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CRIMINAL LAW AND PROCEDURE

Aaron J. Campbell *
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INTRODUCTION

This article surveys recent developments in criminal law and procedure in Virginia. Because of space limitations, the authors have limited their discussion to the most significant appellate decisions and legislation.

I. CRIMINAL PROCEDURE

A. *Indictments*

In *Epps v. Commonwealth*, the Supreme Court of Virginia considered whether an indictment was invalid when the order memorializing the grand jury's actions was not entered until after the trial.¹ The grand jury returned an indictment in open court against Epps for abduction.² Following a bench trial, Epps was convicted of the charge.³ After the trial, Epps moved to dismiss his conviction when he discovered that no order had been entered recording his

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1. 293 Va. 403, 405, 799 S.E.2d 516, 517 (2017).

2. *Id.* at 405, 799 S.E.2d at 517. The grand jury also returned an indictment for assault and battery, for which Epps entered a guilty plea. *See id.* at 405, 799 S.E.2d at 517.

3. *Id.* at 405, 799 S.E.2d at 517.

indictment.⁴ Thereafter, the trial court entered an order memorializing the grand jury's actions and denied Epps' motion to dismiss.⁵

Epps argued on appeal that "his conviction must be reversed because no order recording the presentment of the indictment in open court existed at the time of the trial."⁶ The supreme court observed, however, that none of the statutes or rules governing indictments "requires that an order memorializing [the grand jury's] action[s] must be entered prior to trial in order for the indictment to be valid."⁷ The court thus held that the trial court's delay in entering the order did not render Epps' indictment invalid.⁸

B. *Bail*

Duse v. Commonwealth involved the rare reversal by the Supreme Court of Virginia of a trial court's decision to grant the defendant bail.⁹ Duse was charged with first-degree murder, triggering a statutory presumption against bail.¹⁰ The Commonwealth alleged that Duse, who had recently lost an age discrimination lawsuit against the pharmacy in which he worked, hid behind a dumpster at the rear of the pharmacy and shot the supervisor as the supervisor was throwing away the store's trash.¹¹ In opposing bail, the Commonwealth presented evidence that Duse had a long history of work grievances and mental health issues, and that "his current supervisors at the pharmacy . . . feared him 'a great deal.'"¹² The trial court nonetheless granted Duse bail identifying his presumption of innocence, lack of history of violence, and old age as factors in his favor.¹³

The supreme court agreed with all four of the Commonwealth's arguments for why the trial court abused its discretion in granting

4. *Id.* at 405, 799 S.E.2d at 517.

5. *Id.* at 405-06, 799 S.E.2d at 517.

6. *Id.* at 407, 799 S.E.2d at 518.

7. *See id.* at 408, 799 S.E.2d at 518 (citing VA. CODE ANN. §§ 19.2-216 to -217 (Repl. Vol. 2015 & Cum. Supp. 2017); VA. SUP. CT. R. 3A:5(c) (Repl. Vol. 2017)).

8. *Id.* at 409, 799 S.E.2d at 519.

9. 295 Va. 1, 1, 809 S.E.2d 513, 514 (2018).

10. *Id.* at 2, 809 S.E.2d at 514 (citing VA. CODE ANN. § 19.2-120(B)(2) (Repl. Vol. 2015)).

11. *Id.* at 2, 809 S.E.2d at 515.

12. *Id.* at 2-3, 809 S.E.2d at 515.

13. *Id.* at 6-7, 809 S.E.2d at 517.

Duse bail.¹⁴ First, the court found that the trial court erroneously utilized the doctrine of presumed innocence, which applies to trials, but not pretrial bail hearings.¹⁵ Second, the court found that the trial court “gave no meaningful weight” to the nature of the murder and the seriousness of danger to the public that his release would pose.¹⁶ Third, the court found that the trial court made a clear error in judgment when it speculated that Duse would not abscond due to his old age given that he had a home in the Philippines and had “every incentive, along with the means, to flee prosecution.”¹⁷ Finally, the court held that the trial court made a clear error in judgment by not considering Duse’s history of mental health disorders.¹⁸

C. Evidence

In *Atkins v. Commonwealth*, the Court of Appeals of Virginia considered whether tweets and text messages recovered from the defendant’s cell phone were properly admitted into evidence.¹⁹ Atkins was charged with the burglary of three businesses.²⁰ Police recovered incriminating tweets and text messages about the stolen merchandise from Atkins’ cell phone.²¹ The tweets and text messages were admitted into evidence over Atkins’ hearsay objection.²²

The issue on appeal was whether the Commonwealth proved that Atkins was the person who sent the tweet and text messages.²³ In analyzing this issue, the court of appeals observed that the party admission exception to the hearsay rule requires that the Commonwealth prove the identity of the speaker and “applies equally to statements made over the telephone, through text messages, by emails, or using social media such as Twitter.”²⁴ The Commonwealth must prove the identity of the person who made

14. *Id.* at 7–9, 809 S.E.2d at 518.

15. *Id.* at 7–8, 809 S.E.2d at 518.

16. *Id.* at 8, 809 S.E.2d at 518.

17. *Id.* at 8–9, 809 S.E.2d at 518.

18. *Id.* at 9, 809 S.E.2d at 518.

19. 68 Va. App. 1, 3, 800 S.E.2d 827, 828–29 (2017).

20. *Id.* at 3, 800 S.E.2d at 828–29.

21. *Id.* at 5–6, 800 S.E.2d at 829–30.

22. *Id.* at 6, 800 S.E.2d at 830.

23. *Id.* at 6–7, 800 S.E.2d at 830.

24. *Id.* at 8, 800 S.E.2d at 831.

the statement by a preponderance of the evidence.²⁵ In this case, Atkins' cell phone was password protected, a social media app installed on the phone had been created with an email address using his name, and a photograph in the tweet matched stolen merchandise found in his bedroom.²⁶ Based on this evidence, the court of appeals concluded that the Commonwealth proved by a preponderance of the evidence that Atkins was the person who sent the tweets and text messages from his own phone.²⁷

In *Campos v. Commonwealth*, the Court of Appeals of Virginia was asked to determine whether a forensic nurse examiner's testimony relaying her conversation with a child patient was admissible at trial under the medical treatment exception to the hearsay rule and whether her testimony violated the Confrontation Clause.²⁸ The court found that because the child testified at trial, there was no Sixth Amendment violation as she was subject to cross-examination.²⁹ The court then analyzed the medical treatment exception.³⁰

The court of appeals clarified the distinction between Virginia's codified Rules of Evidence and prior existing case law on the issue of the medical treatment exception.³¹ The court explained that there are two distinct ways to admit such testimony under Virginia law if sufficiently reliable: (1) for non-hearsay reasons—namely, to show the basis for a physician's opinion rather than for the truth of the matter asserted; and (2) a true hearsay exception pursuant to Rule of Evidence 2:803(4) for statements made for the purpose of medical diagnosis or treatment.³² The court held that the child's statements in this case to the forensic nurse examiner, which included the identity of her abuser, were properly admitted under Rule 2:803(4).³³ The court, however, found that a portion of the conversation, describing a threat to harm the victim if she told an-

25. *Id.* at 9, 800 S.E.2d at 831 (citing *Bloom v. Commonwealth*, 262 Va. 814, 821, 554 S.E.2d 84, 87 (2001)).

26. *Id.* at 9–10, 800 S.E.2d at 831–32.

27. *Id.* at 9, 800 S.E.2d at 831.

28. 67 Va. App. 690, 800 S.E.2d 174–75 (2017).

29. *Id.* at 703, 800 S.E.2d at 181.

30. *Id.* at 708, 800 S.E.2d at 183.

31. *Id.* at 711–12, 800 S.E.2d at 185.

32. *Id.* at 711–12, 800 S.E.2d at 185.

33. *Id.* at 715–16, 800 S.E.2d at 187.

yone about what happened, was not admissible under the exception.³⁴ The court explained that the threat did not relate to medical diagnosis or treatment, but that the error was harmless under the facts of the case.³⁵ The court therefore affirmed appellant's convictions.³⁶

In *Carter v. Commonwealth*, Carter shot and killed his ex-girlfriend following a dispute over a blackmail scheme.³⁷ At his murder trial, in support of his self-defense claim, Carter sought to introduce: (1) evidence of a threat against Carter communicated by the victim to her mother on the day of the shooting, (2) evidence that the victim had broken her mother's jaw in 2013, and (3) several specific instances of the victim's past violent behavior.³⁸ The circuit court excluded the recent threat and the evidence of the victim's aggression against her mother, but allowed Carter to testify to the victim's prior violent conduct against himself within the two years preceding the shooting.³⁹ The two-year limitation allowed Carter to testify to several incidents involving the victim's violence, but prevented Carter from testifying about the victim hitting him in 2008 or 2009 and about her stabbing a man ten years before her death.⁴⁰

The Supreme Court of Virginia assumed without deciding that the trial court erred in excluding the recent threat evidence, but held that any such error was harmless in view of the totality of the evidence.⁴¹ The court found that the circuit court did not abuse its discretion by limiting the time frame of the victim's prior violent acts, noting that while the proffered evidence could have been admissible under Rule 2:404, the excluded evidence was "either not relevant to the time and/or circumstances surrounding the victim's death."⁴² The supreme court noted that Carter "knew nothing regarding the circumstances of the victim's alleged 2013 breaking of [her mother]'s jaw," so he could not show how it was "likely to characterize the victim's conduct toward him";⁴³ likewise, the stabbing

34. *Id.* at 716, 800 S.E.2d at 187.

