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Criminal Procedure and Criminal Law: Virginia Supreme Court Decisions During the 70's


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NOTE

CRIMINAL PROCEDURE AND CRIMINAL LAW: VIRGINIA SUPREME COURT DECISIONS DURING THE 70's*

I.	Introduction	586
II.	Search and Seizure	587
	A. Introduction	587
	B. Means of Entry	588
	C. Consensual Searches	592
	D. Vehicle Searches	597
	1. Adoption of the "Furtive Gesture" Rule	599
	2. Application of Plain View: When is a Search a Search	600
	3. Did the Police Have Time to Obtain a Warrant	603
	4. Constitutionality of Inventory Searches	604
	5. Warrantless Inspection Searches	608
	E. Sufficiency of Hearsay as Basis for Affidavit Underlying the Warrant	609
	F. Stop and Frisk Doctrine	615
	G. Administrative Searches (Arson)	617
	H. Other Issues in Search and Seizure	619
	I. Conclusion	622
III.	Pre-Trial Criminal Procedure	622
	A. Confessions	622
	B. Identification Proceedings	630
	C. Entrapment	634
	D. Plea Bargaining	636
	E. Discovery	639
	F. Speedy Trial	643
	G. Conclusion	647
IV.	Criminal Procedure During and Following Trial	648
	A. Introduction	648
	B. Right to Counsel	648
	1. Waiver of Right to Counsel	653

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2. Effective Counsel	653
C. Right to a Jury Trial	656
1. Waiver of Right to a Jury Trial	657
D. Jury Selection	659
E. Control of Jury	663
F. Self-Incrimination	666
G. Sentencing, Probation, and Parole	669
1. Harsher Sentencing in Trial De Novo	673
2. Probation and Suspension of Sentence	674
3. Parole	675
H. Right to Appeal	676
I. Conclusion	679
V. Substantive Criminal Law	679
A. Introduction	679
B. Crimes Against Persons	680
1. Felony Murder	680
2. Involuntary Manslaughter	682
3. Rape	684
4. Robbery	685
C. Crimes Against Property and Crimes Involving Fraud	686
1. Larceny	686
2. Bad Checks	688
D. Crimes Against Health and Safety	689
1. Distribution of Controlled Substances	689
2. Possession of Controlled Substances	693
3. Driving Under the Influence	696
E. Conclusion	696

I. INTRODUCTION

The purpose of this note is to examine the decisions of the Virginia Supreme Court during the period between 1970-1980 in the area of criminal procedure and substantive criminal law. Legislative changes will not be dealt with in depth except as they have affected these decisions. Because of space constraints, a complete review of all areas is impossible; therefore, review has been limited to those issues most likely to be of interest to the practicing attorney. The discussion will also attempt to establish the position of the Virginia Supreme Court on these matters in relation to the United States Supreme Court and the majority of state courts.

Although it is difficult to generalize such a broad area, any changes that have occurred throughout this period do not reveal a change in philosophy on the part of the Virginia Supreme Court but rather reflect United

States Supreme Court decisions, changes by the Virginia General Assembly, or a deference to the position of the trial court. While some states have found matters of criminal procedure an area fertile for successful enlargement of federal constitutional rights, the Virginia Supreme Court has generally been reluctant to accord any more than the minimum guarantees required by the federal constitution as interpreted by the United States Supreme Court.

II. SEARCH AND SEIZURE

A. Introduction

Since 1970, the Supreme Court of Virginia has dealt with many controversial search and seizure issues in areas which are undergoing significant change by the United States Supreme Court.¹ This section of the note first reviews how the Virginia Supreme Court has treated many of these controversial issues. It then briefly reviews a limited number of cases where the Virginia Supreme Court has directly applied recent United States Supreme Court holdings.² This section is intended as a general

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1. Search and seizure law evolves from interpretation of the United States Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. iv.

The Virginia counterpart reads:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

VA. CONST. art. I, § 10.

"[T]he requirements of the Virginia statutes controlling the issuance of search warrants and forbidding searches without a warrant . . . are in substance the same as those contained in the Fourth Amendment." *Kirby v. Commonwealth*, 209 Va. 806, 808, 167 S.E.2d 411, 412 (1969).

2. Not included in this note are areas of search and seizure where the Supreme Court decided issues not encountered by the Virginia court, areas where neither court resolved a question, and areas of search and seizure which are governed by statute in Virginia. During the past decade the United States Supreme Court decided significant issues not yet reached by the Virginia court, including, but not limited to, decisions that: an arrest within the subject's residence generally must be pursuant to a warrant, *Payton v. New York*, 445 U.S. 573 (1980); certain procedures must be available to allow attacks on search warrants based on claimed lack of veracity, *Franks v. Delaware*, 438 U.S. 154 (1978); there is no "murder scene" exception to the warrant requirement, *Mincey v. Arizona*, 437 U.S. 385 (1978); upon a traffic violation stop, a driver may be compelled to get out of his vehicle, *Pennsylvania v. Mimms*, 434 U.S. 106 (1978); if goods are seized in transit, a warrant must be obtained before they are searched, *United States v. Chadwick*, 433 U.S. 1 (1977); information volun-

survey of the Virginia court's approach to fourth amendment doctrines and is not meant to be exhaustive or definitive on any given issue.

B. Means of Entry

An otherwise valid search and seizure can be illegal because of the means used to enter a dwelling. The issue is whether and when unannounced, forced entry is reasonable. At early common law the rule in *Semayne's Case*³ required the sheriff "to signify the cause of his coming, and to make request to open doors"⁴ before breaking in. While many American jurisdictions retain this common law "knock and announce" rule,⁵ some have established by statute that officers must identify their authority and purpose and be actually or constructively denied admittance before forced entry is allowed.⁶ The knock and announce rule was given constitutional status in *Gouled v. United States*.⁷ It has, however,

tarially lodged with third parties may be obtained from them by subpoena duces tecum, without a warrant, *United States v. Miller*, 425 U.S. 435 (1976); grand jury subpoenas are not within fourth amendment protections, *United States v. Dionisio*, 410 U.S. 1 (1973); notwithstanding *Katz v. United States*, 389 U.S. 347 (1967), a informant/participant in a conversation may be wired for recordation, *United States v. White*, 401 U.S. 745 (1971). In some developing areas of important search and seizure law Virginia has not encountered cases since 1970; these include border search doctrines, airport searches, and wiretapping and eavesdropping in light of *Katz*.

Areas where neither court resolved an issue include the degree to which plain view or open view observations may be enhanced by binoculars and other devices and how promptly search warrants must be executed (although by the provisions of VA. CODE ANN. § 19.2-56 (Repl. Vol. 1975) a time limit of 15 days is imposed).

Among the more important statutory provisions are VA. CODE ANN. §§ 19.2-52 to -60 (Repl. Vol. 1975) (search warrants); VA. CODE ANN. §§ 19.2-71 to -76 (Repl. Vol. 1975) (arrest warrants); VA. CODE ANN. § 19.2-81 (Repl. Vol. 1975) (warrantless arrest); VA. CODE ANN. § 19.2-83 (Repl. Vol. 1975) (stop and frisk); VA. CODE ANN. §§ 27-32.1, -34.2, -58, -79 to -79.8, -85.1 (Repl. Vol. 1979) (various provisions for warrantless inspections of premises for fire hazards and subsequent to fires); VA. CODE ANN. §§ 18.2-110, -249 (Repl. Vol. 1975); VA. CODE ANN. §§ 4-54 to 56 (Repl. Vol. 1979), and VA. CODE ANN. §§ 46.1-3, -7 to -9, -351.1 (Repl. Vol. 1974) (warrantless stopping, inspection, and seizure of vehicles under certain conditions).

3. *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603).

4. *Id.* at 195.

5. See *People v. Lujan*, 174 Colo. 554, 484 P.2d 1238 (1971); *Dyton v. State*, 250 A.2d 383 (Del. Super. Ct. 1969); *State v. Johnson*, 102 R.I. 344, 230 A.2d 831 (1967).

6. For illustrative listing of states enacting knock-and-announce statutes, see Blakey, *The Rule of Announcement and Unlawful Entry: Mitler v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 560 (1964).

7. 255 U.S. 298, 305 (1921). The Court stated: "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures . . . [including] entrance to a man's house or office by force . . ." *Gouled* dealt, in part, with a challenge to admissibility of evidence gained after warrantless entry to defendant's premises by ruse of a government

always been recognized that certain circumstances could justify unannounced forced entry.⁸ Indeed, some jurisdictions by statute authorize magistrates to issue so-called "no knock" warrants.⁹

In 1972, *Johnson v. Commonwealth*¹⁰ established Virginia's no knock policy.¹¹ Two 1974 cases, *Carratt v. Commonwealth*¹² and *Heaton v. Commonwealth*,¹³ amplified the court's approach. As the 1975 revision of Virginia's criminal code did not propose a "no knock" statute, these cases seem to begin a case law evolution of no knock policy.¹⁴

In *Johnson*, the court looked primarily to *Ker v. California*¹⁵ for guidance. In *Ker*, a divided Court¹⁶ approached no knock from two different perspectives. The plurality held that no general rule could be fashioned since exigencies did exist which justified the no knock entry. The Court concluded that a case-by-case analysis was required.¹⁷ On the facts of *Ker*,¹⁸ the Court upheld the entry because the evidence sought, narcotics, "could be quickly and easily destroyed," and because the defendant "might well have been expecting the police."¹⁹

agent, not force. The Court held either means of entry subject to fourth amendment requirements. This rule is codified for federal officers:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (1948).

8. For example, *Sabbath v. United States*, 391 U.S. 585, 589-90 (1968) recognizes that 18 U.S.C. § 3109 is a codification of the common law and is subject implicitly to exceptions recognized at common law.

9. See N.Y. CRIM. PROC. LAW (McKinney) § 690.45 (1971 & Supp. 1980-81): "A search warrant must contain . . . [a]n authorization, where the court has specially so determined, that the executing police officer . . . enter the premises to be searched without giving notice of his authority and purpose . . ."

10. 213 Va. 102, 189 S.E.2d 678 (1972).

11. *Id.* at 105-06, 189 S.E.2d at 680-81.

12. 215 Va. 55, 205 S.E.2d 653 (1974).

13. 215 Va. 137, 207 S.E.2d 829 (1974).

14. See Note, *Revision of Virginia's Criminal Code*, 10 U. RICH. L. REV. 133, 153-54 (1975).

15. 374 U.S. 23 (1963).

16. *Id.* at 24.

17. *Id.* at 33-34.

18. In *Ker*, police entered defendants' apartment with a passkey, arrested them, and searched for and found marijuana. Although there was no search warrant, the police had probable cause for an arrest, and under the circumstances the means of entry was reasonable given the possibility of the destruction of contraband if they knocked and announced. *Id.* at 28-29, 38-41.

19. *Id.* at 40.

The *Ker* dissent, however, proposed a general rule to judge no knock entries. It would limit such entries to the following situations:

(1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.²⁰

In *Johnson* the court held that a no knock entry was reasonable where the officers knew that the occupants had installed surveillance and delay systems. Further, the evidence was being distributed from a bathroom, and was readily destructible.²¹ It adopted the ruling of the *Ker* plurality which recognized exigencies, demanded particular case analysis, and refused to propose general rules. Both courts clearly indicated that ready destructibility of drugs is an acceptable exigency.²²

In *Carratt*, which followed *Johnson*,²³ the court believed that the "exigent circumstances . . . [were] even greater."²⁴ The officers believed that the defendant was armed and dangerous, that he knew he was under investigation, and that he expected them.²⁵ *Carratt* implied that an exigency exists whenever knock and announce would frustrate the undertaking, increase the officers' peril, or permit destruction of evidence.²⁶

20. *Id.* at 47 (Brennan, J., dissenting).

21. In *Johnson*, police possessing a valid warrant obtained entry to an apartment with a sledge hammer, without knocking, identifying themselves, or making any announcement of their presence.

The officers knew from prior investigation that there were two locks on the door; that it was equipped with a peephole which was used by the occupants for surveillance of anyone who knocked on the door; that approximately 3 to 4 feet from the room they intended to enter there was a bathroom furnished with a commode and a shower; and that this room was being used for the distribution of narcotics.

Johnson v. Commonwealth, 213 Va. at 102-03, 189 S.E.2d at 678-79.

22. *Ker v. California*, 374 U.S. at 40-41; *Johnson v. Commonwealth*, 213 Va. at 105-06, 189 S.E.2d at 681.

23. *Carratt v. Commonwealth*, 215 Va. at 58-59, 205 S.E.2d at 655-56.

24. *Id.* at 58-59, 205 S.E.2d at 656.

25. In *Carratt*, the defendant was convicted of running a numbers game. With a valid warrant, officers seized numbers paraphernalia from his dwelling. They surrounded the house at 6:00 a.m., knocked on the front storm doors, and forced the main door after hearing nothing and waiting about a minute. All the while a dog aroused by their appearance was barking outside. They announced their presence and identity at both doors they penetrated. The officers knew the defendant was armed, expected the police, and was prepared to destroy evidence. *Id.* at 55-58, 205 S.E.2d at 654-55.

26. *Id.* at 59, 205 S.E.2d at 656. In *Carratt*, the dog barked. The officers *did* knock. They

In *Heaton*, the court however, retreated somewhat from *Carratt* and *Johnson*. It held a no knock entry illegal because the police had no basis for fearing imminent destruction of evidence or any greater peril to themselves if they announced.²⁷ The court established that no emergency exists "where the only exigent circumstance is the readily disposable nature of the contraband that is the object of the search,"²⁸ and refused to extend the no knock privilege to "every case where a search for drugs is involved."²⁹

Thus Virginia has adopted a no knock rule in accord with the *Ker* plurality. Based on the facts of each case, the entry will be upheld if the prosecution can establish that the officers made a reasonable, subjective judgment that no knock entry was necessary to prevent destruction of evidence or increased peril to themselves. While the rule is not wholly permissive,³⁰ it ignores the *Ker* dissent, by whose standards the entries in *Johnson* and *Carratt* would have been illegal,³¹ and establishes only non-

announced themselves and identified themselves as police, but they did not announce their purpose and were not denied entry. After a minute they broke in. The court agreed with the trial court "that this constituted a no-knock entry." *Id.* at 57, 205 S.E.2d at 655. But it has been held that imperfect announcement (stating identity but not purpose) has been viewed as harmless error; and no response from within has been held to justify forced entry within less than a minute in comparable fact situations. Arguably the officers waited long enough to be deemed to have been constructively denied admittance (particularly given the barking dog); their failure to announce a purpose was of little impact; their entry complied with the general knock and announce rule. See *Davis v. State*, 525 P.2d 541 (Alaska 1974) (after knock and announcement of purpose at front and back door, where police seeking narcotics, forced entry after 30-45 seconds legal when no response from within); *People v. Doane*, 33 Mich. App. 579, 190 N.W.2d 259 (1971) (knock, announcement of identity, demand to be admitted, allowance of reasonable time for occupants to answer was substantial compliance with knock and announce rule, notwithstanding failure to state purpose); *State v. Harris*, 12 Wash. App. 481, 530 P.2d 646 (1975) (officers knocked, identified selves, waited only 30-45 seconds before forced entry because believed defendant would destroy narcotics if confronted).

27. *Heaton v. Commonwealth*, 215 Va. at 139, 207 S.E.2d at 831.

28. *Id.*

29. *Id.*

30. The rule is permissive, however, in that it favors the objective of police enforcement of the law over constitutional protections of privacy and presumptions of innocence, by not requiring an objective showing of probable cause for an exigency to justify no knock entry. Such a showing, pursuant, for example, to N.Y. CRIM. PRO. LAW (McKinney) 690.45 (1971 & Supp. 1980-81), quoted in pertinent part *supra* at note 19, would have been possible under both *Johnson* and *Carratt*, given the degree to which the officers' prior knowledge (rather than on-scene discoveries) justified no knock entry. 213 Va. at 102-03, 189 S.E.2d 678-79; 215 Va. at 58-59, 205 S.E.2d at 656.

31. Neither *Johnson* nor *Carratt* had the requisite elements (prior knowledge by the occupants of the police authority and purpose, imminent danger to one within, actual knowledge of apparent attempt to flee or destroy evidence). *Ker v. California*, 374 U.S. at 47.

inal outer limits governing the extent to which the willing police may make unannounced, forceful intrusions.³²

C. *Consensual Searches*

A search³³ not made pursuant to a valid warrant and not meeting the requirements of established exceptions to the warrant requirement³⁴ may nevertheless be reasonable and therefore legal.³⁵ This will be true if either the individual whose person or property is to be searched or an authorized third party consents to the search. Such consent may function as a legitimate waiver of fourth amendment rights,³⁶ whether or not the person who consents is in police custody.³⁷

When a defendant challenges the validity of consent, the prosecution must prove that consent was freely and voluntarily given per *Bumper v. North Carolina*.³⁸ Acquiescence to lawful authority is insufficient proof alone,³⁹ and a search pursuant to an invalid warrant is not legitimized by consent induced by the warrant.⁴⁰ Being in custody, however, does not *per se* vitiate consent, as made clear in *United States v. Watson*,⁴¹ and no *Miranda*-style warning of the right to refuse consent is required as estab-

32. See generally 7 U. RICH. L. REV. 565 (1973) (for discussion of *Johnson*); Annot., 70 A.L.R.3d 217 (1976).

33. A "search" is an intrusion, physical or otherwise, into an area wherein a person has a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J. concurring). Two requirements, if met, indicate an intrusion constituting a search in constitutional terms has occurred: the person alleging intrusion has "exhibited an actual (subjective) expectation of privacy," and "society is prepared to recognize [the expectation] as reasonable." *Id.* at 361.

34. Exceptions to the warrant requirement are searches incident to a lawful arrest, hot pursuit, certain vehicle searches, stop and frisk, certain administrative searches, border searches, airport searches, and searches in emergency circumstances (e.g., investigation of the cause of a fire at the scene before the fire is out).

35. See note 1 *supra*. The Constitution protects only against unreasonable searches by government representatives or their agents.

36. See *Rees v. Commonwealth*, 203 Va. 850, 864-66, 127 S.E.2d 406, 416-17 (1962), *cert. denied*, 372 U.S. 964 (1963) (reiterating validity of consensual searches). See also *Zap v. United States*, 328 U.S. 624, 630 (1946); *Davis v. United States*, 328 U.S. 582, 593-94 (1946). For discussion of third party consent searches generally, see Annot., 31 A.L.R.2d 1078 (1953). For discussion of consent searches subsequent to custody, see Annot., 9 A.L.R.3d 858 (1966).

37. *United States v. Watson*, 423 U.S. 411, 424 (1976).

38. 391 U.S. 543, 548 (1968).

39. *Id.* at 548-49.

40. *Id.* at 549.

41. 423 U.S. at 424.

lished in *Schneckloth v. Bustamonte*.⁴² There are no general rules as to what constitutes requisite "duress or coercion, express or implied"⁴³ necessary to vitiate consent; "[v]oluntariness is a question of fact to be determined from all of the circumstances."⁴⁴

With one interesting exception, *Ritter v. Commonwealth*,⁴⁵ the Virginia court narrowly but reasonably applied the *Bumper*, *Schneckloth*, and *Watson* concepts concerning what is valid consent and what the burdens and means of proof are.⁴⁶ Prior to *Ritter*, consensual search cases in Virginia focused on whether a fourth amendment "search" had occurred at all,⁴⁷ whether consent was invalidated by duress, misrepresentation, or coercion,⁴⁸ the scope of a search conducted pursuant to admittedly valid consent,⁴⁹ and the power of third parties to consent.⁵⁰

*Ritter v. Commonwealth*⁵¹ is the exception. In *Ritter*, an officer confronted the mother of an eighteen year-old boy with a valid warrant to search for narcotics in their dwelling. Finding none inside, after inquiry he obtained from her a package addressed to her son marked "First Class Mail" which she removed from the mailbox.⁵² The court held "there was no search of the mailbox by the officers or seizure of the package by them."⁵³ It stated, "[T]he mother had a legal right to remove the contents from the box . . . [and] voluntarily surrendered" the package.⁵⁴ The implication is that the mother, validly possessing and controlling the mailbox, consented to a search for the package and seizure of it by the

42. 412 U.S. 218, 246-48 (1973).

43. *Id.* at 248.

44. *Id.* at 248-49.

45. 210 Va. 732, 173 S.E.2d 799 (1970).

46. See text accompanying notes 38, 41, & 42 *supra*.

47. 210 Va. at 732, 173 S.E.2d at 799. For a lengthy examination criticizing *Ritter*, see Case Comments, *Family Consent to an Unlawful Search*, 28 WASH. & LEE L. REV. 207 (1971); also discussed in *The Fifteenth Annual Survey of Virginia Law 1969-1970*, 56 VA. L. REV. 1500, 1589-91 (1970).

48. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979); *Lowe v. Commonwealth*, 218 Va. 670, 239 S.E.2d 112 (1977), *cert. denied*, 435 U.S. 930 (1978); *Hairston v. Commonwealth*, 216 Va. 387, 219 S.E.2d 668 (1975), *cert. denied*, 425 U.S. 937 (1976); *McMillon v. Commonwealth*, 212 Va. 505, 184 S.E.2d 773 (1971); *Ritter v. Commonwealth*, 210 Va. 732, 173 S.E.2d 799 (1970). For a discussion of *McMillon*, see *Seventeenth Annual Survey of Developments in Virginia Law: 1971-72*, 58 VA. L. REV. 1158, 1206-07 (1972).

49. *Lugar v. Commonwealth*, 214 Va. 609, 202 S.E.2d 894 (1974).

50. *Henry v. Commonwealth*, 211 Va. 48, 175 S.E.2d 416 (1970); 210 Va. at 732, 173 S.E.2d at 799.

51. 210 Va. 732, 173 S.E.2d 799 (1970).

52. *Id.* at 733-34, 173 S.E.2d at 800-01.

53. *Id.* at 736, 173 S.E.2d at 802.

54. *Id.* at 739, 173 S.E.2d at 804.

police on behalf of her son.

However, if there was no "search" in fourth amendment terms, the case need not have been decided on the issue of consent. The fourth amendment is inapplicable when there is *no* search or merely a *private* search. If the mother's actions were a private search and not an extension of the officers' search of the dwelling pursuant to their warrant, it seems unnecessary to judge the "legal right"⁵⁵ of the mother or the legitimacy of her consent. Further, it is arguable that there was a police search. As stated in *Bumper*, when an officer searches a home under a warrant, "he announces in effect that the occupant has no right to resist the search. The situation is infused with coercion, albeit colorably lawful coercion. Where there is coercion there cannot be consent."⁵⁶ If such coercion were present, it would not have been dissipated when the police inquired about the mail, and the search would have been merely continuing at that point.

Arguably, the conviction could have been reversed on two alternative grounds. First, if the consent was valid, the police ought to have known that the mother lacked authority to surrender the property.⁵⁷ Secondly, the consent was invalid under *Bumper*.

Justice Gordon, dissenting, felt reversal was required under *Bumper*. After noting that the majority tacitly conceded that a police search of the mailbox would have been illegal, he wrote:

Looking in the mailbox was part of an overall search of the premises, ostensibly made under the authority of a search warrant. And Ritter's mother did not, I believe, look freely and without compulsion. Rather, I must conclude that Ritter's mother looked into the mailbox and handed over the package because she knew that the officers would look and seize what was found, if she did not. This conclusion, that her actions resulted from coercion, appears dictated by *Bumper*⁵⁸

Justice Gordon's dissent did not affect later consent search decisions. The court either applied *Bumper*, *Schneckloth* and *Watson* strictly, or avoided the issue altogether deciding cases on the basis of harmless error.⁵⁹ In the recent case of *Craft v. Commonwealth*,⁶⁰ however, the court

55. *Id.* It is not clear whether the court means no public or private search occurred (*i.e.*, the mother had authority from her son by course of usage to remove the mail and the two tests of *Katz* were not met; *see* note 33 *supra*).

56. *Bumper v. North Carolina*, 391 U.S. 543, 550.

57. *See* Case Comments, *supra* note 47 at 207 which points to *Ritter* as a good reason why vicarious waiver of fourth amendment rights by third party consent should not be permitted.

58. 210 Va. at 743, 173 S.E.2d at 807.

59. "Harmless error" was the rationale in *Vass v. Commonwealth*, 214 Va. 740, 745, 204

did recognize that a challenge to a search and seizure could be rejected. In *Craft*, a robber admitted himself to a hospital for emergency treatment of a gunshot wound. The emergency room surgeon removed the robber's shirt and the bullet incident to providing medical care, and gave them to the police.⁶¹ The court pointed out that the police had done nothing except receive articles from a private party who was in lawful control of them and capable of surrendering them.

In *Hairston v. Commonwealth*,⁶² officers arrested a massage parlor operator and asked an employee to provide some identification. Flustered, she fumbled through her purse, finally emptied it and told the officer to "look for it." He found her wallet, "examined it, and discovered four tablets [drugs] in one of its compartments."⁶³ The court assumed, without deciding, that a search had occurred.⁶⁴ It held the evidence showed "an unequivocal display of a free and voluntary consent to search. . . ."⁶⁵ The court did not consider the issue of whether the officer exceeded the scope of the consent, and thus vitiated it.⁶⁶

*Lowe v. Commonwealth*⁶⁷ gave the court its only in-custody consent case. Officers arrested, handcuffed, and placed defendant on the floor of his apartment; they then surrounded him and sought his consent to a search for drugs. The defendant verbally agreed.⁶⁸ The court held his claim of duress and coercion had "no merit."⁶⁹ The court's pronouncement at first glance seems harsh; however, here, as in *Stamper v. Commonwealth*,⁷⁰ the police read and explained a "Consent to Search Form" to the defendant prior to his consent. This constituted a meaningful *Mi-*

S.E.2d 280, 284 (1974).

60. 221 Va. 271, 269 S.E.2d 797 (1980).

61. *Id.* at 277, 269 S.E.2d at 800-01.

62. 216 Va. 387, 219 S.E.2d 668 (1975), *cert. denied*, 425 U.S. 937 (1976).

63. *Id.* at 387-88, 219 S.E.2d at 668.

64. Most would generally agree that a person has a "reasonable expectation of privacy" that is "recognized . . . as reasonable" by society in one's wallet; the test per *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) would appear to be satisfied. The court, by assuming that a search had occurred, avoided deciding whether by dumping its contents the defendant merely consented to a search, or negated any subjective manifestation of a *Katz* expectation of privacy and thus made the inspection not a search.

65. 216 Va. at 389, 219 S.E.2d at 669.

66. He may well have discovered the drugs *after* finding the I.D. or in a compartment of the wallet he knew or ought to have known was not customarily used to store an I.D. The court, however, is sensitive to the scope issue. See note 77 *infra* and accompanying text.

67. 218 Va. 670, 239 S.E.2d 112 (1977), *cert. denied*, 435 U.S. 930 (1978).

68. *Id.* at 674-75, 239 S.E.2d at 115.

69. *Id.* at 678, 239 S.E.2d at 117.

70. 220 Va. 260, 257 S.E.2d 808 (1979).

randa-style warning, though not constitutionally required, of the right to refuse.⁷¹ This process, the court stated, validly counterbalanced the custodial setting. The court reasonably weighed the factors present, and found that the defendant's will had not "been overborne" nor his "capacity for self determination . . . critically impaired."⁷²

In *McMillon v. Commonwealth*,⁷³ the court held defendant's consent invalid because it was induced by an invalid warrant.⁷⁴ In *Stamper*, the police again benefitted from the use of a "Consent to Search Form" to validate consent.⁷⁵ Despite the atmosphere of a station-house interrogation and that the request for consent was accompanied by a statement that a search warrant was being sought, the court believed that the defendant had consented freely, knowingly, and voluntarily.

In *Henry v. Commonwealth*,⁷⁶ the court applied the general rule that a passenger does not have standing to contest the search of a vehicle when a lawful driver has validly consented. In *Lugar v. Commonwealth*,⁷⁷ the court held a search validly consented to after a lawful arrest was conducted in a manner which exceeded the scope of the consent. The consent

71. 218 Va. at 678, 239 S.E.2d at 117.

72. *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. at 225).

73. 212 Va. 505, 184 S.E.2d 773 (1971).

74. Defendant consented to give officers a package addressed to his wife after being handed a search warrant which later was proven to have been issued without probable cause. He further consented to surrender narcotics paraphernalia from his pocket after being arrested. The court, relying on *Bumper v. North Carolina*, 391 U.S. 543 (1968), as to the effect of invalidation of the warrant, held that the prosecution failed to carry its "particularly heavy" burden to prove that consent after custody was not coerced. 212 Va. at 509, 184 S.E.2d at 775-76 (quoting *Gorman v. United States*, 380 F.2d 158, 163 (1st Cir. 1967)). While the surrender of the package would remain illegal after *United States v. Watson*, 423 U.S. 411 (1975), the court would have held the surrender of paraphernalia valid despite the custodial setting, but nevertheless reversed on the basis that it was within the scope of a search incident to a lawful arrest or that the taint of the invalid warrant had not been dissipated. See *Chimel v. California*, 395 U.S. 752 (1969) (scope of search incident to lawful arrest); *Wong Sun v. United States*, 371 U.S. 471 (1963) ("fruit of the poisonous tree" doctrine).

75. Subsequent to the murder of three persons at a restaurant, police stopped employees to interrogate them. *Stamper*, a cook at the restaurant, and his wife, consensually drove to the police station for questioning. Knowing they were free to go and after having discussed the matter with *Stamper's* father on the telephone, they executed consent forms and permitted a search of their car. This search turned up evidence (glass fragments) critical to the conviction. *Stamper v. Commonwealth*, 220 Va. at 264-66, 257 S.E.2d at 812-15.

76. 211 Va. 48, 51, 175 S.E.2d 416, 418 (1970). For a discussion of *Henry*, see *The Fifteenth Annual Survey of Virginia Law: 1969-1970*, 56 VA. L. REV. 1500 (1970).

77. 214 Va. 609, 611-12, 202 S.E.2d 894, 897 (1974). For a discussion of *Lugar*, see *Nineteenth Annual Survey of Developments in Virginia Law: 1973-1974*, 60 VA. L. REV. 1443, 1505 (1974).

was to search for accomplices, but the resulting search was a general search intruding into many areas incapable of hiding felons. The conviction was reversed.

D. Vehicle Searches

Fourth amendment protection traditionally was thought of as protection from unwarranted "invasions of the home."⁷⁸ However, as vehicles are "effects" in fourth amendment terms,⁷⁹ theoretically then persons are to be accorded the benefit of the warrant requirement with its prior showing of probable cause to a neutral, detached magistrate before their vehicles can be searched. This broadening of fourth amendment protection reflects the rule in *Katz v. United States* which states that the fourth amendment protects "people, not places;"⁸⁰ it further assumes people have a valid *Katz* "expectation of privacy"⁸¹ in their vehicles.

A variety of exceptions to the warrant requirement have emerged⁸² based on the vehicle's inherent mobility⁸³ and the diminished expectation of privacy in a vehicle.⁸⁴ From admittedly sound beginnings, the decisions may be emasculating fourth amendment protection for vehicles.

During the seventies, Virginia approached certain vehicle search issues non-controversially, both in applying precedent and in fashioning new Virginia rules. This was true of the court's application of the *Chambers v. Maroney*⁸⁵ exception to the warrant requirement when police stop a vehicle with probable cause to believe it contains contraband or fruits, instrumentalities, or evidence of a crime.⁸⁶ The Virginia court also considered

78. "[T]he searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the FRAMERS, were those involving invasions of the home" *United States v. Chadwick*, 433 U.S. 1, 8 (1977).

79. *Id.* at 12.

80. 389 U.S. at 351.

81. *Id.* at 360.

82. These include exigencies of hot pursuit, plain view, emergencies, consent, stop and frisk, and incident to arrest, as incidentally applicable to cases involving vehicles and more narrowly tailored vehicle exceptions relating to inspection statutes and inventories.

83. *Carroll v. United States*, 267 U.S. 132, 153 (1925).

84. *South Dakota v. Opperman*, 428 U.S. 364, 379 (1976) (Powell, J., concurring).

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.

Cardwell v. Lewis, 417 U.S. 583, 590 (1974). See also *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

85. 399 U.S. 42 (1970).

86. *Id.* at 51. *Chambers* held controlling in *Westcott v. Commonwealth*, 216 Va. 123, 216

the absence of a warrantless search privilege incident to a non-custodial traffic arrest when the search bears no relation to the traffic offense⁸⁷ and adopted the "furtive gesture" rule to determine when the probable cause threshold for a *Chambers* search may be attained.⁸⁸

Many Virginia decisions, however, reflect the view that the fourth amendment gives vehicles only nominal protection. This is suggested in cases that question whether a vehicle search is a fourth amendment "search" at all,⁸⁹ in cases that apply the plain view doctrine to vehicle searches,⁹⁰ and in those that ignore the question of whether a warrant should be obtained when time permits.⁹¹ The cases considering the constitutional status of "inventory" searches of vehicles⁹² are particularly interesting, as are those concerning the scope of an otherwise valid *Chambers* search,⁹³ and those permitting intrusions during administrative or

S.E.2d 60 (1975); *Schaum v. Commonwealth*, 215 Va. 498, 211 S.E.2d 73 (1975); *Vass v. Commonwealth*, 214 Va. 740, 204 S.E.2d 280 (1974); *Fox v. Commonwealth*, 213 Va. 97, 189 S.E.2d 367 (1972); *Smith v. Commonwealth*, 212 Va. 606, 186 S.E.2d 65 (1972).

87. *Matthews v. Commonwealth*, 218 Va. 1, 235 S.E.2d 306 (1977). In *Matthews*, a trooper stopped a driver for speeding and, observing a pack of cigarette papers on the floorboard in plain view, picked them up. After examining them, he searched inside the car and found a bag of marijuana. He arrested the driver. The court held mere observation of the cigarette papers gave no probable cause to search for contraband; conviction reversed. For a discussion of searches incident to noncustodial arrests in routine traffic violations, see Annot., 10 A.L.R.3d 314 (1966).

88. The Rule was adopted in *Hollis v. Commonwealth*, 216 Va. 874, 223 S.E.2d 887 (1976) and held controlling in *Lawson v. Commonwealth*, 217 Va. 354, 228 S.E.2d 685 (1976); see notes 95-103, *infra* and accompanying text.

89. *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 443 (1977); *Shirley v. Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977); *Cook v. Commonwealth*, 216 Va. 71, 216 S.E.2d 48 (1975); *Fox v. Commonwealth*, 213 Va. 97, 189 S.E.2d 367 (1972).

90. *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 443 (1977); *Cook v. Commonwealth*, 216 Va. 71, 216 S.E.2d 48 (1975); *Fox v. Commonwealth*, 213 Va. 97, 189 S.E.2d 367 (1972).

91. *Fore v. Commonwealth*, 220 Va. 991, 265 S.E.2d 729 (1980); *Patty v. Commonwealth*, 218 Va. 150, 235 S.E.2d 437 (1977), *cert. denied*, 434 U.S. 1010 (1978); *Vass v. Commonwealth*, 214 Va. 740, 204 S.E.2d 280 (1974).

92. *Reese v. Commonwealth*, 220 Va. 1022, 265 S.E.2d 746 (1980); *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 443 (1977); *Schaum v. Commonwealth*, 215 Va. 498, 211 S.E.2d 73 (1975); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781 (1971), *cert. denied*, 405 U.S. 1073 (1972).

93. *Westcott v. Commonwealth*, 216 Va. 123, 216 S.E.2d 60 (1975); *Cook v. Commonwealth*, 216 Va. 71, 216 S.E.2d 48 (1975). In these decisions, the scope of a *Chambers* search was described in broad terms by Justice Poff in the majority opinion in *Westcott* and the concurring opinion in *Cook*. The thrust of Justice Poff's view, that even closed and locked containers within a vehicle may be searched in a *Chambers* situation, seems to have been blunted by later Supreme Court decisions. "[I]n the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband." *Arkansas v. Sanders*, 442 U.S. 753, 754 (1979).

inspection searches.⁹⁴ These decisions suggest that the privacy rights of citizens in their vehicles have often been subordinated to the law enforcement objectives of the Commonwealth.

1. Adoption of the "Furtive Gesture" Rule⁹⁵

In *Hollis v. Commonwealth*,⁹⁶ an informer's tip, conceded to be insufficient to constitute probable cause, led police to stop a vehicle at 1:40 a.m. to determine if drugs were inside. When the officer shined a light in the car, he saw the defendant "remove what appeared to be a hand-rolled cigarette from his mouth and throw it to the floor of the car." The officer looked closely at the object and believed it to be marijuana.⁹⁷ The court held that, given the tip, the details of which were corroborated by the officer's first hand observation, "[t]he appearance of the cigarette and [defendant's] furtive gesture in attempting to hide it combined to provide the necessary probable cause to search the car without obtaining a warrant,"⁹⁸ pursuant to *Chambers*.⁹⁹ This furtive gesture rule was held controlling on similar facts in *Lawson v. Commonwealth*.¹⁰⁰

"[S]eizure of the [defendants'] locker [from their car] did not diminish their legitimate expectation that its contents would remain private, for purposes of determining reasonableness of search without a warrant." *United States v. Chadwick*, 433 U.S. 1, 13-14 n.8 (1976). While the Virginia court has not adverted to the issue recently, presumably it will alter its view to correspond to the Supreme Court decisions.

94. *Shirley v. Commonwealth*, 218 Va. 49, 235 S.E.2d 432 (1977).

95. For a discussion of "the furtive gesture" rule in a variety of circumstances, see Annot., 45 A.L.R.3d 581 (1972).

96. 216 Va. 874, 223 S.E.2d 887 (1976).

97. *Id.* at 875, 223 S.E.2d at 888.

98. *Id.* at 877, 223 S.E.2d at 889.

99. *Id.* at 878, 223 S.E.2d at 890.

100. 217 Va. 354, 228 S.E.2d 685 (1976). An informant told the police that the occupants of a certain vehicle were selling heroin. Although the tip did not give rise to probable cause, the officers stopped the vehicle. When they identified themselves, the driver locked the door and he and a passenger exchanged a small bag the officer believed to be a "nickel bag" of marijuana. A tip sufficient to justify investigation and corroborated by first hand observation, combined with the furtive actions of the occupants, was probable cause for a *Chambers* search. *Id.* at 355-58, 228 S.E.2d at 685-87. *Lawson* expressly overruled *Oglesby v. Commonwealth*, 213 Va. 247, 191 S.E.2d 216 (1972). In *Oglesby* the court could well have announced the "furtive gesture" rule but instead reversed for lack of probable cause. An unidentified informant telephoned the police with a tip that a described individual was at a certain location with drugs. The police by first hand observation verified the data. As they approached defendant, he crossed the street and, as he saw them coming, he "picked up his pace and walked into . . . a restaurant." He was observed with a "small brown envelope . . . of the type commonly used for the distribution of marijuana and drugs," and was "trying maybe to get rid of it." *Id.* at 248, 191 S.E.2d at 217. The same elements in *Hollis v. Commonwealth*, 216 Va. 874, 223 S.E.2d 887 (1976) and *Lawson v. Commonwealth*, 217 Va. 354, 228 S.E.2d

There is no uniform "furtive gesture rule." In other jurisdictions, the search has been upheld when the gesture was coupled with additional evasive action, such as locking the door,¹⁰¹ or when the police knew that the neighborhood was a high crime area, or when the police had an informant's tip.¹⁰² The "furtive gesture" rule has been used in Virginia even in the absence of additional evasive action or additional information, for example, in nighttime searches.¹⁰³ The United States Supreme Court has not yet dealt with the question of standards in this area.

2. Application of Plain View: When is a Search a "Search"?

In *Cook v. Commonwealth*,¹⁰⁴ *Thims v. Commonwealth*,¹⁰⁵ *Fox v. Commonwealth*,¹⁰⁶ and *Shirley v. Commonwealth*,¹⁰⁷ the court suggested under various facts that it doubted whether observation of and intrusion into a vehicle is a constitutionally protected search and seizure at all. It supported this approach by applying the plain view and administrative search doctrines.

In *Shirley*, which challenged Virginia's vehicle inspection statute,¹⁰⁸ the court approved the view that there is no *Katz* expectation of privacy in a vehicle identification number.¹⁰⁹ The statute allows intrusion into a vehicle at a public garage or repair shop without any articulable basis, let alone probable cause. In addition, officers may inspect any place where the vehicle identification number might be found (e.g., the locked glove compartment). Neither knowledge and consent of the owner or bailee nor a warrant are necessary.

685, were present in *Oglesby*, perhaps to an even greater degree.

101. *Lawson v. Commonwealth*, 217 Va. 354, 228 S.E.2d 685.

102. *Id.*; *Hollis v. Commonwealth*, 216 Va. 874, 223 S.E.2d 887 (1976).

103. *Id.* For collection of cases see *Annot.*, 45 A.L.R.3d 581 (1972).

104. 216 Va. 71, 216 S.E.2d 48 (1975).

