

11-1-2017

## Criminal Law and Procedure

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### Recommended Citation

Aaron J. Campbell, *Criminal Law and Procedure*, 52 U. Rich. L. Rev. 29 (2017).

Available at: <https://scholarship.richmond.edu/lawreview/vol52/iss1/4>

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# CRIMINAL LAW AND PROCEDURE

*Aaron J. Campbell* \*

## INTRODUCTION

This article aims to give a succinct review of notable criminal law and procedure cases decided by the Supreme Court of Virginia and the Court of Appeals of Virginia during the past year. Instead of covering every ruling or rationale in these cases, the article focuses on the “take-away” of the holdings with the most precedential value. The article also summarizes noteworthy changes to criminal law and procedure enacted by the 2017 Virginia General Assembly.

## I. CRIMINAL PROCEDURE

### A. *Right to a Jury Trial*

In *Richardson v. Commonwealth*, the Court of Appeals of Virginia considered whether the defendant waived his right to a jury trial even though he did not expressly ask to be tried by a judge.<sup>1</sup> When the defendant “refused to participate in the colloquy during his arraignment” on a felony, the trial court declared it would interpret the defendant’s “silence as both a waiver of his right to be tried by a jury and an acquiescence to being tried by the court.”<sup>2</sup> The trial court then tried the case without a jury and found the defendant guilty.<sup>3</sup>

On appeal, the defendant argued his conviction should be reversed because “he never knowingly and voluntarily waived his

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1. 67 Va. App. 436, 439, 796 S.E.2d 854, 855 (2017).
2. *Id.* at 439, 796 S.E.2d at 855.
3. *Id.* at 440, 796 S.E.2d at 856.

right to a jury trial.”<sup>4</sup> In finding in the defendant’s favor, the court of appeals explained that the Virginia Constitution guarantees an accused a right to be tried by a jury, but not a right to be tried by a judge.<sup>5</sup> The court of appeals further explained that the Virginia Constitution requires an accused to affirmatively consent to be tried without a jury and that consent must be entered in the record.<sup>6</sup> In this case, the record did not demonstrate the defendant affirmatively consented to a bench trial.<sup>7</sup> The court of appeals therefore held “that the trial court did not have jurisdiction to proceed with [the defendant’s] bench trial” and remanded the case for a new trial.<sup>8</sup>

### B. *Withdrawal of a Guilty Plea*

In *Small v. Commonwealth*, the Supreme Court of Virginia, for the first time, recognized that trial courts should consider whether allowing a guilty plea to be withdrawn will cause prejudice to the Commonwealth.<sup>9</sup> After the defendant pled guilty to possession of a firearm by a convicted felon, the trial court continued the sentencing hearing nine times so the defendant could testify in another trial.<sup>10</sup> After almost three years, the defendant moved to withdraw his guilty plea, but was denied.<sup>11</sup> In denying the motion, “the trial court found that the Commonwealth would be unduly prejudiced in trying [the defendant] due to the” amount of time that had passed since the incident.<sup>12</sup>

The defendant maintained he should have been allowed to withdraw his guilty plea because he had a reasonable defense that he possessed the firearm out of necessity.<sup>13</sup> The Court of Appeals of Virginia found the defendant did not demonstrate he had a reasonable defense to the charge.<sup>14</sup> The supreme court agreed that the defendant failed to show an “imminent threatened harm’

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4. *Id.* at 441, 796 S.E.2d at 856.

5. *Id.* at 442–43, 796 S.E.2d at 857 (citing VA. CONST. art. I, § 8).

6. *Id.* at 445, 796 S.E.2d at 858 (citing VA. CONST. art. I, § 8).

7. *Id.* at 447, 796 S.E.2d at 859.

8. *Id.* at 447, 796 S.E.2d at 859.

9. 292 Va. 292, 298, 788 S.E.2d 702, 705 (2016).

10. *Id.* at 294–95, 788 S.E.2d at 703.

11. *Id.* at 295, 788 S.E.2d at 703.

12. *Id.* at 295, 788 S.E.2d at 703.

13. *Id.* at 296, 788 S.E.2d at 704.

14. *Id.* at 299, 788 S.E.2d at 705.

which led to him possessing a firearm” out of necessity.<sup>15</sup> The supreme court also joined the Court of Appeals of Virginia and the Fourth Circuit and recognized prejudice to the Commonwealth as a relevant factor that should be considered when reviewing a motion to withdraw a guilty plea.<sup>16</sup> Due to the lengthy delay between the defendant’s guilty plea and his motion to withdraw that plea, the supreme court held that the trial court did not err “by weighing the equities and considering the resulting prejudice to the Commonwealth.”<sup>17</sup>

In *Valazquez v. Commonwealth*, the Supreme Court of Virginia decided whether filing a notice of appeal deprived the trial court of jurisdiction to consider a motion to withdraw a guilty plea.<sup>18</sup> After the defendant’s guilty plea and sentencing, the trial court appointed the defendant a new attorney for the appeal.<sup>19</sup> On the same day, the defendant’s new attorney timely filed a notice of appeal and a motion to withdraw the guilty plea.<sup>20</sup> The trial court ruled that the notice of appeal deprived the court of jurisdiction to consider the motion to withdraw the plea, and alternatively, the defendant did not prove a “manifest injustice” sufficient to withdraw his plea.<sup>21</sup> The supreme court agreed with the alternative ruling that the defendant had not proven a “manifest injustice,” and thus, the defendant’s motion failed on the merits.<sup>22</sup> As for the jurisdictional ruling, however, the supreme court held that the filing of the notice of appeal did not divest the trial court of jurisdiction.<sup>23</sup> The supreme court concluded that, under the plain language of Virginia Code section 19.2-296, a motion to withdraw a guilty plea is timely so long as it is made within twenty-one days of the final order imposing a sentence.<sup>24</sup>

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15. *Id.* at 300, 788 S.E.2d at 706 (quoting *Humphrey v. Commonwealth*, 37 Va. App. 36, 45, 553 S.E.2d 546, 550 (2001)).

16. *Id.* at 298, 788 S.E.2d at 705 (discussing *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991); *Howell v. Commonwealth*, 60 Va. App. 737, 749, 732 S.E.2d 722, 728 (2012); *Hubbard v. Commonwealth*, 60 Va. App. 200, 211 n.4, 725 S.E.2d 163, 168 n.4 (2012)).

17. *Id.* at 298–99, 788 S.E.2d at 705.

18. 292 Va. 603, 610–11, 791 S.E.2d 556, 559 (2016).

19. *Id.* at 606, 791 S.E.2d at 557.

20. *Id.* at 606–07, 791 S.E.2d at 557.

21. *Id.* at 610, 791 S.E.2d at 559.

22. *Id.* at 616–17, 791 S.E.2d at 562.

23. *Id.* at 613, 791 S.E.2d at 560.

24. *Id.* at 613, 791 S.E.2d at 560.

