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Criminal Procedure

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CRIMINAL PROCEDURE*

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I. FOURTH AMENDMENT

A. *Arrests*

In *Tennessee v. Garner*,[1] the United States Supreme Court rejected the common law rule which had permitted the use of deadly force to prevent the escape of an unarmed suspected felon. The Court held that deadly force cannot be used to prevent an escape unless the arresting officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.[2] The United States Supreme Court noted that "apparently" Virginia was one of the few jurisdictions still following the common law rule. However, the only Virginia authority cited, *Berry v. Hamman*,[3] involved an armed and dangerous felon. Because the decision in *Berry* is not inconsistent with the rule announced in *Tennessee v. Garner*, the United States Supreme Court may have clarified the constitutional principle applicable in Virginia, but the decision does not appear to constitute a major change in Virginia law.

The 1985 General Assembly made two minor changes in the law of arrests. The authority to make a warrantless arrest at the scene of a motor vehicle accident was extended to include arrests "at any hospital or medical facility to which any person involved in such accident has been transported."[4] The General Assembly also provided for the destruction of unexecuted warrants or other criminal process "after determining that . . . [such process] is un-

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* This survey addresses only significant Virginia cases and statutes affecting Virginia criminal procedure. For discussion of the impact of federal court decisions, see R. BACIGAL, VIRGINIA CRIMINAL PROCEDURE (Supp. 1985).

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1. 105 S. Ct. 1694 (1985).

2. *Id.* at 1701.

3. 203 Va. 596, 125 S.E.2d 851 (1962).

4. VA. CODE ANN. § 19.2-81 (Cum. Supp. 1985).

prosecutable due to lack of evidence, witnesses or other legal reason."[5]

B. *Stop and Frisk (Brief Detentions of a Person)*

The United States Supreme Court continues to struggle with the definition of a "stop" for purposes of the fourth amendment.[6] Most lower courts have accepted the *United States v. Mendenhall* test of whether "a reasonable person would have believed that he was not free to leave."[7] But in *Addison v. Commonwealth*,[8] the Virginia Supreme Court cited a District of Columbia circuit court decision which rejected the *Mendenhall* standard and adopted the test of "whether a reasonable person, *innocent of any crime*, would have felt free to walk away under the circumstances."[9] According to this test, a stop/seizure is determined by examination of all the circumstances surrounding the incident, and the apparent guilt or innocence of the defendant may be one of the relevant circumstances.

The Virginia Supreme Court has also recognized that a "frisk" may extend beyond the person of the suspect. *Lansdown v. Commonwealth*[10] recognized that the authority to frisk armed and dangerous persons extends to the passengers of a vehicle stopped for speeding and attempting to evade arrest. In *Jones v. Commonwealth*,[11] the court held that, in addition to a pat down, the police may make reasonable inquiries to determine identity and may maintain the status quo momentarily while obtaining more information.[12]

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5. *Id.* § 19.2-76.1.

6. *See, e.g.*, Berkemer v. McCarty, 104 S. Ct. 3138 (1984); Immigration and Naturalization Serv. v. Delgado, 104 S. Ct. 1758 (1984); Florida v. Rodriguez, 461 U.S. 940 (1984); Florida v. Roger, 460 U.S. 491 (1983).

7. 446 U.S. 544, 554 (1980).

8. 224 Va. 713, 299 S.E.2d 521 (1983).

9. *Id.* at 719, 299 S.E.2d at 524 (emphasis in original) (citing Gomez v. Turner, 672 F.2d 134 (D.C. Cir. 1982)).

10. 226 Va. 204, 212, 308 S.E.2d 106, 111 (1983), *cert. denied*, 104 S. Ct. 1604 (1985).

11. 230 Va. ___, 334 S.E.2d 537, *cert. denied*, 105 S. Ct. 2713 (1985).

12. *Id.* at ___, 334 S.E.2d at 540.

C. *Search and Seizure*

Winston v. Lee[13] brought the Virginia and federal courts into conflict and attracted considerable national attention. The Virginia court issued an order for surgical removal of a bullet from the suspect's body, but the United States Supreme Court found that such a procedure would constitute an unreasonable search and seizure.[14] The dramatic facts of *Winston v. Lee* moved the United States Supreme Court to adopt an additional test for defining constitutional searches. The Court noted that the defendant had been given "a full measure of procedural protections" required by the warrant clause of the fourth amendment.[15] However, notwithstanding the existence of probable cause, the Court found that the reasonableness clause of the fourth amendment requires a more substantial justification than that required by the warrant clause.[16] The decision in *Winston* thus authorizes two distinct lines of attack upon searches and seizures: (1) either the procedures of the warrant clause were not followed; or (2) an extreme invasion of privacy violated the substantive values contained within the reasonableness clause of the fourth amendment.[17]

While a search of the suspect's body was limited in *Winston*, the extent of a search of the premises was expanded in *Poyner v. Commonwealth*,[18] where the magistrate properly authorized a search of the entire premises even though the suspect rented a single room. The suspect, in fact, had the "run of the house," and therefore, the court upheld the search of the entire house.[19]

In *Garza v. Commonwealth*,[20] the court explicitly recognized what had long been implicit—that probable cause for a search could no longer be seen as an inflexible standard. The court noted that probable cause is a fluid concept, turning on the assessment of

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13. 105 S. Ct. 1611 (1985).

14. *Id.* at 1620.

15. *Id.* at 1618. The court ordered surgery after a full adversary hearing on the issue. In most situations there is an ex parte determination of probable cause by a magistrate.

16. *Id.* at 1615-18; *see also* Tennessee v. Garner, 105 S. Ct. 1694 (1985) (deadly force used to seize a non-dangerous felon held to be unreasonable notwithstanding the existence of probable cause).

17. *But cf.* Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983) (recognizing that a suspect may consent to a seizure of body fluids), *cert. denied*, 104 S. Ct. 1617 (1984).

