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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

This article surveys recent decisions of Virginia appellate courts in the field of criminal law and procedure. The article also outlines some of the most significant changes to criminal law and procedure enacted by the 2016 Virginia General Assembly.

I. CRIMINAL PROCEDURE

A. *Indictments*

In *Herrington v. Commonwealth*, the Supreme Court of Virginia considered whether the Commonwealth had the authority to obtain an indictment on a different charge than the one certified to the grand jury.[1] The defendant was initially arrested and charged with possession of a controlled substance with intent to sell or distribute.[2] At the preliminary hearing on the charge, the district court found "no probable cause to support the element of intent to sell or distribute."[3] The district court therefore reduced the charge to simple possession of a controlled substance and certified that charge to the grand jury.[4] The grand jury, nonetheless, indicted the defendant with the original distribution charge.[5] The defendant unsuccessfully attempted to quash the indictment in circuit court.[6]

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1. 291 Va. 181, 183–84, 781 S.E.2d 561, 562–63 (2016).
2. *Id.* at 183, 781 S.E.2d at 562.
3. *Id.* at 184, 781 S.E.2d at 562.
4. *Id.* at 184, 781 S.E.2d at 562–63.
5. *Id.* at 184, 781 S.E.2d at 563.
6. *Id.*

The Supreme Court of Virginia held that the circuit court did not err in denying the defendant's motion to quash.[7] In doing so, the supreme court rejected the defendant's contention that, by obtaining an indictment on a charge different than the certified charge, the Commonwealth "amended" the indictment.[8] The supreme court further rejected the defendant's argument that the indictment was improper or obtained by unlawful means.[9] As a matter of settled law, the Commonwealth may obtain an indictment from the grand jury for an offense "for which the district court has previously found no probable cause."[10] Likewise, a district court's finding of probable cause for a charge does not bind the Commonwealth to that charge.[11] Thus, "[a]fter the district court certified the reduced charge of simple possession of a controlled substance at the preliminary hearing, the Commonwealth was not required to obtain an indictment from the grand jury on that charge."[12]

In *Commonwealth v. Bass*, a fatal variance existed between the indictments and the evidence presented at trial; however, the defendant's attorney failed to make any objection to the variance.[13] The Supreme Court of Virginia described the variance as follows:

> [O]ne indictment alleged that Bass attempted to rob Videll Smith, and a second alleged that Bass robbed Irving Smith. However, the evidence proved only that Bass completed the robbery of Videll Smith, and the jury convicted Bass accordingly. Thus, a fatal variance existed between the indictments against Bass and the proof offered by the Commonwealth at trial.[14]

Since Bass' attorney failed to object to the variance, the supreme court considered whether the variance itself warranted applying the ends of justice exception to the contemporaneous objection rule.[15] The Court of Appeals of Virginia had applied its ends of justice exception under Rule 5A:18 and reversed Bass'

7. *Id*. at 185, 781 S.E.2d at 564.
8. *Id*. at 184, 781 S.E.2d at 563.
9. *Id*. at 185, 781 S.E.2d at 563.
10. *Id*.
11. *Id*.
12. *Id*. at 185, 781 S.E.2d at 564.
13. Commonwealth v. Bass, 292 Va. 19, 25, 786 S.E.2d 165, 168–69 (2016).
14. *Id*. at 28, 786 S.E.2d at 170.
15. *Id*. at 27, 786 S.E.2d at 169.

conviction.[16] In finding that the court of appeals misapplied the exception, the supreme court held that there was no "grave injustice" that would entitle Bass to the ends of justice exception.[17] Under prior precedent, "no grave injustice occurs merely because a variance exists between an indictment and the evidence offered at trial—even where the defendant is convicted of a greater crime than the one charged in the indictment."[18] Because Bass failed to identify any reason for the application of the ends of justice exception beyond the variance, he waived his challenge to the sufficiency of the evidence.[19]

B. *Jail Attire in Jury Trials*

The Supreme Court of the United States has held that states "cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes."[20] In *Wilkins v. Commonwealth*, the defendant claimed he had been tried in identifiable jail-issued clothing.[21] The only description in the record of the defendant's clothing came from his counsel: "'a green, sort of scrub outfit,' black sneakers, and 'a visible bracelet on his left arm.'"[22] In deciding whether this attire was "readily identifiable" as jail-issued clothing, the Supreme Court of Virginia first asked which party has the burden of proof—the Commonwealth or the defendant?[23] The supreme court held "the defendant bears the burden of proving that the clothing he or she wore at trial was readily identifiable to the jury as jail attire."[24] Clothing marked with indicia of incarceration weigh in favor of the defendant satisfying that burden.[25] But in this case, the defendant failed to meet his burden of proving

16. *Id.* at 25, 786 S.E.2d at 169.
17. *Id.* at 28, 786 S.E.2d at 171–72.
18. *Id.* at 30, 786 S.E.2d at 171 (citing Henson v. Commonwealth, 208 Va. 120, 121, 128, 155 S.E.2d 346, 346, 351 (1967)).
19. *Id.* at 31–33, 786 S.E.2d at 172.
20. Estelle v. Williams, 425 U.S. 501, 512 (1976).
21. 292 Va. 2, 4, 786 S.E.2d 157, 157 (2016).
22. *Id.*
23. *Id.* at 7, 786 S.E.2d at 159.
24. *Id.* at 7–8, 786 S.E.2d at 159.
25. *Id.* at 8, 786 S.E.2d at 160.

that the clothing described by his attorney at trial was readily identifiable as jail-issued clothing.[26]

C. *Waiver of Right to Withdraw a Guilty Plea*

In *Griffin v. Commonwealth*, the Court of Appeals of Virginia held, as a matter of first impression in Virginia, that a defendant can expressly waive the ability to withdraw a guilty plea through a plea agreement.[27] The defendant signed a plea agreement with an express waiver of his right to withdraw his guilty plea.[28] At the plea hearing, the circuit court reviewed the terms of the agreement in detail with the defendant.[29] During the plea colloquy, the defendant confirmed that he understood and agreed to the terms.[30] But a few weeks later, the defendant requested to withdraw his guilty plea.[31] In finding no error in the circuit court's denial of the request, the court of appeals explained that the ability to withdraw a guilty plea is conferred by statute and like other rights conferred by statute, can be waived.[32] Because the defendant expressly waived his ability to withdraw the plea, the court of appeals concluded that the circuit court did not err in holding the defendant to the terms of the agreement.[33]

D. *Sentencing Hearings*

In *Grafmuller v. Commonwealth*, the Supreme Court of Virginia reaffirmed the "bright-line rule" established by *Rawls v. Commonwealth* that a defendant who has been sentenced in excess of the statutory maximum has the right to a new sentencing hearing.[34] The defendant had originally entered *Alford* pleas to his charges.[35] The defendant later sought a new sentencing hearing

26. *Id.* at 9, 786 S.E.2d at 160.

27. 65 Va. App. 714, 720, 780 S.E.2d 909, 912 (2016).

28. *Id.* at 716, 780 S.E.2d at 910.

29. *Id.* at 717, 780 S.E.2d at 910–11.

30. *Id.* at 719, 780 S.E.2d at 911–12.

31. *Id.* at 717, 780 S.E.2d at 911.