### C. *Defenses*

In *Hines v. Commonwealth*, the Supreme Court of Virginia considered whether the defendant acted in self-defense when he shot and killed someone in his home.<sup>25</sup> The shooting victim, Hudson, became belligerent while drinking at Hines's home.<sup>26</sup> Hines testified that after Hudson brandished a gun in the presence of Hines and his family, Hines retrieved his own gun from another room.<sup>27</sup> When Hines reentered the room, Hudson pointed his gun at him.<sup>28</sup> Hines then shot Hudson.<sup>29</sup> At his trial for first degree murder, Hines argued he acted in self-defense in shooting Hudson.<sup>30</sup> "The trial court concluded as a matter of law, however, that Hines did not carry his burden of proving his claim of self-defense because when he went to another room to retrieve his own gun, he 'removed himself from [the] danger.'"<sup>31</sup>

The supreme court held that the trial court's conclusion was contrary to the evidence and, therefore, "plainly wrong."<sup>32</sup> Notably, the supreme court rejected the notion that Hines could not claim self-defense because "he had the opportunity to remove himself from the threat of danger."<sup>33</sup> As a matter of legal principle in Virginia, "when a party is assaulted in his own home, that party, as a homeowner (or tenant, as the case may be), has the right to use whatever means necessary to repel the aggressor, 'even to the taking of life.'"<sup>34</sup> Given this principle and the facts of the case, the supreme court concluded Hines shot Hudson in self-defense.<sup>35</sup>

In *Broadous v. Commonwealth*, the Court of Appeals of Virginia interpreted, as a matter of first impression, the affirmative defense afforded by Virginia Code section 18.2-251.03.<sup>36</sup> In 2015, the General Assembly passed that statute to provide a "safe harbor"

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25. 292 Va. 674, 676–77, 791 S.E.2d 563, 563–64 (2016).

26. *Id.* at 677, 791 S.E.2d at 564.

27. *Id.* at 677, 791 S.E.2d at 564.

28. *Id.* at 677–78, 791 S.E.2d at 564.

29. *Id.* at 677–78, 791 S.E.2d at 564.

30. *Id.* at 677–78, 791 S.E.2d at 564.

31. *Id.* at 678, 791 S.E.2d at 564 (alteration in original).

32. *Id.* at 679, 791 S.E.2d at 565.

33. *Id.* at 681, 791 S.E.2d at 566.

34. *Id.* at 681, 791 S.E.2d at 566 (quoting *Fortune v. Commonwealth*, 133 Va. 669, 687, 112 S.E. 861, 867 (1922)).

35. *Id.* at 681, 791 S.E.2d at 566.

36. 67 Va. App. 265, 266, 268, 795 S.E.2d 904, 905 (2017).

from prosecution for certain drug offenses for an accused who “seeks or obtains” emergency medical treatment for a drug overdose.<sup>37</sup> In this case, the defendant sought to apply the statute’s affirmative defense to her drug possession charge, even though her boyfriend was the one who called 911 for her drug overdose.<sup>38</sup>

The defendant argued the statute supplied an affirmative defense to her charge because she was a person who “obtained” emergency medical attention for an overdose.<sup>39</sup> In the defendant’s view, “the word ‘obtains’ should not be interpreted to require a volitional act.”<sup>40</sup> In disagreeing with her interpretation of the statute, the court of appeals held that, in context, “the words ‘seek’ and ‘obtain’ are active verbs that require more than passive receipt of emergency medical attention.”<sup>41</sup> The court of appeals concluded that a plain reading of the statute “provides an affirmative defense only to the individual making the emergency report,” which, in this case, would have been the defendant’s boyfriend.<sup>42</sup>

#### D. Testimony

The Court of Appeals of Virginia’s decision in *Reyes v. Commonwealth* involved the balance between the defendant’s Sixth Amendment right to compel evidence in his favor and a witness’s Fifth Amendment right to be free from self-incrimination.<sup>43</sup> Prior to his trial for malicious wounding, the defendant filed a motion to compel the testimony of one of his co-defendants.<sup>44</sup> The co-defendant opposed the motion and “invoked his Fifth Amendment right against self-incrimination.”<sup>45</sup> The trial court had defense counsel proffer the specific questions he intended to ask the co-defendant outside the presence of the jury, so the court could determine question by question whether the co-defendant “was entitled to assert his Fifth Amendment right against self-

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37. *Id.* at 268, 271, 795 S.E.2d at 905–07.

38. *Id.* at 266–67, 795 S.E.2d at 905.

39. *Id.* at 270–71, 795 S.E.2d at 906–07.

40. *Id.* at 270, 795 S.E.2d at 907.

41. *Id.* at 271, 795 S.E.2d at 907.

42. *Id.* at 273, 795 S.E.2d at 908.

43. 66 Va. App. 689, 693, 791 S.E.2d 357, 359 (2016).

44. *Id.* at 691, 791 S.E.2d at 358.

45. *Id.* at 691, 791 S.E.2d at 358.

incrimination.”<sup>46</sup> After doing so, the trial court allowed the co-defendant to assert his Fifth Amendment rights, finding that the questions could expose him to federal prosecution.<sup>47</sup>

The defendant argued on appeal that his Sixth Amendment right to call witnesses on his own behalf was violated when the trial court prevented his co-defendant from testifying in the defendant’s favor.<sup>48</sup> In rejecting this argument, the court of appeals pointed out that “a defendant has ‘no right to compel his co-defendant to testify if the co-defendant elected to invoke his right against self-incrimination.’”<sup>49</sup> Ultimately, a trial court must determine “question by question, whether a witness may invoke his right against self-incrimination.”<sup>50</sup> The court of appeals concluded that the trial court followed the proper procedure in this case and “properly balanced [the defendant’s] Sixth Amendment right to compel evidence in his favor against the witness’s Fifth Amendment right to be free from self-incrimination.”<sup>51</sup>

### E. *Jury Instructions*

In *Payne v. Commonwealth*, the Supreme Court of Virginia considered whether the trial court erred in refusing a proffered jury instruction on eyewitness identifications.<sup>52</sup> A witness had previously identified the defendant—in both a photo lineup and at the preliminary hearing—as the man who had pointed a gun at him.<sup>53</sup> At the conclusion of the trial, the defendant proffered a jury instruction that contained four factors a jury should consider in evaluating the reliability of eyewitness identifications.<sup>54</sup> The trial court refused the proffered instruction.<sup>55</sup>

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46. *Id.* at 691–92, 791 S.E.2d at 358.

47. *Id.* at 692, 791 S.E.2d at 358.

48. *Id.* at 693, 791 S.E.2d at 359.

49. *Id.* at 693–94, 791 S.E.2d at 359 (quoting *Dearing v. Commonwealth*, 259 Va. 117, 122, 524 S.E.2d 121, 124 (2000) (original alterations omitted)).

50. *Id.* at 694, 791 S.E.2d at 359 (citing *Carter v. Commonwealth*, 39 Va. App. 735, 751, 576 S.E.2d 773, 781 (2003)).

51. *Id.* at 694–95, 791 S.E.2d at 360.

52. 292 Va. 855, 859, 863, 794 S.E.2d 577, 578–79, 581 (2016).

53. *Id.* at 860–61, 794 S.E.2d at 579–80.

54. *Id.* at 864, 794 S.E.2d at 582. The proffered jury instruction was “loosely modeled” on the instruction in *United States v. Telfaire*, 469 F.2d 552, 558–59 (D.C. Cir. 1972). *Payne*, 292 Va. at 859, 794 S.E.2d at 581.

55. *Id.* at 864, 794 S.E.2d at 582.