105. 218 Va. 85, 235 S.E.2d 443 (1977).

106. 213 Va. 97, 189 S.E.2d 367 (1972).

107. 218 Va. 49, 235 S.E.2d 432 (1977).

108. VA. CODE ANN. § 46.1-9 (1980 Repl. Vol.) reads:

Any peace officer or Division officer or employee who shall be in uniform or shall exhibit a badge or other sign of authority shall have the right to inspect any motor vehicle, trailer or semitrailer in any public garage or repair shop, for the purpose of locating stolen motor vehicles, trailers and semitrailers and for investigating the title and registration of motor vehicles, trailers and semitrailers. For such purpose the owner of any such garage or repair shop shall permit any such peace officer or Division officer or employee without let or hindrance to make investigation as herein authorized.

109. 218 Va. at 53, 235 S.E.2d at 434 (quoting *United States v. Polk*, 433 F.2d 644, 647-48 (5th Cir. 1970)).

Many vehicle searches rely upon the plain view justification.¹¹⁰ The United States Supreme Court decision in *Coolidge v. New Hampshire*¹¹¹ established that to validate such a search the police officer must have "a prior justification for an intrusion in the course of which he inadvertently [comes] across a piece of evidence incriminating the accused."¹¹² While the exact meaning of inadvertence is unclear, at a minimum the observation should not occur in the context of anticipating the finding of the specific object eventually discovered.

The Virginia court has been slow to adopt the *Coolidge* doctrine. In *Fox v. Commonwealth*,¹¹³ upon finding an unattended vehicle parked in a remote area, an officer entered the car to find its registration card and noticed marijuana seeds on the floor.¹¹⁴ The court held that "if this was a search, it was a reasonable one."¹¹⁵ The officer's observation was "of that which was open to view,"¹¹⁶ subsequent to a valid intrusion whose object was not discovery of marijuana. This satisfied *Coolidge*. But while the officer had ample grounds for curiosity,¹¹⁷ he did not have justifiable grounds to enter the car. He could have determined the registration details by a license plate check with no intrusion,¹¹⁸ or by determining the vehicle identification number by external inspection.¹¹⁹ Arguably, therefore, though he may have seen the marijuana inadvertently, he did not do so with a legitimate "prior justification for an intrusion."¹²⁰

In *Cook v. Commonwealth*,¹²¹ the court narrowed the issue to whether a search occurs when a police officer looks into a parked vehicle from a public sidewalk. It held *Coolidge* "not relevant."¹²² The court held that

110. See Comment, *Warrantless Searches of Automobiles in Virginia*, 12 U. RICH. L. REV. 563 (1978).

111. 403 U.S. 443 (1971).

112. *Id.* at 466.

113. 213 Va. 97, 189 S.E.2d 367 (1972).

114. *Id.* at 98, 189 S.E.2d at 368.

115. *Id.* at 99, 189 S.E.2d at 369 (emphasis added).

116. *Id.* at 100, 189 S.E.2d at 370.

117. The officer observed an unattended vehicle pulled partly off the road on a rural highway, and found a wallet outside the car. The interior of the car was in disarray, as though a struggle had taken place. *Id.* at 98, 189 S.E.2d at 368.

118. "It would be wholly unrealistic to say that there is no reasonable and actual expectation in maintaining the privacy of closed compartments of a locked automobile, when it is customary for people . . . to carry their most personal and private papers and effects in their automobiles from time to time." *South Dakota v. Opperman*, 428 U.S. 364, 388 n.6 (1976) (Marshall, J., dissenting).

119. See notes 172-82 *infra* and accompanying text.

120. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

121. 216 Va. 71, 216 S.E.2d 48 (1975).

122. *Id.* at 73, 216 S.E.2d at 49.

there is no expectation of privacy when a vehicle is parked on a public street with "items of contraband or other evidence of crime" exposed to view. An officer's observation "either deliberately or inadvertently" does not "constitute a search in the constitutional sense."¹²³ It noted a "search 'implies a prying into hidden places';"¹²⁴ thus "there was not an illegal search."¹²⁵

Few would challenge a police officer's right to look into vehicles parked along the public way and seize contraband exposed therein to plain view. It is not clear, however, that this situation existed in *Cook*. The officer went to the vehicle as an extension of a search, pursuant to a valid warrant, of the defendant's apartment. He anticipated finding contraband. His observation was deliberate, not inadvertent. He saw "a brown paper bag" with a plastic face mask sticking out. He did not observe "contraband or other evidence of crime" in plain view. After entering the car to seize the bag and mask, he discovered hashish in the bag. This was a "prying into hidden places" and thus a search.

Justice Poff, in his concurring opinion in *Cook*, recognized that there was a search which had to be justified and that the court could not avoid the broader issues raised. He then justified the search and seizure on *Carroll* and *Chambers* exigent circumstance grounds.¹²⁶

In *Thims v. Commonwealth*¹²⁷ the court again held the inadvertency requirement of *Coolidge* inapplicable, by analogy to *Cook*.¹²⁸ The officer's advertent observation of a car from the public way was not a search. Even though the car was parked on private property "there was no reasonable expectation of privacy as to it,"¹²⁹ and its seizure as evidence after a plain view observation was legitimate.¹³⁰ However, under plain view doctrine the seizure must be pursuant to a valid prior intrusion. In *Thims* the officer had no legitimate basis for entering the private property. The court held alternatively that either (1) no search occurred; the officer merely seized evidence of a crime in plain view, or (2) a search and seizure occurred, but it was justified by Poff's dissenting argument in

123. *Id.*, 216 S.E.2d at 50.

124. *Id.*

125. *Id.* (quoting *Carter v. Commonwealth*, 209 Va. 317, 320, 163 S.E.2d 589, 592 (1968)).

126. 216 Va. at 76, 216 S.E.2d at 51-52. *Cf.* *Leake v. Commonwealth*, 220 Va. 918, 265 S.E.2d 701 (1980) (seizure and shaking of a brown bag held by a defendant stopped on the public way was held to be an illegal search).

127. 218 Va. 85, 235 S.E.2d 443 (1977).

128. *Id.* at 89-90, 235 S.E.2d at 445-46.

129. *Id.* at 93, 235 S.E.2d at 447.

130. *Id.* at 92, 235 S.E.2d at 447.

Cook, or (3) a legitimate inventory search occurred.¹³¹

Justice Poff again differed and this time dissented from the position taken by the majority. He argued that the police knew all along where the vehicle was and went there intending to seize it. Neither inadvertent plain view nor the *Carroll-Chambers* exigent circumstances theory warranted the seizure. The police had abundant cause for obtaining and opportunity to obtain a warrant. Under *Coolidge* they were obligated to do so, and thus the conviction ought to have been reversed.¹³²

3. Did the Police Have Time to Obtain a Warrant?

Coolidge held that where there was probable cause for a vehicle search, but none of the defined exigencies for warrantless entry pertained, the police were not "justified . . . in proceeding without a warrant."¹³³ This holding was weakened by *Cardwell v. Lewis*,¹³⁴ which established that the exigency justifying prompt action may arise at any time. As noted above, the Virginia court was unresponsive to the issue in *Thims*.¹³⁵ It later, however, considered it in *Vass v. Commonwealth*¹³⁶ and *Fore v. Commonwealth*,¹³⁷ but dismissed it in *Patty v. Commonwealth*.¹³⁸

131. *Id.* at 92-93, 235 S.E.2d at 447 (Poff, J., dissenting). See notes 142-77 *infra* and accompanying text for discussion of inventory search rationale.

132. *Id.* at 94-96, 235 S.E.2d at 448-50. "But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever . . . in the absence of 'exigent circumstances.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 470 (1971).

133. 403 U.S. at 464.

134. 417 U.S. 583 (1974). "[W]e know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment."

135. 218 Va. at 91, 235 S.E.2d at 446-47. See notes 127-32 *supra* and accompanying text.

136. 214 Va. 740, 204 S.E.2d 280 (1974). In *Vass*, police were attempting to verify that defendant was selling stolen state documents, and arranged for a third party to return them to defendant's wife, a school teacher. When she left school, apparently with the package, and drove away, they made a stop and warrantless search which was upheld because they had probable cause, but not enough certitude that she would actually leave school with the papers to support a warrant. The cause arose only as they saw her depart and drive away. *Id.* at 743-44, 204 S.E.2d at 283-84.

137. 220 Va. 991, 265 S.E.2d 729 (1980). In *Fore*, the defendant left a car at a repair shop for brake repair in mid-November. His wife was cooperating with police to implicate him in various burglaries, and caused them to believe stolen property was in the trunk of the car. In December, when he was in custody on another charge, but his wife and an accomplice were free and their whereabouts unknown, and the car sitting on a public commercial lot, an officer searched the vehicle without a warrant. The court held his probable cause was not fully formed until he verified where the car was and that it had been left by the defendant. He had a legitimate concern that someone might remove it during the time it would take

In *Patty v. Commonwealth*,¹³⁹ tips from named citizen informants led seven officers to stake out a car at a gas station. Probable cause existed that the trunk contained marijuana, and the officers were waiting for the owner(s) of the vehicle to return. The ignition coil had been removed to insure payment of a repair bill. Defendants were arrested upon their return, and the trunk was pried open and searched.¹⁴⁰ The defendant claimed that no exigency existed justifying warrantless seizure. The court ignored the strength of the police force on the scene, the ease with which one of them could have obtained a warrant without risk to the stake out or to his fellow officers, the testimony of officers that there was "no way" anyone would be allowed to "drive off in the car," the passage of five hours between the beginning of the stake out and the arrest, and the fact that the car could not be driven because the ignition coil was missing. Seizing on the flexibility provided by *Cardwell*, the court gave the police the benefit of the doubt in this situation.¹⁴¹

4. Constitutionality of Inventory Searches

Until *South Dakota v. Opperman*,¹⁴² decided in 1976, the Supreme Court had not ruled on the constitutionality of inventory searches of property taken into custody by the police.¹⁴³ Such searches require balancing individual expectations of privacy and freedom from general searches,¹⁴⁴ with the rationale that warrantless non-investigatory inventories are necessary to protect the *same* individual's property, to prevent spurious claims for losses from being filed against the police, and to avoid harm to citizens and officers in the event dangerous articles are stored in vehicles.¹⁴⁵ The majority opinion in *Opperman* resolved the issue in favor

him to obtain a warrant; his warrantless search was therefore valid under the circumstances.

138. 218 Va. 150, 235 S.E.2d 437 (1977), *cert. denied*, 434 U.S. 1010 (1978).

139. *Id.*

140. *Id.* at 151-53, 235 S.E.2d at 438-39.

141. The court argued:

While we agree the wiser course for the police would have been to acquire a search warrant, it does not necessarily follow that under these circumstances the failure to obtain one requires suppression of the evidence seized. The important factor here is that the police were dealing with contraband goods concealed and about to be illegally transported again in an automobile, and they knew it.

Id. at 154, 235 S.E.2d at 440.

142. 428 U.S. 364 (1976).

143. For a thorough discussion of the "distinct split" on this issue prior to *Opperman*, see Annot., 48 A.L.R.3d 537 (1973).

144. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971).

145. The rationale is argued even though the individual may not have consented to anything more than custody of his vehicle, may consider his property sufficiently protected by

of the police, holding certain warrantless inventory searches reasonable.¹⁴⁶

In 1971, the Virginia court had broadly interpreted the scope of permissible inventory searches in *Cabbler v. Commonwealth*.¹⁴⁷ *Opperman* cited *Cabbler* as support, but only as to the rationale for inventory searches.¹⁴⁸ In fact, because of the scope of the search in *Cabbler*, a writ of habeas corpus had been issued by the United States district court in 1974.¹⁴⁹

In *Cabbler*, the seizure was contemporaneous with the arrest of the defendant for a crime unconnected with his vehicle. The *Cabbler* court admitted evidence of unrelated crimes found during the inventory search in the locked trunk of the vehicle.¹⁵⁰ The court also found the search reasonable within the fourth amendment and validated the search as one in "the best interest of the property owner."¹⁵¹ It gave particular weight to the long-standing practice of taking custody of property and the rationale for inventory searches of such property.¹⁵² However, as noted by the federal district court in issuing the writ of habeas corpus, it gave little weight to testimony that (1) the purpose of the practice of taking custody of property was to protect "valuable goods,"¹⁵³ (2) the police had failed to ask the owner whether he wanted such protection, and (3) there was only a "minute" likelihood of false claims in such a situation.¹⁵⁴

glove compartment, trunk and door locks, and may have no claim against the police because of the low degree of care required of them as involuntary bailees. Arguably the police can as effectively protect the citizen with no intrusion by merely retaining his locked vehicle in a secure lot, or contracting with a properly bonded private party for security, with or without an inventory by the third party solely for its protection. None of the exigencies justifying warrantless searches seem applicable in many inventory cases.

146. "[Warrantless] inventories pursuant to standard police procedures are reasonable" as part of the authorities' legitimate care-taking function, where in good faith there is no investigatory motive. *South Dakota v. Opperman*, 428 U.S. 364, 372.

147. 212 Va. 520, 184 S.E.2d 781 (1971), *cert. denied*, 405 U.S. 1053 (1972). In *Cabbler*, police arrested defendant at a hospital on a felony charge (firing into a dwelling). They informed him that they would remove his vehicle, which was illegally parked blocking an ambulance entrance, for safekeeping until he was released. He did not complain or protest. The car was taken to the property room, and an inventory search conducted, during the course of which unanticipated evidence of unrelated crimes was found in the locked trunk. *Id.* at 521-22, 184 S.E.2d at 784. The inventory occurred after the police discovered and seized a pistol left in plain view in the vehicle, a search which was not challenged. *Cabbler v. Superintendent*, 374 F. Supp. 690, 691 (E.D. Va. 1974).

148. 428 U.S. at 369.

149. *Cabbler v. Superintendent*, 374 F. Supp. at 701.

150. *Id.* at 692.

151. 212 Va. at 522-23, 184 S.E.2d at 782-83.

152. *Id.* at 522, 184 S.E.2d at 782.

153. 374 F. Supp. at 692.

154. *Id.* at 700.

While *Opperman* validated inventory searches of apparently abandoned vehicles found in no parking zones,¹⁵⁵ the search in *Opperman* did not extend to a locked glove compartment or locked trunk; the court there specifically did not reach the issue of searching closed containers or compartments within the vehicle.¹⁵⁶ The *Cabbler* court, however, admitted evidence seized from a locked trunk.¹⁵⁷ Thus the holdings in the cases vary with the context in which such searches are legitimized, the probable motive of the police, and the scope of the search. Justice Marshall's stinging dissent in *Opperman* suggests that law in this area is subject to reexamination generally,¹⁵⁸ and a view more restrictive than *Opperman*, and thus *a fortiori* than *Cabbler*, may develop.

Schaum v. Commonwealth,¹⁵⁹ also decided prior in *Opperman*, dealt obliquely with the inventory search issue. Despite the intervening writ of habeas corpus in *Cabbler*, the court implied lenient grounds for inventory searches that would perhaps have gone far beyond *Cabbler* had not *Opperman* intruded. In *Schaum*, citing *Cabbler*, the court stated "the inventory of the contents of the car, after its occupants had been lawfully arrested, has been recognized by this court as a legitimate police practice under the circumstances."¹⁶⁰ However, the search was valid under *Chambers*,¹⁶¹ and the court had no apparent need to reach the inventory search

155. 428 U.S. at 376.

156. *Id.* at 388 n.5 (Marshall, J., dissenting).

157. 374 F. Supp. at 692.

158. On the limits of *Opperman*, see *United States v. Hellman*, 556 F.2d 442, 443-44 (9th Cir. 1977); *People v. Rutovic*, 566 P.2d 705 (Colo. 1977); *People v. Clark*, 65 Ill. 2d 169, 357 N.E.2d 798 (1976) (Goldenhersh, J., dissenting).

159. 215 Va. 498, 211 S.E.2d 73 (1975).

160. *Id.* at 501, 211 S.E.2d at 75. A burglary was reported. A citizen reported that a dark blue Valiant with North Carolina plates had been driving suspiciously in the area. An officer knew a particular person suspected of burglaries who drove such a car. He went to the home of a "fence" and waited. Soon, the car came and its occupants went to the door. They then drove away. A cooperating officer stopped the vehicle and arrested the occupants. The car was impounded and the "contents of the locked trunk of the car were inventoried" Stolen property was found. *Id.* at 499-500, 211 S.E.2d at 74-75.

161. *Id.* at 501, 211 S.E.2d at 75. *Cabbler* and *Schaum* are distinguishable. While both cases involved vehicles taken into police custody after arrest for a felony, in *Cabbler* arguably the search was unrelated to the reason for the arrest, undertaken pursuant to long-standing policies of the specific police department, bereft of any investigatory motive and undertaken with no anticipation of finding illegal items. The search represented a good faith effort to protect the defendant's property, avoid claims against the police, and avoid risk of harm to the custodians. 212 Va. at 521-23, 184 S.E.2d at 782. On the contrary, the search in *Schaum* was directly related to the reason for the arrest, no underlying police department policies were apparent, there was an overt investigatory motive, and the police anticipated finding stolen property. They had no concern with protecting defendant's property rights, with reducing their liability as involuntary bailees, or with eliminating risk of harm to them-

issue.

Two Virginia cases after *Opperman* continue to suggest a view of permissible inventory searches at variance with the Supreme Court. In *Thims v. Commonwealth*,¹⁶² after justifying a search as a plain view seizure of evidence of a crime based on probable cause, the court went further and held the search valid as an inventory search. The court rejected the defendant's claim that the inventory search was a pretext.¹⁶³

*Reese v. Commonwealth*¹⁶⁴ presented the court with a complex inventory search challenge in light of *Opperman*. The defendant was arrested for speeding, and was jailed. His car was impounded at a nearby wrecker yard, locked, and guarded by dogs. A department policy requiring inventory searches was ignored. Later, officers learned defendant matched the description of a burglary suspect. They then searched his car, seizing cameras and other fruits of the crime. After being confronted, the defendant confessed.¹⁶⁵ The court easily held this search illegal, as "a pretext concealing an investigatory police motive."¹⁶⁶

Later the same day, however, the same officers inventoried the contents of the car, including those in its locked trunk. They shared the inventory schedule with an officer from another jurisdiction who wanted to question the defendant about another robbery. The officer did so, confronting the defendant with evidence obtained in the inventory, and the defendant confessed again.¹⁶⁷ This second search, and thus defendant's conviction on the second charge, was held to be legal.¹⁶⁸

The court reasoned that since the police already had evidence and a confession to one burglary, and no reason to suspect evidence of others, they no longer had an investigatory motive. Instead, the second search

selves or the public. 215 Va. at 499-500, 211 S.E.2d at 73-74.

162. 218 Va. 85, 235 S.E.2d 443 (1977). See notes 127-32 *supra* and accompanying text.

163. *Id.* at 92, 235 S.E.2d at 447. The contradiction is simply that *South Dakota v. Opperman*, 428 U.S. 364 (1976) upheld benign, non-investigatory inventory searches as an exception to the warrant requirement. Where, as in *Thims*, the officer has in the view of the court "probable cause to believe that the car [is] the fruit of a crime, that it might be stolen and that it contain[s] stolen property . . . [and he has] probable cause to seize and search" it, it is unreasonable to then justify his actions as based implicitly on benign, non-investigatory motives. 218 Va. at 91, 235 S.E.2d at 447. Far from being an *Opperman* "caretaking search" of defendant's car, the search in *Thims*, if an inventory search, in the words of *Opperman* "was a pretext concealing an investigatory police motive." 428 U.S. at 375-76.

164. 220 Va. 1022, 265 S.E.2d 746 (1980).

165. *Id.* at 1022-23, 265 S.E.2d at 747-48.

166. *Id.* at 1026, 265 S.E.2d at 749.

167. *Id.* at 1023-24, 265 S.E.2d at 748.

168. *Id.* at 1026, 265 S.E.2d at 749.

was "a good-faith inventory, initiated and conducted for the benign purposes underlying the exception to the warrant requirement."¹⁶⁹ Further, the second confrontation and arrest was not tainted by the first illegal search, because the causal chain was broken by "intervening circumstances,"¹⁷⁰ presumably the legal inventory search. Nothing taken in the first search was used to confront the suspect, and no mention of the first robbery occurred during the interrogation. The interrogation was based solely on data gleaned from a legitimate inventory search.¹⁷¹

Reese raises questions about the entire inventory search policy. The defendant was under arrest and in custody, his car locked and guarded, and he had already confessed to a crime when the supposedly benign inventory search occurred. Since the officer originally skipped the inventory search required by department policy, his motives in the later search are questionable. Further, the second search was arguably the indirect product of the first, thereby tainted by its illegality. Also, if an inventory search must be non-investigatory to be legal, arguably the police ought not to be allowed to share the inventory with others whom they know to have investigatory purposes.