32. *Id.* at 718, 780 S.E.2d at 911 (citing VA. CODE ANN. § 19.2-296 (Repl. Vol. 2015 & Supp. 2016)).

33. *Id.* at 720, 780 S.E.2d at 912.

34. 290 Va. 525, 529, 778 S.E.2d 114, 116 (2015) (citing Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009)).

35. *Id.* at 527, 778 S.E.2d at 114–15.

because his sentence exceeded the statutory maximum.[36] Rather than grant the defendant a new sentencing hearing, the trial judge, who had imposed the original sentence, simply entered an amended sentencing order.[37]

On appeal, the Commonwealth argued that *Rawls* should be limited to sentences that had been imposed by juries.[38] The supreme court declined to create an exception to *Rawls*.[39] The supreme court reasoned that an exception would "re-introduce to this area of the law both a lack of uniformity and a need for speculation as to what the sentence would have been."[40] For instance, the original sentencing judge may not always be available to resentence the defendant.[41] An exception would also run afoul of the defendant's constitutional and statutory right to be present during the trial.[42] Thus, the supreme court held that a defendant who has been sentenced in excess of the statutory maximum, regardless of whether the sentence was imposed by a judge or a jury, has a right to a new sentencing hearing.[43]

In *Nunez v. Commonwealth*, the Court of Appeals of Virginia found harmless error in the circuit court's decision to pronounce a sentence without the defendant present.[44] At a hearing following the defendant's guilty plea and preparation of the pre-sentence report, the circuit court decided to make a deferred disposition.[45] Several months later, the defendant had voluntarily returned to Bolivia after the Immigration and Customs Enforcement agency took custody of him.[46] The defendant was therefore absent for his subsequent hearings on the deferred disposition.[47] The circuit court eventually imposed a fine in the defendant's absence and suspended it in its entirety.[48]

36. *Id*. at 527–28, 778 S.E.2d at 115.
37. *Id*. at 528, 778 S.E.2d at 115.
38. *Id*. at 530, 778 S.E.2d at 116.
39. *Id*.
40. *Id*. at 531, 778 S.E.2d at 116.
41. *Id*. at 531, 778 S.E.2d at 116–17.
42. *Id*. at 531, 778 S.E.2d at 117 (citing U.S. CONST. amends. VI, XIV; VA. CONST. art. I, §§ 8, 11; VA. CODE ANN. § 19.2-259 (Repl. Vol. 2015 & Supp. 2016)).
43. *Id*. at 531,778 S.E.2d at 117.
44. 66 Va. App. 152, 155, 783 S.E.2d 62, 63–64 (2016).
45. *Id*. at 155, 783 S.E.2d at 64.
46. *Id*.
47. *Id*. at 156, 783 S.E.2d at 64.
48. *Id*.

Operating on the assumption that the circuit court erred in sentencing the defendant in his absence, the court of appeals held that the error was subject to harmless error analysis.[49] Specifically, the court of appeals applied the "harmless beyond a reasonable doubt" standard of review for constitutional error.[50] In conducting this analysis, the court of appeals found three relevant circumstances: (1) the defendant's presence during the guilt phase and circuit court's review of the presentence report; (2) his undisputed failure to comply with the terms of his deferred disposition; and (3) the lenient sentence of a suspended fine.[51] Under these unique circumstances, the court of appeals concluded that the circuit court's decision to pronounce a sentence without the defendant's presence was harmless beyond a reasonable doubt.[52]

In *Harvey v. Commonwealth*, the Court of Appeals of Virginia decided whether a victim of a crime may testify about the details of those crimes at the sentencing hearing.[53] The defendant argued that a victim may not testify to the facts of the crime itself because Virginia Code sections 19.2-295.3 and 19.2-299.1 limit the scope of a victim's testimony at a sentencing hearing to "victim impact evidence."[54] The court of appeals examined the plain language of those statutes, as well as language from the Virginia Constitution that crime victims have a "meaningful role in the criminal justice process," and concluded that a victim may testify as to the underlying facts of the crime at the sentencing hearing.[55] The court of appeals stressed that the circuit court has discretion to exclude testimony about the crime.[56] But when that testimony would assist the circuit court as it considers what sentence to impose, Virginia Code sections 19.2-295.3 and 19.2-299.1 do not compel courts to exclude the testimony.[57]

49. *Id*. at 158, 783 S.E.2d at 65.
50. *Id*.
51. *Id*. at 159, 783 S.E.2d at 66.
52. *Id*.
53. 65 Va. App. 280, 281, 777 S.E.2d 231, 232 (2015).
54. *Id*. at 285, 777 S.E.2d at 234.
55. *Id*. at 285–86, 777 S.E.2d at 234 (quoting VA. CONST. art. I, § 8A).
56. *Id*. at 286–87, 777 S.E.2d at 235.
57. *Id*. at 287, 777 S.E.2d at 235.

E. *Collateral Estoppel and Double Jeopardy*

In *Commonwealth v. Davis*, the Supreme Court of Virginia considered whether collateral estoppel barred the defendant's felony convictions after he had been acquitted of a misdemeanor arising from same course of conduct.[58] Davis was arrested following a fatal shooting outside a restaurant in which the shooter fired several gunshots into an occupied parked car.[59] Davis was charged with felonies related to the shooting and a misdemeanor offense of reckless handling of a firearm.[60] He first appeared in general district court for a trial on the misdemeanor and a preliminary hearing on the felonies.[61] At the conclusion of the hearing, the district court dismissed the misdemeanor charge and refused to certify the felony charges to the circuit court.[62] The district court specifically found that the Commonwealth failed to prove Davis had fired the weapon.[63] Thereafter, the Commonwealth obtained direct indictments against Davis for "first-degree murder and attempted first-degree murder."[64] Davis moved to dismiss the indictments, arguing that his acquittal on the misdemeanor firearm charge collaterally estopped the Commonwealth from trying him on the murder charges.[65] After the motion failed, Davis was tried and convicted of the murder charges.[66]

The supreme court agreed with a majority of the Court of Appeals of Virginia that collateral estoppel barred Davis' murder prosecution.[67] The supreme court observed that the felony murder charges and misdemeanor firearm charge stemmed from the same alleged course of conduct and required proof of the same issue of "ultimate fact"—that Davis committed the shooting.[68] Accordingly, the district court's finding that the Commonwealth

58. 290 Va. 362, 365, 777 S.E.2d 555, 556 (2015).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 366, 777 S.E.2d at 557.
63. *Id.* at 367, 777 S.E.2d at 557.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 367–68, 777 S.E.2d at 557 (discussing Davis v. Commonwealth, 63 Va. App. 45, 754 S.E.2d 533 (2014) and Davis v. Commonwealth, 64 Va. App. 70, 764 S.E.2d 724 (2014)).
68. *Id.* at 371, 777 S.E.2d at 559.

failed to prove Davis as the shooter was a "determination of that fact," which applied to all three charges.[69] And "[w]hen the Commonwealth obtained felony convictions that relied upon that specific fact, it put Davis twice in jeopardy for the same offense and violated his rights under the Fifth Amendment."[70]