In finding that the trial court did not err, the supreme court held that “[t]he proffered instruction would have focused the jury’s attention on four enumerated factors, thereby suggesting that those four factors were exclusive or at least entitled to special consideration or undue weight.”<sup>56</sup> As the supreme court explained, while a party may focus the jury’s attention on evidence during closing argument, “it is not appropriate for the *court* to do so in a jury instruction because, under the law of Virginia, the jury is free to weigh the evidence how it chooses.”<sup>57</sup> The supreme court made clear, however, that its decision should not be interpreted as a categorical prohibition against eyewitness identification jury instructions in Virginia.<sup>58</sup> So long as an instruction “avoid[ed] the problem of focusing the jury’s attention on a limited number of factors” and was supported by the evidence, a trial court would not err in giving it.<sup>59</sup>

In *Lindsey v. Commonwealth*, the Supreme Court of Virginia addressed whether a jury instruction concerning the willful concealment of goods violated the defendant’s due process rights by shifting the burden of proof.<sup>60</sup> The defendant was caught concealing merchandise under his jacket at a store.<sup>61</sup> At the defendant’s trial for petit larceny, the trial court gave the following jury instruction over the defendant’s objection: “Willful concealment of goods or merchandise while still on the premises of a store is evidence of an intent to convert and defraud the owner of the value of the goods or merchandise, unless there is believable evidence to the contrary.”<sup>62</sup>

The defendant argued that the instruction violated his due process rights because it “contained a mandatory, rebuttable presumption that shifted the burden of proof to him.”<sup>63</sup> The supreme court held, however, that the instruction contained only a “permissible inference that the jury was free to reject.”<sup>64</sup> The instruction “merely instructed the jury that willful concealment of goods

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56. *Id.* at 871, 794 S.E.2d at 585.

57. *Id.* at 871, 794 S.E.2d at 585.

58. *Id.* at 872, 794 S.E.2d at 586.

59. *Id.* at 872, 794 S.E.2d at 586.

60. 293 Va. 1, 4–5, 795 S.E.2d 311, 312 (2017).

61. *Id.* at 4, 795 S.E.2d at 312.

62. *Id.* at 3–4, 795 S.E.2d at 312 (citing VA. MODEL JURY INSTRUCTIONS—CRIMINAL, Jury Instr. No. 36.840 (Repl. ed. 2011)).

63. *Id.* at 5, 795 S.E.2d at 313.

64. *Id.* at 8, 795 S.E.2d at 314.



while on the premises of a store *is evidence of* intent to convert and defraud.”<sup>65</sup> The “instruction did not relieve the Commonwealth of its burden of proving” the elements of the offense.<sup>66</sup> Thus, the supreme court concluded that the trial court did not err in giving the instruction.<sup>67</sup>

### F. Sentencing

In *Du v. Commonwealth*, the Supreme Court of Virginia wrestled with whether the trial court abused its discretion by ordering the defendant to have no contact with one of the victims—his stepmother.<sup>68</sup> The defendant pled guilty to the “statutory rape of his 13-year-old half-sister, aggravated malicious wounding of his father, and malicious wounding of his stepmother.”<sup>69</sup> Prior to entering his pleas, the defendant “wrote several letters to his father and stepmother attempting to obstruct the ongoing investigation of his charges and to keep them from testifying against him at trial.”<sup>70</sup> As a condition of suspending a portion of the defendant’s sentence, the trial court ordered that the defendant have no contact with the victims.<sup>71</sup> After the trial court announced the condition, the prosecutor proffered simply that the defendant’s stepmother requested that the no-contact provision not apply to her.<sup>72</sup> The trial court declined that request and a subsequent motion to reconsider the no-contact provision.<sup>73</sup>

The supreme court held that the trial court did not abuse its discretion in ordering the no-contact provision.<sup>74</sup> The supreme court found that the record—particularly the stepmother’s victim impact statement—contained “ample grounds for the trial court’s decision to discount the prosecutor’s proffer of the stepmother’s

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65. *Id.* at 8, 795 S.E.2d at 314.

66. *Id.* at 8, 795 S.E.2d at 314.

67. *Id.* at 8, 795 S.E.2d at 314. Two justices dissented. *Id.* at 10, 795 S.E.2d at 315 (Goodwyn, J., dissenting). The dissenting justices would have found that the jury instruction was unconstitutional because it “contains mandatory language that a jury might reasonably have understood as creating a mandatory rebuttable presumption that shifted the burden of persuasion to the defendant.” *Id.* at 17, 795 S.E.2d at 318–19.

68. 292 Va. 555, 557, 561, 790 S.E.2d 493, 495, 497 (2016).

69. *Id.* at 557, 790 S.E.2d at 495.

70. *Id.* at 558, 790 S.E.2d at 496.

71. *Id.* at 561, 790 S.E.2d at 497.

72. *Id.* at 561, 790 S.E.2d at 497.

73. *Id.* at 561–62, 790 S.E.2d 497–98.

74. *Id.* at 568, 790 S.E.2d at 501.

wishes.”<sup>75</sup> The supreme court also shared the trial court’s concern that the defendant might later try again to pressure the stepmother into recanting her testimony.<sup>76</sup>

### G. *Juvenile Life Sentences*

A hotly contested issue continues to be the application of *Miller v. Alabama*, in which the Supreme Court of the United States held that a sentencing scheme mandating life without parole for juveniles violates the Eighth Amendment’s prohibition on cruel and unusual punishments.<sup>77</sup> The Supreme Court of Virginia’s most recent decision on the issue, *Jones v. Commonwealth* (“*Jones II*”), was actually the second time the court had considered whether Jones’s life sentence ran afoul of *Miller*.<sup>78</sup> Three years earlier, in *Jones I*, the Supreme Court of Virginia held that the sentencing scheme applicable to Jones’s life sentence did not violate *Miller* because “the trial court ha[d] the ability under Code § 19.2-303 to suspend part or all of the life sentence.”<sup>79</sup> The Supreme Court of the United States vacated and remanded *Jones I* for reconsideration in light of its recent decision in *Montgomery v. Louisiana* that *Miller* was retroactive.<sup>80</sup>

The Supreme Court of Virginia’s opinion on remand was complex, but essentially the court made three rulings. First, the supreme court reaffirmed its holding in *Jones I* that, under Virginia law, “Jones’s conviction was not a mandatory life without the possibility of parole scheme.”<sup>81</sup> Second, the supreme court rejected Jones’s argument that *Montgomery* and *Miller* require a hearing to present mitigation evidence of his “youth and its attendant characteristics.”<sup>82</sup> The supreme court rejected this argument, in part, because Jones had the “constitutionally required opportuni-

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75. *Id.* at 566–67, 790 S.E.2d at 500.

76. *Id.* at 567, 790 S.E.2d at 501. In dissent, Justice Powell acknowledged this was a “horrible case,” in which “one might wish to impose a no-contact condition.” *Id.* at 568–69, 790 S.E.2d at 501 (Powell, J., dissenting). Justice Powell, however, would have held that the no-contact provision, with regard to the stepmother, was an abuse of discretion. *Id.* at 568–69, 790 S.E.2d at 501–02.

77. 567 U.S. 460, 465 (2012).

78. 293 Va. 29, 33–34, 37, 795 S.E.2d 705, 707, 709 (2017).

79. *Jones v. Commonwealth* (*Jones I*), 288 Va. 475, 477, 763 S.E.2d 823, 823 (2014).

80. *Jones II*, 293 Va. at 33, 37, 795 S.E.2d at 707, 709 (citing *Montgomery v. Louisiana*, 577 U.S. \_\_\_, \_\_\_, 136 S. Ct. 718, 732 (2016)).

81. *Id.* at 41, 795 S.E.2d at 712 (quoting *Jones I*, 288 Va. at 477, 763 S.E.2d at 823).