18. 229 Va. 401, 329 S.E.2d 815, *cert. denied*, 106 S. Ct. 208 (1985).

19. *Id.* at 411-12, 329 S.E.2d at 824.

20. 228 Va. 559, 323 S.E.2d 127 (1984).

probabilities in particular factual contexts.[21] Thus, in *McCary v. Commonwealth*,[22] the court could state:

> On finding a car exactly matching the description and bearing one of the two possible license numbers, the officers clearly had probable cause to believe the vehicle was the robber's getaway car and that it contained fruits of the crimes, weapons, or evidence as to the identity and whereabouts of the robber.[23]

Garza also adopted the *Illinois v. Gates*[24] totality of the circumstances test for probable cause in place of the two-pronged test of *Aguilar v. Texas*.[25] The court further noted that "a statement of the source of the affiant's information, while required by the fourth amendment, is not mandated by Code § 19.2-54."[26] Thus an affiant's *oral* statement of facts establishing the reliability of an informant satisfies constitutional requirements.

The Virginia Supreme Court rendered three significant decisions on warrantless searches. *McCary v. Commonwealth*[27] noted that the immediate need to continue a promising criminal investigation is "within the spirit, though not the text, of the 'hot pursuit' exception."[28] In *Wellford v. Commonwealth*,[29] the court applied the open fields doctrine,[30] but distinguished open fields from the curtilage of dwelling houses.[31] Finally, in *Boggs v. Commonwealth*,[32] the court cleared up some of the confusion surrounding the opening of containers and held "that the search of a closed container, discov-

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21. *Id.* at 564, 323 S.E.2d at 129; *see also Garner*, 105 S. Ct. at 1699 (referring to this fluid balancing of privacy and government interests as the key principle of the fourth amendment).

22. 228 Va. 219, 321 S.E.2d 637 (1984).

23. *Id.* at 228, 321 S.E.2d at 641.

24. 462 U.S. 213 (1983).

25. 378 U.S. 108 (1964).

26. *McCary*, 228 Va. at 231, 321 S.E.2d at 643.

27. 228 Va. 219, 321 S.E.2d 637 (1984).

28. *Id.* at 229, 321 S.E.2d at 642; *see also* United States v. Shelton, 737 F.2d 1292 (4th Cir. 1984) (exigencies of the moment in chasing bank robbers into a house were within the hot pursuit exception).

29. 227 Va. 297, 315 S.E.2d 235 (1984).

30. *See* Oliver v. United States, 104 S. Ct. 1735 (1984).

31. The court stated: "The curtilage of a dwelling house is a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling." *Wellford*, 227 Va. at 302, 315 S.E.2d at 238 (quoting Bare v. Commonwealth, 122 Va. 783, 795, 94 S.E.2d 168, 172 (1917)).

32. 229 Va. ___, 331 S.E.2d 407 (1985).

ered in the course of a legitimate inventory of the contents of a motor vehicle in lawful police custody, is not unreasonable within the intent of the warrant requirement of the fourth amendment."[33]

Perhaps the most significant Virginia search and seizure case of the past year was the decision in *Mosher Steel-Virginia v. Teig*.[34] The court held that probable cause for administrative search warrants may be of two distinct types. First, affidavits may establish the likelihood of specific violations. In such situations, the standards for evaluating probable cause are identical to the standards for criminal search warrants. In the alternative, affidavits may establish that in the absence of specific violations the administrative inspection is based on more general, but still reasonable, legislative or administrative standards.[35] In such situations, probable cause requires that reasonable legislative or administrative standards for inspection are satisfied with respect to the *particular establishment*.[36] The *Aguilar v. Texas* [37] requirement that the affidavit contain factual allegations, rather than bare conclusions, applies to such affidavits. The affidavit must provide the specific facts underlying each step of the procedure by which a particular employer is selected for an administrative inspection. Therefore, if a selection is based on an industry's high hazard ranking, the application must reveal specific empirical data resulting in that ranking.[38] If a particular employer is selected because of a high injury rate, the affiant must substantiate the alleged injury rate with statistics.[39] To insure against arbitrary inspections of a particular employer, the application should recite the employer's own inspection history and the status of general scheduled inspections of all employers subject to inspection by the regional division of the inspecting agency.[40] In *Mosher*, the court noted, but did not decide, the substantial question of whether a general inspection warrant violates

33. *Id.* at ___, 331 S.E.2d at 415.

34. 229 Va. 95, 327 S.E.2d 87 (1985).

35. *Id.* at 103, 327 S.E.2d at 94. In such situations, a party may seek a pre-search declaratory judgment to determine the validity of the warrant and its underlying plan for a general inspection. *Id.* at 102-03, 327 S.E.2d at 91.

36. *Id.* at 103, 327 S.E.2d at 94.

37. 378 U.S. 108 (1964).

38. *Mosher Steel-Virginia*, 229 Va. at 104, 327 S.E.2d at 94.

39. *Id.* "A bare allegation that the inspection is part of an administrative plan and that the establishment is in a high-hazard industry is not enough to establish probable cause." *Id.*

40. *Id.*

the Virginia constitutional prohibition against general warrants.[41]

Another Virginia search and seizure case decided by the United States Supreme Court was *Haring v. Prosise*.[42] The Court recognized that a defendant who pleads guilty in a criminal trial is not estopped from pursuing a section 1983 civil action for an illegal search and seizure. The waiver of fourth amendment rights applies only to the criminal trial and has no effect outside the confines of that proceeding.[43]

Although Virginia adopted the good faith exception to the exclusionary rule[44] in *McCary v. Commonwealth*,[45] an interesting case from the Eastern District of Virginia, *United States v. Belcher*,[46] recognized that bad faith in deliberately avoiding the procedures for issuance of a search warrant may render the search illegal.[47] The Virginia Supreme Court has not ruled upon the "inevitable discovery" doctrine adopted by the United States Supreme Court in *Nix v. Williams*,[48] but earlier cases indicate that Virginia will follow the doctrine.[49]

The 1985 General Assembly expanded the items subject to forfeiture in drug cases. "Everything of value furnished, or intended to be furnished, in exchange for a controlled substance or marijuana . . ., and all moneys or other property, real or personal, traceable to such an exchange" are now deemed forfeited to the commonwealth.[50] The court may also order a law enforcement agency to take custody of substantial quantities of controlled substances and to make provision for ensuring the integrity of these items.[51]

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41. *See* VA. CONST. art. I, § 10.