35. *Id.* at 716–17, 800 S.E.2d at 187–88.

36. *Id.* at 718, 800 S.E.2d at 188.

37. 293 Va. 537, 540–42, 800 S.E.2d 498, 499–500 (2017).

38. *Id.* at 541 n.2, 542–43, 800 S.E.2d at 500 n.2, 501.

39. *Id.* at 541 n.2, 542–43, 800 S.E.2d at 500 n.2, 501.

40. *Id.* at 542–43, 800 S.E.2d at 501.

41. *Id.* at 544–45, 800 S.E.2d at 502.

42. *See id.* at 546–47, 800 S.E.2d at 503.

43. *Id.* at 547, 800 S.E.2d at 503.

a decade earlier, which had arisen out of the victim's attempt to defend her sister, was unrelated to the time or circumstances of her shooting.⁴⁴ The court distinguished *Barnes v. Commonwealth* on the basis that the trial court in *Barnes* excluded all of the proffered evidence of the victim's prior violence, while in this case, "Carter was allowed to present most of the evidence he asked to present regarding the victim's prior violent conduct."⁴⁵

D. *Juror Misconduct*

In *Bethea v. Commonwealth*, the Court of Appeals of Virginia reviewed an allegation of juror misconduct.⁴⁶ On the second day of jury deliberations of a murder trial, "the judge informed the parties that a juror told the bailiff "through tears that she feels she's being bullied."⁴⁷ Defense counsel moved for a mistrial, arguing that "any verdict would be tainted."⁴⁸ The trial court denied the motion and "instructed the entire jury on their individual responsibilities to vote in accordance with their consciences and on its responsibility as a cohesive body to listen to the opinions and arguments of others in the group."⁴⁹ The jury returned a unanimous guilty verdict, and each juror confirmed the verdict when they were polled.⁵⁰ Defense counsel asked to question the juror again, but the trial court denied the request.⁵¹

Virginia protects the secrecy of jury deliberations; therefore, a juror cannot testify as to what occurred during the course of deliberations.⁵² In light of this, the court of appeals held that the trial court appropriately refused to allow defense counsel to ask the juror a question after the poll.⁵³ The court further held that the trial

44. *Id.* at 547, 800 S.E.2d at 503.

45. *Compare id.* at 547, 800 S.E.2d at 503 (allowing Carter to present evidence regarding victim's prior violent conduct), *with Barnes v. Commonwealth*, 214 Va. 24, 25, 197 S.E.2d 189, 190 (1973) (excluding evidence of victim's prior violence).

46. 68 Va. App. 487, 503, 809 S.E.2d 684, 692 (2018).

47. *Id.* at 503-04, 809 S.E.2d at 692.

48. *Id.* at 504, 809 S.E.2d at 692.

49. *Id.* at 508, 809 S.E.2d at 694.

50. *Id.* at 504-05, 809 S.E.2d at 692.

51. *Id.* at 505, 809 S.E.2d at 692.

52. *See id.* at 505-06, 809 S.E.2d at 692-93 (citing VA. R. EVID. 2:606; *Jenkins v. Commonwealth*, 244 Va. 445, 460, 423 S.E.2d 360, 370 (1992)).

53. *Id.* at 506, 809 S.E.2d at 693.

court did not abuse its discretion by denying the motion for mistrial.⁵⁴ The court explained that the juror misconduct “allegation did not go unchecked or ignored.”⁵⁵ The trial court had properly instructed the jury on their individual and group responsibilities, which they are presumed to have followed.⁵⁶

E. *Proffering of Witness Testimony*

In *Logan v. Commonwealth*, the Court of Appeals of Virginia considered whether the trial court abused its discretion by refusing to allow the defendant to proffer additional witness testimony.⁵⁷ At the sentencing hearing, the trial judge told defense counsel that it would limit the number of defense witnesses to five.⁵⁸ Defense counsel asked for the opportunity to proffer testimony from additional witnesses after the judge retired to chambers.⁵⁹ The judge denied the request.⁶⁰

The court of appeals held that the trial court erred when it failed to allow the defendant the opportunity to proffer his evidence.⁶¹ The court stressed that the trial court had considerable discretion in limiting the defendant’s number of witnesses at sentencing.⁶² However, the trial court could not prevent the defense from making a record for appellate review.⁶³ Because the error was not harmless, the court remanded the case for a new sentencing hearing.⁶⁴

F. *Withdrawal of Guilty Plea*

In *Spencer v. Commonwealth*, the Court of Appeals of Virginia resolved whether the trial court erred in refusing to allow the defendant to withdraw his pleas.⁶⁵ The grand jury indicted Spencer

54. *Id.* at 508, 809 S.E.2d at 694.

55. *Id.* at 508, 809 S.E.2d at 694.

56. *Id.* at 508, 809 S.E.2d at 694.

57. 67 Va. App. 747, 751, 800 S.E.2d 202, 204 (2017).

58. *Id.* at 757, 800 S.E.2d at 207.

59. *Id.* at 757, 800 S.E.2d at 207.

60. *Id.* at 757, 800 S.E.2d at 207.

61. *Id.* at 758, 800 S.E.2d at 208.

62. *Id.* at 758 n.3, 800 S.E.2d at 208 n.3.

63. *Id.* at 758, 800 S.E.2d at 208.

64. *Id.* at 759, 800 S.E.2d at 208.

65. 68 Va. App. 183, 185, 806 S.E.2d 410, 411 (2017).

with child pornography charges based on a search warrant that uncovered several nude photographs of a sixteen-year-old girl on his cell phone.⁶⁶ Prior to sentencing, Spencer sought to withdraw his *nolo contendere* pleas to the charges on the ground that the evidence from the search warrant should have been suppressed.⁶⁷ Spencer contended that the search warrant was for a different phone, but he offered no evidence or testimony in support of this claim.⁶⁸ The trial court denied Spencer's request to withdraw his pleas.⁶⁹

The court of appeals explained that, in order to withdraw his pleas, Spencer had to introduce prima facie evidence of a reasonable defense.⁷⁰ Spencer, however, did not present any evidence in support of his "bare assertion" that the search warrant was invalid.⁷¹ The court affirmed the trial court's denial of the motion to withdraw the pleas, holding that Spencer's "unsubstantiated contention that the search warrant was 'for a different phone'" did not constitute prima facie evidence of a reasonable defense.⁷²

G. *Convictions*

In *Hackett v. Commonwealth*, the Supreme Court of Virginia considered whether the trial court erred in finding that it lacked jurisdiction to reduce the defendant's felony conviction to a misdemeanor.⁷³ Hackett pled guilty to felony possession with intent to distribute marijuana.⁷⁴ The prosecutor and the defense counsel had orally agreed that the "appropriate disposition was to 'take the case under advisement for an extended period of time, under any terms and conditions imposed by the court,' and if the defendant successfully completed all terms and conditions, the felony charge would be reduced to a misdemeanor."⁷⁵ The trial court entered the conviction order on January 20, 2009, and the sentencing order on

66. *Id.* at 185, 806 S.E.2d at 411.

67. *Id.* at 186, 806 S.E.2d at 411.

68. *Id.* at 186, 806 S.E.2d at 411.

69. *Id.* at 186, 806 S.E.2d at 411.

70. *Id.* at 188–89, 806 S.E.2d at 412–13.

71. *Id.* at 189, 806 S.E.2d at 413.

72. *Id.* at 186, 806 S.E.2d at 413.

73. 293 Va. 392, 394–95, 799 S.E.2d 501, 502–03 (2017).

74. *Id.* at 395, 799 S.E.2d at 503.

75. *Id.* at 395, 799 S.E.2d at 503.

April 28, 2009.⁷⁶ The trial court never entered any order suspending the conviction or sentencing orders.⁷⁷

Several months later, Hackett asked the court to reconsider the felony conviction.⁷⁸ In December of 2009, the trial court ruled that it would take the motion under advisement.⁷⁹ For approximately five years, the trial court continued the matter.⁸⁰ Finally, on December 30, 2014, the trial court denied Hackett's motion to reduce the felony to misdemeanor.⁸¹ The trial judge explained that he had intended to reduce Hackett's felony to a misdemeanor if he complied with the court's terms, but the judge had been mistaken that he had the discretion to reduce the charge.⁸²

On appeal, the supreme court pointed out that the oral understanding that the trial court would modify the conviction upon completion of certain conditions was never reduced to writing.⁸³ Furthermore, the conviction order was never modified, vacated, or suspended within twenty-one days of its entry.⁸⁴ Therefore, the court held that the trial court had lost jurisdiction by the time Hackett asked the trial court to modify the conviction.⁸⁵

H. Sentences

In *Williams v. Commonwealth*, the Commonwealth and Williams reached an agreement in which he would be found guilty of felony assault and battery and not guilty by reason of insanity of attempted murder.⁸⁶ At sentencing, the trial court ordered Williams to serve his incarceration before being involuntarily committed for his mental illness.⁸⁷ Williams did not object to the sequencing of his prison sentence and civil commitment.⁸⁸ On appeal,

76. *Id.* at 395, 799 S.E.2d at 503.

