 (1986).

127. *Id.*

128. 230 Va. 280, 337 S.E.2d 264 (1985).

129. *Id.*; see VA. CODE ANN. § 19.2-188 (Repl. Vol. 1983).

130. *Saunders v. Commonwealth*, 1 Va. App. 396, 339 S.E.2d 550 (1986).

131. *Kehinde v. Commonwealth*, 1 Va. App. 342, 338 S.E.2d 356 (1986).

answers, with a consciousness of the duty to speak the truth.<sup>132</sup>

The Virginia Supreme Court continued to discourage any use of lie detectors at trial. *Robinson v. Commonwealth*<sup>133</sup> refused to permit the results of a polygraph test to be used for impeachment purposes. The Virginia Court of Appeals reaffirmed that an adequate chain of custody is established when there is "reasonable" assurance that exhibits at trial are the same and in the same condition as they were when first obtained.<sup>134</sup>

In the troublesome area of a defendant's "other criminal offenses," the Virginia Supreme Court issued a general caution that relevant evidence must be weighed against the tendency of the evidence to produce passion and prejudice out of proportion to its probative value.<sup>135</sup> The Virginia Court of Appeals offered specific guidance by listing eight circumstances where evidence of "other crimes" may be relevant: (1) to prove motive to commit the crime charged; (2) to establish guilty knowledge or to negate good faith; (3) to negate the possibility of mistake or accident; (4) to show the conduct and feeling of the accused toward his victim, or to establish their prior relations; (5) to prove opportunity; (6) to prove identity of the accused as the one who committed the crime where the prior criminal acts are so distinctive as to indicate a *modus operandi*; (7) to demonstrate a common scheme or plan where the other crime or crimes constitute a part of a general scheme of which the crime charged is a part; and (8) when evidence of other crimes is so intimately connected and blended with facts proving the commission of the offense charged that it cannot be separated with propriety.<sup>136</sup>

In *Pancoast v. Commonwealth*,<sup>137</sup> the Virginia Court of Appeals offered Virginia's first definitive look at the defense of duress. "The common law defense of duress excuses acts which would otherwise constitute a crime, where the defendant shows that the acts were the product of threats inducing a reasonable fear of immediate death or serious bodily harm."<sup>138</sup> Where it is properly shown, duress is a complete defense to a crime. However, if the defendant

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132. *Royal v. Commonwealth*, 2 Va. App. 59, 341 S.E.2d 660 (1986).

133. 231 Va. 142, 341 S.E.2d 159 (1986).

134. *Horsley v. Commonwealth*, 2 Va. App. 335, 343 S.E.2d 389 (1986).

135. *Coe v. Commonwealth*, 231 Va. 83, 340 S.E.2d 820 (1986).

136. *Stuphini v. Commonwealth*, 1 Va. App. 241, 337 S.E.2d 897 (1985).

137. 2 Va. App. 28, 340 S.E.2d 833 (1986).

138. *Id.* at 33, 340 S.E.2d at 835 (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980)).

failed to take advantage of a reasonable opportunity to escape, or of a reasonable opportunity to avoid doing the acts without being harmed, the defendant may not rely on duress as a defense. Vague threats of future harm will not suffice to excuse criminal conduct. When the defendant fails to take advantage of an alternative to criminal conduct, the defendant may not rely on the defense of duress.<sup>139</sup>

The Virginia Court of Appeals also reaffirmed that counsel's opening statements are not evidence, thus preventing counsel from placing his client's character into evidence through his opening remarks.<sup>140</sup> *Darden v. Wainwright*<sup>141</sup> presented an extreme example of prosecution's emotional appeals during closing argument. In *Darden*, the prosecutor stated: "I wish I could see (the defendant) sitting here with no face, blown away by a shotgun."<sup>142</sup> Although such argument was condemned by every court to review it, the United States Supreme Court found that such comments had not "so infected the trial with unfairness as to make the resulting conviction a denial of due process."<sup>143</sup> Although not a constitutional violation, it is doubtful that Virginia courts would permit such improper emotional pleas.<sup>144</sup>

There is a helpful discussion of the irresistible impulse test in the majority and dissenting opinions in *Godley v. Commonwealth*.<sup>145</sup> The 1986 General Assembly changed a number of the procedures applicable to raising the insanity defense. The defendant must give twenty-one days notice of his intention to present expert testimony of an insanity defense.<sup>146</sup> The court may then order the defendant to submit to an evaluation by commonwealth experts, and shall advise the defendant on the record that a refusal to cooperate could result in exclusion of the defendant's expert evidence.<sup>147</sup> If the defendant refuses to cooperate, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting expert testimony on the issue of in-

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139. *Id.*

140. *Fields v. Commonwealth*, 2 Va. App. 300, 343 S.E.2d 379 (1986).