In *Currier v. Commonwealth*, the Court of Appeals of Virginia addressed a collateral estoppel challenge to a charge that had been severed with the defendant's consent.[71] The grand jury indicted the defendant on charges of "burglary, grand larceny, and possession of a firearm as a convicted felon."[72] Prior to trial, the parties agreed to sever the firearm charge from the other two charges.[73] The first jury acquitted the defendant of the burglary and larceny,[74] but a second jury convicted him of the firearm charge.[75]

The defendant argued that his acquittal in the prior trial meant that his conviction was barred by collateral estoppel protections under the Double Jeopardy Clause.[76] The court of appeals, however, agreed with the Commonwealth that the severance of the firearm charge did not "bring into play the concern that lies at the core of the Double Jeopardy Clause: the avoidance of prosecutorial oppression and overreaching through successive trials."[77] As the court of appeals explained, "[t]he point of separate trials here was to *benefit* the defendant by avoiding the undue prejudice that would occur upon mention of the defendant's felonious past to a jury."[78] Therefore, the court of appeals held that collateral estoppel did not foreclose a second trial when the charge had been "severed with the defendant's consent and for his benefit."[79]

69. *Id.*

70. *Id.* at 371–72, 777 S.E.2d at 559. Justice McClanahan dissented for the reasons stated by the dissenting opinion of the panel decision of the Court of Appeals. *Id.* at 373, 777 S.E.2d at 560 (McClanahan, J., dissenting).

71. 65 Va. App. 605, 608–09, 779 S.E.2d 834, 835–36 (2015).

72. *Id.* at 608, 779 S.E.2d at 835.

73. *Id.*

74. *Id.*

75. *Id.* at 609, 779 S.E.2d at 835.

76. *Id.*

77. *Id.* at 609, 779 S.E.2d at 836.

78. *Id.* at 613, 779 S.E.2d at 837.

79. *Id.*

In *Green v. Commonwealth*, the Court of Appeals of Virginia held, for the first time in Virginia, that the Double Jeopardy Clause does not apply to probation revocation proceedings.[80] Green maintained that his probation violation was based on behavior he had already been punished for in a previous probation violation proceeding.[81] Green asked the court of appeals to consider whether the circuit court violated his constitutional right not to be placed in jeopardy for the same offense twice.[82] In finding that the constitutional protection against double jeopardy was not applicable, the court of appeals relied upon the Supreme Court of the United States precedent that "[t]here is no double jeopardy protection against revocation of a probation and the imposition of imprisonment."[83] The court of appeals noted, however, that "[w]hile double jeopardy does not apply in the probation setting, certain due process rights do attach."[84] Green, however, did not provide an adequate record to enable the court of appeals to determine if any due process violations occurred.[85]

F. *Cruel and Unusual Punishment*

In the combined cases of *Vasquez v. Commonwealth* and *Valentin v. Commonwealth*, the Supreme Court of Virginia determined whether the defendants' term-of-years sentences violated the Eighth Amendment's prohibition of cruel and unusual punishment.[86] When Vasquez and Valentin were sixteen-years-old, they broke into a college student's townhouse, raped her at knifepoint, and threatened to kill her if she resisted.[87] Consequently, Vasquez and Valentin were convicted of multiple felonies.[88] The circuit court sentenced Vasquez to a total sentence of 283 years in pris-

80. 65 Va. App. 524, 533, 779 S.E.2d 207, 212 (2015).

81. *Id.* at 531, 779 S.E.2d at 211.

82. *Id.* at 532, 779 S.E.2d at 211.

83. *Id.* at 533, 779 S.E.2d at 212 (quoting United States v. DiFrancesco, 449 U.S. 117, 137 (1980)).

84. *Id.* The court of appeals also noted that Virginia has codified the protection of double jeopardy for probation violation hearings in Virginia Code section 19.2-306. *Id.* at 535 n.3, 779 S.E.2d at 213 n.3. Since that statute was not raised as an assignment of error, the court refused to address the merits of a statutory argument. *Id.*

85. *Id.* at 535, 779 S.E.2d at 213.

86. 291 Va. 232, 236, 781 S.E.2d 920, 922 (2016).

87. *Id.* at 235–36, 781 S.E.2d at 922.

88. *Id.* at 236, 781 S.E.2d at 922.

on, with 150 years suspended, while Valentin received 148 years in prison, with 80 years suspended.[89] "Between the two defendants and their total of thirty convictions, each conviction received an average of 6.7 years of active incarceration."[90]

Vasquez and Valentin argued that their multiple term-of-years sentences violated the Eighth Amendment ban on cruel and unusual punishment.[91] Specifically, they argued that *Graham v. Florida's*[92] prohibition of life-without-parole sentences should be expanded to "non-life sentences that, when aggregated, exceed the normal life spans of juvenile offenders."[93] In declining to expand the holding in *Graham*, the supreme court clarified that *Graham* applied only to "the imposition of *a life without parole sentence* on a juvenile offender who did not commit homicide."[94] Since neither Vasquez nor Valentin was convicted of a single crime resulting in a life-without-parole sentence, the supreme court concluded that their cases were unlike *Graham*.[95] Ultimately, the supreme court agreed with two of the three United States Courts of Appeal that have addressed the issue: "*Graham* does not apply to aggregate term-of-years sentences involving multiple crimes."[96] Therefore, the court rejected the argument that Vasquez and Valentin's sentences violated the Eight Amendment ban on cruel and unusual punishment.[97]

89. *Id.* at 239, 781 S.E.2d at 924.

90. *Id.*

91. *Id.* at 240, 781 S.E.2d at 924.

92. 560 U.S. 48, 82 (2010) (holding that the Constitution prohibits life without parole sentences for nonhomicidal juvenile offenders).

93. *Vasquez*, 291 Va. at 241, 781 S.E.2d at 925.

94. *Id.* (quoting *Graham*, 560 U.S. at 82) (emphasis added).

95. *Id.*

96. *Id.* at 246, 781 S.E.2d at 928.

97. *Id.* Justice Mims, joined by Justice Goodwyn, concurred with the majority's conclusion that Vasquez and Valentin's sentences did not violate the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 251, 781 S.E.2d at 931 (Mims, J., concurring). However, unlike the majority, Justice Mims believed *Graham* "does apply to a term-of-years sentence that constitutes a de facto life sentence imposed in a single sentencing event." *Id.* at 252, 781 S.E.2d at 931. Justice Mims concluded, however, that prior precedent dictates that "Virginia's geriatric release statute provides the requisite meaningful opportunity for release based on demonstrated maturity and rehabilitation that *Graham* requires." *Id.* (citing Angel v. Commonwealth, 281 Va. 248, 274, 704 S.E.3d 386, 401 (2011)). Yet, Justice Mims questioned "whether the geriatric release statute *as applied* will continue to provide the 'meaningful opportunity for release' required by *Graham*." *Id.* at 258, 781 S.E.2d at 935 (emphasis added).