77. *Id.* at 396, 799 S.E.2d at 503.

78. *Id.* at 396, 799 S.E.2d at 503.

79. *Id.* at 396, 799 S.E.2d at 503.

80. *See id.* at 396, 799 S.E.2d at 503–04.

81. *Id.* at 396, 799 S.E.2d at 504.

82. *Id.* at 396–97, 799 S.E.2d at 504.

83. *Id.* at 399–400, 799 S.E.2d at 505.

84. *Id.* at 400, 799 S.E.2d at 505 (applying VA. SUP. CT. R. 1:1 (Repl. Vol. 2017)).

85. *Id.* at 401, 799 S.E.2d at 506.

86. 294 Va. 25, 25, 810 S.E.2d 885, 886 (2017).

87. *Id.* at 26–27, 810 S.E.2d at 887.

88. *Id.* at 27, 810 S.E.2d at 887.

however, he argued that the trial court erred by sentencing him to serve the prison term first.⁸⁹

Because Williams did not preserve the issue for appeal, the Supreme Court of Virginia considered whether the ends of justice exception to Rule 5:25 applied.⁹⁰ The court held that the exception did not apply because the trial court's decision to order incarceration before involuntary civil commitment did not result in a grave injustice.⁹¹ Williams had essentially argued that "imposing his incarceration before his involuntary civil commitment is manifestly unjust because it deprives him of mental health treatment that he needs."⁹² The court concluded, however, that Williams would not be deprived of the mental health treatment he needed while in prison.⁹³

I. Appeals

In *Cole v. Commonwealth*, the Alexandria police arrested Cole on an outstanding warrant for a drug charge and brought him to Alexandria Detention Center, where booking authorities performed a routine strip search and discovered that Cole was attempting to smuggle cocaine into the jail.⁹⁴ Cole was subsequently charged with possession with intent to distribute cocaine.⁹⁵ The circuit court granted Cole's motion to suppress the fruits of the strip search on the basis that it violated Cole's Fourth Amendment rights.⁹⁶ On the Commonwealth's pretrial appeal, the Court of Appeals of Virginia reversed the trial court's suppression order, and remanded the matter for trial.⁹⁷ Cole was convicted, and he appealed, challenging the court of appeals' reversal of the suppression order.⁹⁸

89. *Id.* at 27, 810 S.E.2d at 887.

90. *Id.* at 27–28, 810 S.E.2d at 887.

91. *Id.* at 28, 810 S.E.2d at 888.

92. *Id.* at 29, 810 S.E.2d at 888.

93. *Id.* at 29, 810 S.E.2d at 888–89. Justice Powell, in dissent, would have applied the ends of justice exception because, in her opinion, the trial court did not follow the statutory requirements for involuntary civil commitments. *See id.* at 32–35, 810 S.E.2d at 890–91 (Powell, J., dissenting).

94. 294 Va. 342, 346–47, 806 S.E.2d 387, 390 (2017).

95. *Id.* at 347, 806 S.E.2d at 390.

96. *Id.* at 350, 806 S.E.2d at 392.

97. *Id.* at 350–51, 806 S.E.2d at 392.

98. *Id.* at 352, 806 S.E.2d at 392. Cole also unsuccessfully challenged the sufficiency of the evidence. *See id.* at 351, 806 S.E.2d at 392.

The court of appeals denied Cole's petition, holding that his attempt to relitigate the suppression issue was precluded by the "law of the case" doctrine.⁹⁹ The Supreme Court of Virginia held that the court of appeals erred by finding that its decision in the Commonwealth's pretrial appeal was preclusive on Cole's attempt to raise the issue on his own direct appeal, noting that Virginia Code section 19.2-409, concerning the finality of a decision in a Commonwealth's pretrial appeal, provides that a defendant may seek reconsideration of any decision rendered in the pretrial appeal if he is subsequently convicted.¹⁰⁰ The court went on to find that Cole's strip search did not violate his Fourth Amendment rights.¹⁰¹

J. *Expungement*

In *A.R.A. v. Commonwealth*, the Supreme Court of Virginia considered whether the trial court erred in declining to expunge a felony arrest record.¹⁰² While in college, the petitioner was arrested for felony assault and battery of a law enforcement officer after she "drank to excess."¹⁰³ After the Commonwealth amended the charge to misdemeanor disorderly conduct, the petitioner pled guilty to the charge.¹⁰⁴ She went on to graduate from college with honors and work for "a large media company."¹⁰⁵ About a year after the arrest, she sought to expunge the record of her felony arrest.¹⁰⁶ In denying her request, the trial court focused on the facts surrounding her arrest.¹⁰⁷

The supreme court concluded that the trial court abused its discretion in denying the petition for expungement.¹⁰⁸ The court explained that, since the petitioner's felony charge had been amended to a "separate and unrelated" misdemeanor, her felony arrest qualified as a charge that was "otherwise dismissed" under the expungement statute.¹⁰⁹ And because the petitioner occupied

99. *Id.* at 352, 806 S.E.2d at 392.

100. *Id.* at 353, 806 S.E.2d at 393 (citing VA. CODE ANN. § 19.2-409 (Repl. Vol. 2015)).

101. *Id.* at 360, 806 S.E.2d at 397.

102. 295 Va. 153, 156, 809 S.E.2d 660, 661 (2018).

103. *Id.* at 156, 806 S.E.2d at 661.

104. *Id.* at 156, 806 S.E.2d at 661.

105. *Id.* at 156, 806 S.E.2d at 661.

106. *Id.* at 156, 806 S.E.2d at 661.

107. *Id.* at 157, 809 S.E.2d at 662.

108. *Id.* at 163, 809 S.E.2d at 665.

109. *Id.* at 158, 809 S.E.2d at 662 (citing VA. CODE ANN. § 19.2-392.2(A) (Repl. Vol. 2015

“the status of innocent’ with respect to the original charge,”¹¹⁰ the facts of the crime she sought to expunge were irrelevant to the resolution of the expungement petition.¹¹¹ The appropriate inquiry “is forward-looking, rather than backward-looking” and “turns on whether the continued existence of the record will or may cause the petitioner a manifest injustice in the future.”¹¹² Applying this standard, the court concluded that the trial court gave inappropriate weight to the facts of the alleged crime.¹¹³ The court further concluded that the petitioner’s circumstances had satisfied the required “manifest injustice” standard because there was a reasonable possibility that a felony arrest record would hinder her career and educational opportunities.¹¹⁴

II. CRIMINAL LAW

A. *Collateral Estoppel*

Collateral estoppel, a subset of the Fifth Amendment’s protections against double jeopardy, prevents the relitigation of certain factual issues decided in previous litigation.¹¹⁵ To successfully raise collateral estoppel, a criminal defendant must establish four elements: (1) that the parties to the two proceedings are the same, (2) that the factual issue was actually litigated in the prior proceeding, (3) that the factual issue was essential to the result in the prior proceeding, and (4) that the prior proceeding resulted in final judgment against the Commonwealth.¹¹⁶ The Supreme Court of Virginia decided two cases in 2017 in which collateral estoppel featured prominently.

In *Pijor v. Commonwealth*, the defendant claimed that collateral estoppel barred his prosecution for perjury after his testimony in

& Cum. Supp. 2017)).

110. *Id.* at 158, 809 S.E.2d at 662 (quoting *Dressner v. Commonwealth*, 285 Va. 1, 7, 736 S.E.2d 735, 738 (2013)).

111. *Id.* at 159, 809 S.E.2d at 663.

112. *Id.* at 160, 809 S.E.2d at 663.

113. *Id.* at 162, 809 S.E.2d at 665.

114. *Id.* at 163, 809 S.E.2d at 665. The dissenting opinion disagreed with the majority’s conclusion that the trial court cannot consider the circumstances of the arrest when a petitioner seeks to expunge an arrest record. *See id.* at 167–73, 809 S.E.2d at 667–71 (Kelsey, J., dissenting). The dissent would have found that the trial court did not abuse its discretion in refusing the expungement petition. *See id.* at 172–76, 809 S.E.2d at 670–72.