5. Warrantless Inspection Searches

In *Shirley v. Commonwealth*,¹⁷² the court upheld the constitutionality of section 46.1-9 of the Virginia Code, which allows investigation of the title and registration of motor vehicles in garages or repair shops,¹⁷³ against a challenge that it authorized an unreasonable warrantless search.¹⁷⁴ The court held the statute was part of a comprehensive scheme to protect "lawful owners and the public."¹⁷⁵ It compared inspections in garages or repair shops to random stops of vehicles. It is "routine" for officers to randomly stop vehicles to inspect registration papers and li-

169. *Id.*

170. *Id.* at 1027, 265 S.E.2d at 750, quoting *Brown v. Illinois*, 422 U.S. 590 (1975).

171. *Id.* at 1027-28, 265 S.E.2d at 750.

172. 218 Va. 49, 235 S.E.2d 432 (1977); see notes 107-08 *supra* and accompanying text.

173. Pursuant to VA. CODE ANN. § 46.1-9 (Repl. Vol. 1980) (see note 108 *supra* for full text) a policeman and an agent of the National Automobile Theft Bureau inspected "a number of motor vehicles parked" in defendant's "public garage and repair shop," and noticed several without vehicle identification numbers. Defendant admitted (or claimed) ownership of one, a Corvette. The title defendant showed used a vehicle identification for an Impala, and the license plates on the Corvette were assigned to an Impala. An interior search ensued, and inspection stickers were seized indicating that the Corvette was the car inspected, but used the Impala license number. Defendant was arrested and convicted of grand larceny of the Corvette. 218 Va. at 50-51, 235 S.E.2d at 432-33.

174. *Id.* at 58, 235 S.E.2d at 437.

175. *Id.* at 51, 235 S.E.2d at 433.

censes as "part of the regulatory system."¹⁷⁶ The defendant had actual or constructive knowledge of the statute and implicitly consented to abide by its provisions.¹⁷⁷ Because one can have no expectation of privacy concerning a vehicle identification number, a limited investigation to determine the number is a reasonable warrantless administrative search.¹⁷⁸

Due to its peculiar facts, *Shirley* may have been properly decided.¹⁷⁹ However, one of its rationales, random stops, has been presumptively invalidated by *Delaware v. Prouse*,¹⁸⁰ and there is nothing to indicate that *Shirley* involved anything other than a random inspection. Further, third party vehicle owners leaving their cars in bailment with repairmen arguably have not impliedly consented to searches of their vehicles pursuant to the statute. The consent they give the repairmen regarding their vehicles generally would be limited to access for the agreed upon servicing, and most reasonably would not contemplate that the repairman will grant access to the vehicle to third parties.

The broad language of the Virginia statute permits access by the police to virtually the entire vehicle, locked or unlocked, and to closed containers within it. No "articulable and reasonable suspicion"¹⁸¹ of any irregularity need exist so long as the vehicle is in a public garage or repair shop.¹⁸² Thus, apparently the police have an unlimited right of access to inspect on a random basis.

E. Sufficiency of Hearsay as Basis for Affidavit Underlying Warrant

Many search warrants are based upon affidavits representing hearsay received by the affiant from one or more unidentified informants. Supreme Court cases have clarified how the sufficiency of such information is to be evaluated. During the seventies, Virginia adhered to basic requirements, although it did carve out a number of limited exceptions that relaxed the rules.

176. *Id.* at 52, 235 S.E.2d at 434.

177. *Id.* at 57, 235 S.E.2d at 436.

178. *Id.* at 53, 235 S.E.2d at 434.

179. In *Shirley*, the purported owner of the vehicles was also the owner of the repair shop and was present when the inspections took place. *Id.* at 51, 235 S.E.2d at 433. Absent the vehicle owner's connection with the repair shop, the charge of constructive knowledge of the statute may be unreasonable.

180. 440 U.S. 648 (1979). The Court held vehicle stops for the purpose of checking the driver's license and/or vehicle registration illegal, except where "there is at least articulable and reasonable suspicion" of lack of registry or violation of law subjecting the driver or vehicle to seizure or "spot checks." *Id.* at 663.

181. *Id.*

182. VA. CODE ANN. § 46.1-9 (Repl. Vol. 1980); see note 108 *supra*.

An affidavit may be based on hearsay information from an unnamed informant¹⁸³ and still establish probable cause.¹⁸⁴ For purposes of a magistrate's determination of probable cause, it is not important that the informant be present or identified.¹⁸⁵ However, the underlying facts and circumstances upon which the informant's statements are based must be presented in the affidavit in some detail, not merely by affirmance of belief or suspicion,¹⁸⁶ so that "a neutral and detached" magistrate¹⁸⁷ may independently draw reasonable inferences therefrom. The magistrate must be able to find the informant's data "credible" or "reliable,"¹⁸⁸ based upon a "commonsense" reading of the affidavit.¹⁸⁹ Although it is not essential that hearsay be corroborated,¹⁹⁰ it is preferred. Such corroboration may be in the form of the affiant's first hand verification,¹⁹¹ other hearsay,¹⁹² affirmation that the informant had first hand knowledge and on prior occasions had been reliable,¹⁹³ the affiant's "knowledge of a suspect's reputation,"¹⁹⁴ an informant's admissions against interest,¹⁹⁵ or the presence of a wealth of detail in the affidavit.¹⁹⁶

The Virginia court applied these Supreme Court doctrines in *Hooper v. Commonwealth*¹⁹⁷ and *Warren v. Commonwealth*.¹⁹⁸ *Hooper* reversed a conviction because references in the affidavit only to "a reliable source of information who has given information in the past" provided no statement of underlying facts, but were "merely a statement of a conclusion."¹⁹⁹ *Warren* upheld a conviction where an informant had firsthand

183. *McCray v. Illinois*, 386 U.S. 300 (1967); *Jones v. United States*, 362 U.S. 257 (1960).

184. Probable cause exists when facts and circumstances are within the affiant's own knowledge and he has reasonably trustworthy information sufficient to justify the conclusion by a person of reasonable caution that seizable property will be found in a particular place or on a particular person. *Carroll v. United States*, 267 U.S. 132, 162 (1925).

185. "Nor is it especially significant that neither the name nor the person of the informant was produced before the magistrate." *United States v. Harris*, 403 U.S. 573, 584-85 (1971).

186. *Nathanson v. United States*, 290 U.S. 41, 47 (1933).

187. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

188. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

189. *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

190. *United States v. Harris*, 403 U.S. at 584.

191. *Draper v. United States*, 358 U.S. 307, 313 (1959).

192. *Jones v. United States*, 362 U.S. 257, 271 (1960).

193. *Spinelli v. United States*, 393 U.S. 410, 416 (1969).

194. 403 U.S. at 583.

195. *Id.*

196. 393 U.S. at 416-17.

197. 212 Va. 49, 181 S.E.2d 816 (1971).

198. 214 Va. 600, 202 S.E.2d 885 (1974).

199. 212 Va. at 52, 181 S.E.2d at 818. A second warrant based on statements against

knowledge and on prior occasions had given information that had proven to be correct.²⁰⁰ Recently, in *Fagan v. Commonwealth*,²⁰¹ however, the court rejected a challenge to the sufficiency of a warrant. While the defendant did not challenge the reliability of the informant, he argued that the mere assertion alone by the affiant that the informant had "personal knowledge" that marijuana was at a certain place failed to give the requisite basis of facts and circumstances necessary for the magistrate to weigh the informant's statements.²⁰² This decision appears to be at variance with the Supreme Court requirement in *Nathanson* that the informant's statements not be based merely on affirmation of belief or suspicion²⁰³ and in *Johnson* that the information be such that a neutral and detached magistrate can draw the reasonable inferences independently.²⁰⁴

In *McKoy v. Commonwealth*,²⁰⁵ defendant's counsel conceded past reliability, and the facts and circumstances of uncorroborated hearsay were accepted based primarily on "a wealth of detail."²⁰⁶ Similarly in *Andrews v. Commonwealth*,²⁰⁷ defendant conceded that the "informant was credible and that his information was reliable."²⁰⁸ His challenge was based on the failure to indicate how the informant got his information. The court looked to the presence of sufficient detail to allow the magistrate to infer that the informant gained his information reliably, thereby invoking the holding in *McKoy*.²⁰⁹

interest by a suspect in a burglary was held sufficient. *Id.* at 51, 181 S.E.2d at 817-18. See also *Manley v. Commonwealth*, 211 Va. 146, 176 S.E.2d 309 (1970), *cert. denied*, 403 U.S. 936 (1971).

200. 214 Va. at 604-05, 202 S.E.2d at 888-89. The pertinent part of the affidavit reads:

On June 6, 1972 a reliable informer advised the affiant that during the past 24 hours the informer had observed a quantity of heroin and a large supply of hypodermic syringes in the premises to be searched . . . This informer's credibility or the reliability of the information may be adjudged by the following facts: The informer on numerous occasions has supplied the affiant . . . with drug information which has proven to be correct. Informer is also self-admitted drug abuser.

Id. at 601, 202 S.E.2d at 886.

201. 220 Va. 692, 261 S.E.2d 320 (1980).

202. *Id.* at 694, 261 S.E.2d at 322.

203. 290 U.S. 41 (1933).

204. 333 U.S. 10 (1948).

205. 212 Va. 224, 183 S.E.2d 153 (1971).

206. *Id.* at 226, 183 S.E.2d at 156. The affidavit "described with specificity" a car, driver, occupant and their exact location. The informant had been "so detailed as to raise the inference either of personal observation or of acquisition of the information in a reliable way." This was actually a warrantless arrest situation, but the court applied the standards for validating the action of a magistrate in issuing a warrant.

207. 216 Va. 179, 217 S.E.2d 812 (1975).

208. *Id.* at 182, 217 S.E.2d at 814.

209. *Id.* at 183, 217 S.E.2d at 815. In pertinent part the affidavit reads:

*Huff v. Commonwealth*²¹⁰ affirmed that where multiple informants unknown to each other in effect corroborated each other's tips ("hearsay on hearsay") "the enhanced reliability of the information [lent] credibility to the informants."²¹¹ *Wheeler v. Commonwealth*²¹² rejected a challenge to the reliability of an informant who had observed LSD in the defendants' possession on the basis of the *Ventresca* "common sense reading" rule.²¹³

The more interesting informant cases developed the "statement against interest" premise of reliability and a relaxed "citizen informant" presumption. Seizing on dictum in a concurrence to *Spinelli v. United States*,²¹⁴ the court in *Manley v. Commonwealth*²¹⁵ held sufficient an informant's affidavit based on his firsthand knowledge as a participant in the crime,²¹⁶ predating the support given this premise in *United States v.*

I have received information from a reliable informer who has given me information in the past that has led to the arrest of other persons for possession of a controlled drug, stated to me that [defendant], a black male, was coming from New York City with a large quantity of heroin, on an airline at the Norfolk Regional Airport . . . [Defendant] arrived in Norfolk . . . on Piedmont Flight 79.

Id. at 181, 217 S.E.2d at 813. Defendant and a female companion were arrested, strip searched, and released. The warrant was obtained subsequently to search three unclaimed pieces of luggage; a surveillance team saw defendant observe but not touch the bags in the baggage room. *Id.* at 180-81, 217 S.E.2d at 813. The court did not reach the issue of legality of the original arrest which was warrantless; all the police knew was that defendant had arrived, as they had been told he would, from New York City.

210. 213 Va. 710, 194 S.E.2d 690 (1973).

211. *Id.* at 714-15, 194 S.E.2d at 694. The pertinent part of the affidavit reads:

That from as many as three different reliable sources, the Winchester Police Department has received information that the [defendant] is dealing in and with the unlawful distribution of Controlled Drugs; that these informants are not known to each other as informers and each has a different connection with the [defendant]; and that their individual reliability is established by reason of their position in connection with the [defendant], affording each of them the opportunity to learn of his activities, and by reason that much of the information given by one is corroborated by the information given by one or both of the others.

Id. at 713, 194 S.E.2d at 693.

212. 217 Va. 95, 225 S.E.2d 400 (1976).

213. *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

214. "[I]f . . . the informer's hearsay comes . . . in the nature of an admission against interest, the affidavit giving this information should be held sufficient." *Spinelli v. United States*, 393 U.S. 410, 425 (1969) (White, J., concurring).

215. 211 Va. 146, 176 S.E.2d 309 (1970), *cert. denied*, 403 U.S. 936 (1971).

216. *Id.* at 151, 176 S.E.2d at 313. In pertinent part the affidavit reads:

I have received information from a reliable informant who states that he was at the apartment . . . this past week and he saw a large quantity of marijuana (a narcotic drug) . . . My informer also states that in the past month he has smoked marijuana in the apartment . . . and in the past month he has made two purchases of marijuana from [defendant].

Harris.²¹⁷ Later the court in *Guzewicz v. Commonwealth*²¹⁸ went a step further; it implied that statements against interest by third party declarants to informants providing information for an affidavit were reliable sources *per se*.²¹⁹

Guzewicz also adopted the citizen informant presumption that "we will not apply to citizen informers the same standard of reliability as is applicable when police act on tips from professional informers or those who seek immunity for themselves, whether such citizens are named . . . or, as here, unnamed."²²⁰ In *Guzewicz* the information which bolstered this presumption of reliability was that the informant "has been known . . . and [her] family has been known . . . [to] this affiant [a policeman] for many years."²²¹

The *Guzewicz* rule controlled *Brown v. Commonwealth*, an opinion issued the same day.²²² In *Brown* the citizen was a first-time informer, "steadily employed," a "registered voter," with a "good reputation in his neighborhood," who had "expressed concern for young people involved with narcotics."²²³ In *McNeill v. Commonwealth*²²⁴ the *Guzewicz* rule was again invoked where the informant was a former fireman who walked into the police station to report an attempted drug sale.²²⁵ It was significant to

Id. at 147-48, 176 S.E.2d at 311.

217. "Admissions of crime . . . carry their own indicia of credibility - sufficient at least to support a finding of probable cause to search." *United States v. Harris*, 403 U.S. 573, 583 (1971).

218. 212 Va. 730, 187 S.E.2d 144 (1972). Defendants were charged with possession of controlled drugs after a search pursuant to a warrant. An unnamed informant told an officer about drug activity, and the warrant issued. *Id.* at 730-31, 187 S.E.2d at 145-46.

219. In *Guzewicz*, the court considered multiple affidavits, rejecting two but upholding one. The first failed for want of facts upon which to base a conclusion of reliability; the second, because it contained a "mere affirmation of suspicion and belief." *Id.* at 733, 187 S.E.2d at 146-47. The relevant part of the third affidavit reads:

[A]n information [sic], who has been known and whose family has been known by this affiant [policeman] for many years, and is known by this affiant to be reliable, informed this affiant that persons known by her to frequent the premises to be searched have stated in her presence that they frequent said premises for the purpose of securing and using controlled drugs which are there unlawfully possessed This affiant further states that he has personal knowledge that said premises are frequented by persons known to him to be unlawful users of controlled drugs.

Id. at 731-32, 187 S.E.2d at 145.

220. *Id.* at 735-36, 187 S.E.2d at 148.

221. *Id.* at 731, 187 S.E.2d at 145.

222. 212 Va. 672, 674, 187 S.E.2d 160, 161-62 (1972).

223. *Id.* at 674, 187 S.E.2d at 161.

224. 213 Va. 200, 191 S.E.2d 1 (1972).

225. *Id.* at 201-02, 191 S.E.2d at 2-3.

the court that the informant was willing to testify in court.²²⁶

Despite some assertions to the contrary,²²⁷ the court appears to have avoided a *per se* presumption of citizen reliability, and applied the doctrine only where by a "common sense" reading²²⁸ the affidavit gave sufficient basis to rely on the citizen's information. This does not seem an unreasonable relaxation, as applied.²²⁹

In finding an affidavit sufficient in *Tamburino v. Commonwealth*,²³⁰ the court combined statement against interest, the citizen reliability presumption, and the "wealth of detail" premise with corroboration by an officer, and participation by the informant in a "controlled buy."²³¹ The court did not deal, however, with the apparent contradiction that an informant, an admitted user of illegal drugs, who made a statement against interest was accorded citizen reliability. Further, the court did not indicate on what factual basis it applied the citizen reliability presumption in

226. The pertinent part of the affidavit reads:

[An] individual came to me at the police department and advised that [defendant] had just tried to sell him and three (3) others some dope, he gave the description of automobile and licence [*sic*] number and said it was at the Pizzarena. I went to the Pizzarena and the individual was there and in talking with him he stated that he was a retired fireman from Washington, D.C. My informer has proven to be reliable and is willing to testify in court.

Id. at 201, 191 S.E.2d at 2.

227. See *Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, 59 VA. L. REV. 1400, 1485 (1973) arguing that "*McNeill* represents a further significant deterioration [of fourth amendment protection]. An informer's ability to establish credibility through his own statement negates any need for an objective manifestation of reliability."

228. *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

229. The *Guzewicz* citizen informer presumption played an important part in a warrantless search, seizure, and arrest situation in *Patty v. Commonwealth*, 218 Va. 150, 235 S.E.2d 437 (1977), *cert. denied*, 434 U.S. 1010 (1978), discussed at notes 139-41 *supra* and accompanying text relative to warrantless vehicle searches. In *Patty*, three named citizens in a position to report firsthand knowledge were involved. *Id.* at 154-55, 235 S.E.2d at 439.

230. 218 Va. 821, 241 S.E.2d 762 (1978).

231. *Id.* at 824-25, 241 S.E.2d at 764-65. The pertinent part of the affidavit reads:

A concerned citizen . . . advised the affiant . . . that he was in a position to furnish the [police] with information concerning the illegal possession and distribution of contribant [*sic*] drugs in the Richmond metro area.

This citizen's reliability may be adjudged by the following facts:

He had been associated with the drug culture in the Richmond Metro area for the past three years.

He is an admitted user of Marijuana and chemical drugs. He possesses the knowledge of how, when and where to purchase contriband [*sic*] drugs.

He has demonstrated his knowledge and ability to purchase same. [Controlled buy then described].

Id. at 822-23, 241 S.E.2d at 763.

this case. In addition, it backed away from sufficiency of the statement against interest concept standing alone.²³² These facts might suggest alternatively that there was such a variety of bases noted for the affidavit that the court was avoiding a definitive statement, or that there is a reexamination of the doctrine under way.²³³

F. Stop and Frisk Doctrine

*Howard v. Commonwealth*²³⁴ presented a difficult investigative stop question in terms of the basis for such a stop. In *Howard*, a motel had been robbed and the suspect, after abandoning his car, escaped on foot. More than an hour later, an officer in the area of the motel stopped the taxi in which the defendant was riding to determine the passenger's identity.²³⁵ Although the court affirmed the conviction, the incident amounted to a random vehicle stop, which the Supreme Court subsequently held illegal in *Delaware v. Prouse*.²³⁶

While the court ascribed the basis for the stop as a *Terry v. Ohio*²³⁷ investigative stop, the officer in *Howard* had neither observed the defendant, nor seen him acting suspiciously. He merely "spotted a taxicab in the area with its roof light out, indicating it had a fare," and stopped it to ask the driver where he picked up his passenger and to determine the

232. "While the admission by the informant that he was associated with the drug culture, and was a user of marijuana, would not alone be sufficient to establish his credibility, it is a factor to be considered." *Id.* at 825, 241 S.E.2d at 765.

233. For comparative views of citizen informant presumption see *Etchieson v. State*, 372 S.W.2d 690 (Tex. 1963), *vacated on other grounds*, 378 U.S. 589 (1964) ("reliable, credible and trustworthy citizen" language sufficient). *Contra Kemp v. State*, 464 S.W.2d 141 (Tex. Crim. 1971). For case in accord with "community standing" test, see *Yantis v. State*, 476 S.W.2d 24 (Tex. Crim. 1972) ("excellent reputation in the neighborhood . . . , the lack of a criminal record and his continuous gainful employment" sufficient statement of bases for conclusion of reliability. 476 S.W.2d at 27). See also Annot., 10 A.L.R.3d 359 (1966) (propriety of considering hearsay in establishing probable cause); Annot., 14 A.L.R.2d 605 (1950) (sufficiency of affidavit based on unnamed informant). See 7 U. RICH. L. REV. 367 (1972) which criticizes *Guzewicz*, arguing that the traditional citizen informer rule applies only where the informant provides information observed at first hand and not double hearsay, as in *Guzewicz*, where declarants told informer, who told police. *Guzewicz* is therefore a pronounced relaxation of the rule. *Id.* at 370. The court applied the citizen informant presumption in *Tamburino v. Commonwealth*, 218 Va. 821, 241 S.E.2d 762 (1978); *Patty v. Commonwealth*, 218 Va. 150, 235 S.E.2d 437 (1977), *cert. denied*, 434 U.S. 1010 (1978); *McNeill v. Commonwealth*, 213 Va. 200, 191 S.E.2d 1 (1972); and *Brown v. Commonwealth*, 212 Va. 672, 187 S.E.2d 60 (1972).