G. *Pardons*

In *Blount v. Clarke* the Supreme Court of Virginia interpreted the Governor's pardon power.[98] When Blount was fifteen years old, he participated in an armed robbery.[99] Blount was convicted of forty-nine counts related to the robbery and sentenced to six life sentences, as well as 118 mandatory years in prison.[100] After exhausting his post-conviction remedies in state court, Blount filed a federal petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, contending that his life sentences were unconstitutional under *Graham*.[101] As that case was ongoing, Blount filed a request for a conditional pardon with the Governor's office, asking then-Governor McDonnell to modify his sentence "to a more appropriate amount of time for the crimes he committed, which many believe might be somewhere between ten and twenty years' incarceration."[102] In 2014, Governor McDonnell issued an executive order, which reduced Blount's incarceration to forty years.[103] This action left the federal habeas corpus case in doubt.[104]

The federal court sent certified questions to the Supreme Court of Virginia asking, whether the Governor of Virginia had issued a pardon or a commutation, and whether the actions by the Governor were valid under the Virginia Constitution.[105] In answering the questions, the supreme court interpreted the Governor's pardon power under Article V, section 12 of the Constitution of Virginia as threefold.[106] The Governor has the power to: "(1) grant reprieves; (2) grant pardons; and (3) commute capital punishment."[107] Upon examining the history of executive clemency in Virginia, the supreme court determined that, while the Governor lacks the power to commute non-capital sentences, the Governor

98. 291 Va. 198, 201, 782 S.E.2d 152, 153 (2016).
99. *Id*. at 202, 782 S.E.2d at 154.
100. *Id*.
101. *Id*. at 203, 782 S.E.2d at 153.
102. *Id*.
103. *Id*.
104. *See id*. at 204, 782 S.E.2d at 154.
105. *Id*. at 201–02, 782 S.E.2d at 153.
106. *Id*. at 205, 782 S.E.2d at 155.
107. *Id*.

is vested with the power to issue a "partial pardon."[108] The supreme court explained that the difference between a partial pardon and a commutation is that a partial pardon "lessens the punishment by degrees," while a commutation "changes the kind of punishment from death to life imprisonment."[109] The supreme court concluded that the executive order from Governor McDonnell constituted a partial pardon because it contained no conditions and exonerated Blount from some, but not all, punishment for his crimes.[110]

II. CRIMINAL LAW

A. *Fourth Amendment Search and Seizure*

1. Exigent Circumstances

In *Evans v. Commonwealth*, the Supreme Court of Virginia held that exigent circumstances justified the police entering the defendant's apartment without a warrant.[111] Three police officers on bicycle patrol noticed an "extremely strong odor of marijuana coming from an apartment window,"[112] prompting them to knock "on the apartment door three times."[113] "Evans' mother answered each time."[114] During the second encounter, she appeared to be "shaking" and "nervous."[115] "She exclaimed, '[a]in't nobody smoking weed in here,' and then 'slammed' the door" in an officer's face.[116] The officers could smell "the odor of marijuana 'like a gust of wind' coming from inside the apartment," so they knocked a third time.[117] There was no answer for approximately five minutes, but the officers could hear "unspecified movement inside

108. *See id*. at 205–06, 782 S.E.2d at 155–56.

109. *Id*. at 208, 782 S.E.2d at 157.

110. *Id*. at 211, 782 S.E.2d at 158. The three-justice dissent would have applied *Lee v. Murphy*, 63 Va. (22 Gratt.) 789 (1872) and held that Governor McDonnell issued a commutation, or at the least a conditional pardon, of the sentences. *See id*. at 212, 782 S.E.2d at 158–59 (Kelsey, J., dissenting).

111. 290 Va. 277, 283, 776 S.E.2d 760, 762 (2015).

112. *Id*. at 280, 776 S.E.2d at 761.

113. *Id*.

114. *Id*.

115. *Id*. at 281, 776 S.E.2d at 761.

116. *Id*.

117. *Id*.

the apartment."[118] When "Evans' mother finally opened the door, she quickly tried to close it again."[119] The officers entered the apartment and observed marijuana in plain view.[120] A subsequent search yielded other illegal drugs and firearms.[121]

The supreme court held that two facts established exigent circumstances to the Fourth Amendment's warrant requirement prior to officers entering the apartment: (1) "the cloud of heavy and extremely strong marijuana odors" and (2) "the contemporaneous knowledge of Evans' mother that the investigating officers at her doorway smelled the marijuana, which would naturally give her a potent incentive to destroy, discard, or hide the illegal drug (or ask others to do so) soon after she closed the door."[122] While these facts, by themselves, established exigent circumstances, the behavior and statements from Evans' mother provided additional justification for the officers to enter the apartment.[123] For example, Evans' mother's remark, "[a]in't nobody smoking weed in here," followed by the slamming of the door, "implied that [she] knew the police officers were aware that marijuana was present in the apartment, and she needed a little time and privacy to something about the problem."[124] The supreme court concluded that the officers were justified in entering the apartment without a warrant "to thwart the objectively reasonable possibility that evidence would be destroyed, discarded, or hidden if they did not take immediate action."[125]

2. Reasonable Suspicion

In *Mason v. Commonwealth*, the Supreme Court of Virginia resolved whether an officer had reasonable suspicion to conduct a

118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 285, 776 S.E.2d at 764.
123. *Id.*
124. *Id.* at 281, 285–86, 776 S.E.2d at 761, 764.
125. *Id.* at 291, 776 S.E.2d at 767. The supreme court also rejected Evans' contention that the police, by announcing their presence and awareness of the marijuana, created the exigency. *Id.* at 288, 776 S.E.2d at 765–66. A three-justice dissent believed the majority had wrongly "permit[ted] the government to dispense with the constitutional requirement to obtain a warrant before entering a private residence if law enforcement officers have probable cause to suspect criminal activity, make contact with an occupant, and announce their suspicions before entering." *Id.* at 291–92, 776 S.E.2d at 767 (Mims, J., dissenting).

Terry stop of an automobile based on observing a "dangling object" from the vehicle's rearview mirror.[126] The dangling object in question was an opaque plastic parking pass approximately three inches by five inches in size.[127] The officer believed the dangling object might be in violation of Virginia Code section 46.2-2-1054, prohibiting any object from being "suspended from any part of the motor vehicle in such a manner as to obstruct the driver's clear view of the highway through the windshield, the front side windows, or the rear window."[128] The defendant, a passenger in the vehicle, sought to suppress the illegal contraband recovered from the traffic stop.[129] The trial court denied his motion to suppress.[130] The supreme court agreed to hear the case after a closely divided Court of Appeals of Virginia, sitting en banc, affirmed the judgment of the trial court.[131]

The supreme court framed the issue as "whether the facts and circumstances apparent to the officer at the time he decided to make the stop were such as to create in the mind of a reasonable officer in the same position a suspicion that a violation of the law was occurring."[132] In considering this issue, the supreme court explained that the legislative purpose of Virginia Code section 46.2-1054 is "far from trivial."[133] Given the configurations of modern vehicles, the statute's prohibition on dangling objects is meant to prevent a driver's view from being obstructed from dangers such as when "another vehicle backs out of a shrubbery-screened driveway ahead or a child darts out from between parked cars into a residential street in pursuit of a ball or a runaway pet."[134] The supreme court recognized that officers charged with enforcing the statute are confronted with a "demanding task" and with a "virtual impossibility" of determining whether a dangling object obstructs the driver while the car is in motion.[135] The supreme court concluded that "[a] reasonable person could readily conclude from