115. *See Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

116. *See Whitley v. Commonwealth*, 260 Va. 482, 489, 538 S.E.2d 296, 299 (2000).

an earlier larceny trial (concerning Pijor's theft of Ben the dog ("Ben") from Pijor's ex-girlfriend) was shown to be false after his acquittal.¹¹⁷ Pijor testified in the larceny trial that he did not take Ben, and that he had neither seen Ben nor received any information about Ben's whereabouts since September 6, 2013.¹¹⁸ Five days after his acquittal of larceny by a jury (by general verdict), Pijor was discovered in possession of Ben and charged with perjury.¹¹⁹ Pijor argued that collateral estoppel precluded relitigating his (now exposed) role in Ben's disappearance, because the ultimate issue in both trials was the same: "whether [Pijor] stole the dog."¹²⁰

The Supreme Court of Virginia disagreed with Pijor's framing of the ultimate issues in the respective trials.¹²¹ The ultimate issue in the larceny trial was whether Pijor took the dog with the intent to steal him; the ultimate issue in the perjury trial was whether Pijor willfully lied under oath in his testimony at the larceny trial.¹²² The court emphasized that Pijor had not only testified that he did not take Ben, but that he had also claimed not to have seen Ben and to have been ignorant of Ben's whereabouts.¹²³ Assuming the jury credited Pijor's denial of stealing Ben, as Pijor urged it had, the jury did not even need to reach Pijor's denials of having seen or received information about Ben's whereabouts.¹²⁴ Accordingly, the court held that collateral estoppel did not preclude Pijor's prosecution on those latter statements.¹²⁵

In *Commonwealth v. Leonard*, a defendant was convicted of driving under the influence, third or subsequent offense within five years, in violation of Virginia Code section 18.2-266.¹²⁶ The Commonwealth relied on a 2010 general district court conviction of DUI, first offense, and a 2012 circuit court conviction of DUI, first offense, to establish Leonard's two predicate convictions for the sentencing enhancement.¹²⁷ Leonard noted that before he had

117. 294 Va. 502, 505–06, 808 S.E.2d 408, 409–10 (2017).

118. *Id.* at 506, 808 S.E.2d at 410.

119. *Id.* at 506, 510–11, 808 S.E.2d at 410, 412–13.

120. *Id.* at 510, 808 S.E.2d at 412.

121. *Id.* at 511, 808 S.E.2d at 413.

122. *Id.* at 511, 808 S.E.2d at 413.

123. *See id.* at 511, 808 S.E.2d at 413.

124. *See id.* at 511, 808 S.E.2d at 413.

125. *Id.* at 511, 808 S.E.2d at 413.

126. 294 Va. 233, 235, 805 S.E.2d 245, 246 (2017).

127. *Id.* at 235–36, 805 S.E.2d 246–47.

taken and lost his of-right appeal to circuit court in the 2012 case, the general district court had declined to find him guilty of DUI, second offense, and had instead convicted him of DUI, first offense, because the 2010 conviction order did not recite that Leonard had pled guilty knowingly and voluntarily as required by *Boykin v. Alabama*.¹²⁸ Leonard invoked collateral estoppel, claiming that the 2012 general district court's ruling barred the Commonwealth from relitigating the admissibility of the 2010 order for the purposes of sentence enhancement.¹²⁹

The Supreme Court of Virginia rejected Leonard's theory on the grounds that the 2012 ruling was a legal determination rather than a factual matter, and thus determined that collateral estoppel did not apply.¹³⁰ The court noted that "the application of collateral estoppel in the criminal context has been confined to attempts by the government to relitigate the facts underlying a prior acquittal."¹³¹ The only factual issue resolved in the 2012 general district proceeding was that Leonard was not advised of his rights prior to entering his guilty plea in the 2010 proceeding.¹³² The court emphasized that Leonard had not relied on that fact in the present proceeding, instead claiming that "the 2010 DUI conviction order was inadmissible in this case because it was ruled inadmissible in the 2012 proceeding."¹³³ The court held that the 2012 general district court's admissibility decision "was a determination of law . . . based on resolution of a factual question that is not at issue in this case," and that collateral estoppel thus did not apply to make it binding in the case at bar.¹³⁴ The court noted that the 2010 DUI conviction remained valid and was admissible for recidivism sentencing enhancement purposes, and that the "double jeopardy concerns arising from attempts by the government to relitigate facts

128. *Id.* at 236, 805 S.E.2d at 247 (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).

129. *Id.* at 236–37, 805 S.E.2d at 247.

130. *Id.* at 240, 805 S.E.2d at 249–50.

131. *Id.* at 241, 805 S.E.2d at 250.

132. *Id.* at 240, 805 S.E.2d at 249.

133. *Id.* at 240, 805 S.E.2d at 249–50. The court observed that Leonard "had no viable legal ground to collaterally attack the 2010 DUI conviction," because while *Boykin* protects a defendant's Fifth Amendment rights, "[o]nly convictions obtained in violation of the Sixth Amendment right to counsel are subject to collateral attack in recidivist proceedings." *See id.* at 240 n.10, 805 S.E.2d at 249 n.10.

134. *Id.* at 241–42, 805 S.E.2d at 250.

underlying a prior acquittal do not apply to the use of a valid and existing conviction for enhanced sentencing.”¹³⁵

B. Searches

Virginia Code section 19.2-54 requires, among other things, that magistrates file the affidavit supporting a warrant application with the circuit court of the jurisdiction where the search is to take place within seven days after issuing the warrant.¹³⁶ The section further provides that failure to file “shall not invalidate any search made under the warrant unless such failure shall continue” for thirty days, and that when the affidavit is filed before the thirty-day period ends, “evidence obtained in any such search shall not be admissible until a reasonable time after the filing.”¹³⁷ Due to a faxing error, the clerk of court never received a complete affidavit supporting a search warrant issued for a methamphetamine lab in *Commonwealth v. Campbell*, and the Court of Appeals of Virginia found that this rendered the warrant invalid and the search’s fruits inadmissible.¹³⁸

The Supreme Court of Virginia reversed the court of appeals’ decision, holding that suppression of evidence obtained in a search pursuant to a defective warrant is inappropriate where the search is “justified on grounds other than a warrant.”¹³⁹ The court held that the search of Campbell’s methamphetamine lab was valid under the exigent circumstances exception to the warrant requirement, expressed no opinion as to whether Virginia Code section 19.2-54 contains an implied suppression remedy, and reinstated Campbell’s convictions.¹⁴⁰

In *Commonwealth v. White*, the Supreme Court of Virginia considered the Court of Appeals of Virginia’s reversal of a conviction for possession with intent to distribute heroin.¹⁴¹ The court of ap-

135. *See id.* at 241–42, 805 S.E.2d at 250.

136. *Commonwealth v. Campbell*, 294 Va. 486, 491, 807 S.E.2d 735, 737 (2017) (citing VA. CODE ANN. § 19.2-54) (Cum. Supp. 2017)).

137. VA. CODE ANN. § 19.2-54 (Cum. Supp. 2018).

138. *Campbell*, 294 Va. at 491–92, 807 S.E.2d at 737–38 (citing *Campbell v. Commonwealth*, 66 Va. App. 677, 791 S.E.2d 351 (2016)).

139. *Id.* at 493, 807 S.E.2d at 738.

140. *Id.* at 493 n.1, 495–97, 807 S.E.2d at 738 n.1, 739–40.

141. 293 Va. 411, 413, 799 S.E.2d 494, 495 (2017).

peals had held that the trial court erred by denying White's suppression motion, after finding that White's girlfriend did not possess apparent authority to give the police consent to search White's hotel room.¹⁴² The supreme court reversed, assuming without deciding that the circuit court erred by denying White's suppression motion and finding that nevertheless, the evidence from sources other than the hotel room—including 4.3 grams of undiluted heroin packaged in three different weights, \$644 in cash organized by denominations in different pockets, two cell phones, and a baggie of marijuana, all found on White's person—was so overwhelming that any error was harmless beyond a reasonable doubt.¹⁴³

C. *Firearm Offenses*

In *Gerald v. Commonwealth*, Gerald was convicted of discharging a firearm in public, brandishing a firearm, and possession of a firearm by a convicted felon, after he fired a "large frame handgun" several times and threatened a number of witnesses with it.¹⁴⁴ He challenged the sufficiency of the evidence supporting his convictions, claiming that because the gun was never found, the Commonwealth had failed to prove that it met the relevant statutory definitions for "firearm" under Virginia Code sections 18.2-280, 18.2-282, and 18.2-308.2.¹⁴⁵ Virginia Code section 18.2-282(C) contains its own definition of "firearm" "[f]or purposes of this section,"¹⁴⁶ and the definition of "firearm" is well-established for felon in possession prosecutions under Virginia Code section 18.2-308.2.¹⁴⁷ What constitutes a firearm in the context of a prosecution for discharging a firearm in public in violation of Virginia Code section 18.2-280, however, came to the Court of Appeals of Virginia as a matter of first impression.¹⁴⁸

The court of appeals held that the definition of "firearm" contained in Virginia Code section 18.2-282(C) is the proper definition to use for Virginia Code section 18.2-280.¹⁴⁹ The court further held

142. *White v. Commonwealth*, 66 Va. App. 333, 363, 366–67, 785 S.E.2d 239, 254, 256 (2016).

143. *White*, 293 Va. at 419, 423–24, 799 S.E.2d at 498, 500–01.

144. 68 Va. App. 167, 170–71, 805 S.E.2d 407, 409–10 (2017).

145. *Id.* at 172–75, 805 S.E.2d at 409–12.

146. VA. CODE ANN. § 18.2-282(C) (Repl. Vol. 2014 & Cum. Supp. 2018).

147. *See Armstrong v. Commonwealth*, 263 Va. 573, 562 S.E.2d 139 (2002).

148. *Gerald*, 68 Va. App. at 174, 805 S.E.2d at 411.