42. 462 U.S. 306 (1983).

43. *Id.* at 317.

44. *See* Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984); United States v. Leon, 104 S. Ct. 3405 (1984).

45. 228 Va. 219, 321 S.E.2d 637 (1984).

46. 577 F. Supp. 1241 (E.D. Va. 1983).

47. *Id.* at 1252. *See generally* Bacigal, *The Road to Exclusion is Paved With Bad Intents: A Bad Faith Corollary to the Good Faith Exception*, 87 WEST VA. L. REV. 747 (1985).

48. 105 S. Ct. 2681 (1985).

49. Keeter v. Commonwealth, 222 Va. 134, 278 S.E.2d 841 (1981) (legal, warrantless entry and evidence is in plain view); Warlick v. Commonwealth, 215 Va. 263, 208 S.E.2d 746 (1974) (evidence of illegal involvement would have been gained inevitably without unlawful action on officer's part).

50. VA. CODE ANN. § 18.2-249 (Cum. Supp. 1985).

51. *Id.* § 18.2-253.2.

II. Fifth and Sixth Amendments

A. *Confessions*

The Virginia Supreme Court continues to recognize that the voluntariness of a confession is affected by such factors as the suspect's intelligence, education and experience with the police;[52] the use of drugs or alcohol;[53] police trickery and deceit;[54] psychological pressures;[55] and promises of lenience, although the court has noted that such promises "have generally been found insufficient to overbear a defendant's free will."[56]

The *Miranda* warnings are required only when there is both custody and interrogation.[57] Thus, *Addison v. Commonwealth*[58] found that the defendant was not in custody when "the defendant never asked to leave, was never told either that he was or was not free to leave, but in fact would have been permitted to depart at any time if he had indicated a desire to do so."[59] Without mentioning the test for defining interrogation,[60] *Bradshaw v. Commonwealth*[61] held the defendant's statement to be spontaneous under the following circumstances: The police seized two shotguns and told the defendant they wanted to have them tested. As the officer wrote a receipt for one gun, the defendant remarked, "That's not the one that did it." The officer asked if the defendant wanted "to talk about it," and without any further questioning by the officer the defendant gave a fifteen or twenty minute narrative statement.[62]

The Virginia Supreme Court has not ruled upon the "public

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52. Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984), *cert. denied*, 105 S. Ct. 2347 (1985); Simpson v. Commonwealth, 227 Va. 557, 318 S.E.2d 386 (1984).

53. Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371, *cert. denied*, 105 S. Ct. 229 (1984). The court also recognized that statements made while intoxicated are not per se involuntary. Boggs v. Commonwealth, 229 Va. ___, ___, 331 S.E.2d 407, 415 (1985) (quoting United States v. Brown, 535 F.2d 424, 427 (8th Cir. 1976)).

54. Rodgers v. Commonwealth, 227 Va. 605, 318 S.E.2d 298 (1984).

55. Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 105 S. Ct. 2713 (1985).

56. *Rodgers*, 227 Va. at 616, 318 S.E.2d at 304.

57. *See* Berkemer v. McCarty, 104 S. Ct. 3138, 3148 (1984) ("[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.").

58. 224 Va. 713, 299 S.E.2d 521 (1983).

59. *Id.* at 717, 299 S.E.2d at 523.

60. *See* Rhode Island v. Innis, 446 U.S. 291 (1980).

61. 228 Va. 484, 323 S.E.2d 567 (1984).

62. *Id.* at 489-90, 323 S.E.2d at 570-71.

safety exception" to *Miranda* recognized in *New York v. Quarles*,[63] but the standard for valid waiver of *Miranda* rights was both clarified and confused by recent cases. *Poyner v. Commonwealth*[64] endorsed the holding of *Oregon v. Elstad*[65] that an initial unwarned confession does not automatically preclude the admissibility of a second confession given after a subsequent administration of *Miranda* warnings.[66] Further clarification was provided in *Washington v. Commonwealth*,[67] which held that a valid waiver once given "will be presumed to continue in effect throughout subsequent custodial interrogations until the suspect manifests, in some way which would be apparent to a reasonable person, his desire to revoke it."[68] However, confusion was created with respect to the standard for waiver of counsel during interrogation. *Edwards v. Arizona*[69] held that once a suspect invokes the right to counsel, a subsequent waiver requires two separate determinations: (1) Did the defendant initiate further communications? (2) Did the prosecution establish that the suspect made a knowing and intelligent waiver of his rights?[70] *Oregon v. Bradshaw*[71] appeared to establish a per se rule that the question of a knowing and intelligent waiver could not be addressed unless there was a showing that the suspect had initiated further communications.[72] But in *Bunch v. Commonwealth*,[73] the Virginia Supreme Court refused to recognize a per se rule and indicated that the totality of circumstances test determines voluntary waiver even when the defendant did not initiate further communication.[74] The Virginia Supreme Court also distinguished *Edwards* in cases involving interrogation by different police officers regarding different crimes.[75]

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63. 104 S. Ct. 2626 (1984).

64. 229 Va. 401, 329 S.E.2d 815, *cert. denied*, 106 S. Ct. 208 (1985); *see also* Boggs v. Commonwealth, 229 Va. ___, 331 S.E.2d 407 (1985) (unwarned, uncoerced confession was not incriminating and *Miranda* was not violated).

65. 105 S. Ct. 1285 (1985).

66. *Poyner*, 229 Va. at 401, 329 S.E.2d at 822.