141. 106 S. Ct. 2464 (1985).

142. *Id.* at 2472 n.12.

143. *Id.* at 2472.

144. *See Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (1929).

145. 2 Va. App. 249, 343 S.E.2d 368 (1986).

146. VA. CODE ANN. § 19.2-168 (Cum. Supp. 1986).

147. *Id.* § 19.2-168.1.

sanity.<sup>148</sup> The legislation also addresses the defendant's right to expert testimony<sup>149</sup> in capital offense cases.<sup>150</sup>

Having previously recognized a first amendment right of access to suppression hearings,<sup>151</sup> and voir dire,<sup>152</sup> the United States Supreme Court extended the right of access to preliminary hearings.<sup>153</sup> Closure is appropriate only upon specific findings that: (1) there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent; and (2) reasonable alternatives to closure cannot adequately protect the defendant's free trial rights.<sup>154</sup>

### F. Sentencing

A condition for imposing the death penalty is a factual finding that the defendant killed, attempted to kill, or intended that a killing take place.<sup>155</sup> However, under federal constitutional law, this finding need not be made either by the jury or the sentencing judge, but may instead be made by a reviewing court.<sup>156</sup> Double jeopardy does not bar a further capital sentencing proceeding when a reviewing court finds the evidence insufficient to support the only aggravating factor on which the sentencing judge relied, and insufficient also to support the death penalty.<sup>157</sup>

Of more immediate impact in Virginia is the United States Supreme Court's ruling that a sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.<sup>158</sup> The court also held that the presumption of judicial vindictiveness<sup>159</sup> upon resentencing does not apply to cases in which the trial judge granted a post-trial motion for a new trial based on

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148. *Id.* § 19.2-168.1 (B).

149. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

150. VA. CODE ANN. § 19.2-264.3:1 (Cum. Supp. 1986).

151. *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 281 S.E.2d 915 (1981).

152. *Waller v. Georgia*, 467 U.S. 39 (1984).

153. *Press-Enterprise Co. v. Superior Court*, 106 S. Ct. 2735 (1986).

154. *Id.* at 2743.

155. *Enmund v. Florida*, 458 U.S. 782 (1982).

156. *Cabana v. Bullock*, 106 S. Ct. 689 (1986).

157. *Poland v. Arizona*, 106 S. Ct. 1749 (1986).

158. *Skipper v. South Carolina*, 106 S. Ct. 1669 (1986).

159. *See North Carolina v. Pearce*, 395 U.S. 711 (1969).

prosecutorial misconduct.<sup>160</sup> New evidence regarding the defendant's past "life, conduct, and his mental and moral propensities" may justify an increased sentence upon retrial.<sup>161</sup>

Also with respect to the death penalty, the United States Supreme Court reaffirmed the common-law rule prohibiting a state from inflicting the death penalty upon an insane person.<sup>162</sup> The Court also addressed the type of due process hearing required to determine post-conviction insanity. While not mandating a particular procedure, the Court found three due process deficiencies in the Florida procedure: (1) the defendant was not a party to the proceeding; (2) the defendant was denied any opportunity to challenge the determination of sanity; and (3) the decision of sanity was placed wholly within the executive branch.<sup>163</sup>

In *Duncan v. Commonwealth*,<sup>164</sup> the Virginia Court of Appeals limited defense efforts to present mitigating circumstances to the jury. The defendant offered evidence that he had made restitution, and had continued to be employed by the victim of the felony. The trial court's decision to exclude such evidence was upheld by the court of appeals. "By vesting the trial court with discretionary authority to suspend or modify the sentence imposed by the jury, the legislature intended to leave the consideration of mitigating circumstances to the court."<sup>165</sup>

Although the due process clause requires the prosecution to prove beyond a reasonable doubt every element of the offense charged,<sup>166</sup> the preponderance of evidence standard may be used to determine aggravating factors which affect the sentence to be imposed.<sup>167</sup> Under appropriate circumstances, defense counsel's decision not to introduce any evidence (other than a plea for mercy) in mitigation of the death penalty is reasonable and not ineffective representation of counsel.<sup>168</sup>

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160. *Texas v. McCullough*, 106 S. Ct. 976 (1986).

161. *Id.* at 982.