82. *Id.* at 42, 795 S.E.2d at 712.

ty” to present such evidence, but “he simply chose not to exercise it.”<sup>83</sup> Finally, the supreme court held that a *Miller* violation would not make Jones’s sentence “void ab initio,” but would make it “merely voidable.”<sup>84</sup> The supreme court concluded that a *Miller* violation, like any voidable sentence, cannot be addressed by a motion to vacate filed years later.<sup>85</sup>

## H. Appeals

In *Granado v. Commonwealth*, the Supreme Court of Virginia reviewed whether the appellant’s appeal should have been dismissed for failing to timely file a “written statement of facts in lieu of a transcript.”<sup>86</sup> On the day of the deadline, the appellant filed a proposed written statement of facts.<sup>87</sup> Two days after the initial filing, the appellant filed a revised version of the facts, which the trial court signed two days later.<sup>88</sup> The circuit court clerk, however, only transmitted the revised version to the court of appeals.<sup>89</sup> In its per curiam order denying the appeal, the court of appeals “held that because there was no timely filed transcript or written statement of facts in the record, the record was insufficient to address the assignments of error.”<sup>90</sup> Three days after this ruling, the circuit court clerk forwarded the original statement of facts to the court of appeals.<sup>91</sup> A three-judge panel of the court of appeals nonetheless denied the appeal for the same reasons as the per curiam order.<sup>92</sup>

The supreme court held that the court of appeals erred in dismissing the appeal.<sup>93</sup> The supreme court noted that a trial court

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83. *Id.* at 43–44, 795 S.E.2d at 713.

84. *See id.* at 54, 795 S.E.2d at 720.

85. *See id.* at 54, 795 S.E.2d at 720. Three justices dissented. *Id.* at 60, 795 S.E.2d at 723 (Powell, J., dissenting). The dissenting justices would have held that “*Montgomery* explicitly requires that a *Miller* hearing be held before a life sentence without parole may be imposed upon a juvenile offender.” *Id.* at 60, 795 S.E.2d at 723. Because Jones never received such a hearing, the dissent would have held that the trial court was without jurisdiction to impose the life sentence. *Id.* at 60, 795 S.E.2d at 723.

86. 292 Va. 402, 405, 790 S.E.2d 233, 234 (2016).

87. *Id.* at 405, 790 S.E.2d at 234–35.

88. *Id.* at 405, 790 S.E.2d at 234–35.

89. *Id.* at 405, 790 S.E.2d at 235.

90. *Id.* at 405, 790 S.E.2d at 235.

91. *Id.* at 405–06, 790 S.E.2d at 235.

92. *Id.* at 406, 790 S.E.2d at 235.

93. *Id.* at 409, 790 S.E.2d at 237.

has the “correction power . . . to enter a revised version of a timely filed statement of facts.”<sup>94</sup> Here, the court of appeals should not have dismissed the appeal because it had received an amended record that contained the timely version of the statement of facts.<sup>95</sup> Also, because an appeal had not yet been granted, the court of appeals did not need to issue “a writ of certiorari before it could consider the contents of the amended record certified by the clerk of the circuit court.”<sup>96</sup>

## II. CRIMINAL LAW

### A. Search and Seizure

In *Edmond v. Commonwealth*, the Court of Appeals of Virginia examined whether a police officer had reasonable suspicion to stop the defendant’s vehicle under the “collective knowledge doctrine.”<sup>97</sup> On May 5, 2014, Richmond police learned of a robbery and homicide at a jewelry store.<sup>98</sup> Earlier that day, Detective Henry of the Henrico County Police Department received a report of a “suspicious situation” at a bank, in which two individuals left in a Dodge Durango.<sup>99</sup> Detective Henry located the lease owner of the Durango and learned that it had a GPS tracking device.<sup>100</sup> Using the GPS tracking technology, the officer discovered that the Durango had been near the jewelry store shortly before the robbery.<sup>101</sup> Detective Henry passed on this information to Detective Gouldman of the City of Richmond Police Department.<sup>102</sup> The next day, the GPS tracking showed the Durango in North Carolina.<sup>103</sup> Detective Henry provided this information to Detective Gouldman, who contacted the United States Marshal’s office for assistance in locating the vehicle.<sup>104</sup> A Deputy United States Marshal in North Carolina located the Durango and, after speak-

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94. *Id.* at 409, 790 S.E.2d at 237 (citing VA. SUP. CT. R. 5A:8(d) (Repl. Vol. 2017)).

95. *See id.* at 408, 790 S.E.2d at 236.

96. *Id.* at 409, 790 S.E.2d at 236–37.

97. 66 Va. App. 490, 493, 498, 788 S.E.2d 277, 279, 281 (2016).

98. *Id.* at 493–94, 788 S.E.2d at 279.

99. *Id.* at 494, 788 S.E.2d at 279.

100. *Id.* at 494–95, 788 S.E.2d at 279.

101. *Id.* at 495, 788 S.E.2d at 279.

102. *Id.* at 493–95, 788 S.E.2d at 279.

103. *Id.* at 495, 788 S.E.2d at 279.

104. *Id.* at 495, 788 S.E.2d at 279–80.

ing with Detective Gouldman about the matter, had local law enforcement stop the vehicle.<sup>105</sup>

On appeal, the defendant argued that the Deputy United States Marshal did not have “a reasonable, articulable suspicion” to stop the vehicle.<sup>106</sup> In deciding this issue, the court of appeals, for the first time in Virginia, adopted the “collective knowledge doctrine.”<sup>107</sup> Under the doctrine, “an officer is justified in acting upon an instruction from another officer if the instructing officer had sufficient information to justify taking such action himself.”<sup>108</sup> In applying the collective knowledge doctrine to this case, the court of appeals found that the Deputy United States Marshal was “little more than a conduit or ‘go between’ transmitting information” to the local police.<sup>109</sup> The court of appeals concluded that the instructing officer was actually Detective Gouldman and that he possessed the necessary reasonable suspicion to effectuate the stop.<sup>110</sup> Accordingly, the stop did not violate the Fourth Amendment.<sup>111</sup>

In *Collins v. Commonwealth*, the Supreme Court of Virginia considered whether the trial court erred in denying a “motion to suppress evidence obtained when police conducted a warrantless search of a stolen motorcycle parked in the driveway” of the defendant’s home.<sup>112</sup> The motorcycle in question had twice eluded law enforcement.<sup>113</sup> During the second encounter, Officer Rhodes took a picture of the motorcycle’s license plate and later learned that the motorcycle had been stolen.<sup>114</sup> A few months later, while investigating another matter involving the defendant, officers confronted the defendant about the motorcycle.<sup>115</sup> The defendant denied any knowledge of the motorcycle, despite pictures on his Facebook account of him with the motorcycle.<sup>116</sup> Shortly thereaf-

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105. *Id.* at 495–97, 788 S.E.2d at 280.

106. *Id.* at 499, 788 S.E.2d at 282.

107. *Id.* at 503, 788 S.E.2d at 283.

108. *Id.* at 503, 788 S.E.2d at 283.

109. *Id.* at 505, 788 S.E.2d at 284.

110. *Id.* at 504, 788 S.E.2d at 284.

111. *Id.* at 506, 788 S.E.2d at 285.

112. 292 Va. 486, 488, 790 S.E.2d 611, 612 (2016), *cert. granted*, No. 16-1027, 2017 U.S. LEXIS 4455 (Sept. 28, 2017).

113. *Id.* at 489, 790 S.E.2d at 612–13.

114. *Id.* at 489–90, 790 S.E.2d at 613.

115. *Id.* at 491, 790 S.E.2d at 613.