67. 228 Va. 535, 323 S.E.2d 577 (1984), *cert. denied*, 105 S. Ct. 2347 (1985).

68. *Id.* at 548, 323 S.E.2d at 586.

69. 451 U.S. 477 (1981).

70. *Id.* at 482-84. *But see Poyner*, 229 Va. 401, 329 S.E.2d 815 (1985) (a request to clarify the right to counsel does not amount to a request for counsel).

71. 462 U.S. 1039 (1983).

72. *See* Wyrick v. Fields, 459 U.S. 42 (1982); United States v. Renda, 567 F. Supp. 487 (E.D. Va. 1983), *aff'd without opinion*, 758 F.2d 649 (4th Cir. 1985).

73. 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983).

74. *Id.* at 434, 304 S.E.2d at 276-77.

75. *See, e.g.*, Simmons v. Commonwealth, 225 Va. 111, 300 S.E.2d 918 (1983). When military police had already read the defendant his rights and the defendant had requested

The Virginia Supreme Court drew an important distinction between third-party, out-of-court confessions and the in-court testimony of such declarants.[76] An out-of-court statement of a person admitting the commission of the crime with which the accused is charged is admissible as a declaration against penal interest if the declarant is unavailable and the declaration is reliable or trustworthy.[77] The question of reliability is dependent upon the facts and circumstances of the case and turns upon a determination that "there is anything substantial other than the bare confession to connect the declarant with the crime."[78] However, if the declarant is called as a witness he may be fully examined about his involvement in the alleged crime.[79] If the declarant denies making a prior confession, his original statement is not available, and it is proper to introduce proof of the alleged confession by others who heard it.[80] "[T]he truth of the alleged confession and the credibility of the witness who undertook to repeat the declaration, must, like the truthfulness of all other testimony, be settled by the jury."[81]

The commonwealth has no right to introduce selected portions of a defendant's confession and exclude those which tend to mitigate or excuse the offense charged.[82] Nor does the defendant have a right to exclude portions which might inflame the passions of the jury if the confession was voluntary and was the product of an essentially free and unconstrained choice by its maker.[83] In *Clozza v. Commonwealth*,[84] the court recognized that only slight corroborative evidence is required when the commission of the crime has been fully confessed by the accused.[85]

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counsel, it was not a violation of *Miranda* for a civilian law enforcement officer to later initiate questioning and obtain a confession for different crimes. *Id.* at 121, 300 S.E.2d at 923; McFadden v. Commonwealth, 225 Va. 103, 300 S.E.2d 924 (1983). Where police officers in two different locations were investigating different crimes, a request for counsel in one instance did not prevent other police officers in other locations from initiating questioning about other crimes. *Id.* at 109-10, 300 S.E.2d at 927.

76. Morris v. Commonwealth, 229 Va. 145, 326 S.E.2d 693 (1985).

77. *Id.* at 146, 326 S.E.2d at 694 (quoting Ellison v. Commonwealth, 219 Va. 404, 408, 247 S.E.2d 685, 686 (1978)).

78. *Ellison*, 219 Va. at 409, 247 S.E.2d at 686 (quoting Hines v. Commonwealth, 136 Va. 728, 748, 117 S.E. 843, 849 (1923)).

79. *Morris*, 229 Va. at 148, 326 S.E.2d at 695.

80. *Id.* at 149, 326 S.E.2d at 695 (quoting *Hines*, 136 Va. at 745, 117 S.E. at 848).

81. *Morris*, 229 Va. at 149, 326 S.E.2d at 695.

82. Boggs v. Commonwealth, 229 Va. ___, ___, 331 S.E.2d 407, 419 (1985).

83. *Id.* at ___, 331 S.E.2d at 419.

84. 228 Va. 124, 321 S.E.2d 273 (1984), *cert. denied*, 105 S. Ct. 1233 (1985).

85. *Id.* at 133, 321 S.E.2d at 279.

B. *Lineups and Identification Procedures*

The Virginia Supreme Court decided only one significant case dealing with identification procedures. *McCary v. Commonwealth*[86] held that the witness's identification was reliable under the "totality of the circumstances" test even when (1) fifteen months elapsed between the crimes and the identification testimony at the preliminary hearing; (2) the police supplied the defendant's name as that of the man whom the victims had described; and (3) the victims were unable to identify the defendant from the photographic array.[87] The Virginia court has not yet addressed *Hayes v. Florida*,[88] which condemned both the involuntary removal of a suspect from his home to a police station and his detention there for identification purposes such as fingerprinting.[89] The United States District Court for the Eastern District of Virginia upheld an identification where the defendant was required to wear a false beard, a cap, and sunglasses.[90]

C. *Right to Counsel*

Recent cases have cast doubt on the constitutional right to be represented by counsel at ex parte communications between judges and jurors.[91] This past term both the United States[92] and Virginia[93] Supreme Courts denied claims that the defense has a constitutional right to be present at every interaction between a judge and jury. However, the 1985 Virginia General Assembly recognized that "[n]o judge shall communicate in any way with a juror in a criminal proceeding concerning the juror's conduct or any aspect of the case during the course of the trial outside the presence of the parties or their counsel."[94]

The General Assembly also clarified provisions relating to compensation of court-appointed counsel. Counsel appointed by the court to represent an indigent charged with repeated violations of the same section of the Code of Virginia, with each of such viola-

86. 228 Va. 219, 321 S.E.2d 637 (1984).
87. *Id.* at 234, 321 S.E.2d at 645.
88. 105 S. Ct. 1643 (1985).
89. *Id.* at 1647.
90. Griffin v. Commonwealth, 606 F. Supp. 941 (E.D. Va. 1985).
91. *See* Rushen v. Spain, 464 U.S. 114 (1983).
92. United States v. Gagnon, 105 S. Ct. 1482, 1486 (1985) (per curiam).
93. Ellis v. Commonwealth, 227 Va. 419, 423, 317 S.E.2d 479, 481-82 (1984).
94. VA. CODE ANN. § 19.2-263.1 (Cum. Supp. 1985).