126. 291 Va. 362, 371–72, 786 S.E.2d 148, 150 (2016).
127. *Id*. at 366, 786 S.E.2d at 150.
128. *Id*. at 365, 786 S.E.2d at 150.
129. *Id*. at 366, 786 S.E.2d at 150.
130. *Id*.
131. *Id*. at 366, 786 S.E.2d at 150–51.
132. *Id*. at 368, 786 S.E.2d at 151.
133. *Id*. at 370, 786 S.E.2d at 153.
134. *Id*. at 371, 786 S.E.2d at 153.
135. *Id*. at 371, 786 S.E.2d at 154.

the fact that the tag was sufficiently prominent to attract the officer's attention during the brief moments that it passed through his field of view that it might have violated the statute."[136]

3. Consensual Searches

In *Hawkins v. Commonwealth*, the Court of Appeals of Virginia decided whether a defendant's nonverbal actions constituted consent for police to search his person.[137] A group of officers encountered Hawkins and another man on the street.[138] Upon seeing a bulge under Hawkins's shirt Officer Mazzio asked "Hawkins if he had 'a big cell phone on [his] belt, and then asked him if he 'could do him a favor' by raising his 'shirt up a little bit so [Mazzio could] see how it sits.'"[139] In response, "Hawkins extended his arms completely out to his sides and raised them about halfway up to his shoulders with his palms facing the officers."[140] "[A]n officer lifted the tail of Hawkins's shirt and revealed the handle of a handgun tucked into his waistband."[141] "Hawkins was arrested for possessing a firearm as a convicted felon."[142] After his arrest, Hawkins told an officer that he did not initially warn the officers of the gun so as not to startle them, but he eventually "came around and showed the officers that he . . . was indeed wearing a firearm."[143]

In denying Hawkins's attempt to suppress the firearm, the trial court determined that Hawkins had consented to the lifting of his shirt.[144] The court of appeals agreed that "Hawkins's nonverbal response to Mazzio's requests invited the officers to lift his shirt."[145] Comparing him to a suspect who places his or her hands on a wall when an officer requests to perform a search, the court of appeals concluded that Hawkins assumed a well-known "frisk

136. *Id*.
137. 65 Va. App. 101, 103, 774 S.E.2d 492, 493 (2015).
138. *Id*. at 104, 774 S.E.2d at 494.
139. *Id*. at 105, 774 S.E.2d at 494.
140. *Id*.
141. *Id*.
142. *Id*.
143. *Id*.
144. *Id*.
145. *Id*. at 108–09, 774 S.E.2d at 496.

stance" that implied his consented to the search.[146] The court of appeals additionally determined that Hawkins's statements to the police afterwards implied that he made a conscious decision to show police the firearm.[147] The court of appeals thus upheld the trial court's determination that the search was consensual.[148]

In *McLaughlin v. Commonwealth*, the Court of Appeals of Virginia addressed whether a probation officer had the authority to enter the defendant's house or bedroom and, thus, was not in a lawful position to see a handgun in plain view.[149] McLaughlin's supervised probation contained a provision allowing probation officers to visit his home.[150] The probation officer had information that McLaughlin was living with his sister in a trailer in Virginia Beach.[151] When the probation officer arrived at that residence, an adult female answered the door.[152] The woman, who was entertaining guests at the time, appeared to be living at the residence.[153] The woman allowed the probation officer both into the house and into McLaughlin's bedroom.[154] Upon opening the bedroom door, the probation officer saw McLaughlin asleep in a bed, with a handgun in plain view.[155]

In considering whether the handgun should have been suppressed, the court of appeals recognized that a "home visit" from a probation officer does not operate as a full Fourth Amendment waiver.[156] That court of appeals, however, held that a reasonable officer in the probation officer's position would have thought that the woman who let the officer into the residence had the apparent authority to do so.[157] Likewise, the woman had a sufficient relationship to the premises to justify a reasonable person in the pro-

146. *Id*. at 109, 774 S.E.2d at 496.

147. *Id*.

148. *Id*. at 109–10, 774 S.E.2d at 496. Concurring in the judgment, Judge Petty found it unnecessary to decide whether Hawkins consented to the search because, in his view, the officers were justified in lifting the shirt based on their reasonable suspicion that Hawkins might be armed. *Id*. at 110, 774 S.E.2d at 496–97 (Petty, J., concurring).

149. 65 Va. App. 427, 430, 778 S.E.2d 529, 530–31 (2015).

150. *Id*. at 430, 778 S.E.2d at 531.

151. *Id*.

152. *Id*. at 432, 778 S.E.2d at 531.

153. *Id*.

154. *Id*.

155. *Id*. at 432, 778 S.E.2d at 532.

156. *Id*. at 435, 778 S.E.2d at 533.

157. *Id*. at 435–36, 778 S.E.2d at 533.

bation officer's position to conclude that the woman had the authority to take the officer into McLaughin's bedroom.[158] "[B]ecause a person with apparent authority admitted the probation officer into the house and the bedroom, the probation officer was lawfully in a position to" view the gun in plain view.[159]

4. Drug Dog Sniffs

In *Sanders v. Commonwealth*, the Court of Appeals of Virginia took up whether drug dog sniffs outside the door of the defendant's two motel room doors were searches under the Fourth Amendment.[160] The court of appeals rejected the defendant's argument that he was entitled to the same protections on the external walkway, adjacent to the door of each motel room, as someone would have on the front porch of their home.[161] The court of appeals concluded that, based upon a number of factors, the walkways did not qualify as curtilage to the defendant's home.[162] The court of appeals further concluded that, considering the totality of the circumstances, the defendant "had no objectively reasonable expectation of privacy in the external motel walkways."[163] For instance, the defendant "had a possessory interest in the two rooms themselves, but as to the walkways, his interest, like that of the other motel guests, was one of common, not exclusive, use and access."[164] Thus, the court held that "the dog sniffs conducted on the common external walkways outside the [defendant's] motel room doors were not searches under the Fourth Amendment."[165]

5. GPS Tracking Devices

In *Turner v. Commonwealth*, the Court of Appeals of Virginia considered whether the use of a Global Positioning System ("GPS") tracking device on the defendant's vehicle violated the

158. *Id.* at 437, 778 S.E.2d at 534.

159. *Id.* at 438, 778 S.E.2d at 534.

160. 64 Va. App. 734, 739, 772 S.E.2d 15, 17 (2015).

161. *Id.* at 747, 772 S.E.2d at 21 (interpreting Florida v. Jardines, 133 S. Ct. 1409 (2013)).

162. *Id.* at 749, 772 S.E.2d at 22 (applying United States v. Dunn, 480 U.S. 294, 301 (1987)).

163. *Id.* at 753, 772 S.E.2d at 24.

164. *Id.*

165. *Id.* at 756, 772 S.E.2d at 25.