116. *Id.* at 491, 790 S.E.2d at 613.

ter, Officer Rhodes located the house in the pictures and what appeared to be a motorcycle covered with a tarp in the driveway.<sup>117</sup> The officer lifted the tarp, located the vehicle identification number, and confirmed that it was the same stolen motorcycle that had eluded him.<sup>118</sup>

The trial court denied the defendant's motion to suppress the evidence obtained from Officer Rhodes's search.<sup>119</sup> The Court of Appeals of Virginia upheld the trial court's ruling "under the exigent circumstances exception to the Fourth Amendment's warrant requirement."<sup>120</sup> The supreme court held that the case was "more properly addressed by a different exception to the warrant requirement: the automobile exception."<sup>121</sup> There exists a "simple, bright-line test for the automobile exception: '[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.'<sup>122</sup> In applying the exception to this case, the supreme court found that Officer Rhodes had probable cause to believe the motorcycle was contraband.<sup>123</sup> The supreme court further found that the automobile exception applies even if the vehicle is not "immediately mobile."<sup>124</sup> Finally, the supreme court held that the automobile exception may apply to vehicles parked on private property.<sup>125</sup>

## B. *Specific Crimes*

### 1. Accessory After the Fact to Murder

In *Suter v. Commonwealth*, the Court of Appeals of Virginia addressed an issue of first impression in Virginia: whether accessory after the fact to murder requires the victim's death to have

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117. *Id.* at 491, 790 S.E.2d at 614.

118. *Id.* at 492, 790 S.E.2d at 614.

119. *Id.* at 495, 790 S.E.2d at 615.

120. *Id.* at 495, 790 S.E.2d at 615 (citing *Collins v. Commonwealth*, 65 Va. App. 37, 46–48, 773 S.E.2d 618, 623–24 (2015)).

121. *Id.* at 497, 790 S.E.2d at 617.

122. *Id.* at 498, 790 S.E.2d at 617 (alterations in original) (quoting *Maryland v. Dyson*, 527 U.S. 465, 467 (1999)).

123. *Id.* at 498–99, 790 S.E.2d at 617.

124. *See id.* at 499–501, 790 S.E.2d at 617–18.

125. *See id.* at 501–03, 790 S.E.2d at 619–20. In dissent, Justice Mims would not have applied the automobile exception because, in his view, "Officer Rhodes did not search an automobile, he searched a tarp." *Id.* at 506, 790 S.E.2d at 621 (Mims, J., dissenting).

occurred prior to the rendering of aid.<sup>126</sup> Following a shooting, the defendant drove the shooter away from the scene of the crime.<sup>127</sup> Two days later, the victim died from the gunshot wounds.<sup>128</sup> The defendant challenged her conviction to accessory after the fact to murder, arguing that because the victim did not die until two days after he had been shot, she could not have possessed the requisite knowledge that a homicide had occurred when she rendered aid to the shooter.<sup>129</sup> The court of appeals agreed.<sup>130</sup>

Under the common law, a felony must be complete at the time the assistance is rendered to constitute accessory after the fact.<sup>131</sup> The court of appeals concluded that because this common law rule “has not been modified by the General Assembly, a person cannot, as a matter of law, be convicted as an accessory after the fact to a murder because of aid given after the murderer’s acts but before the victim’s death.”<sup>132</sup> The court of appeals noted that “a small minority of jurisdictions have departed from the requirement that the death must have occurred prior to the rendering of assistance.”<sup>133</sup> The court of appeals declined, however, to depart from the common law rule, noting that any change to the common law is a decision that rests with the General Assembly.<sup>134</sup>

## 2. Assault and Battery

In *Commonwealth v. Lambert*, the Supreme Court of Virginia examined whether the “Court of Appeals erred in reversing a school teacher’s misdemeanor conviction for assault and battery of a special needs student.”<sup>135</sup> The teacher was on “bus duty” when a “bus arrived carrying . . . an eleven-year-old student with Downs Syndrome.”<sup>136</sup> The student got off the bus, handed her be-

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126. 67 Va. App. 311, 318, 796 S.E.2d 416, 420 (2017).

127. *Id.* at 315, 796 S.E.2d at 418.

128. *Id.* at 315, 796 S.E.2d at 418.

129. *Id.* at 318, 796 S.E.2d at 420.

130. *Id.* at 320, 796 S.E.2d at 421.

131. *Id.* at 319, 796 S.E.2d at 420.

132. *Id.* at 320, 796 S.E.2d at 421.

133. *Id.* at 321, 796 S.E.2d at 421 (discussing *Maddox v. Commonwealth*, 349 S.W.2d 686 (Ky. 1960) as an example of a jurisdiction that departed from the requirement).

134. *Id.* at 323, 796 S.E.2d at 422.

135. 292 Va. 748, 750, 793 S.E.2d 805, 806 (2016).

136. *Id.* at 751, 793 S.E.2d at 806.

longings to a teacher's aide, and went into the school building.<sup>137</sup> The teacher confronted the student inside and yelled at her to go back out and get her things.<sup>138</sup> When the student refused, the teacher grabbed the child by the arm and dragged her outside.<sup>139</sup>

At her trial for misdemeanor assault and battery, the teacher moved to strike the evidence, arguing that her physical contact with the student fell within the Virginia Code section 18.2-57(G)(i) exception.<sup>140</sup> For that exception to apply, "a full-time school employee must be acting in the course and scope of her official capacity and the conduct at issue must be 'incidental, minor or reasonable physical contact or other actions designed to maintain order and control.'"<sup>141</sup> The trial court found the exception inapplicable because the teacher had acted outside the scope of her official capacity.<sup>142</sup> In the alternative, the trial court ruled that the teacher's conduct was "still 'unreasonable' and exceeded the physical contact permitted by school personnel" under the statute.<sup>143</sup> The court of appeals found error in the trial court's ruling that the teacher had acted outside the scope of her official capacity.<sup>144</sup> The supreme court held that the court of appeals did not give due consideration to the trial court's alternative ruling that, even under the teacher's version of the facts, her actions exceeded the physical contact permitted by school personnel under Virginia Code section 18.2-57(G)(i).<sup>145</sup> The supreme court held the factual finding by the trial court was "fully supported by the record . . . and it rendered the Code § 18.2-57(G)(i) exception inapplicable."<sup>146</sup>

### 3. Attempted Murder

In *Jin v. Commonwealth*, the Court of Appeals of Virginia decided whether the defendant's two counts of attempted murder

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137. *Id.* at 751, 793 S.E.2d at 806.

138. *Id.* at 752, 793 S.E.2d at 806-07.

139. *Id.* at 751-52, 793 S.E.2d at 806-07.

140. *Id.* at 753, 755, 793 S.E.2d at 807-08.

141. *Id.* at 753, 793 S.E.2d at 807 (quoting VA. CODE ANN. § 18.2-57(G) (Cum. Supp. 2017)).

142. *Id.* at 755, 793 S.E.2d at 808.

143. *Id.* at 759, 793 S.E.2d at 810.

144. *Id.* at 756, 793 S.E.2d at 808-09 (quoting *Lambert v. Commonwealth*, 65 Va. App. 682, 690-91, 779 S.E.2d 871, 874-75 (2015)).

145. *Id.* at 759, 793 S.E.2d at 810.