tions arising out of the same incident, occurrence, or transaction, shall be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such offenses are tried as part of the same judicial proceeding.[95]

In addition to compensation of counsel, the Code of Virginia authorized the trial court to "direct the payment of such reasonable expenses incurred by such court-appointed attorney as it deems appropriate under the circumstances of the case."[96] This provision has been utilized to provide for state funding for services necessary for an adequate defense, such as expert witnesses and private investigators, although the Virginia Supreme Court noted that provision of such services was not constitutionally required.[97] *Ake v. Oklahoma*,[98] while limiting its holding to the state's responsibility to provide psychiatric examination, also stated that "[a] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."[99] Such broad language will undoubtedly generate new claims for state funding of services necessary for an adequate defense. What had previously been an act of judicial grace in Virginia may become a constitutional right. Nonetheless, in *Watkins v. Commonwealth*,[100] the court reaffirmed that there is no constitutional right to appointment of a private investigator at public expense.[101]

The Virginia Supreme Court made several changes in dealing with claims of ineffective assistance of counsel, but these changes received mixed reviews from the Virginia General Assembly and the federal courts. First, the Virginia Supreme Court abandoned the "farce and mockery" standard to join the majority of jurisdictions applying the standard of "reasonable competence" as the test for effective representation of counsel.[102] This change was noncon-

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95. *Id.* § 19.2-163.

96. *Id.*

97. Quintana v. Commonwealth, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982) (employment of an investigator by the court at public expense is an act of judicial grace not constitutionally required), *cert. denied*, 460 U.S. 1029 (1983); Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371, *cert. denied*, 105 S. Ct. 229 (1984); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

98. 105 S. Ct. 1087 (1985); *see also* Tuggle v. Commonwealth, 230 Va. ___, 334 S.E.2d 838 (1985) (applying *Ake*).

99. 105 S. Ct. at 1094.

100. 229 Va. ___, 331 S.E.2d 422 (1985).

101. *Id.* at ___, 331 S.E.2d at 430.

102. Stokes v. Warden, 226 Va. 111, 116, 306 S.E.2d 882, 883 (1983).

troversial, and in fact the court acknowledged that it had been applying the new standard for a "considerable period of time."[103] Because claims of inadequate representation of counsel normally involve matters not appearing in the trial record, the Virginia Supreme Court attempted to restrict "to habeas corpus proceedings the litigation of claims of ineffective assistance of counsel."[104] However, the 1985 Virginia General Assembly effectively negated this holding and authorized consideration of such claims on direct appeal "if all matters relating to such issue are fully contained within the record of the trial."[105] The court also applied the doctrine of laches to delays in filing a petition alleging ineffective assistance of counsel,[106] but the United States District Court for the Eastern District of Virginia held that the government must show actual prejudice from the delay, which "cannot be presumed solely from the passage of time."[107] Both the Virginia[108] and federal[109] courts have noted that the constitutional standard for effective assistance of counsel is no more stringent in capital cases than in those where less severe punishments may be imposed. However, the seriousness of the offense and the severity of the punishment are factors which must be considered in assessing an attorney's performance.[110]

Church v. Commonwealth[111] recognized that, although no particular ritual is required, the record must establish that a waiver of counsel was knowingly made. The court reluctantly reversed the conviction where there was a "fortuitous omission" of that part of the record which might have established a waiver.[112]

III. MISCELLANEOUS

A. *Pre-Trial Release/Bail*

In *Heacock v. Commonwealth*,[113] the court addressed some of the confusion surrounding revocation of bail and forfeiture of

103. *Id.* at 116-17, 306 S.E.2d at 884.
104. Walker v. Mitchell, 224 Va. 568, 570, 299 S.E.2d 698, 699 (1983).
105. VA. CODE ANN. § 19.2-317.1 (Cum. Supp. 1985).
106. *Walker*, 224 Va. at 575, 299 S.E.2d at 702.
107. Walker v. Mitchell, 587 F. Supp. 1432, 1438 (E.D. Va. 1984).
108. Virginia Dep't of Corrections v. Clark, 227 Va. 525, 318 S.E.2d 399 (1984).
109. Strickland v. Washington, 104 S. Ct. 2052 (1984).
110. *Clark*, 227 Va. at 534, 318 S.E.2d at 403; *see also Strickland*, 104 S. Ct. at 2064.
111. 230 Va. ___, 2 V.L.R. 359 (1985).
112. *Id.* at ___, 2 V.L.R. at 367.
113. 228 Va. 235, 321 S.E.2d 645 (1984).

bond. The court held that a surety is not a party to a proceeding to revoke bail, i.e., the previous release from custody. However, the surety is an essential party to a bond forfeiture proceeding and is entitled to notice and a hearing.[114] At such a hearing, the commonwealth must prove by a preponderance of the evidence that the defendant violated a condition of bond.[115] A previous determination of violations at the *bail* revocation hearing (such determination being based on probable cause, and not on a preponderance standard) is not prima facia proof for purposes of the *bond* forfeiture proceeding.[116] The court suggested that the difficulties created by different standards of proof for *bail* revocation (probable cause) and *bond* forfeiture (preponderance) could be avoided if the two proceedings were combined in one hearing.[117]

B. *Indictments and Charges*

Although the Rules of the Supreme Court of Virginia require that an indictment cite "the statute or ordinance that defines the offense,"[118] error or omission of the citation is harmless unless the court finds that the defendant was thereby prejudiced in preparing his defense.[119] A reference in the indictment to the violated ordinance gives the defendant fair notice that the commonwealth intends to prove elements such as scienter which are necessary for the offense.[120]

If two offenses are charged in a single count, only one conviction and one sentence are permissible.[121] Except for capital offenses, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects

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114. *Id.* at 240, 321 S.E.2d at 648.

115. *Id.* at 241, 321 S.E.2d at 648.