234. 210 Va. 674, 173 S.E.2d 829 (1970).

235. *Id.* at 675, 173 S.E.2d at 830-31.

236. 440 U.S. 648 (1979).

237. 392 U.S. 1 (1968).

passenger's identity.²³⁸ The facts do not seem to support the court's dictum that "[w]hen a person is observed . . . under suspicious circumstances he is not clothed with the right of privacy which prevents a police officer from inquiring into his identity and actions."²³⁹ It is not inherently suspicious to be an unseen passenger in an operating taxi.

The holding in *Howard* seems open to question under the "specific objective facts" test of *Brown v. Texas*.²⁴⁰ Lacking specific, objective facts, the officer in *Howard* had no basis to stop the cab. Having illegally stopped the cab, all discoveries during detention of the defendant were properly inadmissible. Subsequent to *Howard*, the Virginia General Assembly codified its stop and frisk procedures.²⁴¹ Under the present statute, it is doubtful that the outcome in *Howard* would be the same today.

The court also applied the *Terry* doctrine in *Simmons v. Commonwealth*²⁴² which validated a stop, and in *Bryson v. Commonwealth*,²⁴³

238. 210 Va. at 675, 173 S.E.2d at 831.

239. *Id.* at 677, 173 S.E.2d at 832.

240. 443 U.S. 47 (1979). In *Brown* the Court unanimously clarified and limited *Terry v. Ohio*, 392 U.S. 1 (1968) as it dealt with the issue of police stops of pedestrians (*i.e.*, taxi cab passengers), holding such stops unconstitutional absent any reasonable suspicion that the person is or was engaged in criminal conduct. 443 U.S. at 51. The fact that the neighborhood was frequented by drug users was not a specific, objective fact on which an officer could base a reasonable suspicion about a person walking there. *Id.* Using the *Brown* rationale, therefore, the mere presence of a taxi with a passenger in the vicinity of a motel robbed 70 minutes earlier is not a basis for a legal stop unlike *Howard*. For discussion of *Brown*, see 7 AM. J. CRIM. LAW 385 (1979).

241. VA. CODE ANN. § 19.2-83 (Repl. Vol. 1975) reads:

Any police officer may detain a person in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or possesses a concealed weapon in violation of § 18.2-308, and may require of such person his name and address. Provided further, that such police officer may, if he reasonably believes that such person intends to do him bodily harm, search his person for a dangerous weapon, and if such person is found illegally to possess a dangerous weapon, the police officer shall take possession of the same and dispose of it as is provided by law.

242. 217 Va. 552, 231 S.E.2d 218 (1977). Subsequent to a complaint of the burglary of a Xerox office building, an officer encountered nearby a man "matching the description of the prowler," whose jacket "was sagging in the front." Something "was in the pocket" which he believed "to be a weapon." *Id.* at 553, 231 S.E.2d at 219. He conducted an outer clothes pat down, and removed a hard object that turned out to be a pocket tape recorder. The officer's experience met the *Terry* test. *Id.* at 555-56, 231 S.E.2d at 220-21. The court held the procedure valid pursuant to VA. CODE ANN. § 19.2-83 (Repl. Vol. 1975). See note 241 *supra*.

243. 211 Va. 85, 175 S.E.2d 248 (1970). An officer stopped a man on the street merely because he had a rubberband around his finger securing a paper. A search turned up lottery paraphernalia. The court reversed the conviction, holding *Terry v. Ohio*, 392 U.S. 1 (1968) inapplicable and *Brinegar v. United States*, 338 U.S. 160 (1949) controlling in its requirement that at the moment of a warrantless arrest the officer must have probable cause. 211 Va. at 85-87, 175 S.E.2d at 250. See also *Rios v. United States*, 364 U.S. 253 (1960).

which invalidated a stop. In an interesting case in light of *Cook v. Commonwealth*²⁴⁴ and the *Terry* doctrine, the court in the recent opinion of *Leake v. Commonwealth*,²⁴⁵ held that since a *Terry* patdown is a search, to grab and shake a bag held by a defendant is also a search. As such it was without probable cause and therefore illegal, invalidating the discovery of marijuana in the bag as well as defendant's confession.²⁴⁶

G. Administrative Searches - Arson

*Bennett v. Commonwealth*²⁴⁷ dealt with the issue of the reasonableness of warrantless searches pursuant to arson investigations, both at the scene of the fire prior to extinguishment and at a later time. The court upheld the validity of the searches in *Bennett* on grounds that may have been subsequently invalidated.

In *Bennett*, an officer assigned to direct traffic at the scene of a fire smelled a "petroleum like odor."²⁴⁸ Before the fire was out, he and a fellow officer "walked around and inspected the house and yard," finding and seizing a jug "in plain view" containing a kerosene-like product.²⁴⁹ The next day, an "expert fire investigator"²⁵⁰ searched the premises without consent or a warrant, seizing additional evidence of arson.

As to the first search and seizure, the court ignored both the limited scope of the officer's presence, which was "to handle traffic congestion" and that the officer was not a firefighter or an arson investigator. The fact that the jug was not in plain view from the street and the investigatory nature of the search²⁵¹ were also given little weight. The court invoked *Camara v. Municipal Court*²⁵² as its basis and held that no warrant is required in an emergency. But *Camara* dealt directly with routine annual building inspections that were not "personal in nature nor aimed at the discovery of evidence of a crime,"²⁵³ and referred only tangentially to emergency searches without warrants.²⁵⁴

As to the second search, the court refused to engraft a *Camara* warrant

244. 216 Va. 71, 216 S.E.2d 48 (1975). See notes 121-26 *supra* and accompanying text.

245. 220 Va. 918, 265 S.E.2d 701 (1980).

246. *Id.* at 922-23, 265 S.E.2d at 704.

247. 212 Va. 863, 188 S.E.2d 215 (1972).

248. *Id.* at 864, 188 S.E.2d at 216.

249. *Id.*

250. *Id.* at 865, 188 S.E.2d at 217.

251. *Id.* at 864, 188 S.E.2d at 216.

252. 387 U.S. 523 (1967).

253. *Id.* at 537.

254. *Id.* at 539.

requirement.²⁵⁵ It relied upon section 27-58 of the Virginia Code which authorizes fire investigations.²⁵⁶ The court presumed that had the defendant known, he would have consented to the search. This is improbable, given the circumstances of arson.²⁵⁷ The court invoked the emergency exigency despite the lack of supporting evidence.

The United States Supreme Court in *See v. City of Seattle*²⁵⁸ held that a warrant must be obtained for a non-investigatory fire inspection of commercial premises where consent was withheld.²⁵⁹ More recently, in *Michigan v. Tyler*,²⁶⁰ it was recognized that a warrantless fire investigation may be conducted under the emergency exigency at the scene by someone such as a fire chief, pursuant to his duty, although not by a policeman.²⁶¹ However, subsequent entries at the fire scene which are "clearly detached from the initial exigency . . . must be made pursuant to . . . warrant procedures."²⁶² The nature of the individual fire determines whether entry the day after flames are doused is valid as a mere continuation of an initially valid warrantless entry or invalid because "clearly detached from the initial entry."²⁶³ It is possible, therefore, that both searches in *Bennett* situations would be resolved differently now.²⁶⁴

255. 212 Va. at 865, 188 S.E.2d at 218.

256. VA. CODE ANN. § 27-58 (Repl. Vol. 1964) reads in part: "The [State Corporation] Commission, and such person or persons as it may appoint, shall have the authority at all times of the day, in the performance of the duties imposed by the provisions of § 27-56, to enter upon and examine any building or premises where any fire has occurred . . ." At present VA. CODE ANN. § 27-58 (Repl. Vol. 1979) reads identically with the exception that vests the power of entry in the Department of State Police.

257. 212 Va. at 865, 188 S.E.2d at 217.

258. 387 U.S. 541 (1967); companion case to *Camara*, *supra* note 252.

259. *Id.* at 545.

260. 436 U.S. 499 (1978).

261. *Id.* at 509.

262. *Id.* at 511.

263. *Id.* at 509-12. Entry to determine *cause* is more benign than entry to investigate *arson*. The Court imposes a warrant requirement with the traditional showing of probable cause applicable to searches for evidence when investigating officers find probable cause to believe that arson has occurred and they require further access to gather evidence. *Id.* at 512.

264. The holding in *Bennett*, arguing application of the *Camara* administrative search exception was inapt because the *Bennett* searches were in reality criminal investigations. As subsequently was done in *Michigan v. Tyler*, 436 U.S. 499 (1978), a warrant requirement should have been engrafted on state fire inspection laws to insure that authorization of searches continue a judicial inquiry, not one "left to the legislature or the police." Comment, *Arson*, *supra* at 142-43.

H. Other Issues in Search and Seizure

During the decade the court faced many less significant search and seizure issues in isolated cases. While these cases are interesting for a sense of the overall work-product of the court, lengthy explication is unwarranted.

Many of the cases involved the validity of searches incident to arrest. The court invoked *Beck v. Ohio*²⁶⁵ to find a search incident to an illegal arrest invalid in *Upton v. Commonwealth*.²⁶⁶ In *Cosby v. Commonwealth*²⁶⁷ and *Fierst v. Commonwealth*²⁶⁸ the court considered and rejected allegations that arrests were mere pretexts for searches incident to arrest, finding the issue moot in *Cosby* and finding probable cause to arrest in *Fierst*. In the recent case of *Hart v. Commonwealth*,²⁶⁹ however, the court reversed a conviction because the arrest, though legitimate, was made solely to obtain evidence to convict the defendant of a crime unrelated to the stated purpose of the arrest. The court in *Italiano v. Commonwealth*²⁷⁰ applied the rule that so long as a search incident to arrest occurs contemporaneously with the arrest, it may precede it if the arrest is not based upon fruits of the search; this is, of course, the requirement of pre-existing probable cause.²⁷¹ In *Greenfield v. Commonwealth*,²⁷² the court applied the doctrine of *United States v. Edwards*²⁷³ to justify under certain circumstances, a remote search and seizure of clothing from a de-

265. 379 U.S. 89, 91 (1964). An arrest without probable cause is illegal.

266. 211 Va. 445, 447, 177 S.E.2d 528, 530 (1970).

267. 211 Va. 573, 179 S.E.2d 460 (1971).

268. 210 Va. 757, 173 S.E.2d 807 (1970).

269. 221 Va. 283, 269 S.E.2d 806 (1980).

270. 214 Va. 334, 200 S.E.2d 526 (1973). See discussion in *Nineteenth Annual Survey of Developments in Virginia Law: 1973-1974*, *supra* note 77, at 1510.

271. *Husty v. United States*, 282 U.S. 694, 700 (1931).

272. 214 Va. 710, 204 S.E.2d 414 (1974). Greenfield was arrested at a Richmond hospital where he was being treated for a cut hand. He earlier had slain a twenty-one year old coed in Charlottesville. He was given a change of clothes after arrival at the Charlottesville jail. Laboratory analysis of his clothes "revealed bloodstains of deceased's blood type." *Id.* at 711-12, 204 S.E.2d at 416-17.

273. 415 U.S. 800 (1974). "The question here is whether the Fourth Amendment should be extended to exclude from evidence certain clothing taken from [defendant] while he was in custody, at the city jail approximately 10 hours after his arrest." *Id.* at 801. By a five to four majority, the Court held that while the fourth amendment is not generally applicable "to post-arrest seizures of the effects of an arrestee," *id.* at 808, it was nevertheless legitimate for the police to wait overnight to take from defendant his clothes as "effects in his immediate possession that constituted evidence of crime." *Id.* at 805. "[R]easonable delay in effectuating" a search incident to arrest is legitimate as creating no greater an imposition than a contemporaneous search would. *Id.*

fendant incident to arrest. Finally, in *Kirkpatrick v. Commonwealth*²⁷⁴ the court held that *Chimel v. California*,²⁷⁵ which established the "grabbing distance" scope for a search incident to arrest, mandated only prospective application.

Other cases dealt with the validity of warrants and affidavits. The court recognized the invalidity of an arrest pursuant to an expired warrant in *Leatherwood v. Commonwealth*,²⁷⁶ and reversed convictions because data in affidavits was insufficient to enable a magistrate to independently conclude probable cause existed in *Stallworth v. Commonwealth*,²⁷⁷ *Berger v. Commonwealth*,²⁷⁸ and *Moore v. Commonwealth*.²⁷⁹ In an interesting recent case, *Gilluly v. Commonwealth*,²⁸⁰ the court reversed a conviction not because the affidavit was faulty, but because in preparing the warrant the name of the offense was deleted. The warrant thus became a general warrant.²⁸¹ In *Stovall v. Commonwealth*,²⁸² a conviction was reversed because it was the product of a stale warrant, one based on seventy-two day old data.²⁸³ However, a *Stovall* challenge to a warrant because much of the information in the affidavit was stale was rebuffed in *Piercell v. Commonwealth*.²⁸⁴ The court held that demonstration of probable cause of a continuing nature along with receipt of a reliable informant's tip within twenty-four hours of execution negated the challenge.²⁸⁵ *Clodfelter v. Commonwealth*²⁸⁶ rejected a claim that the magistrate could not fulfill his duties in good faith when a warrant was executed two minutes before the magistrate signed it. The warrant consisted of a one page standard form, and the two minute review was "neither unreasonable nor un-

274. 211 Va. 269, 176 S.E.2d 802 (1970).

275. 395 U.S. 752 (1969). This view was validated in *Williams v. United States*, 401 U.S. 646 (1971).

276. 215 Va. 161, 163, 207 S.E.2d 845, 847 (1974).

277. 213 Va. 313, 314-15, 191 S.E.2d 738, 739 (1972). See discussion in *Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, *supra* note 227, at 1483.

278. 213 Va. 54, 55-56, 189 S.E.2d 360, 361 (1972). See discussion in *Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, *supra* note 227, at 1482.

279. 211 Va. 569, 570, 179 S.E.2d 458, 459-60 (1971). See discussion in *Survey of Developments in Virginia Law: 1970-1971*, 57 VA. L. REV. 1436, 1444 (1971).

280. 221 Va. 39, 267 S.E.2d 105 (1980).

281. *Id.* at 42, 267 S.E.2d at 107.

282. 213 Va. 67, 189 S.E.2d 353 (1972). See discussion in *Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, *supra* note 227, at 1486.

283. *Id.* at 70-71, 189 S.E.2d at 356. The magistrate must determine that probable cause exists at the time the warrant issues. *Segro v. United States*, 287 U.S. 206, 210-11 (1932).

284. 218 Va. 1016, 243 S.E.2d 222 (1978), *cert. denied*, 439 U.S. 1067 (1979).

285. *Id.* at 1025, 243 S.E.2d at 227.

286. 218 Va. 98, 235 S.E.2d 340 (1977).

usual.²⁸⁷ Finally, in *Crowder v. Commonwealth*²⁸⁸ the court held that an officer's personal knowledge that two felony warrants for a defendant were outstanding in another jurisdiction validated a warrantless arrest in Virginia.²⁸⁹

During the decade, the court made several rulings on the fruit of the poisonous tree doctrine. In *Garris v. Commonwealth*²⁹⁰ the court held that where police held a valid warrant to search a car involved in an accident and achieved entry with keys possibly illegally removed from the defendant, the entry was nevertheless valid under the inevitable discovery exception to the "fruit of the poisonous tree" doctrine.²⁹¹ The court invoked the dissipation of the taint exception to the doctrine in *Warlick v. Commonwealth*.²⁹² In *Warlick*, drugs were illegally seized in one room; after a Christian charity speech, the defendant voluntarily led officers to other drugs.²⁹³ The court also applied a fruit of the poisonous tree exception, the "intervening circumstances" argument, in *Reese v. Commonwealth*.²⁹⁴

Other challenges to fourth amendment searches and seizures also failed. In *Patler v. Commonwealth*,²⁹⁵ a defendant challenged a search of a field adjacent to his father-in-law's home, and the seizure of some bullets found there. The court applied "open fields" to reject the challenge, as the area was outside the curtilage.²⁹⁶ The court also held that a defendant must establish, not merely allege, a possessory or proprietary inter-

287. *Id.* at 100, 235 S.E.2d at 341.

288. 213 Va. 151, 191 S.E.2d 239 (1972).

289. *Id.* at 153, 191 S.E.2d at 240. Insufficient facts are given to determine whether the recent case of *Payton v. New York*, 445 U.S. 573 (1980), holding a warrant required for arrest in the residence of a defendant, would apply in *Crowder*.

290. 212 Va. 26, 27, 181 S.E.2d 631, 632 (1971).

291. *Wong Sun v. United States*, 371 U.S. 471 (1963) ("fruit of the poisonous tree" doctrine enunciated); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (independent source rule and inevitable discovery exception declared).

292. 215 Va. 263, 208 S.E.2d 746 (1974).

293. *Id.* at 267, 208 S.E.2d at 749. The "independent source" and "inevitable discovery" exceptions also justified admissibility in this case. *Id.*

294. 220 Va. 1022, 265 S.E.2d 746 (1980).

295. 211 Va. 448, 177 S.E.2d 618 (1970), *cert. denied*, 407 U.S. 909 (1972); discussed in *Survey of Developments in Virginia Law: 1970-1971*, *supra* note 279, at 1438 (1971). See *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974), holding police violate fourth amendment only if they enter the curtilage. Interestingly, the court did not reach standing of the defendant, which at the time was probably not in question as he was "legitimately on premises," *Jones v. United States*, 362 U.S. 257, 267 (1960). Under *Rakas v. Illinois*, 439 U.S. 128 (1978), however, standing would have been denied on the theory that the holding in *Jones* was overly broad. *Id.* at 142.

296. 211 Va. at 451, 177 S.E.2d at 621.

est in the premises searched in *Chesson v. Commonwealth*²⁹⁷ and that the burden of proof lies with the defendant.²⁹⁸ In *Townes v. Commonwealth*²⁹⁹ the court held that no fourth amendment violation occurred when officers tried in the defendant's door a key found on the ground at the scene of a crime. The key would be admissible as validly found at the scene of a crime.³⁰⁰

I. Conclusion

Since 1970, the Virginia Supreme Court was extremely involved with search and seizure cases. Particularly in the areas consent searches, inventory and administrative searches and the scope of otherwise valid vehicle searches, it has read narrowly Supreme Court doctrine. However, in areas of no-knock entry, the "furtive gesture" rule, and presumptions as to the sufficiency of affidavits based on data from unnamed informants it has followed an approach wholly in keeping with the trend line of the Court's opinions. The years ahead should continue to provide evidence of a court challenged by the dynamic tension inherent in the problem of safeguarding the public welfare without excessive intrusion into areas of protected individual freedom.

III. PRE-TRIAL CRIMINAL PROCEDURES

A. Confessions

To be admissible a confession must have been made voluntarily and not in violation of the confessor's privilege against self-incrimination or right to counsel. A series of decisions by the United States Supreme Court has developed standards for determining the admissibility of the confession which reflect a concern for protecting individual constitutional rights, deterring unacceptable police conduct in obtaining confessions and insuring the reliability of confessions.³⁰¹ The voluntariness requirement

297. 216 Va. 827, 223 S.E.2d 923 (1976), *cert. denied*, 429 U.S. 927 (1976).

298. Defendant was denied automatic standing under *Jones v. United States*, 362 U.S. 257 (1960), because he was charged with a non-possessory offense. 216 Va. at 830, 223 S.E.2d at 925.

299. 214 Va. 683, 204 S.E.2d 269 (1974).

300. *Id.* at 684-85, 204 S.E.2d at 271.