149. *Id.* at 175, 805 S.E.2d at 412.

that the evidence was sufficient to satisfy all of Gerald's convictions, laying particular emphasis on the testimony regarding Gerald's actual discharge of the handgun.¹⁵⁰

Virginia Code section 18.2-279 criminalizes several gradations of discharging a firearm within an occupied building, varying with the level of mens rea and the result of the discharge.¹⁵¹ In *Bryant v. Commonwealth*, Bryant was indicted under the statute for "unlawfully, but not maliciously," shooting within an occupied building.¹⁵² She testified in her own defense and denied intentionally shooting the firearm, but admitted that she had inadvertently fired.¹⁵³ The circuit court refused her proffered jury instruction which instructed the jury to find her not guilty if it had a reasonable doubt as to whether the discharge was accidental or intentional, and Bryant was convicted.¹⁵⁴

The Supreme Court of Virginia affirmed Bryant's conviction, finding that "unlawfully" shooting within an occupied building requires only a showing of criminal negligence.¹⁵⁵ The court explained that even an unintentional shooting, if it resulted from mishandling of a firearm in a manner that evinced a reckless or indifferent disregard of the rights of others, would constitute an "unlawful" shooting in the context of Virginia Code section 18.2-279.¹⁵⁶ Accordingly, Bryant's accident defense was not cognizable, and she was not entitled to a jury instruction on that theory.¹⁵⁷

Virginia Code section 18.2-53.1, use of a firearm in the commission of a felony, is unique: it creates an unclassified felony with a mandatory minimum sentence without explicitly stating a maximum penalty.¹⁵⁸ In *Graves v. Commonwealth*, the Supreme Court of Virginia clarified that the mandatory minimum sentence is also

150. *Id.* at 175–76, 805 S.E.2d at 412. ("[N]o reasonable definition with respect to any of the offenses here, provides relief for Gerald Notwithstanding the failure to recover the weapon, it is difficult to conceive of what more a forensic report from a ballistics examiner could provide regarding the nature of the object Gerald displayed and discharged as a firearm than the testimony in the record before us supplies.")

151. VA. CODE ANN. § 18.2-279 (Repl. Vol. 2014 & Cum. Supp. 2017).

152. 295 Va. 302, 304, 309, 811 S.E.2d 250, 251, 253 (2018) (quoting VA. CODE ANN. § 18.2-279 (Repl. Vol. 2014 & Cum. Supp. 2017)).

153. *Id.* at 305–06, 811 S.E.2d at 251–52.

154. *Id.* at 307–08, 811 S.E.2d at 252. The jury sentence fixed Bryant's punishment at a fine of zero dollars, with no confinement. *Id.* at 307–08, 811 S.E.2d at 252.

155. *Id.* at 310–11, 811 S.E.2d at 253–54.

156. *Id.* at 310–11, 811 S.E.2d at 253–54.

157. *Id.* at 311, 811 S.E.2d at 254.

158. See VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 2014 & Cum. Supp. 2018).

the maximum.¹⁵⁹ The court noted that Virginia Code section 18.2-53.1's lack of both class and maximum punishment language makes it anomalous among the forty-two statutes in the Virginia Code prescribing mandatory minimum punishments.¹⁶⁰ The court resolved this ambiguity by resorting to legislative history, holding that the General Assembly did not intend to increase the offense's penalty when it amended it in 2004 as part of a broader effort at standardizing mandatory minimum language throughout the Virginia Code.¹⁶¹ Because the maximum penalty was three years, Graves's original sentence of five years with two years suspended was accordingly invalid and the court granted Graves's motion to vacate his sentence.¹⁶² The court rejected Graves's request for a new sentencing hearing and instead remanded the case for entry of a new sentencing order in conformity with its ruling because a three-year sentence was the only sentence available.¹⁶³

D. *Property Crimes*

In *Commonwealth v. Moseley*, Moseley was convicted of two counts of burglary and two counts of larceny, based on an entirely circumstantial body of evidence.¹⁶⁴ Moseley had been seen driving away from the vicinity of a burglarized house, and another burglary had occurred nearby two weeks later.¹⁶⁵ Moseley was detained in the vicinity of a third aborted burglary near the second burgled home, on the same day as the second home was burglarized, with heavy knit gloves in his pocket on a warm June day.¹⁶⁶ While Moseley was detained, a car that he used but did not own was towed from an apartment complex with its windows down and its keys in the ignition; the center console of the car contained property that had been taken in the two burglaries, mixed together

159. See 294 Va. 196, 200, 805 S.E.2d 226, 227 (2017).

160. *Id.* at 200–01, 805 S.E.2d at 227–28.

161. *Id.* at 202–04, 805 S.E.2d at 230; see also VA. CODE ANN. § 18.2-12.1 (Repl. Vol. 2014) (creating one definition for “mandatory minimum” sentences).

162. *Graves*, 294 Va. at 198, 805 S.E.2d at 227.

163. *Id.* at 198–99, 805 S.E.2d at 227. Justice Kelsey wrote a dissent, stating that he is unwilling to find that the minimum punishment must equal the maximum punishment in a case where the legislature declined to state a maximum. *Id.* at 209, 805 S.E.2d at 232–33 (Kelsey, J., dissenting). The dissent argued that in the absence of an explicit statutory maximum penalty, the maximum penalty is life imprisonment. *Id.* at 222, 805 S.E.2d at 234.

164. 293 Va. 455, 458, 464, 799 S.E.2d 683, 684, 687 (2017).

165. *Id.* at 458–60, 799 S.E.2d at 684–85.

166. *Id.* at 459–60, 799 S.E.2d at 684–85.

with Moseley's identification card and library card.¹⁶⁷ The Court of Appeals of Virginia reversed Moseley's convictions after concluding that the evidence was insufficient to establish that Moseley had exclusive dominion and control over the stolen property.¹⁶⁸

The Supreme Court of Virginia reversed and reinstated Moseley's convictions, finding that the court of appeals had made a "fragmented assessment of the record" and "improperly scrutinized each piece of evidence in isolation," rather than viewing the evidence in its totality, and that it had moreover failed to give proper deference to the factfinder.¹⁶⁹ The court reaffirmed the strong deference given to a factfinder's resolution of conflicts in the evidence and its determination of whether a hypothesis of innocence is reasonable, as laid out in *Commonwealth v. Hudson*.¹⁷⁰ The court held that "a rational factfinder could . . . find that the totality of the suspicious circumstances proved beyond a reasonable doubt that Moseley" committed all four crimes.¹⁷¹

The issue decided by the court of appeals in *Lee v. Commonwealth* was whether a screwdriver may be a deadly weapon for sentencing enhancement purposes for breaking and entering in violation of Virginia Code section 18.2-91.¹⁷² Lee conceded the evidence was sufficient for breaking and entering in the daytime when he used his screwdriver to pry open a basement window.¹⁷³ After Lee entered the home, he encountered the victim and held the screwdriver to her neck and demanded money.¹⁷⁴ Lee argued that because the breaking and entering was already complete when he used the screwdriver against the victim, it was not a "deadly weapon" within the meaning of the statute.¹⁷⁵

167. *Id.* at 459–61, 799 S.E.2d at 685.

168. *Moseley v. Commonwealth*, No. 0881-15-1, 2016 Va. App. LEXIS 182, at *16 (June 7, 2016) (unpublished decision).

169. *Moseley*, 293 Va. at 466, 799 S.E.2d at 688.

170. *Id.* at 464–65, 799 S.E.2d at 687 (citing *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003)).

171. *Id.* at 466, 799 S.E.2d at 688. Justice Goodwyn dissented, opining that because the larceny and related burglary inferences did not apply in this case, the evidence did not reach the necessary threshold of proof beyond a reasonable doubt, even viewed in the light most favorable to the Commonwealth. *Id.* at 466–68, 799 S.E.2d at 688–89 (Goodwyn, J., dissenting).

172. 68 Va. App. 313, 315–16, 808 S.E.2d 224, 225–26 (2017).

173. *Id.* at 316–17, 808 S.E.2d at 226–27.

174. *Id.* at 316, 808 S.E.2d at 226.

175. *Id.* at 317, 808 S.E.2d at 227.

The court of appeals upheld the trial court's determination to classify the screwdriver as a deadly weapon.¹⁷⁶ The court found that the legislature intended to protect occupants by discouraging burglars from carrying deadly weapons.¹⁷⁷ Therefore, the manner of an object's use inside the dwelling is relevant to prove the material issue of whether the burglar intended to use an object as a weapon and whether it could be deadly.¹⁷⁸ The court also held that what the burglar contemplated or intended was relevant in categorizing an object as a deadly weapon.¹⁷⁹ The court determined that the screwdriver was used for the dual purpose of a burglarious tool and a weapon as the evidence showed that Lee knew someone was home, kept the screwdriver in his hand for ready use and did not abandon it, and made statements indicating his intent.¹⁸⁰ The court accordingly affirmed the conviction.¹⁸¹

E. *Displaying a Noose*

Virginia Code section 18.2-423.2(B) prohibits displaying a noose in a "public place" with intent to intimidate.¹⁸² In *Turner v. Commonwealth*, Turner was convicted of violating this statute after he displayed a noose in his front yard, visible from a public road, from which he hung a black, life-size mannequin.¹⁸³ Turner claimed that because the noose was on his private property, it was not located in a public place as required by the statute.¹⁸⁴

The Supreme Court of Virginia disagreed, distinguishing between concepts of "public place" and "public property," and contrasting the General Assembly's use of "public place" with its use of "private property" in subsection (A) of the same statute.¹⁸⁵ The court applied the definition of "public place" adopted in *Hackney v. Commonwealth* which includes "private property generally visible by the public from some other location."¹⁸⁶ Because Turner's noose

176. *Id.* at 320, 808 S.E.2d at 228.