146. *Id.* at 760, 793 S.E.2d at 810.



violated double jeopardy because they were part of one continuing offense or whether they were separate and distinct acts.<sup>147</sup> After an argument with his estranged wife, the defendant entered his car and accelerated toward her as she walked away.<sup>148</sup> The wife's brother pulled her out of the way, but the side mirror of the defendant's car struck her in the face.<sup>149</sup> Shortly thereafter, the defendant succeeded in hitting his wife and her brother with the car.<sup>150</sup> The defendant then removed a hammer from the back of the car and entered the backdoor of the restaurant where his wife was lying injured.<sup>151</sup> The defendant proceeded to "hit [his wife] multiple times in the head with the hammer."<sup>152</sup>

The defendant argued that his two convictions for attempted murder violated double jeopardy because the attempts—the one with a car and the one with a hammer—were part of one continuing offense.<sup>153</sup> The court of appeals, however, held that the two attempts were separate and distinct acts.<sup>154</sup> The court of appeals concluded that each act "independently met the requirements of an attempted murder."<sup>155</sup> The court of appeals further concluded that the "more vicious, hands-on" act of violence with the hammer was not a continuation of the first attack with the car.<sup>156</sup> In doing so, the court of appeals noted that the "two acts occurred in different locations and were perpetrated by different means, with a short break of time between the two."<sup>157</sup> Thus, the defendant's double jeopardy rights were not violated.<sup>158</sup>

#### 4. Carjacking

In *Hilton v. Commonwealth*, the Supreme Court of Virginia considered whether seizing a vehicle's keys by gunpoint supported a conviction for carjacking.<sup>159</sup> The two victims were a father

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147. 67 Va. App. 294, 299, 795 S.E.2d 918, 921 (2017).

148. *Id.* at 300–01, 795 S.E.2d at 921.

149. *Id.* at 301, 795 S.E.2d at 921.

150. *Id.* at 301, 795 S.E.2d at 922.

151. *Id.* at 301, 795 S.E.2d at 922.

152. *Id.* at 301, 795 S.E.2d at 922.

153. *Id.* at 302, 795 S.E.2d at 922.

154. *Id.* at 305–06, 795 S.E.2d at 924.

155. *Id.* at 306, 795 S.E.2d at 924.

156. *Id.* at 307, 795 S.E.2d at 925.

157. *Id.* at 307, 795 S.E.2d at 925.

158. *Id.* at 307, 795 S.E.2d at 925.

159. 293 Va. 293, 296–97, 797 S.E.2d 781, 782–83 (2017).

and son who had answered an advertisement for a used car.<sup>160</sup> When the victims went to view the car, they encountered the defendant and his companion.<sup>161</sup> “The advertised car was nowhere to be seen.”<sup>162</sup> The defendant and his companion proceeded to rob the victims at gunpoint.<sup>163</sup> During the robbery, the robbers pointed a gun at the father’s chest and threatened to shoot him before taking his truck keys and ordering both victims back into the truck.<sup>164</sup> After the victims entered the truck, the robbers proceeded to walk away.<sup>165</sup>

In affirming the defendant’s conviction for carjacking, the supreme court observed that under Virginia’s carjacking statute, Virginia Code section 18.2-58.1, “a perpetrator can commit carjacking without actually seizing the victim’s vehicle, i.e., taking possession of it.”<sup>166</sup> Under the statute’s express language, “a perpetrator can violate the statute by only seizing *control* of the victim’s vehicle . . . .”<sup>167</sup> In this case, the victim had “possession or control’ of his truck while standing beside it with his truck keys in his pocket.”<sup>168</sup> That changed, however, when the defendant took the victim’s truck keys “by means of pulling out a revolver, pointing it at the victim’s chest at point-blank range, and threatening to shoot the victim as he and his son were being robbed . . . .”<sup>169</sup> That was enough to seize control of the truck because “[a]t that point, the victim was not free to get back into his truck, much less drive it.”<sup>170</sup>

## 5. Credit Card Theft

In *Scott v. Commonwealth*, the Supreme Court of Virginia defined the type of criminal intent needed to support a credit card

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160. *Id.* at 296, 797 S.E.2d at 783.

161. *Id.* at 296, 797 S.E.2d at 783.

162. *Id.* at 296, 797 S.E.2d at 783.

163. *Id.* at 297, 797 S.E.2d at 783.

164. *Id.* at 297, 797 S.E.2d at 783.

165. *Id.* at 297, 797 S.E.2d at 783.

166. *Id.* at 298–99, 797 S.E.2d at 783–84 (discussing VA. CODE ANN. § 18.2-58.1 (Repl. Vol. 2014)).

167. *Id.* at 299, 797 S.E.2d at 784 (discussing VA. CODE ANN. § 18.2-58.1 (Repl. Vol. 2014)).

168. *Id.* at 300, 797 S.E.2d at 785.

169. *Id.* at 300–01, 797 S.E.2d at 785.

170. *Id.* at 301, 797 S.E.2d at 785.

theft conviction under Virginia Code section 18.2-192.<sup>171</sup> The defendant broke into his ex-partner's home and took her purse, containing her credit cards.<sup>172</sup> The next day, the defendant "called the victim and told her that the purse was at her mother's house."<sup>173</sup> When the victim retrieved her purse, her credit cards were still there, and it did not appear that the defendant had tried to use them.<sup>174</sup>

The defendant argued that the credit card theft statute required the Commonwealth to prove specific intent as an element of the crime and that the facts did not show he had the specific intent to take the credit cards.<sup>175</sup> The Commonwealth argued that specific intent only applied to the second prong of the statute—"receiving a stolen credit card, knowing it to have been stolen, with the intent to use it, sell it, or transfer it to another unauthorized person . . . ."<sup>176</sup> The Commonwealth interpreted the statute's first prong—unlawfully "taking, obtaining or withholding a credit card" or credit card number—as requiring only a general criminal intent.<sup>177</sup> The supreme court agreed with the Commonwealth's interpretation and held that "credit card theft under the first prong of the statute is a general intent crime completed upon an unlawful taking."<sup>178</sup>

## 6. Driving Under the Influence ("DUI") Related Offenses

In *Rich v. Commonwealth*, the Supreme Court of Virginia interpreted the causation element of DUI maiming.<sup>179</sup> On August 6, 2011, at approximately 2:20 AM, a witness stopped her vehicle when she saw the victim crossing her lane of traffic in a wheelchair.<sup>180</sup> The witness told the victim, who was intoxicated and operating the wheelchair in an "erratic fashion," to be careful.<sup>181</sup> When the victim reached the opposite lane of traffic, the defend-

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171. 292 Va. 380, 385, 789 S.E.2d 608, 610 (2016).

172. *Id.* at 381–82, 789 S.E.2d at 608–09.

173. *Id.* at 382, 789 S.E.2d at 609.

174. *Id.* at 382, 789 S.E.2d at 609.

175. *Id.* at 383, 789 S.E.2d at 609.

176. *Id.* at 383–85, 789 S.E.2d at 609–10.

177. *Id.* at 383–85, 789 S.E.2d at 609–10.

178. *Id.* at 385, 789 S.E.2d at 610.

179. 292 Va. 791, 794, 793 S.E.2d 798, 800 (2016).

180. *Id.* at 794–95, 793 S.E.2d at 800.

181. *Id.* at 795, 797, 793 S.E.2d at 800–01.

ant's vehicle crashed into the wheelchair at about twenty-five or thirty miles per hour.<sup>182</sup> The defendant—who was intoxicated, inattentive, and sleep deprived—was convicted of DUI maiming in violation of Virginia Code section 18.2-51.4.<sup>183</sup>

On appeal, the defendant argued “that the trial court erred in finding that she was a proximate cause of [the victim’s] injuries because it is impossible to determine how and why the collision occurred.”<sup>184</sup> The supreme court disagreed, finding that there were “ample facts from which the trial court could draw reasonable inferences” as to the cause of the accident.<sup>185</sup> Notable were the defendant’s voluntary intoxication, admitted inattentiveness, and sleep deprivation.<sup>186</sup> Also notable was that the other driver, “under similar conditions . . . was able to see [the victim] in time to allow him to cross the street.”<sup>187</sup>

In *Kim v. Commonwealth*, the defendant challenged his conviction for unreasonably refusing to submit to a breath test in violation of Virginia Code section 18.2-268.3.<sup>188</sup> Because a refusal charge requires operation of a vehicle on a highway, as defined in Virginia Code section 46.2-100, the dispositive issue for the Supreme Court of Virginia was whether the defendant was on a highway or a private road.<sup>189</sup> In the early morning hours, police found a “vehicle parked ‘somewhat diagonally’ in one of the parking spaces” at a private apartment complex.<sup>190</sup> The defendant was asleep and drunk in the driver’s seat of the vehicle.<sup>191</sup> The parking spaces ran perpendicular to the privately maintained roads within the complex.<sup>192</sup> The apartment complex was accessible by public roads, but throughout the complex were several “No Trespassing” signs.<sup>193</sup>

The supreme court began its analysis by reviewing the case law on “whether a particular ‘way’ falls within the statutory defini-

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182. *Id.* at 795, 793 S.E.2d at 800.