301. There is conflict among jurisdictions and among the Supreme Court decisions themselves as to which of these factors is most important to the criminal process. The conservative or law and order approach focuses on achieving factual truth in the most efficient (informal) way and is more concerned with protecting societal rights than individual rights. The liberal or due process focus is upon preservation of individual rights through formalized procedures. See Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

was the earliest standard for judging the admissibility of confessions.³⁰² However, this standard was too flexible and lower courts applied a very broad definition of "voluntary". The Supreme Court recognized the need for more explicit standards in order to limit discretionary practices by lower courts. The sixth amendment right to counsel approach in *Massiah v. United States*³⁰³ and *Escobedo v. Illinois*³⁰⁴ served as a transition from the de facto voluntariness approach to the fairly rigid requirements of *Miranda v. Arizona*.³⁰⁵ In *Miranda* the Court focused on the fifth amendment privilege against self-incrimination. To secure this constitutional privilege, *Miranda* required that certain procedural safeguards be followed before a confession obtained during a custodial investigation could be admissible in state or federal court.³⁰⁶

Critical to any analysis of a *Miranda* problem is a determination of whether there was custody and an interrogation, and if so, whether there was a knowing, intelligent and voluntary waiver by the defendant of his rights under *Miranda*.³⁰⁷ *Miranda* defined custody as "taken into custody or otherwise deprived of . . . freedom by the authorities in any significant way."³⁰⁸ After *Miranda*, there was confusion among lower courts in recon-

302. *Brown v. Mississippi*, 297 U.S. 278 (1936) made voluntariness a due process requirement applicable to the states through the fourteenth amendment.

303. 377 U.S. 201 (1964). In *Massiah*, the Court held that there could be no deliberate interrogation, no matter how indirect or surreptitious, of an accused after indictment without the consent and presence of counsel unless there has been a knowing, intelligent and voluntary waiver of the right.

304. 378 U.S. 478 (1964). The *Escobedo* decision expanded the right to counsel and held that the right commenced when an investigation began to "focus" on the accused, *i.e.*, when an investigation changed from investigatory to accusatory.

305. 384 U.S. 436 (1966).

306. *Id.* at 444. Before a suspect in police custody is questioned, he must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, that he has a right to the presence of an attorney at the interrogation and that if he cannot afford an attorney, one will be appointed for him. *Id.* at 444, 467-72.

307. Because the validity of the waiver relates to the voluntariness of the confession, *Akers v. Commonwealth*, 216 Va. 40, 46, 216 S.E.2d 28, 32 (1975), this phase of analysis will be discussed under the voluntariness requirement. See notes 330-55 *infra* and accompanying text.

308. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), *quoted in* *Smith v. Commonwealth*, 219 Va. 455, 470, 248 S.E.2d 135, 140 (1978). The Virginia Supreme Court has not limited the protections of *Miranda* to custody for certain types of offenses, but the Fourth Circuit recently held that the warnings were not required when a suspect was in custody for a traffic offense. *Clay v. Riddle*, 541 F.2d 956 (4th Cir. 1976). Generally, when a person is a witness before a grand jury, he is not considered to be under custodial interrogation. I. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: TRIAL RIGHTS § 83 (1974 & Supp. 1979). However, in Virginia, an individual called to testify before a grand jury will be given *Miranda* warnings. VA. CODE ANN. § 19.2-203 (Rep. Vol. 1977). For a general discussion of factors considered by

ciling the idea of "focus" from *Escobedo* and that of "custody" in *Miranda*. The Court had said that "custodial interrogation" was what *Escobedo* meant by an investigation focused on the accused.³⁰⁹ Later decisions indicated that "focus" began to exist at the time of custody and not before.³¹⁰ The Virginia Supreme Court has adopted this latter approach. In *Smith v. Commonwealth*,³¹¹ the court held that the fact that "the investigation had focused upon the suspect and had become accusatory was not determinative of the question of custody."³¹² Thus it would seem that *Escobedo* is no longer accepted in Virginia. In determining the existence of custody, the Virginia court has adopted the objective test used by the majority of lower courts.³¹³ Under this test, the subjective beliefs of the officer and suspect are not dispositive. The "fact that the defendant may have felt he was deprived of his right to leave does not require the [*Miranda*] warnings to be given."³¹⁴ Factors which the court does consider include whether or not the defendant was: 1) free to move away;³¹⁵ 2) under arrest;³¹⁶ 3) in coercive or familiar surroundings;³¹⁷ and 4) actually did leave afterwards.³¹⁸

The second critical aspect of the *Miranda* problem is determining if an interrogation has taken place. "Interrogation" was defined in *Miranda* as "questioning initiated by law enforcement officers."³¹⁹ The Virginia court

courts in determining the existence of custody, see I. COOK, *supra*, at § 83; B. GEORGE, 1 CRIMINAL PROCEDURE SOURCEBOOK 360-65 (1976); Annot., 31 A.L.R.3d 565 (1970 & Supp. 1980).

309. *Miranda v. Arizona*, 384 U.S. 436, 444 n.4 (1966).

310. *See Beckwith v. United States*, 425 U.S. 341 (1969).

311. 219 Va. 455, 248 S.E.2d 135 (1978).

312. *Id.* at 470, 248 S.E.2d at 144. *See also* *Jordan v. Commonwealth*, 216 Va. 768, 222 S.E.2d 573 (1976) (court rejected defense argument that process shifted from investigatory to accusatory and therefore required *Miranda* warnings).

313. B. GEORGE, *supra* note 308, at 361; Annot., *supra* note 308, at 581.

314. *Adkins v. Commonwealth*, 218 Va. 945, 948, 243 S.E.2d 205, 207 (1979) (citing *Oregon v. Mathiason*, 429 U.S. 492 (1977)).

315. *Id.*; *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978) (no physical restraints); *Jordan v. Commonwealth*, 216 Va. 768, 772, 222 S.E.2d 573, 577 (1976) (police even asked him to move away).

316. *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202 (1979) (defendant accompanied officers voluntarily at his own suggestion); *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978); *Adkins v. Commonwealth*, 218 Va. 945, 243 S.E.2d 215 (1978).

317. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978) (his own home which he entered of his own accord); *Jordan v. Commonwealth*, 216 Va. 768, 222 S.E.2d 573 (1976). Interrogations in the home of the accused are often found to be non-custodial. *See* I. COOK, *supra* note 308, at § 83; Annot., *supra* note 308, at 576.

318. *Adkins v. Commonwealth*, 218 Va. 945, 243 S.E.2d 205 (1978).

319. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), *quoted in* *Smith v. Commonwealth*, 219 Va. 455, 470, 248 S.E.2d 135, 140 (1978). Under *Massiah* and *Brewer v. Williams*, 430

has applied this definition extremely narrowly and if the conversation was in any way initiated by the defendant, it is unlikely that a Virginia court would find that an interrogation occurred.³²⁰ However, the Virginia Supreme Court does indicate that police intent is a factor to be considered in determining whether an interrogation took place.³²¹ The Virginia court is in accord with the majority of jurisdictions supporting the view that "general on-the-scene" questioning, or questioning designed to elicit neutral background information or information dealing with the safety of others, is not custodial interrogation under *Miranda*.³²² In *Waye v. Commonwealth*³²³ and *Jordan v. Commonwealth*³²⁴ the factors which were considered in concluding that the situation was general "on-the-scene"

U.S. 387 (1977), interrogation has been more broadly defined as any purposeful or deliberate elicitation of a statement by the police. This definition includes very skillful and subtle forms of interrogation. *United States v. Henry*, 48 U.S.L.W. 4703 (June 17, 1980), established a "likely to induce" test.

320. See, e.g., *Clodfelter v. Commonwealth*, 218 Va. 98, 235 S.E.2d 340 (1977) (even though defendant was arrested and had previously refused to talk, if he later initiates conversation by asking police if his knife had been found and thereby incriminates himself in the ensuing conversation, it is admissible); *Owens v. Commonwealth*, 218 Va. 69, 235 S.E.2d 331 (1977) (defendant asked officer what he wanted).

321. See *id.* at 74, 235 S.E.2d at 334 (1977) (where defendant initiated conversation and officer did not intend to elicit a confession but to advise as a friend); *Jordan v. Commonwealth*, 216 Va. 768, 222 S.E.2d 573 (1976) (were not attempting to elicit a confession but to find out what happened at a reported accidental shooting). The detective's intention had been determinative in *Brewer v. Williams*, 430 U.S. 387 (1977).

322. "[G]eneral on-the-scene questioning as to facts surrounding the crime or other general questioning of citizens in the fact-finding process is not affected by our holding." *Miranda v. Arizona*, 384 U.S. at 477, quoted in *Jordan v. Commonwealth*, 216 Va. 768, 772, 222 S.E.2d 573, 577 (1976). See generally I. COOK, *supra* note 308 at § 84; Annot., *supra* note 308, at 579. All states, including Virginia, have adopted the rule that spontaneous or volunteered statements are also not the product of a custodial interrogation. "There is no requirement that police stop a person who . . . states that he wishes to confess to a crime. . . . Volunteered statements . . . are not barred by the fifth amendment." 384 U.S. at 478, quoted in *Clodfelter v. Commonwealth*, 218 Va. 98, 104, 235 S.E.2d 340, 344 (1977). See *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202 (1979); *Massie v. Commonwealth*, 211 Va. 429, 177 S.E.2d 615 (1970) (when defendant, although already in jail, asked to see officer because he wanted to confess, officer had no duty to stop him from talking). See generally I. COOK, *supra* note 308, at § 84; B. GEORGE, *supra* note 308, at 367-70; Annot., *supra* note 308, at 581. *Miranda* also does not apply to questioning by private individuals. In these cases, the confession is to be considered under the voluntariness standard. See, e.g., *Jones v. Commonwealth*, 214 Va. 723, 264 S.E.2d 247 (1974) (polygraph expert employed by defendant).

323. 219 Va. 683, 693, 251 S.E.2d 202, 208 (1979) ("Here the statements . . . were in response to general investigatory questions posed at a time when police were not even certain a crime had been committed.").

324. 216 Va. 768, 772, 222 S.E.2d 573, 577 (1976) (questions were of a fact finding nature and were asked to determine if a crime had been committed).

questioning included the fact that the police were more interested in reviving the victim, had no cause to believe a crime had been committed and intended merely to determine the circumstances of the incident. Whether the defendant was under arrest was also considered in *Waye*.³²⁵

A surreptitious interrogation by an informant, the type of situation dealt with in *Massiah* and *United States v. Henry*,³²⁶ confronted the Virginia court in *Hummel v. Commonwealth*.³²⁷ In *Hummel* the defendant contacted a key witness at his upcoming grand larceny trial and offered him money to change his testimony. The witness contacted the police who arranged for him to keep in touch with the defendant and record any conversations. At the larceny trial these tapes were admitted into evidence on the issue of guilt. The defendant argued that *Massiah* mandated a reversal of his conviction because the government had utilized an informant to deliberately elicit inculpatory statements from him in absence of counsel. The court distinguished *Massiah* on the fact that this information was obtained during the investigation of a new and different offense—bribery—and the conviction was upheld. This holding is in accord with the very narrow reading generally given by lower courts to *Massiah*³²⁸ and with the general rule that even under *Massiah* the government may question a defendant without presence of counsel about an offense unrelated to the one for which he has been indicted.³²⁹

While the *Miranda* requirements may have been complied with,³³⁰ a

325. *Waye v. Commonwealth*, 219 Va. at 693, 251 S.E.2d at 208. The fact of arrest could bear not only on whether the investigation had gone beyond the general investigatory phase but also on whether there was any deliberate elicitation.

326. 447 U.S. 264 (1980). As with *Escobedo* the validity of *Massiah* was uncertain after *Miranda*. However, the Supreme Court expressly reaffirmed it in *Henry*. Therefore, it is clear that *Massiah* at least means that it is a violation of the sixth amendment *right to counsel* to admit a confession deliberately elicited by the police by surreptitious methods in the absence of retained counsel after the defendant has been indicted regardless of whether the defendant is in custody or not.

327. 219 Va. 252, 247 S.E.2d 385 (1978), *cert. denied*, 440 U.S. 935 (1979).

328. I. COOK, *supra* note 308, at § 77.

329. B. GEORGE, *supra* note 308, at 466. It is doubtful that *Henry* would change the result in a subsequent similar case. The Court in *Henry* was primarily concerned with the fact that the government had intentionally created the situation which elicited the statements. In *Hummel* the defendant created the situation before the police were even contacted by the witness. Also, the *Hummel* court relied in part on *Hoffa v. United States*, 385 U.S. 293 (1966), a case which *Henry* held was not affected by the decision in *Henry*. There is also a sound policy behind the *Hummel* decision. To require the police to forewarn defendants or their counsel of current investigations on any post-indictment criminal activity would thwart such investigations and encourage such behavior.

330. Whether the warnings were given and given properly is a question to be determined by the court upon all of the evidence. *Wilson v. Commonwealth*, 220 Va. 26, 255 S.E.2d 464

confession is nevertheless inadmissible if the court determines that it was not voluntary, either because a waiver was not knowing, intelligent or voluntary or because coercive measures were used by the police.³³¹ By focusing on voluntariness, the courts indicate their concern for the loss of reliability or credibility that can result from coercion.³³² Whether a confession is voluntary depends on the totality of the circumstances. Factors considered by the Virginia courts include: 1) influence of drugs or alcohol;³³³ 2) intelligence;³³⁴ 3) education;³³⁵ 4) prior experience with police;³³⁶ 5) emotional or mental disability;³³⁷ 6) physical deprivation and abuse;³³⁸ 7) ineffective representation by counsel;³³⁹ and 8) psychological pressures.³⁴⁰ Generally a showing of just one factor will not preclude a finding of voluntariness.³⁴¹

(1979).

331. The orthodox rule is that the judge solely and finally determines the admissibility of a confession based on compliance with *Miranda* or a finding of voluntariness. The only question for the jury is the weight to be accorded to the confession once it is admitted. *Jackson v. Denno*, 378 U.S. 368 (1964); *Wilson v. Commonwealth*, 220 Va. 26, 255 S.E.2d 464 (1979); *Witt v. Commonwealth* 215 Va. 670, 212 S.E.2d 293 (1975). The prosecution must show by a preponderance of the evidence that the statements and/or waiver were made voluntarily. *Lego v. Twomey*, 404 U.S. 477 (1972); *Witt v. Commonwealth*, 215 Va. 670, 212 S.E.2d 293 (1975). The accused does not have to admit that he made the alleged incriminating statements before he has standing to contest admissibility. *Jones v. United States*, 362 U.S. 257 (1960); *Wilson v. Commonwealth*, 220 Va. 26, 32, 255 S.E.2d 464, 468 (1979).

332. Admissibility of a confession depends upon an application of a rule of evidence, i.e., whether it is, under the circumstances, trustworthy. *Jones v. Commonwealth*, 214 Va. 723, 726, 204 S.E.2d 247, 249 (1974).

333. *Yarborough v. Commonwealth*, 217 Va. 971, 234 S.E.2d 286 (1977) (statements made while intoxicated are not *per se* involuntary); *Akers v. Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975).

334. *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976); *Akers v. Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975). For a collection of cases dealing with intelligence as a factor to be considered, see Annot., 69 A.L.R.2d 348 (1960, Later Case Service 1978 & Supp. 1980).

335. *Akers v. Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975); *Penn v. Commonwealth*, 210 Va. 229, 169 S.E.2d 419 (1969).

336. *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976).

337. *Griggs v. Commonwealth*, 220 Va. 46, 255 S.E.2d 475 (1979) (severe form of dyslexia made accused very susceptible to suggestion in a stressful situation).

338. *Penn v. Commonwealth*, 210 Va. 229, 169 S.E.2d 419 (1969) (rest, food, drink, cigarettes provided).

339. *Davis v. Commonwealth*, 215 Va. 816, 213 S.E.2d 785 (1975).

340. *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976) (duration of interrogation); *Akers v. Commonwealth*, 216 Va. 40, 216 S.E.2d 28 (1975) (threats, promises); *Penn v. Commonwealth*, 210 Va. 229, 169 S.E.2d 419 (1969) (threats, promises, isolation from family, duration of interrogation).

341. See generally I. COOK, *supra* note 308, at §§ 71-74; B. GEORGE, *supra* note 308, at 313-22, 417-22.

Psychological influences such as trickery,³⁴² cajolery, persuasion, appeals to conscience, decency and honor,³⁴³ and appeals to leniency for self or a friend,³⁴⁴ are usually not found to be sufficiently coercive to mandate a finding of involuntariness,³⁴⁵ especially if the means used would not reasonably be expected to elicit an untrue statement. This represents the law and order³⁴⁶ approach and indicates that the Virginia court feels that the public interest in placing probative evidence before the jury in order to find the truth is not outweighed by the individual's rights or the interest in deterring such police conduct.

Miranda provided that an individual may knowingly, intelligently and voluntarily waive his rights after the warnings have been given, but the government would have a heavy burden to demonstrate this waiver.³⁴⁷ In *Lamb v. Commonwealth*,³⁴⁸ the Virginia court rejected the New York rule that waiver must be in the presence of defendant's attorney once retained and held that the police may question an accused who has counsel whether the attorney is present or not, if there has been an affirmative waiver. The interrogation must cease if at any time before or during questioning the defendant indicates in any manner that he wishes to remain silent.³⁴⁹ The Virginia court has read the emphasized language very narrowly and has refused to require the police to accept as conclusive any statement, no matter how ambiguous, as a sign that the defendant wishes to assert his rights.³⁵⁰ In both *Land v. Commonwealth*³⁵¹ and *Taylor v. Commonwealth*³⁵² the court refused to accept as an assertion of the right

342. *Smith v. Commonwealth*, 219 Va. 455, 470, 248 S.E.2d 135, 144 (1978) (officers suggested they found defendant's fingerprints and footprints at scene of crime). Generally where the police lead the suspect to believe they have more evidence against him than they actually do, voluntariness is still found. I. Cook, *supra* note 308, at § 74 nn. 72 & 75.

343. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978) (appeals to conscience); *Owens v. Commonwealth*, 218 Va. 69, 71, 235 S.E.2d 331, 332 (1977) ("takes a man to tell the truth").

344. *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979) (not *per se* inadmissible because confessed in effort to secure leniency for a friend).

345. *Rhode Island v. Innis*, 446 U.S. 291 (1980) (appeals to decency and honor did not invalidate the confession). See generally I. Cook, *supra* note 308, at § 74 and notes.

346. See note 301 *supra*.

347. 384 U.S. 436, 444, 474-75; *Johnson v. Commonwealth*, 220 Va. 146, 255 S.E.2d 525 (1979); *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976).

348. 217 Va. 307, 227 S.E.2d 737 (1976). The court based its decision upon federal precedent and the fact that the Supreme Court had not gone as far as New York.

349. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 473 (1966).

350. *Lamb v. Commonwealth*, 217 Va. 307, 312, 227 S.E.2d 737, 741 (1976).

351. 211 Va. 223, 176 S.E.2d 586 (1970).

352. 212 Va. 725, 187 S.E.2d 180 (1972). See also *Akers v. Commonwealth*, 216 Va. 40, 45, 216 S.E.2d 28, 31 (1975) (defendant asked, "Do I have to talk about it now?").

to remain silent a statement to the effect that the defendant would give information, but not a statement. The court based its decision on the statement in *Miranda* which said an individual could waive his rights and agree to make a statement or to answer questions.³⁵³ These cases raise the possibility that the defendants did not fully appreciate their rights or realize the full import of their comments. The statements could have been interpreted as an assertion, albeit unclear, of the right to remain silent and many courts would have agreed with such an interpretation.³⁵⁴ In the alternative, police could have tried to ascertain the extent of the suspects' appreciation of their rights. However, in these cases, the defendants were informed of their rights and chose to speak despite this awareness. The court's decisions are consistent with the minimum constitutional safeguards of *Miranda* and emphasize the Virginia court's narrow reading of that case.

The court's decisions may seem questionable as to a finding of voluntariness, waiver, custody or interrogation; however, the fact findings by the trial court, upon which the decision of admissibility is based, are accorded the same deference as a jury finding of fact and are not to be set aside unless there is no credible evidence supporting them.³⁵⁵ In all of the cases discussed there would have been sufficient evidence to support the decision.³⁵⁶ Thus, the law and order approach of the lower courts is reflected

353. 384 U.S. at 479.

354. Many courts will accept any statement which arguably could be an assertion of the right. I. Cook, *supra* note 308, at § 80 nn.37, 38 & 50.