Fourth Amendment.[166] Based upon information that Turner was involved in cocaine trafficking, the police obtained a search warrant permitting the placement of a GPS tracking device on Turner's vehicle.[167] The warrant allowed the tracking device to be used for a period of thirty days.[168] Shortly after it had been attached, however, police learned that Turner intended to take the vehicle to a garage for repairs.[169] A detective therefore removed the tracking device to avoid its detection.[170] A few days later, the detective reinstalled the tracking device on Turner's vehicle.[171]

Relying upon *United States v. Jones,*[172] Turner contended that the reattachment of the GPS device constituted a new search and thus required a second warrant under the Fourth Amendment.[173] The court of appeals concluded, however, that *Jones* actually reinforced the "principle that a search or seizure pursuant to a properly obtained and issued warrant is valid so long as the search or seizure is within the scope of the warrant."[174] The court of appeals noted that both the removal and subsequent reattachment of the device occurred within the original thirty-day period authorized by the warrant.[175] The court of appeals therefore held "that the removal and reattachment of the GPS tracking device was a single, continuing search that was authorized by the warrant" and, thus, valid under the Fourth Amendment.[176]

B. *Specific Crimes*

1. Child Pornography

In two opinions, the Court of Appeals of Virginia considered the evidence required to support a conviction for possession of child pornography in violation of Virginia Code section 18.2-460(A). In

166. 65 Va. App. 312, 318, 777 S.E.2d 569, 572 (2015).
167. *Id*.
168. *Id*.
169. *Id*. at 318–19, 777 S.E.2d at 572.
170. *Id*. at 319, 777 S.E.2d at 572.
171. *Id*. at 319, 777 S.E.2d at 573.
172. 132 S. Ct. 945 (2012).
173. *Turner*, 65 Va. App. at 321, 777 S.E.2d at 573–74.
174. *Id*. at 321–22, 777 S.E.2d at 574.
175. *See id*. at 322–23, 777 S.E.2d at 574.
176. *Id*. at 323, 777 S.E.2d at 574–75.

Terlecki v. Commonwealth, the defendant's former-girlfriend testified at trial that she saw images of child pornography in the recycle bin of the defendant's laptop.[177] Although none of the images were admitted into evidence, the ex-girlfriend described the pornographic nature of the images and identified the subjects of the photographs as minors.[178] On redirect, she "testified that the images did not 'appear to be computer generated in any way' and 'appeared to be real people.'"[179]

Relying heavily on the fact that the images were not admitted into evidence, the defendant argued that the evidence failed to exclude the possibility that the images were computer-generated, rather than actual people.[180] The court of appeals held that, while the images were not admitted into evidence, the Commonwealth could still meet its burden of proof by other competent evidence.[181] In this case, the Commonwealth did so by presenting two pieces of evidence.[182] First, the ex-girlfriend testified in detail that the pornographic images were of actual minors.[183] Second, the defendant admitted in a police interview to possessing pornography containing "small children from the ages of . . . eight to seventeen."[184] Viewing this evidence in the light most favorable to the Commonwealth, the court of appeals concluded the "evidence was sufficient for a reasonable trier of fact to conclude that the images depicted 'identifiable minors' as their subject."[185]

In *Kobman v. Commonwealth*, the location of the child pornography on the computer was dispositive on whether the defendant possessed the images beyond a reasonable doubt.[186] Nine of the images were in the defendant's desktop computer's recycle bin under the user account named "Kobman."[187] Forty-five images were in the defendant's desktop and laptop computers' "unallo-

177. 65 Va. App 13, 16, 772 S.E.2d 777, 779 (2015).
178. *Id*. at 16–17, 772 S.E.2d at 779.
179. *Id*. at 17, 772 S.E.2d at 779.
180. *Id*. at 19–20, 772 S.E.2d at 780–81.
181. *Id*. at 21, 772 S.E.2d at 781.
182. *See id*. at 22, 772 S.E.2d at 781.
183. *Id*.
184. *Id*. at 22, 772 S.E.2d at 782.
185. *Id*. at 23, 772 S.E.2d at 782.
186. 65 Va. App. 304, 306–08, 777 S.E.2d 565, 566–67 (2015).
187. *Id*. at 306, 777 S.E.2d at 566.

cated space."[188] An investigator found these images using special forensic "software designed to restore deleted and damaged data that is not otherwise accessible to the computer's user."[189]

The court of appeals agreed with the Commonwealth's concession that the convictions based on the forty-five photographs found in the unallocated space should be reversed.[190] There was no evidence that the defendant was "aware of, or exercised dominion and control over" those forty-five photographs.[191] For instance, there was no evidence he had access to the software necessary to retrieve the deleted photographs.[192] As for the remaining nine counts associated with the photographs found in the recycle bin, the court upheld those convictions.[193] A number of circumstances supported the verdict, including the fact that the photographs were found in the recycle bin associated with the defendant's last name, and that he made incriminating remarks to the police as they executed the search warrant.[194]

2. Construction Fraud

Bowman v. Commonwealth involved a conviction of construction fraud against a contractor who accepted a $2100 deposit from a homeowner to install a replacement liner in a swimming pool.[195] After the contractor failed to complete the job on time, the homeowner called the police.[196] The police advised him to send a "certified letter" to the contractor.[197] The homeowner did that, but the letter was returned unopened.[198] That letter was entered into evidence, but never opened at any point during or after the trial.[199] The owner sent a second letter to a different address.[200] The contractor received this letter; however, a copy of it was never intro-

188. *Id*. at 306, 777 S.E.2d at 566–67.
189. *Id*. at 306, 777 S.E.2d at 567.
190. *See id*. at 307–08, 777 S.E.2d at 567.
191. *Id*. at 308, 777 S.E.2d at 567.
192. *Id*.
193. *Id*. at 310, 777 S.E.2d at 568–69.
194. *Id*. at 310, 777 S.E.2d at 568.
195. 290 Va. 492, 494, 777 S.E.2d 851, 853 (2015).
196. *Id*. at 495, 777 S.E.2d at 853.
197. *Id*.
198. *Id*. at 495, 777 S.E.2d at 854.
199. *Id*.
200. *Id*.

duced into evidence.[201] No evidence at trial disclosed the contents of that letter.[202]

In reversing the contractor's construction fraud conviction, the supreme court observed that Virginia Code section 18.2-2000.1 has "highly specific language to protect against the risk of being interpreted as a means of criminalizing mere contractual defaults."[203] The statute's notice requirement requires the certified letter to contain an "unqualified demand" for the return of the advance.[204] The notice cannot give the contractor other options—"such as continued contractual performance at a reduced price, the return of something other than the advance, or the delivery of materials in lieu of a return of the advance."[205] In this case, the supreme court was unable to discern the contents of the demand letters based on the evidence presented and the testimony given.[206] Thus, the evidence failed to prove that the homeowner made an unqualified demand for the return of the advance.[207]

3. Firearms

In *Jones v. Commonwealth*, the Court of Appeals of Virginia defined the term "firearm" in the reckless handling of a firearm statute.[208] After a manager of a grocery store followed a suspected shoplifter to the parking lot, he saw the defendant had a handgun and "heard two or three loud gunshots."[209] The defendant was charged with reckless handling of a firearm under Virginia Code section 18.2-56.1(A) and with possession of a firearm as a convicted felon under section 18.2-308.2.[210] At trial, "he moved to strike the evidence."[211] The court granted the motion regarding the possession charge, but denied it for the reckless handling charge.[212]

201. *Id*.
202. *Id*.
203. *Id*. at 497, 777 S.E.2d at 855.
204. *Id*. at 498, 777 S.E.2d at 856.
205. *Id*. at 498–99, 777 S.E.2d at 856.
206. *Id*. at 500, 777 S.E.2d at 857.
207. *Id*. at 501, 777 S.E.2d at 857.
208. 65 Va. App. 274, 276–77, 777 S.E.2d 229, 230–31 (2015).
209. *Id*. at 276, 777 S.E.2d at 230.
210. *Id*. at 277, 777 S.E.2d at 230.
211. *Id*.
212. *Id*.