177. *Id.* at 319, 808 S.E.2d at 227.

178. *Id.* at 319, 808 S.E.2d at 227.

179. *Id.* at 319, 808 S.E.2d at 228.

180. *Id.* at 320, 808 S.E.2d at 228.

181. *Id.* at 320, 808 S.E.2d at 228.

182. VA. CODE ANN. § 18.2-423.2(B) (Repl. Vol. 2014 & Cum. Supp. 2018).

183. 295 Va. 104, 107, 809 S.E.2d 679, 680 (2018).

184. *Id.* at 108, 809 S.E.2d at 681.

185. *Id.* at 110, 809 S.E.2d at 682–84.

186. *Id.* at 113, 809 S.E.2d at 683–84 (quoting *Hackney v. Commonwealth*, 186 Va. 888,

display undisputedly fell within this definition, the court affirmed his conviction.¹⁸⁷

F. *Sex Crimes Against Minors*

Virginia Code section 18.2-374.3(B) proscribes using a cell phone for “purposes of procuring or promoting the use of a minor” in conduct that would violate the indecent liberties statute, Virginia Code section 18.2-370 or 18.2-374.1.¹⁸⁸ In *Dietz v. Commonwealth*, a teacher was convicted of violating this provision after she engaged in a lengthy sexualized text and photo conversation with a detective who was responding as her eleven-year-old student by using the student’s cell phone.¹⁸⁹ Dietz sent photos of a portion of her breasts, her legs, her face, and her lips, all taken while she was lying in a bathtub.¹⁹⁰ Dietz claimed on appeal that Virginia Code section 18.2-374.3(B) did not prohibit communications with the minor himself, but that it rather criminalized communications with a third party to solicit a minor.¹⁹¹ Dietz also claimed that the photo of her breasts did not constitute exposure of a “sexual part” within the meaning of Virginia Code section 18.2-370(A)(1), and that a completed offense under that section was required to prove a violation of Virginia Code section 18.2-374.3(B).¹⁹²

The Supreme Court of Virginia rejected both of Dietz’s arguments.¹⁹³ The court declined to read a third-party requirement into Virginia Code section 18.2-374.3(B), noting the lack of an explicit provision and the fact that the plain language of the statute could be satisfied by communication with a minor or a third party.¹⁹⁴ The court did not reach whether the photo of Dietz’s breasts were a “sexual part” sufficient to support a completed violation of Virginia Code section 18.2-370(A)(1).¹⁹⁵ The court clarified that the Commonwealth need not establish a completed violation of Virginia Code section 18.2-370 to show a violation of section 18.2-374.3(B),

891–93, 45 S.E.2d 241, 242–43 (1947)).

187. *Id.* at 113, 809 S.E.2d at 684.

188. VA. CODE ANN. § 18.2-374.3(B) (Repl. Vol. 2014 & Cum. Supp. 2018).

189. 294 Va. 123, 127–29, 804 S.E.2d 309, 311–12 (2017).

190. *Id.* at 127, 804 S.E.2d at 311.

191. *Id.* at 133, 804 S.E.2d at 314.

192. *Id.* at 130, 134, 804 S.E.2d at 312, 314–15.

193. *Id.* at 134, 136–37, 804 S.E.2d at 314, 316.

194. *Id.* at 133–34, 804 S.E.2d at 314.

195. *Id.* at 134, 804 S.E.2d at 314–15.

and held that given Dietz's express lascivious intent toward the victim, the factfinder could have concluded that Dietz had used the cell phone with the intent to "procure or promote the use of" the victim for a future violation of Virginia Code section 18.2-370.¹⁹⁶ The court also found that the factfinder could have also concluded that Dietz's communications constituted a completed violation of Virginia Code section 18.2-370(A)(5), which prohibits enticing a minor to enter any place for the purposes of committing any of the foregoing subdivisions of subsection (A), where Dietz had asked the victim where they could be alone so that she could kiss him, and had stated she would do "[s]o many dirty things" with the victim if they were alone.¹⁹⁷

G. *Felony Child Neglect and Endangerment*

Virginia Code section 18.2-371.1(A) prohibits a child's caregivers from making willful acts or omissions that result in serious injury or death to the child.¹⁹⁸ In *White v. Commonwealth*, a mother was convicted of violating the statute after her five-year-old son's body was found in a septic tank with an unsecured lid, after White had left him to play unattended.¹⁹⁹

The Court of Appeals of Virginia reversed the conviction, finding that no evidence in the record supported a finding of fact that White knew that the septic tank lid was unsecured.²⁰⁰ The court reasoned that mere proof that the lid was unsecured was insufficient to establish that the child's death resulted from White's willful act or omission.²⁰¹ To support the conviction, the evidence had to establish that White actually knew about the lid and the danger that it presented for her failure to act to be willful.²⁰² The evidence did not establish that White knew about the danger posed by the unsecured lid, so her failure to remedy it was not willful.²⁰³

196. *Id.* at 134–37, 804 S.E.2d at 314–16.

197. *Id.* at 137, 804 S.E.2d at 316 (alteration in original).

198. VA. CODE ANN. § 18.2-371.1(A) (Cum. Supp. 2018).

199. 68 Va. App. 111, 114–15, 804 S.E.2d 317, 318–19 (2017).

200. *Id.* at 123–27, 804 S.E.2d at 322–24.

201. *Id.* at 123, 126, 804 S.E.2d at 323.

202. *Id.* at 123–25, 804 S.E.2d at 322–24.

203. *Id.* at 125–27, 804 S.E.2d at 323–24. Judge Alston dissented, opining that the totality of the evidence, viewed in the light most favorable to the Commonwealth, could have supported a reasonable factfinder in concluding "that the totality of [White]'s actions and

In *Hannon v. Commonwealth*, the Court of Appeals of Virginia determined that the evidence was insufficient to sustain appellant's convictions for felony child endangerment in violation of Virginia Code section 18.2-371.1(B)(1).²⁰⁴ The evidence established that a five-year-old boy and four-month-old girl were sitting in a car with unlocked doors in the parking lot of a Dollar General for approximately fifteen minutes.²⁰⁵ The trial court found that, left alone, both children were at risk of substantial injury or death despite the defense argument that Hannon did not act with a reckless disregard for human life.²⁰⁶

The court of appeals, however, found that although there are a variety of possible ways a child could suffer injury in the circumstances presented, "even the aggregation of those possibilities does not result in a situation where the children were *likely* to suffer injury."²⁰⁷ Accordingly, the court reversed Hannon's conviction.²⁰⁸

H. *Murder and Crimes of Violence*

In *Howsare v. Commonwealth*, the Supreme Court of Virginia determined whether the trial court erred in admitting the prosecution's proposed jury instruction because it omitted an otherwise correct statement of law.²⁰⁹ Over the defense's objection, the jury was instructed that it could infer intent for a murder conviction from the defendant's acts and conduct instead of "acts, conducts, and statements."²¹⁰ On appeal, Howsare argued that the statement of law was incomplete and therefore misleading, even though a separate instruction was given that informed the jury that it could take into account the defendant's statements.²¹¹

In rejecting Howsare's argument, the Supreme Court of Virginia reaffirmed the principle that "[w]here other [jury] instructions fully and fairly cover the principles of law governing the case, the trial court does not err in refusing an additional instruction on the

omissions ultimately led to [her son]'s death; which is all that the Commonwealth was required to prove." *Id.* at 127–30, 804 S.E.2d at 325–26 (Alston, J., dissenting).

204. 68 Va. App. 87, 90, 803 S.E.2d 355, 356 (2017).

205. *Id.* at 90, 803 S.E.2d at 356–57.

206. *Id.* at 91, 803 S.E.2d at 357.

207. *Id.* at 96, 803 S.E.2d at 359.

208. *Id.* at 96, S.E.2d at 359.

209. 293 Va. 439, 442–43, 799 S.E.2d 512, 514 (2017).

210. *Id.* at 442–43, 799 S.E.2d at 514–15.