355. Witt v. Commonwealth, 215 Va. 670, 674, 212 S.E.2d 293, 297 (1975).

356. Two cases decided by the Virginia Supreme Court during the survey period indicate that the court draws a very fine line in this area. In Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975), the court held that an accused ordered by the court to undergo a psychiatric exam was not in custody for purposes of *Miranda* and that any statement made during the exam could be admissible on the question of the defendant's guilt. Even though the defendant had been ordered to be examined, during the examination he was not compelled to answer any questions, therefore, the court concluded, there was no violation of the fifth amendment. The Fourth Circuit reached an opposite decision when the case came to them on a writ of habeas corpus. Gibson v. Zahradnick, 581 F.2d 75 (1978). The court held that the confession could be admitted only on the question of sanity, not on the question of guilt. Most courts are in accord with this holding. See *In re Beverly*, 342 So. 2d 481 (Fla. 1977); Note, *Protecting the Confidentiality of Pretrial Psychiatric Disclosures: A Survey of Standards*, 51 N.Y. L. REV. 409, 422 (1976); Annot., 31 A.L.R.3d 565, 669 (1970 & Supp. 1980). This would seem to be the better approach. The most reliable testimony by a psychiatrist would be unobtainable in most cases if he were not free to inquire into all aberrant conduct of a patient. The defendant's right to a hearing on the issue of insanity should not be conditioned upon a waiver of his privilege against self-incrimination.

Penn v. Commonwealth, 210 Va. 229, 169 S.E.2d 419 (1969), presented the problem of multiple interrogations under *Miranda*, but the supreme court did not even consider the issue. Four times within 12 hours the police returned to see if the defendant had reconsid-

in the decisions of the supreme court.

The admission of an involuntary confession into evidence is never harmless error in a Virginia court even if there is sufficient other evidence to support the conviction.³⁵⁷ In *Hall v. Commonwealth*,³⁵⁸ the supreme court held that a confession in violation of *Miranda* could be harmless error where other evidence overwhelmingly established the defendant's guilt and the judge issued a prompt cautionary instruction to the jury. This reasoning is supported by *Milton v. Wainwright*³⁵⁹ wherein the United States Supreme Court ruled that admission of a confession obtained in violation of the right to counsel was harmless error where there was sufficient other evidence to support a verdict beyond a reasonable doubt.

B. Identification Proceedings

Police conduct which violates individual constitutional rights is a concern in the area of identification procedures as well as confessions. The danger of mistaken identification of a defendant is increased when inherently suggestive identification procedures are used by the police prior to trial.³⁶⁰ To minimize the danger of such conduct, the Supreme Court has established two constitutional safeguards—a right to counsel and a due process standard.

In *United States v. Wade*³⁶¹ and its companion case *Gilbert v. California*³⁶² the Court established a right to counsel at a post-indictment line-

ered his assertion of his rights. The defendant confessed and the confession was found to be voluntary. Courts have split on the issue of multiple interrogations after the initial assertion of rights. Some allow a confession if an examination of the totality of the circumstances shows it was voluntary. See, e.g., *Jennings v. United States*, 391 F.2d 512 (5th Cir. 1968). This is the approach Virginia took in *Penn*, because it merely examined the voluntariness of the confession. *Michigan v. Moseley*, 423 U.S. 96 (1975), would seem to allow such subsequent interrogations only when there has been a change in circumstances, e.g. a different crime. Mere lapse of time should be insufficient. If police are allowed to ask a defendant repeatedly to reconsider his waiver, he is coerced in a manner inconsistent with the spirit, if not the explicit holding, of *Miranda*.

357. *Washington v. Commonwealth*, 214 Va. 737, 739, 204 S.E.2d 266, 267 (1974). See *Haynes v. Washington*, 373 U.S. 503 (1963).

358. 213 Va. 736, 195 S.E.2d 882 (1973). The Virginia Supreme Court has found a violation not harmless error where the confession was crucial to the prosecution's case. *Cardwell v. Commonwealth*, 209 Va. 412, 164 S.E.2d 699 (1968).

359. 407 U.S. 71 (1972).

360. *United States v. Wade*, 388 U.S. 218, 235 (1967).

361. *Id.* at 218.

362. 388 U.S. 263 (1967).

up identification.³⁶³ In the first cases to come before the Virginia Supreme Court after *Wade*, that court refused to extend the right to counsel to a pre-indictment lineup.³⁶⁴ Although the court recognized that the risk of suggestiveness and need for reconstruction at trial was just as great in pre-indictment as in post-indictment proceedings, it was concerned that to hold otherwise would impede effective law enforcement.³⁶⁵ Subsequently, the United States Supreme Court also refused to extend the *Wade-Gilbert* right to counsel to any identification proceeding that occurs prior to indictment or other formal charges.³⁶⁶ Once again the two courts have adopted a more conservative law and order approach to the criminal process with emphasis on effective police procedures and factual accuracy.

The Virginia court also has refused to extend *Wade* to any identification proceeding at which the defendant was not present, such as a photo array.³⁶⁷ One year later the Supreme Court affirmed this view of *Wade* in the case of *United States v. Ash*.³⁶⁸ Both courts held that counsel could not perform any function to minimize the risk of prejudice to the defendant at trial. They also expressed concern that a different holding could

363. The Court stated that this was a critical stage of the criminal prosecution and because misidentification could reduce the trial to a mere formality, counsel should be present to preserve the defendant's right to a fair trial. A critical stage was defined as one in which there is a grave potential for prejudice which may not be capable of reconstruction at trial. *Id.* In *Law v. City of Danville*, 212 Va. 702, 187 S.E.2d 197 (1972), the Virginia Supreme Court held that a blood test was not a critical stage within the *Wade* definition because there was no indispensable function that counsel could perform. The rationale of *Wade* was not applicable because the scientific techniques involved in a blood test were well enough established that they could easily be reconstructed to provide for meaningful cross-examination at trial. The court cited *Schmerber v. California*, 384 U.S. 757 (1966), in support of its decision. In *Schmerber* the Court had held that no right to counsel extended to a blood test. Since there was no right to presence of counsel during the exam, *Law* held there was also no right to consult with counsel before deciding whether to take a blood test.

364. *Zeigler v. Commonwealth*, 212 Va. 632, 186 S.E.2d 38 (1972); *Buchanan v. Commonwealth*, 210 Va. 664, 173 S.E.2d 792 (1970).

365. *Zeigler v. Commonwealth*, 212 Va. 632, 637, 186 S.E.2d 38, 42 (1972). A liberal reading of this decision would indicate that the presence of counsel is not critical in line-up proceedings prior to arrest or being charged with a crime.

366. *Kirby v. Illinois*, 406 U.S. 682 (1972). The Court stated that a "critical stage" did not extend to any period before indictment, arraignment or preliminary hearing. The Court rejected the basic rationale of *Wade* that the right to counsel was a means of protecting other constitutional rights. Instead, they viewed it as an independent right which attached at a definite time.

367. *Drewry v. Commonwealth*, 213 Va. 186, 191 S.E.2d 178 (1972).

368. 413 U.S. 300 (1973). The majority of federal and state courts had already adopted this view of *Wade*. See *Drewry v. Commonwealth*, 213 Va. 186, 191 S.E.2d 178 (1972) and cases cited therein.

lead to the presence of defense counsel at the prosecution's pretrial interviews with the victim or witness, creating situations which afford as much opportunity for undue suggestiveness as a photo array.³⁶⁹ Both courts rely on the ethical responsibilities of the prosecuting attorney through his supervision of the case and the application of the due process standard to insure a fair trial.

The *Wade-Gilbert* exclusionary rule declares an out-of-court identification obtained in violation of right to counsel *per se* inadmissible;³⁷⁰ however, any in-court identification is admissible if the prosecution can show by clear and convincing evidence that it had a basis for identification independent of the lineup confrontation.³⁷¹ *Wade* established six factors to be considered in determining this independent basis.³⁷² The Virginia Supreme Court, applying these factors in *Stanley v. Commonwealth*,³⁷³ determined that the lineup identifications were a mere confirmation of a previous positive identification and the in-court identifications were admissible.³⁷⁴ The improper admission of either an in-court or lineup identification can be harmless error if the conviction is supported by sufficient other evidence.³⁷⁵

The second, or the due process standard, was announced in *Stovall v. Denno*³⁷⁶ as a safeguard against police misconduct in identification procedures. The Supreme Court recognized a due process right to exclude unreliable identification testimony that resulted from unnecessarily suggestive procedures conducive to irreparable mistaken identification. The Supreme Court has not articulated any identifiable tests defining suggestiveness in the conduct of a lineup, but it appears that physical differ-

369. *United States v. Ash*, 413 U.S. 300, 317 (1973); *Drewry v. Commonwealth*, 213 Va. 186, 189, 191 S.E.2d 178, 181 (1972). Both courts also mentioned that defense interviews, especially of alibi witnesses, can also be suggestive and could influence the trial in defendant's favor. They suggested that accurate reconstruction at trial, by introduction of the photo array itself, could cure any defects that did exist.

370. *Gilbert v. California*, 388 U.S. 263, 273-74 (1967).

371. *United States v. Wade*, 388 U.S. 218, 242 (1967); *Williamson v. Commonwealth*, 211 Va. 57, 175 S.E.2d 285 (1970).

372. Prior opportunity to observe the alleged criminal act, existence of any discrepancies between any pre-lineup description, any identification prior to lineup of another person, failure to identify defendant on a prior occasion, lapse of time between crime and lineup and the conduct of the lineup are all factors to be considered. 388 U.S. at 241; see *Stanley v. Commonwealth*, 210 Va. 490, 493, 171 S.E.2d 846, 849 (1970).

373. 210 Va. 490, 171 S.E.2d 846 (1970).

374. *Id.* at 494-95, 171 S.E.2d at 849-51.

375. *Gilbert v. California*, 388 U.S. 263, 274 (1967); *Nero v. Commonwealth*, 213 Va. 154, 191 S.E.2d 206 (1972).

376. 388 U.S. 293 (1967).

ences among participants in a lineup do not alone render it unduly suggestive.³⁷⁷ In *Williamson v. Commonwealth*³⁷⁸ the Virginia court stated that the mere fact that some participants were taller or older was not a sufficient showing of suggestiveness. It found no requirement that all participants be alike in appearance as long as nothing was affirmatively done to single out the defendant.³⁷⁹ In *Zeigler v. Commonwealth*³⁸⁰ the court gave great weight to the facts that: 1) the witnesses had not discussed their line-up observations with each other or the police, and 2) the photo of the line-up showed that nothing had been done to single out the defendant.³⁸¹ The court concluded therefore that due process had not been violated and the identifications were admissible.

Single suspect confrontations present a greater opportunity for suggestiveness than line-ups but are upheld by most courts if they occur shortly after the crime.³⁸² The Virginia court was confronted with such an issue in *Martin v. Commonwealth*.³⁸³ The court rejected a reading of *Wade-Gilbert* which would prohibit single suspect identifications. Central to its decision was a concern for the desirable objectives of quick, accurate identification which could lead to the immediate release of innocent suspects³⁸⁴ and allow the police to continue the search while the trail was still fresh.³⁸⁵ The court also considered the circumstances in their entirety and found the identification reliable and therefore admissible.³⁸⁶

In summary, it appears that in identification proceedings and confessions the Virginia Supreme Court is more likely to protect society's interest in swift, effective and sure punishment of crime than to deter or prohibit certain police practice and vindicate the defendant's constitutional rights.

377. Project, *Ninth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1978-1979*, 68 GEO. L. J. 279, 353 (1980).

378. 211 Va. 57, 59, 175 S.E.2d 285, 287 (1970).

379. See also *Zeigler v. Commonwealth*, 212 Va. 632, 186 S.E.2d 38 (1972) (age discrepancy does not violate due process).

380. 212 Va. 632, 186 S.E.2d 38 (1972).

381. The defendant had not been required to speak, wear distinctive clothing or perform any act. *Id.* This due process exclusionary rule has not been applied by the Supreme Court to require *per se* exclusion of an identification resulting from suggestive procedures. If an examination of the circumstances shows that it is reliable, it will be admissible. *Manson v. Braithwaite*, 432 U.S. 98 (1977).

382. I. COOK, *supra* note 308 at § 52 n.67 and accompanying text.

383. 210 Va. 686, 173 S.E.2d 794 (1970).

384. In *Martin* three suspects were freed on the basis of victim identification. *Id.*

385. *Id.* at 691, 173 S.E.2d at 798.

386. The identifications occurred within 15-20 minutes of the assault, only six blocks from the scene, and the identification was made spontaneously by the victim. *Id.*

C. Entrapment

A concern with the deterrence of police misconduct led to the development of the entrapment defense which was first articulated and applied by the United States Supreme Court in *Sorrells v. United States*.³⁸⁷ Entrapment as defined by *Sorrells* is "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetuated it except for the trickery, persuasion or fraud of the officer."³⁸⁸ Under this definition, if a defendant was predisposed to commit the crime or if the crime was originally conceived by the defendant, he cannot avail himself of the defense.

Since *Sorrells*, members of the Supreme Court have been sharply divided on the proper focus of, and test for the application of the defense.³⁸⁹ In *Sorrells* the Court established what has been called the "subjective" test. Under this approach the focus is on the intent or predisposition of the criminal to commit the crime. This test would distinguish between police conduct "that merely affords an opportunity for the commission of the offense and 'creative activity' that implants in the mind of an otherwise innocent person the disposition to commit an offense and induces its commission in order to prosecute."³⁹⁰ In two subsequent decisions, *Sherman v. United States*³⁹¹ and *United States v. Russell*³⁹² the Supreme Court was urged to reconsider *Sorrells* and adopt an "objective" approach to entrapment.³⁹³ The focus of this test is on "whether the police conduct . . . falls below standards . . . for the proper use of governmental power."³⁹⁴ Supporters of the objective approach consider it more consistent with the rationale and purpose of the

387. 287 U.S. 435 (1932).

388. *Id.* at 454, quoted in *Wood v. Commonwealth*, 213 Va. 363, 367, 192 S.E.2d 762, 765 (1972).

389. See *United States v. Russell*, 411 U.S. 423, 439-40 (1973) (Stewart, J., dissenting). This debate also extends to the function of judge and jury on the issue of entrapment. Advocates of the objective approach agree that entrapment is a question for the judge to decide. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 453 (1932) (Roberts, J., concurring). Supporters of *Sorrells* would allow the question to go to the jury. The Virginia Supreme Court continues to assert that the existence of entrapment is often a question for the jury unless the evidence is insufficient as a matter of law. See *Codgill v. Commonwealth*, 219 Va. 272, 279, 247 S.E.2d 392, 396-99 (1978).

390. *Johnson v. Commonwealth*, 211 Va. 815, 817-18, 180 S.E.2d 661, 663 (1971).

391. 356 U.S. 369 (1958).

392. 411 U.S. 423 (1973).

393. *United States v. Russell*, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting); *Sherman v. United States*, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring).

394. *United States v. Russell*, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting) (quoting *Sherman v. United States*, 356 U.S. 369, 382 (1958)).

defense, which is not to protect persons who are "otherwise innocent," but to prohibit unlawful government activity and protect the integrity of the government and courts.³⁹⁵ However, in both *Sherman* and *Russell* the Court reaffirmed the approach taken by the majority in *Sorrells*.

The test laid out by the Supreme Court is based upon interpretation of federal statutes³⁹⁶ and, therefore, not binding on state courts. The *Russell* Court expressly rejected the contention that entrapment involves any constitutional rights.³⁹⁷ However, the Court did recognize, as the Virginia court had two years earlier,³⁹⁸ that police misconduct could be so outrageous as to violate due process.³⁹⁹ Because it is not binding, some state and federal courts have rejected *Sorrells* and have adopted the objective approach.⁴⁰⁰ The Virginia Supreme Court, however, has continued to assert its support of *Sorrells*.⁴⁰¹

In every entrapment case before the Virginia court during the past decade, the defense of entrapment was disallowed because the court concluded the evidence clearly showed that police merely afforded "an opportunity for the commission of the offense" and the defendant willingly accepted that opportunity.⁴⁰² However, in several of these cases the court did consider the police conduct and the predisposition of the defendant in making its determination. The court expressly recognized that entrapment was a rule of fairness barring conviction as a result of police misconduct contrary to public policy.⁴⁰³

Some jurisdictions tend to reverse convictions where an underworld agent is used to bait the trap because the incentive to entrap a normally law-abiding person increases when release on bail or a reduced sentence is

395. *Id.* at 442-43.

396. *Id.* at 440.

397. *Id.*

398. *Johnson v. Commonwealth*, 211 Va. 815, 817 n.2, 180 S.E.2d 661, 662 n.2 (1971).

399. *United States v. Russell*, 411 U.S. 423, 430-32 (1973).

400. *See, e.g., State v. Mullen*, 216 N.W.2d 375 (Iowa 1974).

401. "We have repeatedly held that, when the criminal design originates in the mind of the accused and thereafter the Commonwealth does no more than afford an opportunity for the commission of a crime, the defense of entrapment does not lie." *Codgill v. Commonwealth*, 219 Va. at 272, 247 S.E.2d at 396. *See Johnson v. Commonwealth*, 211 Va. 815, 180 S.E.2d 661 (1971); *Falden v. Commonwealth*, 167 Va. 549, 189 S.E. 329 (1937).

402. *Codgill v. Commonwealth*, 219 Va. 272, 279, 247 S.E.2d 392, 396 (1978); *accord, Neighbors v. Commonwealth*, 214 Va. 18, 197 S.E.2d 207 (1973); *Wood v. Commonwealth*, 213 Va. 363, 192 S.E.2d 762 (1972); *Johnson v. Commonwealth*, 211 Va. 815, 180 S.E.2d 661 (1971).

403. *Wood v. Commonwealth*, 213 Va. 363, 367, 192 S.E.2d 762, 765 (1972); *Johnson v. Commonwealth*, 211 Va. 815, 817, 180 S.E.2d 661, 662 (1971).

involved.⁴⁰⁴ The Virginia Supreme Court was faced with such a situation in *Neighbors v. Commonwealth*.⁴⁰⁵ The "bait" had been in jail on a heroin possession charge and was released on reduced bail to aid the police in apprehending drug pushers. The defendant resisted the first several attempts to get him to sell, but the agent finally "begged" him to do so. The court refused to take this opportunity to apply the defense to prohibit such police practice; thereby negating any advantages of the practice. Apparently this was a policy decision which the court felt belonged more properly to the legislative and executive branches of government.⁴⁰⁶ Although unwilling to judicially prohibit this type of conduct, the fact that the court will consider conduct a factor in determining whether entrapment existed demonstrates movement toward adoption of the objective test.

D. Plea Bargaining

Many courts and legal scholars have recognized that the criminal justice system could not function effectively unless the majority of cases were disposed of through guilty pleas.⁴⁰⁷ The plea bargain is one means of arriving at a plea of guilty. The constitutionality of the plea bargain has been upheld by the United States Supreme Court,⁴⁰⁸ and its value to the administration of criminal justice has been affirmed in the United States and Virginia Supreme Court decisions.⁴⁰⁹

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part. . . . It leads to prompt and largely

404. See *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962); *United States v. Curry*, 284 F. Supp. 458 (E.D. Ill. 1968).

405. 214 Va. 18, 197 S.E.2d 207 (1973).

406. The majority in *Russell* was also unwilling to prohibit certain types of law enforcement practices and indicated that the defense of entrapment "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." 411 U.S. at 435.

407. *Santobello v. New York*, 404 U.S. 257 (1971); *Jordan v. Commonwealth*, 217 Va. 57, 62, 225 S.E.2d 661, 664 (1976). Guilty pleas account for the great majority of criminal convictions in the United States and it is estimated that 90% of these result from plea bargains or agreements. Davidson & Kraus, *Plea Bargaining: Limits on Prosecutorial Discretion*, 1979 ANNUAL SURVEY OF AMERICAN LAW 27.

408. *Brady v. United States*, 397 U.S. 742 (1970). "But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State." *Id.* at 753.

409. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) (The plea bargain "is an essential component of the administration of justice. Properly administered, it is to be encouraged."); *Jordan v. Commonwealth*, 217 Va. 57, 225 S.E.2d 661 (1976); *Johnson v. Commonwealth*, 214 Va. 515, 201 S.E.2d 594 (1974).

final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement . . . ; it protects the public from those accused persons who are prone to continue criminal conduct . . . while on pretrial release; and, by shortening the time between charge and disposition, it enhances . . . the rehabilitative prospects of the guilty when they are ultimately imprisoned.⁴¹⁰

Thus not only does the plea bargain expedite the judicial process, but it serves the ends of deterrence and rehabilitation—concerns which are central to our theory of criminal law.⁴¹¹

These important advantages of the plea bargain agreement were recognized by the Virginia Supreme Court in a decision validating and enforcing such agreements⁴¹² while simultaneously stressing the importance of upholding the honor and integrity of the state and preserving public confidence in the fair administration of justice.⁴¹³ To achieve these ends and to assure that the system remains useful and productive, the court has sought to protect the plea bargain system from abuse.⁴¹⁴ In *Santobello v. New York*⁴¹⁵ the Supreme Court held that the government has a legal obligation to fulfill any promise which induced the defendant to plead guilty.⁴¹⁶ The prosecutor's failure to perform his part of the agreement is considered a material breach and the defendant is entitled to rescission (withdrawal of the guilty plea) or specific performance (indictment and conviction only on the agreed upon lesser charge).⁴¹⁷ The Virginia Supreme Court has adopted this contractual approach to the plea bargain. It is viewed as a formal contract under which both parties have a legal obligation. The court analyzes the cases in contractual language⁴¹⁸ and grants contractual remedies.