116. *Id.*

117. *Id.* at 242, 321 S.E.2d at 649. Furthermore, *Heacock* applies only when bond was revoked on some ground other than a failure to appear. "The absence of the accused is conclusive proof" of the violation of the condition to appear. *Id.* at 241 n.3, 321 S.E.2d at 649 n.3.

118. VA. SUP. CT. R. 3A:6.

119. Stamper v. Commonwealth, 228 Va. 707, 713, 324 S.E.2d 682, 686 (1985).

120. Wall Distrib., Inc. v. Newport News, 228 Va. 358, 323 S.E.2d 75 (1984); KMA, Inc. v. Newport News, 228 Va. 365, 323 S.E.2d 78 (1984), *cert. denied*, 105 S. Ct. 2324 (1985). "An indictment need not be drafted in the exact words of the applicable statute so long as the accused is given notice of the nature and character of the offense charged." Boggs v. Commonwealth, 229 Va. ___, ___, 331 S.E.2d 407, 420 (1985) (quoting Black v. Commonwealth, 223 Va. 274, 282, 288 S.E.2d 449, 451 (1982)).

121. Morris v. Commonwealth, 228 Va. 206, 209, 321 S.E.2d 633, 635 (1984).

as if a principal in the first degree.[122] The defendant may only be convicted of the specific offense charged in the indictment; thus an accused indicted for larceny by false pretenses cannot be convicted upon evidence which establishes larceny by trick.[123] "Where as here, the Commonwealth elects to prosecute a defendant for a specific category of larceny, and no other, its case must either prevail or fail upon that election."[124] A variance is fatal when the proof is different from and irrelevant to the crime defined in the indictment and is, therefore, insufficient to prove the commission of the crime charged.[125]

C. *Discovery*

Materials in the hands of third parties are the proper subject of a subpoena duces tecum if they "could be used at trial."[126] Counsel is entitled to a reasonable opportunity to examine discovery material and prepare for its use at trial.[127] If the commonwealth fails to provide adequate discovery, "the court may order the Commonwealth to permit the discovery or inspection, grant a continuance, or prohibit the Commonwealth from introducing evidence not disclosed, or the court may enter such other order as it deems just under the circumstances."[128] When a discovery violation does not prejudice the substantial rights of a defendant, such undisclosed material may be admitted into evidence.[129]

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122. Riddick v. Commonwealth, 226 Va. 244, 248, 308 S.E.2d 117, 119 (1983); VA. CODE ANN. § 18.2-18 (Repl. Vol. 1982).

123. Baker v. Commonwealth, 225 Va. 192, 300 S.E.2d 788 (1983).

124. *Id.* at 194, 300 S.E.2d at 789; *see also* Edenton v. Commonwealth, 227 Va. 413, 416, 316 S.E.2d 736, 738 (1984) (traffic offenses).

125. Hawks v. Commonwealth, 228 Va. 244, 321 S.E.2d 650 (1984) (evidence of rape is relevant to charge that defendant intended to deprive victim of liberty); Graybeal v. Commonwealth, 228 Va. 736, 324 S.E.2d 698 (1985) (proof that the defendant broke into and entered a trailer failed to prove that he broke into an office or storehouse as stated in the indictment).

126. Cox v. Commonwealth, 227 Va. 324, 328, 315 S.E.2d 228, 230 (1984).

127. *Id.*; *see also* Gilchrist v. Commonwealth, 227 Va. 540, 546, 317 S.E.2d 784, 787 (1984).

128. VA. CODE ANN. § 19.2-265.4 (Cum. Supp. 1985).

129. Griffin v. Commonwealth, 606 F. Supp. 941 (E.D. Va. 1985); *see also* Davis v. Commonwealth, 230 Va. ___, 335 S.E.2d 375 (1985) (where inculpatory pictures were withheld but defendant was not prejudiced).

D. *Speedy Trial*

Any delay caused by a demand for separate trials by a defendant indicted on different charges is not excluded from the statutory speedy trial period.[130] In the absence of a formal motion for a continuance, the defendant is deemed to have agreed to and concurred in delays necessitated by his own motion.[131] However, as the court noted in *Godfrey v. Commonwealth*,[132] the commonwealth's reasons for delay must appear on the record. "Representations of counsel, or even the trial judge, if not supported by the record, are insufficient. . . . Continuances in criminal cases, therefore, must be documented to enable us to review and evaluate them when they are challenged."[133]

E. *Double Jeopardy*

The mere fact that a lesser offense is charged at the preliminary hearing does not preclude the commonwealth from also charging a greater offense arising out of the same act or transaction.[134] "If a single act results in injury to two or more persons, a corresponding number of distinct offenses may result."[135]

F. *Potential Bias of Judge or Prosecutor*

The trial judge must exercise reasonable discretion to determine whether he possesses such bias as would deny a party a fair trial.[136] "Merely because a trial judge is familiar with a party and his legal difficulties through prior judicial hearings . . . does not automatically or inferentially raise the issue of bias."[137] The Virginia Supreme Court refused to overturn the common law rule which permits the appearance of private counsel to assist the prosecution. A private prosecutor, however, is subject to the same standard of conduct as is a public prosecutor.[138] To remedy considerable administrative problems, the Virginia General Assembly amended

130. Walker v. Commonwealth, 225 Va. 5, 11, 301 S.E.2d 28, 31 (1983).
131. Stephens v. Commonwealth, 225 Va. 224, 233, 301 S.E.2d 22, 29 (1983).
132. 227 Va. 460, 317 S.E.2d 781 (1984).
133. *Id.* at 464, 317 S.E.2d at 783.
134. Bradshaw v. Commonwealth, 228 Va. 484, 492, 323 S.E.2d 567, 572 (1984).
135. Morris v. Commonwealth, 228 Va. 206, 212, 321 S.E.2d 633, 636 (1984).
136. Deahl v. Winchester Dep't of Social Services, 224 Va. 664, 672-73, 299 S.E.2d 863, 867 (1983) (quoting Barry v. Sigler, 373 F.2d 835, 836 (8th Cir. 1967)).
137. *Id.*
138. Cantrell v. Commonwealth, 229 Va. 387, 329 S.E.2d 22 (1985).