211. *Id.* at 442–43, 799 S.E.2d at 514–15.

same subject.”²¹² Moreover, because the instructions are to be reviewed as a whole rather than in isolation, the court found that the jury had been properly instructed.²¹³ The court further rejected Howsare’s argument that an instruction is inadmissible simply because it deviates from the Model Jury Instructions.²¹⁴

In *Edwards v. Commonwealth*, the Court of Appeals of Virginia considered whether the prosecution proved venue in a murder case by relying exclusively on circumstantial evidence.²¹⁵ The victim was last seen in Chesterfield County at her home and Edwards was found to be nearby the victim’s home when the offense occurred.²¹⁶ A witness testified that screams were heard coming from the victim’s residence.²¹⁷ Edwards’s car had blood stains in the trunk with hair that matched the victim’s hair color.²¹⁸ The defense made a motion to dismiss for improper venue, arguing that venue was not properly established.²¹⁹

The Court of Appeals of Virginia held that Virginia Code section 14.2-248 was the applicable statute, which provides that “if a mortal wound, or other violence or injury, be inflicted . . . and death ensues therefrom in another county or city, the offense may be prosecuted in either.”²²⁰ The court reasoned that the circumstantial evidence in the case established a “strong inference” that Edwards went into the victim’s home in Chesterfield County for several hours and either mortally wounded or murdered her there, and then later disposed of her body.²²¹ The court noted, however, that any violence in a particular locality, “no matter how minor,” could be sufficient to establish venue under Virginia Code section 19.2-248.²²² The court additionally rejected a sufficiency argument and affirmed the judgment.²²³

212. *Id.* at 443, 799 S.E.2d at 515.

213. *Id.* at 445, 799 S.E.2d at 515.

214. *Id.* at 444, 799 S.E.2d at 515.

215. 68 Va. App. 284, 294–95, 808 S.E.2d 211, 215–16 (2017).

216. *Id.* at 290–91, 808 S.E.2d 213–14.

217. *Id.* at 295, 808 S.E.2d at 216.

218. *Id.* at 295, 808 S.E.2d at 216.

219. *Id.* at 294, 808 S.E.2d at 215.

220. *Id.* at 294, 808 S.E.2d at 216 (quoting VA. CODE ANN. § 19.2-248 (Repl. Vol. 2015)).

221. *Id.* at 296, 808 S.E.2d at 216.

222. *Id.* at 296 n.3, 808 S.E.2d at 216 n.3.

223. *Id.* at 304, 808 S.E.2d at 220.

In *Commonwealth v. Gregg*, the Supreme Court of Virginia found that Gregg's conviction for common law involuntary manslaughter and involuntary manslaughter per Virginia Code section 18.2-154 (malicious shooting at an occupied vehicle) violated the Double Jeopardy clause.²²⁴ Gregg argued that the Double Jeopardy Clause foreclosed his second conviction because Virginia Code section 18.2-154 provides that a person so convicted "is guilty of involuntary manslaughter."²²⁵ The Court of Appeals of Virginia reversed Gregg's conviction, holding that Gregg could not be convicted of both charges.²²⁶

The supreme court began its analysis by noting that if the legislature expressly declares its intent to inflict multiple punishments for the same conduct, the courts must respect its intent to do so.²²⁷ The court found that the General Assembly did not draw a distinction between species of involuntary manslaughter and did not specify, as it did in some other statutes, that a violation of that section does not preclude the applicability of other criminal statutes.²²⁸ The court concluded that the legislature did not intend to permit simultaneous punishment for both involuntary manslaughter and manslaughter per Virginia Code section 18.2-154.²²⁹ The court then remanded for the Commonwealth to elect between the sentences for which conviction to vacate.²³⁰

In *Burrous v. Commonwealth*, the Court of Appeals of Virginia found that the evidence was sufficient to support Burrous's robbery conviction.²³¹ The police recovered a bandana containing DNA evidence matching the defendant's profile.²³² The victims identified the bandana as the one worn by the robber.²³³ Burrous also had photos on Facebook with him wearing a similar bandana.²³⁴ The

224. 295 Va. 293, 300–01, 811 S.E.2d 258–59 (2018).

225. *Id.* at 296, 300, 811 S.E.2d at 256, 258 (quoting VA. CODE ANN. § 18.2-154 (Cum. Supp. 2017)).

226. *Gregg v. Commonwealth*, 67 Va. App. 375, 387–88, 796 S.E.2d 447, 454 (2017).

227. *Gregg*, 295 Va. at 298, 811 S.E.2d. at 257.

228. *Id.* at 299–301, 811 S.E.2d at 258.

229. *Id.* at 301, 811 S.E.2d at 259.

230. *Id.* at 301, 811 S.E.2d at 259.

231. 68 Va. App. 275, 808 S.E.2d 206, 207 (2017).

232. *Id.* at 277, 808 S.E.2d at 207–08.

233. *Id.* at 278–79, 808 S.E.2d at 208.

234. *Id.* at 278, 808 S.E.2d at 208.

defense argued there was insufficient evidence of the identity of the perpetrator.²³⁵

Burrous argued his case was controlled by *Jennings v. Commonwealth*, in which the court found there was insufficient evidence to prove identity where the evidence was limited to DNA evidence, because the defendant matched one of several DNA profiles recovered.²³⁶ The court determined that *Jennings* did not control because Burrous was the only DNA profile found and the bandana was recovered by a police dog tracking the scent of the assailant.²³⁷ The court further noted that in the present case, there were other circumstances which negated the possibility that someone could have innocently come into contact with the bandana at another time.²³⁸ Accordingly, the court affirmed Burrous's conviction.²³⁹

I. *Implied Consent*

In *Shin v. Commonwealth*, the defense appealed the trial court's ruling that Shin unreasonably refused to submit to a breath test in violation of Virginia's implied consent laws.²⁴⁰ First, Shin argued his refusal was reasonable because the implied consent law violated the "unconstitutional conditions doctrine" in that it required him to waive his Fourth Amendment right against unreasonable searches as a condition of his driving privilege.²⁴¹ The Supreme Court of Virginia disagreed, relying on *Birchfield v. North Dakota*, to find that warrantless breath tests incident to arrests for drunk driving do not violate the Fourth Amendment.²⁴² Because Shin was only required to give a blood test if he did not submit to a breath test, the court did not reach the question of whether the unconstitutional conditions doctrine applies to the portion of the statutes concerning blood samples.²⁴³

235. *Id.* at 279, 808 S.E.2d at 208.

236. *Id.* at 280, 808 S.E.2d at 209 (citing *Jennings v. Commonwealth*, 67 Va. App. 620, 628, 798 S.E.2d 828, 832 (2017)).

237. *Id.* at 281, 808 S.E. 2d at 209.

238. *Id.* at 283, 808 S.E.2d at 210.

239. *Id.* at 283, 808 S.E.2d at 210.

240. 294 Va. 517, 808 S.E.2d 401, 402 (2017).

241. *Id.* at 520, 808 S.E.2d at 402.

242. *Id.* at 524, 808 S.E.2d at 404 (citing *Birchfield v. North Dakota*, 579 U.S. ___, ___, 136 S. Ct. 2160, 2186 (2016)).

243. *Id.* at 525, 808 S.E.2d at 405.

Shin also argued Virginia Code section 18.2-268.3 was unconstitutionally vague in not providing when refusal is reasonable.²⁴⁴ Shin asserted that the determination of reasonableness is entirely subjective, leading to arbitrary enforcement.²⁴⁵ The supreme court found Shin lacked standing to challenge the constitutionality of the statute because he could not show that his refusal, which he asserted was because “he did not believe he was intoxicated and should not have been subjected to such tests,” was reasonable.²⁴⁶

Finally, Shin argued that Virginia’s implied consent law violates article I, section 8 of the Virginia Constitution, which provides that no individual “shall be compelled in any criminal proceeding to give evidence against himself.”²⁴⁷ Shin argued that requiring samples to be provided would constitute providing evidence against himself.²⁴⁸ The court found that breath tests, like blood tests, are not testimonial because they do not communicate anything related to an individual’s thoughts or motivations and thus do not implicate the protections encompassed by Article I, Section 8 of the Virginia Constitution.²⁴⁹

J. *Driving Privileges*

The Court of Appeals of Virginia held in *Grasty v. Commonwealth* that if a commercial fisherman’s license is suspended pursuant to Virginia Code section 46.2-301(B), they are prohibited from operating any motor vehicle on the highways of the Commonwealth, even if they are otherwise exempt from the requirement to obtain a driver’s license.²⁵⁰ Grasty argued that if he never needed a license to begin with pursuant to Virginia Code sections 46.2-300, 46.2-303, and 46.2-674, then the trial court erred in finding him guilty of operating a motor vehicle on a suspended or revoked license.²⁵¹

244. *Id.* at 525, 808 S.E.2d at 405.

245. *Id.* at 525, 808 S.E.2d at 405.

246. *Id.* at 527, 808 S.E.2d at 406.

247. *Id.* at 527–28, 808 S.E.2d at 406 (citing VA. CONST. art. I, § 8).

248. *Id.* at 528, 808 S.E.2d at 406.

249. *Id.* at 530, 808 S.E.2d at 407.

250. 68 Va. App. 232, 807 S.E.2d 238, 242 (2017).

251. *Id.* at 236, 807 S.E.2d at 240.