183. *Id.* at 798, 793 S.E.2d at 802.

184. *Id.* at 799, 793 S.E.2d at 802.

185. *Id.* at 800–01, 793 S.E.2d at 803.

186. *Id.* at 801, 793 S.E.2d at 804.

187. *Id.* at 801, 793 S.E.2d at 804.

188. 293 Va. 304, 307, 797 S.E.2d 766, 767 (2017).

189. *Id.* at 310–11, 797 S.E.2d at 769.

190. *Id.* at 307–08, 797 S.E.2d at 767–68.

191. *Id.* at 308, 797 S.E.2d at 768.

192. *Id.* at 307–08, 797 S.E.2d at 767.

193. *Id.* at 307–08, 797 S.E.2d at 767.

tion of 'highway.'"<sup>194</sup> The case law has established that a particular way is a highway when the public has unrestricted access to it.<sup>195</sup> Moreover, "[a] sufficient showing of unrestricted access gives rise to the [rebuttable] presumption that the way is a highway."<sup>196</sup> In order to rebut the presumption, the opposing party must show the area was not open to the public.<sup>197</sup> In this case, the supreme court found that the Commonwealth had met its initial burden of showing that the presumption applied.<sup>198</sup> The supreme court, however, found that the defendant had successfully rebutted that presumption.<sup>199</sup> Key to the supreme court's holding was the presence of the several posted "No Trespassing" signs, which established that the apartment complex's roads were "not 'open to the use of the public' for any purpose, including vehicular travel."<sup>200</sup>

## 7. Failure to Appear

In *Johnson v. Commonwealth*, the Supreme Court of Virginia addressed whether the defendant who failed to show for court on multiple pending charges could be convicted of multiple failure to appear charges.<sup>201</sup> The defendant was charged with "forgery, uttering, and attempting to obtain money by false pretenses."<sup>202</sup> "All three charges stemmed from allegations that [the defendant] had altered a check written by a third party and attempted to cash it."<sup>203</sup> The defendant failed to appear for a preliminary hearing on the charges in general district court.<sup>204</sup> The grand jury therefore indicted the defendant "for three counts of felony failure to appear" in violation of Virginia Code section 19.2-128(B).<sup>205</sup>

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194. *Id.* at 312–15, 797 S.E.2d at 770–72.

195. *Id.* at 315, 797 S.E.2d at 772 (citing *Caplan v. Bogard*, 264 Va. 219, 227, 563 S.E.2d 719, 723 (2002)).

196. *Id.* at 315, 797 S.E.2d at 772 (quoting *Caplan*, 264 Va. at 227, 563 S.E.2d at 723).

197. *Id.* at 315, 797 S.E.2d at 772 (citing *Caplan*, 264 Va. at 227, 563 S.E.2d at 723).

198. *Id.* at 316, 797 S.E.2d at 772.

199. *Id.* at 319, 797 S.E.2d at 773–74.

200. *Id.* at 319–20, 797 S.E.2d at 774. Three justices dissented. *Id.* at 320, 797 S.E.2d at 774 (Kelsey, J., dissenting). The dissenting justices would have held that, based on the record, a reasonable factfinder could have determined that the apartment complex road was a "highway" under Code § 46.2-100. *See id.* at 320, 797 S.E.2d at 774.

201. 292 Va. 738, 740, 793 S.E.2d 321, 322 (2016).

202. *Id.* at 740, 793 S.E.2d at 322.

203. *Id.* at 740, 793 S.E.2d at 322.

204. *Id.* at 740, 793 S.E.2d at 322.

205. *Id.* at 740, 793 S.E.2d at 322.

The defendant argued that, under the statute, “he could be convicted of, at most, one felony failure to appear.”<sup>206</sup> The defendant reasoned that the “gravamen” of the offense was the failing to appear for court, not the number of charges pending when he failed to appear.<sup>207</sup> In rejecting this argument, the supreme court looked at the statutory language and noted that “[t]he legislature selected the term ‘a’ felony, thereby indicating that each felony charge could serve as the predicate of a failure to appear conviction.”<sup>208</sup> The supreme court went on to explain that “[a] defendant’s willful failure to appear prevents the Commonwealth from proceeding on each of the separate felonies and it prevents the court from adjudicating each charge.”<sup>209</sup> The “net effect of [the defendant’s] willful failure to appear were three distinct injuries to the administration of justice, even if these injuries occurred at the same time.”<sup>210</sup>

## 8. Threats

In *Turner v. Commonwealth*, the Court of Appeals of Virginia considered whether the defendant’s conviction for displaying a noose with the intent to intimidate offended the First Amendment of the United States Constitution.<sup>211</sup> Turner had displayed in his yard an “all-black, life-size dummy hanging by a noose from a tree.”<sup>212</sup> The noose display was visible to any passerby, including his African-American neighbors, who reported it to the police.<sup>213</sup> When confronted by police about the noose display, Turner said it was a “scarecrow” and “implied it was to scare away people.”<sup>214</sup> Turner then indicated his actions were motivated by his racist beliefs.<sup>215</sup> Turner’s neighbors felt threatened by the noose display, especially since “nine African-Americans had been killed

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206. *Id.* at 740, 793 S.E.2d at 322.

207. *Id.* at 740, 793 S.E.2d at 322.

208. *Id.* at 742, 793 S.E.2d at 323.

209. *Id.* at 742, 793 S.E.2d at 323.

210. *Id.* at 742, 793 S.E.2d at 323. Two justices dissented. *Id.* at 744, 793 S.E.2d at 324 (Mims, J., dissenting). In their view, the defendant committed a single violation when he failed to “appear at one time and one place.” *Id.* at 744, 793 S.E.2d 324.

211. 67 Va. App. 46, 51, 57, 792 S.E.2d 299, 301, 304 (2016), *cert. granted*, No. 161804, 2017 Va. LEXIS 130 (Sept. 8, 2017).

212. *Id.* at 51, 792 S.E.2d at 301.

213. *Id.* at 51–52, 792 S.E.2d at 301–02.

214. *Id.* at 52, 792 S.E.2d at 302.