162. *Ford v. Wainwright*, 106 S. Ct. 2595 (1986).

163. *Id.* at 2604-05.

164. 2 Va. App. 342, 343 S.E.2d 392 (1986).

165. *Id.* at 345, 343 S.E.2d at 394.

166. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975).

167. *McMillian v. Pennsylvania*, 106 S. Ct. 2411 (1986).

168. *Darden v. Wainwright*, 106 S. Ct. 21 (1986).

### G. Appeals

Failure to file notice of appeal with the trial court is jurisdictional, and the Virginia Court of Appeals has no authority to extend the time period.<sup>169</sup> However, the court may extend the time for delivering a copy of the notice of appeal to the clerk of the court of appeals.<sup>170</sup> *Commonwealth v. Smith*<sup>171</sup> recognized that the commonwealth may appeal a judgment of the court of appeals admitting a convicted defendant to bail. Because the issue was not properly presented, the Virginia Supreme Court declined to rule on whether a single judge of the court of appeals has authority to grant or deny bail.<sup>172</sup>

Absent a specific showing of bias or prejudice, the trial judge may preside over a habeas corpus proceeding.<sup>173</sup> The court of appeals may not issue a writ for one held under criminal process, because only the Virginia Supreme Court or the circuit court which entered the original judgment may issue a writ of habeas corpus in such cases.<sup>174</sup> The court of appeals also is without jurisdiction to hear habeas corpus appeals arising from convictions where the death penalty has been imposed.<sup>175</sup> *Welch v. Department of Corrections*<sup>176</sup> recognized that the scope of a habeas corpus inquiry is limited to determining the propriety of the present detention. There is no requirement that the petitioner be given credit for time served under a void sentence prior to the habeas corpus proceeding.

In its review of two Virginia cases, the United States Supreme Court further tightened the procedural bars to federal habeas corpus review. Some twenty years ago, the "Warren Court" held that the failure to exhaust state remedies of direct appeal and state habeas corpus would bar federal habeas corpus review only if the habeas petitioner had "deliberately by-passed the orderly procedure of the state courts."<sup>177</sup> This *deliberate* by-pass required "an

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169. *Williams v. Landon*, 1 Va. App. 206, 336 S.E.2d 907 (1985).

170. *Johnson v. Commonwealth*, 1 Va. App. 510, 339 S.E.2d 919 (1986).

171. 230 Va. 354, 337 S.E.2d 278 (1985).

172. *Id.* at 361, 337 S.E.2d at 282.

173. *Titcomb v. Wyant*, 1 Va. App. 31, 333 S.E.2d 82 (1985).

174. *Bullock v. Department of Corrections*, 1 Va. App. 70, 334 S.E.2d 150, *cert. denied*, 106 S. Ct. 576 (1985).

175. *Peterson v. Bass*, 2 Va. App. 314, 343 S.E.2d 475 (1986).

176. 1 Va. App. 179, 334 S.E.2d 150 (1985).

177. *Fay v. Noia*, 372 U.S. 391, 438 (1963).

intentional relinquishment or abandonment of a known right or privilege."<sup>178</sup> *Wainwright v. Sykes*<sup>179</sup> implied that default of a claim by counsel pursuant to trial strategy would bind the habeas petitioner even if he had not personally waived that claim. The Court of Appeals for the Fourth Circuit interpreted *Wainwright* as requiring a deliberate decision of counsel, and thus permitted federal habeas corpus review when counsel's failure to pursue state remedies was due to ignorance or inadvertance.<sup>180</sup> The Supreme Court reversed the Fourth Circuit and held that "so long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."<sup>181</sup> The only exception is that, in an "extraordinary case where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."<sup>182</sup>

Finally, in *Rose v. Clark*,<sup>183</sup> the United States Supreme Court held that harmless error analysis<sup>184</sup> must be applied to cases where a jury instruction has impermissibly shifted the burden of proof to a defendant.<sup>185</sup>

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178. *Id.* at 439.

179. 433 U.S. 72 (1977).

180. *Carrier v. Hutto*, 724 F.2d 396 (4th Cir. 1983).

181. *Smith v. Murray*, 106 S. Ct. 2661 (1986); *Murray v. Carrier*, 106 S. Ct. 2639, 2645-46 (1986).

182. *Murray*, 106 S. Ct. at 2650.

183. 106 S. Ct. 3101 (1986).

184. *See Chapman v. California*, 386 U.S. 18 (1967).

185. *See Sandstrom v. Montana*, 442 U.S. 510 (1979).