the Code to provide that rejection of a plea bargain disqualifies a judge only when "the parties do not agree that he may hear the case."[139]

G. *Jury Selection*

The Virginia Supreme Court has provided the first judicial interpretation of the 1981 statutory change which gave counsel the right to examine prospective jurors.[140] *LeVasseur v. Commonwealth*[141] recognized that counsel does not have an unlimited right to "propound any question he wishes."[142] The court must afford a party a full and fair opportunity to question jurors but the "trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so."[143] Counsel's questions must relate to "any of the four criteria set forth in [Code § 8.01-358]."[144] It is also discretionary with the trial court whether to permit examination of each venireman out of the presence of the others, but counsel should be afforded the opportunity to challenge jurors out of the presence of the panel.[145]

Reluctance to serve as a juror is not grounds for disqualification,[146] but "when a juror is related by blood or marriage to either party of record or a victim in a criminal prosecution, the potential for prejudice is inherent and the law conclusively presumes partiality."[147] The court thus affirmed the absolute common law rule disqualifying a venireman who is related within the ninth degree of consanguinity or affinity to a party to the trial.[148] The exclusion of veniremen irrevocably committed to voting against the death pen-

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139. VA. CODE ANN. § 19.2-153 (Cum. Supp. 1985).

140. VA. CODE ANN. § 8.01-358 (Repl. Vol. 1984). Previously such examination was with permission of the court.

141. 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063 (1984).

142. *Id.* at 581, 304 S.E.2d at 653.

143. *Id.*

144. Tuggle v. Commonwealth, 228 Va. 493, 505, 323 S.E.2d 539, 546 (1984) (quoting *LeVasseur*, 225 Va. at 581, 304 S.E.2d at 653 (1983)), *vacated on other grounds*, 105 S. Ct. 2315 (1985).

145. *Id.*

146. Calhoun v. Commonwealth, 226 Va. 256, 262, 307 S.E.2d 896, 899-900 (1983).

147. Gray v. Commonwealth, 226 Va. 591, 594, 311 S.E.2d 409, 410 (1984).

148. Elam v. Commonwealth, 229 Va. 113, 116, 326 S.E.2d 685, 687 (1985) (juror could not be challenged merely because she was the sister of a former commonwealth's attorney); *see also Calhoun*, 226 Va. at 263, 307 S.E.2d at 900 (court declined to adopt a per se rule disqualifying a prospective juror solely on the ground that sometime in the past the commonwealth's attorney had represented him).

alty does not violate the defendant's sixth amendment right to a jury drawn from a fair cross-section of the community.[149] In *Haddad v. Commonwealth*,[150] the trial court abused its discretion in denying a mistrial after a juror expressed an opinion to third persons during the trial proceedings.

The court continues to affirm the trial judge's wide discretion in deciding whether to sequester the jury,[151] and a party moving to change venue still must carry the burden of proof.[152] The court said:

> This burden cannot be carried merely by a showing that the prospective jurors have been exposed to pretrial publicity, or even by a showing that the jurors may have arrived at some preconceived notion as to the guilt or innocence of the accused. It is not required that they be entirely ignorant of the facts and issues. It is sufficient if they can lay aside their impressions or opinions and render a verdict based on the evidence presented in court.[153]

The General Assembly amended the Code to prohibit an employer from taking "any adverse personnel action" against any person summoned for jury duty.[154] Any employer violating this provision shall be guilty of a Class 4 misdemeanor.

H. *Trial*

The 1985 General Assembly enacted four provisions which will have an impact upon criminal trials. First, a defendant or his counsel may tape record proceedings in general district court.[155] Second, defense counsel or the attorney for the commonwealth may

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149. Poyner v. Commonwealth, 229 Va. 401, 413-14, 329 S.E.2d 815, 824-25, *cert. denied*, 106 S. Ct. 208 (1985); *see also* Wainwright v. Witt, 105 S. Ct. 844 (1985). *Wainwright* held that even if the juror is not irrevocably committed to voting against the death penalty, he may be excused if his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Id.* at 846 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

150. 229 Va. 325, 329-30, 329 S.E.2d 17, 20 (1985).

151. Boggs v. Commonwealth, 229 Va. ___, 331 S.E.2d 407 (1985); Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984); Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984).

152. Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984).

153. *Id.* at 544, 323 S.E.2d at 584; *Boggs*, 229 Va. at ___, 331 S.E.2d at 416.

154. VA. CODE ANN. § 18.2-465.1. (Cum. Supp. 1985).

155. *Id.* § 16.1-69.35:2.

raise the question of the defendant's competency to stand trial.[156] Third, photographs of goods or merchandise taken in designated larcenies and burglaries are admissible to the same extent as if the goods or merchandise had been introduced in evidence.[157] Finally, communications between ministers of religion and penitents are privileged in criminal prosecutions.[158]

The Virginia Supreme Court reaffirmed its position that the prosecution may meet its burden of proof with wholly circumstantial evidence, although all necessary circumstances must be consistent with guilt, inconsistent with innocence, and must exclude any other rational hypothesis to a moral certainty.[159] The hypotheses "which must be thus excluded are those which flow from the evidence itself, and not from the imaginations of defense counsel."[160] The court also held that the malice required for second degree murder normally cannot be implied from negligent operation of a motor vehicle.[161] However, *Fleming v. United States*[162] presented a factual situation wherein reckless operation of a vehicle would properly sustain a conviction of murder.

The court also reaffirmed previous holdings on the entrapment defense,[163] the *McNaughten* test for insanity,[164] and recognized that failure to sequester a witness may be harmless error.[165] In *Church v. Commonwealth,*[166] the court examined recent statutory changes and held that the interspousal communication privilege applies in criminal prosecutions.[167]

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156. *Id.* § 19.2-169.1.