215. *Id.* at 52, 792 S.E.2d at 302.

in South Carolina earlier the same day at the 'Charleston Church Shooting.'"<sup>216</sup> Turner was found guilty of violating Virginia Code section 18.2-423.2, which prohibits displaying a noose with the intent to intimidate.<sup>217</sup>

The defendant argued the First Amendment gave him the right to hang a noose on his property.<sup>218</sup> In finding no First Amendment violation, the court of appeals noted that Virginia's noose statute is "substantially similar" to the cross-burning statute that the Supreme Court of the United States upheld in *Virginia v. Black*.<sup>219</sup> Like the cross burning statute, "displaying a noose in the manner [Virginia] Code § 18.2-423.2 proscribes constitutes a 'true threat' . . . [that] is undeserving of First Amendment protection."<sup>220</sup> As the court of appeals concluded, "while the First Amendment protects Turner's right to be a racist and even to convey his racist beliefs to others, the protections of our Constitution do not permit him to threaten or intimidate others who do not share his views."<sup>221</sup>

### III. LEGISLATION

#### A. *Blood Test Refusal*

In *Birchfield v. North Dakota*, the Supreme Court of the United States held that imposing a criminal penalty for refusing to consent to a blood test is unconstitutional because, unlike the less intrusive breath test, the search incident to arrest doctrine does not justify the warrantless taking of a blood sample.<sup>222</sup> In response to *Birchfield*, the 2017 General Assembly eliminated the criminal penalties for refusing to submit to a blood test to determine the alcohol or drug content of a defendant's blood upon an arrest for a DUI related offense.<sup>223</sup> The legislation, however, increased the criminal penalty for a second offense of refusing to submit to a

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216. *Id.* at 53, 792 S.E.2d at 302.

217. *Id.* at 54–55, 792 S.E.2d at 303.

218. *Id.* at 56–57, 792 S.E.2d at 304.

219. *Id.* at 57–58, 792 S.E.2d at 304 (citing *Virginia v. Black*, 538 U.S. 343, 347–48 (2003)).

220. *Id.* at 61, 792 S.E.2d at 306.

221. *Id.* at 61, 792 S.E.2d at 306.

222. 579 U.S. \_\_\_, \_\_\_, 136 S. Ct. 2160, 2166–67, 2184–86 (2016).

223. See Act of Mar. 16, 2017, ch. 623, 2017 Va. Acts \_\_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-268.3 (Cum. Supp. 2017)).

breath test from a Class 2 misdemeanor to a Class 1 misdemeanor.<sup>224</sup> The legislation also created a rebuttable presumption of intoxication for blood tests performed by the Department of Forensic Science pursuant to a search warrant.<sup>225</sup> Lastly, the legislation provided that an application for a search warrant to perform a blood test on a person suspected of committing a DUI-related offense shall be given priority over other matters pending before the judge or magistrate.<sup>226</sup>

### B. *Delayed Appeals*

The 2017 General Assembly expanded an appellant's ability to obtain a delayed appeal in a criminal case.<sup>227</sup> Previously, an appellant could not pursue a delayed appeal if any part of the appeal had been refused on the merits.<sup>228</sup> Now, an appellant may seek a delayed appeal for a procedurally defaulted assignment of error, even if other assignments of error were refused on the merits.<sup>229</sup>

### C. *Domestic Abuse*

The 2017 General Assembly passed two bills pertaining to first offenders of domestic violence. The first prevents a person previously convicted of a violent felony under Virginia Code section 19.2-297.1 from being eligible for a first offender status for assault and battery against a family or household member.<sup>230</sup> The person may, however, be placed on first offender status if the attorney for the Commonwealth does not object to the deferral.<sup>231</sup>

The second prohibits a person who consented to a first offender disposition on a domestic violence charge from appealing if he is subsequently found guilty for violating the terms of the proba-

224. *Id.*

225. *Id.* (codified as amended at VA. CODE ANN. § 18.2-269 (Cum. Supp. 2017)).

226. *Id.* (codified as amended at VA. CODE ANN. § 19.2-52 (Cum. Supp. 2017)).

227. Act of Feb. 20, 2017, ch. 77, 2017 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 19.2-321.1 to -321.2 (Cum. Supp. 2017)).

228. VA. CODE ANN. §§ 19.2-321.1(A)(ii), 19.1-321.2(A)(ii) (Repl. Vol. 2015).

229. Ch. 77, 2017 Va. Acts \_\_, \_\_.

230. Act of Mar. 16, 2017, ch. 621, 2017 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-57.3 (Cum. Supp. 2017)).

231. *Id.*



tion.<sup>232</sup> The person “may file a motion to withdraw his consent . . . within 10 days of the entry of the order deferring proceedings” and the “court shall schedule a hearing within 30 days of receipt of the motion.”<sup>233</sup> “If the person appears at the hearing and requests to withdraw his consent, the court shall grant such request, enter a final order adjudicating guilt, and sentence the person accordingly.”<sup>234</sup> If the person fails to show for the hearing, the court shall deny the motion.<sup>235</sup>

#### D. *Female Genital Mutilation*

The 2017 General Assembly created a Class 1 misdemeanor for any person to knowingly circumcise, excise, or infibulate the labia majora, labia minora, or clitoris of a minor.<sup>236</sup> It is also a Class 1 misdemeanor for any parent, guardian, or other person responsible for the care of a minor to consent to such circumcision, excision, or infibulation.<sup>237</sup> Finally, it is a Class 1 misdemeanor for any parent, guardian, or other person responsible for the care of a minor to knowingly remove, cause, or permit the removal of such minor from the Commonwealth for the purposes of performing such circumcision, excision, or infibulation.<sup>238</sup>

#### E. *Marijuana Possession*

The 2017 General Assembly created an exception to the mandatory six month driver’s license suspension for persons placed on a deferred disposition for a drug offense.<sup>239</sup> A court now retains the discretion as to whether to suspend or revoke the driver’s license of a person placed on deferred disposition for simple possession of marijuana.<sup>240</sup> The exception applies only to adults, not ju-

232. Act of Apr. 5, 2017, ch. 785, 2017 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-57.3 (Cum. Supp. 2017)).

233. *Id.*

234. *Id.*

235. *Id.*

236. Act of Mar. 20, 2017, ch. 667, 2017 Va. Acts \_\_, \_\_ (codified at VA. CODE ANN. § 18.2-51.7 (Cum. Supp. 2017)).

237. *Id.*

238. *Id.*

239. Act of Mar. 24, 2017, ch. 695, 2017 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 46.2-390.1 (Cum. Supp. 2017)).

240. *Id.* (codified as amended at VA. CODE ANN. § 18.2-251 (Cum. Supp. 2017)).

veniles.<sup>241</sup> Also, the exception does not apply if the person was operating a motor vehicle at the time of the offense.<sup>242</sup> Finally, a person whose driver's license is not suspended or revoked must perform fifty hours of community service in addition to any community service ordered as part of the deferred disposition.<sup>243</sup>

#### F. *Peeping or Spying with an Electronic Device*

The 2017 General Assembly created a Class 1 misdemeanor prohibiting the knowing and intentional use of an electronic device to enter the property of another to secretly or furtively peep, spy, or attempt to peep or spy into a dwelling or occupied building located on the property.<sup>244</sup> These provisions do not apply to lawful criminal investigations.<sup>245</sup>

#### G. *Withdrawal of Defense Counsel*

Under new legislation, “[a] privately retained counsel in any criminal case may, pursuant to the terms of a written agreement between the attorney and the client, withdraw from representation . . . without leave of court after certification of a charge by a district court.”<sup>246</sup> Within ten days of the certification, the attorney must also provide written notice to the client, the attorney for the Commonwealth, and the circuit court.<sup>247</sup>

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241. *Id.*

242. *Id.*

243. *Id.*

244. Act of Mar. 13, 2017, ch. 502, 2017 Va. Acts \_\_, \_\_ (codified at VA. CODE ANN. § 18.2-130.1 (Cum. Supp. 2017)).

245. *Id.*

246. Act of Apr. 5, 2017, ch. 774, 2017 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-190.2 (Cum. Supp. 2017)).

247. *Id.*

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