The court of appeals held that *Triplett v. Commonwealth* controlled.²⁵² There, the Supreme Court of Virginia held that habitual offenders were prohibited from driving motor vehicles even if the vehicle was a farm-use vehicle and otherwise did not require a driver's license.²⁵³ The court followed the *Triplett* court's reasoning and held that legislative intent plainly expressed that the privilege to drive can be revoked or suspended and that an exception to the licensing requirement was not legislative immunity from "all consequences of violating the rules of the road."²⁵⁴

III. LEGISLATION

A. *Animal Abandonment*

The General Assembly lowered from five days to four days the amount of time for which failing to provide the elements of basic care constitutes the crime of abandonment of an animal.²⁵⁵ The General Assembly also increased the penalty for abandonment of an animal from a Class 3 misdemeanor to a Class 1 misdemeanor penalty.²⁵⁶

B. *Cell Phone Service Expiration After Protective Order*

The General Assembly passed legislation providing that a petitioner of a protective order or family or household member in a family abuse case may be granted exclusive use and possession of a cellular telephone number or electronic device.²⁵⁷ It additionally allows the court to enjoin a respondent from terminating a cellular telephone number or contract with a third-party provider.²⁵⁸ The

252. *Id.* at 238, 807 S.E.2d at 241 (citing *Triplett v. Commonwealth*, 212 Va. 649, 186 S.E.2d 16 (1972)).

253. *Triplett*, 212 Va. at 651–52, 186 S.E.2d at 17–18.

254. *Grasty*, 68 Va. App. at 240, 807 S.E.2d at 242.

255. Act of Mar. 23, 2018, ch. 416, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 3.2-6500, -6504 (Cum. Supp. 2018); *id.* §§ 18.2-403.1, -403.2 (Cum. Supp. 2018)).

256. *Id.* ch. 416, 2018 Va. Acts at __.

257. Act of Feb. 26, 2018, ch. 38, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 16.1-253.1, -279.1 (Cum. Supp. 2018)).

258. *Id.* ch. 38, 2018 Va. Acts at __.

court may also enjoin the respondent from using location service tracking to locate the petitioner.²⁵⁹

C. *Discovery*

Criminal history record information may only be disseminated to enumerated entities as provided in Virginia Code section 19.2-389. Under new legislation, this criminal history record information may now be disseminated in response to a discovery request, or more generally for a court's review.²⁶⁰

D. *Drones*

The General Assembly created two new Virginia Code sections that criminalize certain use of drones.²⁶¹ Under section 18.2-121.3, it is a Class 1 misdemeanor for a person to “knowingly and intentionally cause[] an unmanned aircraft system to enter the property of another and come within 50 feet of a dwelling house (i) to coerce, intimidate, or harass another person or (ii) after having been given actual notice to desist.”²⁶² The section does not apply if the person has consent or is authorized by federal regulation to operate the drone.²⁶³

Section 18.2-324.2 prohibits certain uses of drones by sex offenders and respondents of protective orders.²⁶⁴ Registered sex offenders cannot use a drone to follow or contact someone without permission; or to capture recognizable images of a person without permission.²⁶⁵ Respondents of a protective order cannot use a drone to follow, contact, or capture images of the petitioner or persons named in the protective order.²⁶⁶ A violation of these provisions is a Class 1 misdemeanor.²⁶⁷

259. *Id.* ch. 38, 2018 Va. Acts at __.

260. Act of Feb. 26, 2018, ch. 49, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 19.2-389 (Cum. Supp. 2018)).

261. Act of May 18, 2018, ch. 851, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 15.2-926.3 (Repl. Vol. 2018); codified at *id.* §§ 18.2-121.3, -324.2 (Cum. Supp. 2018)).

262. VA. CODE ANN. § 18.2-121.3(A) (Cum. Supp. 2018).

263. *Id.* § 18.2-121.3(B) (Cum. Supp. 2018).

264. *Id.* § 18.2-324.2 (Cum. Supp. 2018).

265. *Id.*

266. *Id.*

267. *Id.* § 18.2-324.2(C) (Cum. Supp. 2018).

E. *Female Genital Mutilation*

Previously, violating Virginia's prohibition against female genital mutilation constituted a Class 1 misdemeanor. The General Assembly increased the gradation of this offense to a Class 2 felony.²⁶⁸

F. *Larceny Threshold*

The General Assembly raised the value threshold for felony larceny, as well as a host of other property crimes containing similar thresholds, from \$200 to \$500.²⁶⁹

G. *Presumption Against Bail*

The General Assembly added several human trafficking offenses to the list of crimes for which there is a presumption against bail.²⁷⁰ The list includes: (1) taking or detaining a person for the purposes of prostitution or unlawful sexual intercourse, (2) receiving money from procuring or placing a person in a house of prostitution or forced labor, (3) receiving money from the earnings of a prostitute, and (4) commercial sex trafficking.²⁷¹

H. *Restitution*

Virginia's restitution system received three significant alterations. First, a system was created to identify and locate crime victims to whom restitution is still owed, and to distribute collected but unclaimed restitution payments to them.²⁷² Second, new procedures were established enabling courts to monitor defendants' compliance with restitution orders.²⁷³ Finally, the General Assembly exempted restitution orders docketed as civil judgments under

268. Act of Mar. 30, 2018, ch. 549, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 18.2-51.7 (Cum. Supp. 2018); *id.* § 19.2-8 (Cum. Supp. 2018)).

269. Act of Apr. 4, 2018, ch. 764, 2018 Va. Acts __, __ (codified as amended in scattered sections of VA. CODE ANN. tit. 18.2 (Cum. Supp. 2018); codified as amended at *id.* § 29.1-553 (Cum. Supp. 2018)).

270. Act of Mar. 2, 2018, ch. 71, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 19.2-120 (Cum. Supp. 2018)).

271. *Id.* ch. 71, 2018 Va. Acts at __.

272. Act of Mar. 30, 2018, ch. 724, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 19.2-305.1, -349, -368.3 (Cum. Supp. 2018)).

273. Act of Mar. 19, 2018, ch. 316, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 9.1-176.1, -305.1, -358, -368.15 (Cum. Supp. 2018); *id.* § 53.1-145 (Cum. Supp.

Virginia Code section 8.01-446, pursuant to Virginia Code section 19.2-305.2(B), from any statute of limitations.²⁷⁴

I. *Sentence Reduction for Substantial Assistance to the Prosecution*

Under new legislation, a trial court may reduce a convicted individual's sentence after final judgment if such person provides "substantial assistance" in the furtherance of an investigation of another person engaged in an act of violence or for offenses involving the manufacture or distribution of controlled substances or marijuana.²⁷⁵ Only the Commonwealth's Attorneys may move for the sentence reduction.²⁷⁶ In determining whether the defendant provided "substantial assistance," the court shall consider an enumerated list of circumstances.²⁷⁷ In addition, depending on the circumstances, the court may or may not be able to reduce the sentence if the motion is made more than one year after entry of the final judgment order.²⁷⁸

J. *THC-A Oil/Cannabidiol Oil*

New legislation provides that a medical practitioner may issue a written certification for the use of cannabidiol ("CBD") oil or THC-A oil for the treatment or to alleviate the symptoms of any diagnosed "condition or disease" determined by the practitioner.²⁷⁹ This expands the ability of medical practitioners to prescribe these oils for use beyond intractable epilepsy, which was the only use allowable under prior law.²⁸⁰ The legislation also provides for a ninety-day supply when previously only thirty-day supplies were authorized.²⁸¹

2018)).

274. Act of Mar. 30, 2018, ch. 736, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 19.2-305.2, -341 (Cum. Supp. 2018)).

275. Act of Mar. 29, 2018, ch. 492, 2018 Va. Acts __, __ (codified at VA. CODE ANN. § 19.2-303.01 (Cum. Supp. 2018)).

276. *Id.* ch. 492, 2018 Va. Acts at __.

277. *Id.* ch. 492, 2018 Va. Acts at __.

278. *Id.* ch. 492, 2018 Va. Acts at __.

279. Act of Mar. 9, 2018, ch. 246, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 18.2-250.1 (Cum. Supp. 2018); *id.* §§ 54.1-3408.3, -3442.5, -3442.7 (Cum. Supp. 2018)).

280. *Id.* ch. 246, 2018 Va. Acts at __.

281. *Id.* ch. 246, 2018 Va. Acts at __.

K. *Timeliness of Indictments*

The legislature passed a new law to clarify a pre-existing requirement that a person in jail on a criminal charge is to be discharged from jail if an indictment, presentment, or information is not found or filed against him before the end of the second term of court at which he is held to answer.²⁸² The bill elaborates that this only applies when a charge has been certified or otherwise transferred from a district court to circuit court.²⁸³

L. *Weekend Jail Time*

New legislation allows courts to impose nonconsecutive or weekend jail time for defendants convicted of a misdemeanor, traffic offense, any offense under chapter 5 of title 20, or a non-violent felony if there are forty-five days or less to serve.²⁸⁴ Courts must find “good cause” and may only impose a nonconsecutive sentence if the Commonwealth does not object.²⁸⁵

282. Act of Mar. 30, 2018, ch. 551, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 19.2-242 (Cum. Supp. 2018)).

283. *Id.* ch. 551, 2018 Va. Acts at __.

284. Act of Mar. 29, 2018, ch. 535, 2018 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 53.1-131.1 (Cum. Supp. 2018)).

285. *Id.* ch. 535, 2018 Va. Acts at __.