157. *Id.* § 19.2-270.1.

158. *Id.* § 19.2-271.3.

159. Bishop v. Commonwealth, 227 Va. 164, 169, 313 S.E.2d 390, 393 (1984); Dukes v. Commonwealth, 227 Va. 119, 122, 313 S.E.2d 382, 383 (1984) (quoting Inge v. Commonwealth, 217 Va. 360, 366, 228 S.E.2d 563, 567 (1976)).

160. Cook v. Commonwealth, 226 Va. 427, 433, 309 S.E.2d 325, 329 (1983), *quoted with approval in* Tuggle v. Commonwealth, 228 Va. 493, 511, 323 S.E.2d 539, 550 (1984); Elam v. Commonwealth, 229 Va. 113, 115, 326 S.E.2d 685, 687 (1985).

161. Essex v. Commonwealth, 228 Va. 273, 322 S.E.2d 216 (1984).

162. 672 F.2d 905 (3d. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

163. *Stamper*, 228 Va. 707, 324 S.E.2d 682 (1985).

164. Price v. Commonwealth, 228 Va. 452, 459, 323 S.E.2d 106, 110 (1984).

165. Watkins v. Commonwealth, 229 Va. ___, ___, 331 S.E.2d 422, 433 (1985).

166. 230 Va. ___, 335 S.E.2d 823 (1985).

167. *Id.* at ___, 335 S.E.2d at 826-27 (interpreting VA. CODE ANN. § 19.2-271.2 (Repl. Vol. 1983)).

I. *Sentencing*

The General Assembly established a procedure whereby defendants charged with a misdemeanor first offense against property may be placed on probation without adjudication of guilt.[168] *Baker v. Commonwealth*[169] interpreted the Code (prior to the 1984 amendment) to authorize court-ordered restitution *only* when the defendant is placed on probation.[170] *In re Commonwealth's Attorney*[171] recognized that the Virginia General Assembly has divested the trial judge of all discretion with respect to mandatory punishment for use of a firearm while committing certain felonies.[172] The mandatory sentence is "inflexible" and shall not be suspended, nor may the court delay imposition of sentence or stay its execution.[173] A juvenile transferred to circuit court and tried by a jury has the right to have his sentence fixed by the judge.[174]

In addition to rejecting the familiar challenges to the constitutionality of capital punishment, the court decided a number of issues relating to imposition of the death sentence. As to the aggravating factors for the death penalty, *Poyner v. Commonwealth*[175] held that vileness or torture includes "psychological torture." In *Jones v. Commonwealth*,[176] the court recognized that mutilation, disfigurement or sexual assault committed on a corpse evidences depravity of mind. The court also decided that prior unadjudicated criminal activity is admissible to establish dangerousness.[177] As to mitigating circumstances, *Department of Corrections v. Clark*[178] held that the defendant has a constitutional right to present virtually unlimited evidence in mitigation; the commonwealth has an absolute right to cross-examine witnesses on a matter relevant to punishment which the defendant has put in issue by direct exami-

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168. VA. CODE ANN. § 19.2-303.2 (Cum. Supp. 1985).
169. 230 Va. ___, 335 S.E.2d 276 (1985).
170. *Id.* at ___, 335 S.E.2d at 277.
171. 229 Va. 159, 163, 226 S.E.2d 695, 697 (1985).
172. *See* VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 1982).
173. *In re* Commonwealth's Attorney, 229 Va. at 163, 226 S.E.2d at 698.
174. Ballard v. Commonwealth, 228 Va. 213, 321 S.E.2d 284 (1984).
175. 229 Va. 401, 425-26, 329 S.E.2d 815, 832 (1985).
176. 228 Va. 427, 448, 323 S.E.2d 554, 565 (1984).
177. *Poyner*, 229 Va. at 418, 329 S.E.2d at 827-28; *Watkins*, 229 Va. at ___, 331 S.E.2d at 436. In Peterson v. Commonwealth, 225 Va. 289, 298, 302 S.E.2d 520, 526, *cert. denied*, 104 S. Ct. 202 (1983), the court noted that if dangerousness is to be proved by evidence of other crimes: "[i]n fairness to the defendant, . . . the preferred practice is to make known to him before trial the evidence that is to be adduced at the penalty stage if he is found guilty."
178. 227 Va. 525, 539, 318 S.E.2d 399, 406 (1984).

nation of the witness;[179] in the absence of a request the trial judge is not required to instruct the jury on possible mitigating circumstances;[180] and evidence of the defendant's impaired mental capacity need not amount to insanity or incompetence to stand trial.[181]

When the jury returns a verdict finding the death sentence warranted under both the vileness and the dangerousness standards, "it is of no importance whether the instruction on 'vileness' was correct so long as the instruction on 'dangerousness' was correct."[182]

J. *Appeals*

The Virginia General Assembly revised provisions by which an aggrieved party may appeal to the court of appeals, and provided for direct appeal to the Supreme Court from final judgments involving a petition for habeas corpus.[183] The General Assembly also provided for appeals by the commonwealth of dismissals based on grounds that a statute is unconstitutional, or the suppression of evidence on grounds that the evidence was obtained in violation of certain constitutional provisions.[184] The provisions of this act take effect December 1, 1986, if approved in a referendum in November 1986.

179. Washington v. Commonwealth, 228 Va. 535, 549, 323 S.E.2d 577, 586-87 (1984).

180. Briley v. Bass, 750 F.2d 1238, 1244 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1855 (1985).

181. *Washington*, 228 Va. at 549, 323 S.E.2d at 584-86.

182. *Briley*, 750 F.2d at 1245; *see also Watkins*, 229 Va. at ___, 331 S.E.2d at 437.

183. VA. CODE ANN. §§ 17-116.05, 17-116.05:1 (Cum. Supp. 1985).

184. *Id.* § 19.2-398.