The court of appeals recognized that caselaw has defined the term "firearm" differently depending on whether or not a statute's purpose is to prevent even the appearance of an actual firearm.[213] For example, the Supreme Court of Virginia has defined the use of a firearm during the commission of a felony under Virginia Code section 18.2-53.1 more broadly than possessing a firearm as a convicted felon under Code section 18.2-308.2.[214] Under Code section 18.2-308.2, a victim cannot merely perceive an object as a firearm, the object must be "an instrument which was designed, made, and intended to expel a projectile by means of an explosion."[215] The court of appeals explained that the "manifest purpose" of reckless handling of a firearm under Code section 18.2-56.1(A) "is to prevent actual endangerment, not the mere appearance of endangerment."[216] Thus, the court of appeals employed the definition of "firearm" that applies to Code section 18.2-308.2, rather than the broader standard that applies for prosecutions under Code section 18.2-53.1.[217] Because the circuit court acquitted the defendant of possession of a firearm as a convicted felon and that definition of a "firearm" is the same reckless handling of a firearm, the trial court rendered inconsistent verdicts.[218] And because a trial court may not render an inconsistent verdict in a bench trial, the court of appeals reversed the defendant's conviction for reckless handling of a firearm.[219]

In *Prekker v. Commonwealth*, the Court of Appeals of Virginia decided whether a portion of Virginia Code section 18.2-308.2's firearm ban violated the defendant's Second Amendment rights.[220] The defendant entered a conditional guilty plea to the charge that he illegally possessed a firearm in violation of Virginia Code section 18.2-308.2 after having been previously adjudicated a delinquent for an offense that would have been a felony had he been

213. *Id.*

214. *Id.* at 277–78, 777 S.E.2d at 230 (citing Armstrong v. Commonwealth, 263 Va. 573, 582, 562 S.E.2d 139, 144 (2002)).

215. *Id.* at 278, 777 S.E.2d at 230 (quoting *Armstrong*, 263 Va. at 584, 562 S.E.2d at 145).

216. *Id.* at 278, 777 S.E.2d at 231.

217. *Id.*

218. *Id.* at 279, 777 S.E.2d at 231.

219. *Id.* at 279–80, 777 S.E.2d at 231.

220. 66 Va. App. 103, 104–05, 782 S.E.2d 604, 604 (2016).

an adult.[221] In doing so, the defendant preserved his argument for appeal that, as applied to him, Code section 18.2-308.2's temporary ban on him possessing a firearm until the age of twenty-nine violates his Second Amendment right "to keep and bear arms."[222] In rejecting this argument, the court of appeals noted that the Supreme Court of the United States decision in *District of Columbia v. Heller*[223] identified "presumptively valid regulations" on firearms such as bans on firearms for convicted felons.[224] The court of appeals held "a ban on possession by a juvenile who was adjudicated delinquent for a felonious act rests on the same footing as the presumptively constitutional ban on a felon possessing firearms."[225]

4. Obtaining Money by False Pretenses

In *Reid v. Commonwealth*, the Court of Appeals of Virginia took up the question of when title or ownership passes to the perpetrator to support a conviction of obtaining money by false pretenses.[226] Reid scammed two different victims out of hundreds of dollars by telling them his car had been illegally towed and, that if they loaned him money to retrieve the car, he would repay them extra for their assistance.[227]

Reid was convicted of obtaining money by false pretenses, which "unlike larceny by trick, requires that title or ownership pass to the perpetrator."[228] Reid argued that "because the victims loaned money expecting to receive repayment and additional profit," he only gained "temporary possession of their funds."[229] The court of appeals acknowledged that determining when title or ownership passes with currency is less straightforward than with tangible property.[230] The question turns on whether "the transfer

221. *Id*. at 105–06, 782 S.E.2d at 605.
222. *Id*. at 110, 782 S.E.2d at 607.
223. 554 U.S. 570 (2008).
224. *Prekker*, 66 Va. App. at 118, 782 S.E.2d at 611 (citing District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008)).
225. *Id*. at 121, 782 S.E.2d at 613.
226. 65 Va. App. 745, 747, 781 S.E.2d 373, 374–75 (2016).
227. *Id*. at 747–48, 781 S.E.2d at 375.
228. *Id*. at 749, 781 S.E.2d at 375.
229. *Id*. at 752, 781 S.E.2d at 377.
230. *Id*. at 751, 781 S.E.2d at 376.

of currency was so that the defendant would use it on behalf of the victim (larceny by trick) or for his or her own benefit (false pretenses)."[231] Because the victims relinquished their funds for Reid to recover his vehicle, Reid committed larceny by false pretenses.[232]

5. Obstruction of Justice

The Court of Appeals of Virginia addressed the crime of obstruction of justice in two published cases. In *Molinet v. Commonwealth*, one officer was investigating a reported fight while a second officer was tasked at maintaining a safe perimeter at the scene.[233] The defendant attempted repeatedly to breach the perimeter and ignored the second officer's orders to move to the curb.[234] The defendant shouted multiple expletives at the officer and stepped toward the officer in an aggressive manner.[235] The court of appeals held that the defendant obstructed justice because the second officer was "required to focus on [the defendant] and the threat posed by his actions" and was unable to perform his assigned duty of maintaining a safe perimeter.[236]

In *Thorne v. Commonwealth*, a police officer stopped Thorne's car for suspected illegal window tint.[237] The officer explained to Thorne why he stopped her car and that he needed her to roll down the window at least four to six inches so that he could test the legality of the window tint.[238] At least five times during the course of the stop, the officer made that request, but Thorne refused to roll down her window.[239] Instead, she "kept yelling that the window tint was legal and [the officer] had no reason to stop her."[240] After the officer told Thorne that he would charge her with obstruction of justice if she did not comply, she responded by

231. *Id*. at 751, 781 S.E.2d at 377.
232. *Id*. at 752–53, 781 S.E.2d at 377.
233. 65 Va. App. 572, 574–75, 779 S.E.2d 231, 232 (2015).
234. *Id*. at 575, 779 S.E.2d at 232.
235. *Id*. at 575, 779 S.E.2d at 232–33.
236. *Id*. at 580–81, 779 S.E.2d at 235.
237. 66 Va. App. 248, 250–51, 784 S.E.2d 304, 305 (2016).
238. *Id*. at 250–51, 784 S.E.2d at 305.
239. *Id*. at 257, 784 S.E.2d at 309.
240. *Id*.

saying, "I know my rights! Do what you gotta do!"[241] About nine minutes after the initial request, Thorne finally complied.[242] In upholding Thorne's obstruction of justice conviction, the court of appeals concluded that she did more than merely make the officer's tasks more difficult; Thorne prevented his efforts to investigate the suspected window tint violation.[243]

6. Strangulation

In the combined opinion of *Ricks v. Commonwealth* and *Commonwealth v. Chilton*, the Supreme Court of Virginia resolved what constitutes "bodily injury" under the strangulation statute, Virginia Code section 18.2-51.6.[244] Drawing from how Virginia courts have interpreted "bodily injury" under the malicious wounding statute, the supreme court elected a broad definition:

> [T]oday we hold that "bodily injury" within the scope of Code § 18.2-51.6 is any bodily injury whatsoever and includes an act of damage or harm or hurt that relates to the body; is an impairment of a function of a bodily member, organ, or mental faculty; or is an act of impairment of a physical condition.[245]

In applying this definition, the supreme court affirmed Ricks's conviction where the victim was choked to the point that she could not speak for a couple of days leaving a red mark on her neck.[246] As for Chilton, the supreme court affirmed the Court of Appeals of Virginia's reversal of his conviction, albeit on different grounds.[247] The court of appeals had decided that loss of consciousness alone was not enough to constitute bodily injury under the statute.[248] The supreme court disagreed and held that unconsciousness—no matter how brief—caused by pressure to the neck is sufficient to constitute a bodily injury under the statute.[249] The victim, however, never clearly testified that Chilton actually ap-

241. *Id*.
242. *Id*.
243. *Id*. at 256–57, 784 S.E.2d at 308–09.
244. 290 Va. 470, 473, 778 S.E.2d 332, 333 (2015).
245. *Id*. at 478, 778 S.E.2d at 336.
246. *Id*. at 478–79, 778 S.E.2d at 336.
247. *Id*. at 480, 778 S.E.2d at 336–37.
248. *Id*. at 480, 778 S.E.2d at 336.
249. *Id*. at 479–80, 778 S.E.2d at 336.

plied pressure to her neck or that she lost consciousness.[250] The Commonwealth's evidence therefore was "so minimal" that it failed to establish that the victim suffered a bodily injury in the form of a loss of consciousness.[251]

III. LEGISLATION

A. *Child Victim Hearsay Exception*

The 2016 Virginia General Assembly created a hearsay exception for out-of-court statements made by a child under the age of thirteen who is the alleged victim of an "offense against children."[252] The statute lists a number of felonies that fall within the definition of an "offense against children."[253] In a proceeding in which the statement will be offered into evidence, notice of intent to offer the statement and the statement itself must be given to the adverse party at least fourteen days in advance.[254] In addition, the court must hold a pre-trial hearing and find: (1) the statement is trustworthy and (2) the child either (a) testifies or (b) is declared unavailable and there is corroborative evidence of the act.[255] The statute provides a non-exhaustive list of factors for the court to consider when making the trustworthiness determination.[256]

B. *Protective Orders and Stalking*

A number of legislative enactments took aim at combatting domestic violence.[257] The 2016 Virginia General Assembly elevated possession of a firearm while under a permanent protective

250. *Id.* at 480, 778 S.E.2d at 337.

251. *Id.*

252. Act of Mar. 29, 2016, ch. 553, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 19.2-268.3 (Repl. Vol. 2015 & Cum. Supp. 2016)).

253. VA. CODE ANN. § 19.2-268.3 (Repl. Vol. 2015 & Cum. Supp. 2016).

254. *Id.*

255. *Id.*

256. *Id.*

257. *See* Jennifer L. McClellan, Opinion, *Virginia Takes Steps to Ease Domestic Violence Epidemic,* RICH. TIMES-DISPATCH, (Mar. 5, 2016, 10:30 PM), http://www.richmond.com/opinion/their-opinion/guest-columnists/article_3114f60e-5b7e-512f-8ca8-06460cac4781.html?mode=story.

order for domestic abuse to a Class 6 Felony.[258] Under this legislation, any person subject to such a permanent protective order must relinquish his or her firearms within twenty-four hours of being served the order.[259]

The 2016 Virginia General Assembly also created a Class 6 felony for persons who violate a protective order while armed with a firearm or other deadly weapon.[260] Additionally, it is now a Class 6 felony to stalk a party with a protective order.[261] And, a second stalking offense committed within five years of any prior stalking conviction is now a Class 6 felony.[262]

Finally, the 2016 Virginia General Assembly amended the proof required to prove stalking.[263] Now under the statute, following, contacting, or attempting to do so, after being given actual notice that the person does not want to be contacted or followed, is prima facie evidence that the suspect intended to place the victim in fear of death, criminal sexual assault, or bodily injury to the victim or a family or household member.[264]

C. *Sexual Assault Recovery Kits*

The 2016 Virginia General Assembly established a comprehensive procedure for the collection and analysis of physical evidence recovery kits for victims of sexual assault.[265] Kits from victims who elect not to report a sexual assault to law enforcement will be stored at the Division of Consolidated Laboratory Services for a

258. Act of Feb. 26, 2016, ch. 48, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 18.2-308.09, -308.1:4, -308.2:3 (Repl. Vol. 2014 & Cum. Supp. 2016)).

259. *Id.*

260. Act of Mar. 29, 2016, ch. 585, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 16.1-253.2 (Repl. Vol. 2015 & Cum. Supp. 2016); *id.* § 18.2-60.4 (Repl. Vol. 2014 & Cum. Supp. 2016)).

261. Act of Mar. 29, 2016, ch. 583, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 16.1-253.2 (Repl. Vol. 2015 & Cum. Supp. 2016); *id.* § 18.2-60.4 (Repl. Vol. 2014 & Cum. Supp. 2016)).

262. Act of Apr. 4, 2016, ch. 696, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 16.1-253.2 (Repl. Vol. 2014 & Cum. Supp. 2016); *id.* § 18.2-60.4 (Repl. Vol. 2014 & Cum. Supp. 2016)).

263. Act of Apr. 20, 2016, ch. 745, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 18.2-60.3 (Repl. Vol. 2014 & Cum. Supp. 2016)).

264. VA. CODE ANN. § 18.2-60.3 (Repl. Vol. 2014 & Cum. Supp. 2016).

265. Act of Mar. 11, 2016, ch. 332, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 19.2-11.5 to -11.11 (Repl. Vol. 2015 & Cum. Supp. 2016)).

minimum of two years.[266] When the victim elects to report the offense to law enforcement at the time of the exam, law enforcement is required to take possession of the victim's kit and submit the kit to the Department of Forensic Science for analysis within sixty days.[267] The legislation also outlines the exceptions to mandatory submissions for analysis; storage requirements for retention of analyzed samples; expungement of DNA samples obtained but not connected to a crime; and victims' notification rights.[268] Notably, a person accused or convicted of committing a crime against a sexual assault victim has no standing to object to any failure to comply with the requirements.[269] And, the failure to comply with the requirements shall not be grounds for challenging the admissibility of the evidence or setting aside the conviction or sentence.[270]

D. *Stolen Valor*

In 2012, a plurality of the Supreme Court of the United States struck down the federal government's "Stolen Valor Act," holding that lying about military heroics was constitutionally protected speech.[271] A year later, the federal government passed a new Stolen Valor Act, which prohibited fraudulently holding oneself out to be a recipient of several military decorations or medals with the intent to obtain money, property, or other tangible benefit.[272] The 2016 Virginia General Assembly passed similar legislation.[273] Under the new law, it is a Class 1 misdemeanor for any person to intentionally obtain any services through false representations of military service.[274]

266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012).
272. 18 U.S.C. § 704 (2012 & Supp. I 2013).
273. *See* Act of Mar. 4, 2016, ch. 236, 2016 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 18.2-177.1 (Repl. Vol. 2014 & Cum. Supp. 2016)).
274. *Id.*