410. *Santobello v. New York*, 404 U.S. 257, 261 (1971), *quoted in* *Jordan v. Commonwealth*, 217 Va. 57, 62, 225 S.E.2d 661, 664-65 (1976).

411. B. GEORGE, *supra* note 308, at 675.

412. *Jordan v. Commonwealth*, 217 Va. 57, 61, 225 S.E.2d 661, 664 (1976).

413. *Id.* at 59, 225 S.E.2d at 663.

414. *Johnson v. Commonwealth*, 214 Va. 515, 518, 201 S.E.2d 594, 596 (1974).

415. 404 U.S. 257 (1971).

416. *Id.* at 262. The Court seems to raise the agreement to the level of a formal contract. Language of promissory estoppel and detrimental reliance is also used by the Court. For a discussion of the trend toward viewing plea bargains as enforceable contracts, see Jones, *Negotiation, Ratification, and Rescission of the Guilty Plea Agreement: A Contractual Analysis and Typology*, 17 Duq. L. Rev. 591 (1978-1979).

417. 404 U.S. 257 (1971).

418. *Jones v. Commonwealth*, 217 Va. 248, 257, 227 S.E.2d 701, 707 (1976) ("defendant fully performed his part of the agreement"; "ends of justice require specific performance"); *Jordan v. Commonwealth*, 217 Va. 57, 61, 225 S.E.2d 661, 664 (1976) ("restore parties to the position they occupied" before the bargain).

In *Johnson v. Commonwealth*⁴¹⁹ the Virginia court granted rescission of the agreement and remanded to the trial court with instructions that the defendant be allowed to withdraw his guilty plea. All actions and proceedings were vacated and the indictment restored to its original form. The defendant was allowed to plead not guilty to the original charge and was entitled to a new trial. Specific performance, on the other hand, was the remedy granted in both *Jordan v. Commonwealth*⁴²⁰ and *Jones v. Commonwealth*⁴²¹ because the court was unable to restore the parties to their pre-bargaining positions.

The Virginia Supreme Court considers the inadvertent failure of the prosecutor to comply immaterial.⁴²² In addition, if the defendant does not immediately call the non-compliance to the attention of the court and request withdrawal of his guilty plea, he is deemed to have waived the right to do so.⁴²³

It is doubtful that the Virginia Supreme Court will change its approach to such cases in the future because in *Jordan* it directed that any apprehensions about the legitimacy of the system be directed to the General Assembly.⁴²⁴ Thus, in 1978, Rule 3A:11 of the Virginia Rules of Court was amended to add a subsection entitled "Plea Agreement Procedure"⁴²⁵ which was modeled after Rule 11(e) of the Federal Rules of Criminal Procedure.⁴²⁶ This section provides that any plea agreement in a felony case be in writing, signed and entered in the record.⁴²⁷ This provision is another of the safeguards established by many states to protect the plea bargaining system from abuse.⁴²⁸ The Virginia court may accept or reject the plea. Should the court reject it, the defendant must be offered an opportunity to withdraw his plea.⁴²⁹ The Virginia Supreme Court, relying on federal precedent, has construed this provision to confer only a presentence right to withdrawal.⁴³⁰ In construing federal rule 11(e)(4), federal courts have held that "where a defendant plea bargains only for a

419. 214 Va. 515, 201 S.E.2d 594 (1974).

420. 217 Va. 57, 225 S.E.2d 661 (1976).

421. 217 Va. 248, 227 S.E.2d 701 (1976) (defendant had already served time for the lesser charge, therefore the court dismissed the conviction on the greater charge).

422. *Johnson v. Commonwealth*, 214 Va. 515, 518, 201 S.E.2d 594, 596 (1974).

423. *Id.* at 518-19, 201 S.E.2d at 597.

424. 217 Va. at 63, 225 S.E.2d at 665.

425. VA. SUP. CT. R. 3A:11(d).

426. FED. R. CRIM. P. 11(e).

427. VA. SUP. CT. R. 3A:11(d)(2).

428. For a list of safeguards, see Davidson & Kraus, *supra* note 407, at 30-31.

429. VA. SUP. CT. R. 3A:11(d)(2), (4).

430. *Holler v. Commonwealth*, 220 Va. 961, 265 S.E.2d 715 (1980); *Lilly v. Commonwealth*, 218 Va. 960, 963, 243 S.E.2d 208, 210 (1978).

recommendation by the government, *which the defendant knows is not binding on the trial court*, and the government complies with the agreement . . . , nonacceptance of the recommendation by the trial court is not a rejection . . . under Rule 11(e)(4).⁴³¹ Therefore, the Virginia court held that Rule 3A:25(d), rather than Rule 3A:11(d)(4), was applicable to a post sentence motion for withdrawal of a guilty plea. The former provides that "to correct manifest injustice, the court . . . may set aside the judgment . . . and permit the defendant to withdraw his [guilty] plea."⁴³² The Virginia Supreme Court again relied on federal precedent in determining the post-sentence standard to be applied under Rule 3A:25(d). In applying the comparable federal rule, federal courts applied a stricter standard to avoid motions based on disappointment in the outcome.⁴³³ Under the federal standard used by the Virginia court for determining "manifest injustice" the court must look to the total record, from acceptance of the plea to sentencing. If upon this record it appears that the defendant has been fully apprised that the court was not bound to accept the agreement or recommendation, there can be no showing of injustice to the defendant.⁴³⁴ The record in *Holler v. Commonwealth*⁴³⁵ revealed that the defendant had full knowledge that the recommendation was not binding and that the maximum penalty involved was life. The court found no abuse of discretion under Rule 3A:25(d) in the trial court's denial of the post-sentence motion to withdraw the guilty plea.

E. Discovery

Two developments, the adoption of the Virginia Rules of Court on Criminal Practice and Procedure⁴³⁶ and holdings in two United States Supreme Court decisions, have influenced the Virginia Supreme Court decisions in the area of discovery during the past decade.⁴³⁷

Virginia Rule 3A:14 provides for limited pretrial discovery by the defendant in a felony case and represents a liberalization of the rules of discovery established in earlier cases.⁴³⁸ Given a showing that the items sought are relevant to the preparation of the defense, Rule 3A:14(b) com-

431. *Holler v. Commonwealth*, 220 Va. 961, 265 S.E.2d 715, 719 (1980) (quoting *United States v. Savage*, 561 F.2d 554, 556 (4th Cir. 1977) (emphasis added)).

432. VA. SUP. CT. R. 3A:25(d).

433. *Lilly v. Commonwealth*, 218 Va. 960, 965, 243 S.E.2d 208, 211 (1978).

434. *Id.* at 963-64, 243 S.E.2d at 211.

435. 220 Va. 961, 265 S.E.2d 715 (1980).

436. VA. SUP. CT. R. 3A:1-36. These rules became effective on January 1, 1972.

437. *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963).

438. For earlier case law, see *Bellfield v. Commonwealth*, 215 Va. 303, 208 S.E.2d 771 (1974).

pels the court to order pretrial discovery of statements of the accused, scientific reports relating to the accused or the victim, books, documents, tangible objects and buildings in possession, custody or control of the Commonwealth.⁴³⁹ The rule does not authorize discovery or inspection of statements made by prosecution witnesses or prospective witnesses to agents of the Commonwealth or reports, memorandum or other internal documents made by agents of the Commonwealth in connection with the investigation of the case.⁴⁴⁰

The Virginia Supreme Court has also refused to extend Rule 3A:14(b) to allow discovery of statements of witnesses for purposes of cross-examination and impeachment.⁴⁴¹ In support of this decision the court cited recent construction of the comparable federal rule⁴⁴² and the practice in other state courts. Federal courts have denied such discovery under the federal rules⁴⁴³ and states are fairly evenly divided on this issue.⁴⁴⁴ In *Bellfield v. Commonwealth*⁴⁴⁵ the Virginia Supreme Court denied discovery of police notes containing the victim-witness' description of her attacker which had been made shortly after the attack. The defendant, in support of his motion, stated that he hoped to find inconsistencies between the description and the testimony; he made no other showing of relevancy. The court denied the discovery. This denial is consistent with the rule in most jurisdictions requiring the defendant to demonstrate the

439. VA. SUP. CT. R. 3A:14(b). In 1978 this rule was amended to require trial judges to order discovery upon a proper showing of relevancy. Prior to amendment the rule had provided that the court "may order" it, but they were not required to do so. VA. SUP. CT. R. 3A:14(b); reprinted in 2 VA. CODE ANN. (Rep. Vol. 1977). The amendment also provided that the only proper sanction for failure to comply is compulsion. A continuance or "any other order . . . just under the circumstances" is no longer adequate. Compare VA. SUP. CT. R. 3A:14(g) with prior VA. SUP. CT. R. 3A:14(g), reprinted in 2 VA. CODE ANN. (Repl. Vol. 1977).

440. VA. SUP. CT. R. 3A:14(b)(2).

441. *Hackman v. Commonwealth*, 220 Va. 710, 261 S.E.2d 555 (1980); *Bellfield v. Commonwealth*, 215 Va. 303, 208 S.E.2d 771 (1974). The *Bellfield* holding must be read in conjunction with constitutional due process requirements. See notes 455-72 *infra*, and accompanying text.

442. FED. R. CRIM. P. 16(a).

443. For an overview of federal case law, see *Hackman v. Commonwealth*, 220 Va. 710, 714, 261 S.E.2d 555, 558 (1980).

444. Annot., 7 A.L.R.3d 181 (1966 & Supp. 1980). The court in *Bellfield v. Commonwealth*, 215 Va. 303, 307, 208 S.E.2d 771, 774 (1974) also cited this annotation in support of its holding.

445. 215 Va. 303, 208 S.E.2d 771 (1974). The Virginia court refused to apply the holding of *United States v. Jencks*, 353 U.S. 657 (1957) as codified at 18 U.S.C. § 3500 (1970) to Virginia criminal proceedings. The court stated that this was a rule of evidence for federal courts and did not require extension to state courts.

manner in which the statements are inconsistent with the testimony.⁴⁴⁶ The motion must be based on facts and conclusions, not mere surmise or conjecture.⁴⁴⁷ Thus the court could have decided *Bellfield* on the basis of failure to show the requisite relevance, but instead chose a broader holding to clarify the extent of discovery under the new rules. It based its denial on the fact that these statements were for purposes of impeachment and were therefore not discoverable under the rules. In refusing to extend discovery to include witness statements for cross-examination and impeachment, the court also expressed concern that a different result would hamper the prosecution's ability to prosecute by allowing a "fishing expedition."⁴⁴⁸

Discovery under this rule also does not extend to names and addresses of eyewitnesses to the crime unless there is a showing that their testimony would be exculpatory.⁴⁴⁹ Criminal records of prospective jurors are not discoverable if they are not within the immediate possession of the prosecution.⁴⁵⁰ Voir dire would provide sufficient opportunity to discover such information. This holding is in line with the general liberal trend in a few jurisdictions which would allow limited disclosure of such information as long as it is in the prosecution's possession.⁴⁵¹ Construction of this discovery rule shows that the Virginia court will read a defendant's motion for discovery very narrowly. Anything not specifically mentioned therein need not be disclosed. In *Payne v. Commonwealth*⁴⁵² the court held that a request for discovery of tangible objects was not a request for information concerning these objects.

Virginia construction of Rule 3A:14 notwithstanding, a defendant has a constitutional right to the discovery of any exculpatory evidence that meets the requirements of *Brady v. Maryland*⁴⁵³ and *United States v.*

446. Annot., *supra* note 444, at 188.

447. *Id.* at 8, 49-51. See also *Lowe v. Commonwealth*, 218 Va. 670, 239 S.E.2d 112 (1977) (the speculation inherent in the contention is fatal to the defendant's position). Generally courts look at other factors in determining whether there should be a right to discovery. These include: 1) a person who was present when the statement was made was or could have been called as a witness and 2) the defendant had a right to interview witness before trial. Annot., *supra* note 444, at 189. The Virginia Supreme Court also considered these in *Bellfield v. Commonwealth*, 215 Va. at 307, 208 S.E.2d at 774 (policeman was present at trial).

448. *Bellfield v. Commonwealth*, 215 Va. 303, 307, 208 S.E.2d 771, 774 (1974).

449. *Lowe v. Commonwealth*, 218 Va. 670, 239 S.E.2d 112 (1977).

450. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979).

451. See generally Annot., 86 A.L.R.3d 571, 574, 583 (1978 & Supp. 1980).

452. 216 Va. 265, 217 S.E.2d 870 (1975).

453. 373 U.S. 83 (1963).

Agurs.⁴⁵⁴ In *Brady* the Supreme Court held that the government's failure to disclose evidence specifically requested by the defendant violated the defendant's right to due process under the fourteenth amendment if the undisclosed evidence was favorable to the defendant and material to guilt or punishment.⁴⁵⁵ This obligation to disclose depends on the character of the evidence involved. The government's good faith is irrelevant.⁴⁵⁶ The decision in *Agurs* extended the *Brady* rule to cases in which the defendant makes only a general reference or no reference at all to exculpatory evidence.⁴⁵⁷ The rationale of the holding was that some evidence is of such substantial value to the defense that due process requires its disclosure in the absence of any request.⁴⁵⁸ The test for materiality in a *Brady* situation is whether the evidence might affect the outcome of the trial on the issue of either guilt or punishment.⁴⁵⁹ In an *Agurs* situation, reversal is mandated if the evidence is so material to the question of guilt that it creates a reasonable doubt that did not otherwise exist.⁴⁶⁰ These decisions have had the effect of creating a constitutional right to discovery of exculpatory evidence that meets either materiality test.⁴⁶¹

The Virginia Supreme Court had occasion to apply these rules to several cases in the past ten years. The *Brady* test was applied in *Stover v. Commonwealth*,⁴⁶² *Dozier v. Commonwealth*⁴⁶³ and *Robinson v. Commonwealth*.⁴⁶⁴ The defendant in *Stover* had specifically requested a statement made by one of the victims which indicated that he and his companions had initiated a similar incident a few days before the incident in which *Stover* was involved. Because this evidenced the turbulent disposition of the victim, it would have corroborated *Stover's* explanation of his use of a weapon and therefore could have affected the outcome at least as to pun-

454. 427 U.S. 97 (1976).

455. *Brady v. Maryland*, 373 U.S. 83 (1963). See also *Dozier v. Commonwealth*, 219 Va. 1113, 1116, 253 S.E.2d 655, 657 (1979); *Stover v. Commonwealth*, 211 Va. 789, 795, 180 S.E.2d 504, 509 (1971).

456. 373 U.S. at 87. See also *Stover v. Commonwealth*, 211 Va. 789, 795, 180 S.E.2d 504, 509 (1971).

457. *United States v. Agurs*, 427 U.S. 97 (1976). See also *Dozier v. Commonwealth*, 219 Va. 1113, 1116, 253 S.E.2d 655, 657 (1979).

458. 427 U.S. 97.

459. 373 U.S. 83.

460. 427 U.S. 97.

461. The rule in *Brady* was incorporated into the Virginia Code of Professional Responsibility, Disciplinary Rule 7-103.

462. 211 Va. 789, 180 S.E.2d 504 (1971).

463. 219 Va. 1113, 253 S.E.2d 655 (1979).

464. 220 Va. 673, 261 S.E.2d 318 (1980).

ishment. The conviction was reversed.⁴⁶⁵ In *Dozier* the defendant's conviction was reversed because the nondisclosed evidence, which went to the credibility of the state's key witness, could have affected the verdict where the jury's estimation of the truthfulness and credibility of a given witness may have been determinative of guilt or innocence.⁴⁶⁶ The conviction was upheld in *Robinson*.⁴⁶⁷ The non-disclosed evidence there consisted of the murder victim's police record for assaults. The court admitted that such evidence was crucial to establishing self-defense, but held that since the victim of the assault in question had testified to it in the court room, production of the record would have added little to a description of the violent nature of the decedent's conduct. Therefore, it would not have affected the outcome.

The stricter materiality test of *Agurs* was applied in *Payne v. Commonwealth*⁴⁶⁸ because there was only a general, nonspecific request for exculpatory material. The principal value of the evidence in this case would have been to discredit a witness. When this omission was evaluated in the context of the entire record, the court concluded that even without the discredited witness' testimony, there was sufficient evidence to support the verdict beyond a reasonable doubt.⁴⁶⁹ Even *Brady* and *Agurs* do not establish a constitutional right to production of evidence the exculpatory nature of which is purely speculative.⁴⁷⁰ Similarly, in *Lowe v. Commonwealth*⁴⁷¹ the defendant requested a list of eyewitnesses contending that if the uncalled witnesses could testify it might be exculpatory. The court found this conjecture insufficient to bring the case under either *Brady* or *Agurs*.

The court's decisions in all of these cases seem to be correct. The court was diligent in objectively evaluating the omitted evidence on the basis of the entire trial record. However, since the factual circumstances in every case did not fall within "the gray area," it is difficult to say whether the court is giving these cases a broad or narrow reading and application.

F. Speedy Trial

The sixth amendment to the United States Constitution guarantees the

465. *Stover v. Commonwealth*, 211 Va. 789, 180 S.E.2d 504 (1971).

466. 219 Va. at 1118, 253 S.E.2d at 658.

467. *Robinson v. Commonwealth*, 220 Va. 673, 677, 261 S.E.2d 318, 320 (1980).

468. 220 Va. 601, 260 S.E.2d 247 (1979).

469. *Id.*

470. *Lowe v. Commonwealth*, 218 Va. 670, 239 S.E.2d 112 (1977).

471. *Id.*

right to a speedy trial.⁴⁷² Virginia has a constitutional⁴⁷³ and a statutory implementation of this guarantee.⁴⁷⁴ The purposes of this guarantee are "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."⁴⁷⁵

During the past decade the cases before the Virginia Supreme Court claiming denial of a speedy trial fall into two categories: (1) those which require the court to construe the speedy trial statute and (2) those which required the court to apply the balancing test in *Barker v. Wingo*.⁴⁷⁶ Virginia's speedy trial statute⁴⁷⁷ provides that an accused held continuously in custody must be brought to trial within five months from the preliminary hearing or indictment, and an accused not in custody must be brought to trial within nine months.⁴⁷⁸ The consequence of a violation is absolute discharge from prosecution⁴⁷⁹ and the defendant need not show prejudice to establish a statutory violation.⁴⁸⁰ Once the defendant has established that the time limit has passed without trial, the burden is on the prosecution to prove excusable delay within the enumerated exceptions of the statute.⁴⁸¹ The failure of a judge to appear on the trial date has not been accepted as excusable delay within the meaning of the statute.⁴⁸² If this were allowed, a judge could circumvent the defendant's stat-

472. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI. This provision applies to the states through the due process clause of the fourteenth amendment. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

473. VA. CONST. art. 1, § 8. "In all capital or criminal prosecutions a man hath a right . . . to a speedy trial." *Id.*

474. VA. CODE ANN. § 19.2-243 (Cum. Supp. 1980).

475. *United States v. Ewell*, 383 U.S. 116, 120 (1966). See also *Fowlkes v. Commonwealth*, 218 Va. 763, 240 S.E.2d 662 (1978); *Miller v. Commonwealth*, 217 Va. 929, 234 S.E.2d 269 (1977).

476. 407 U.S. 514 (1972).

477. VA. CODE ANN. § 19.2-243 (Cum. Supp. 1980).

478. *Id.* Before 1974 the statute provided that all persons, whether in custody or not, be brought to trial within three regular terms of court from indictment. VA. CODE ANN. § 19.1-191 (Repl. Vol. 1960) (amended 1974).

479. VA. CODE ANN. § 19.2-243 (Cum. Supp. 1980). See *Knott v. Commonwealth*, 215 Va. 537, 211 S.E.2d 86 (1975).

480. *Fowlkes v. Commonwealth*, 218 Va. 763, 769, 240 S.E.2d 662, 666 (1978).

481. *Woodward v. Commonwealth*, 214 Va. 495, 201 S.E.2d 785 (1974); *Heflin v. Commonwealth*, 211 Va. 407, 177 S.E.2d 644 (1970). These excusable delays are: 1) defendant's insanity or confinement in hospital, 2) prosecution witness enticed away, sick or injured, 3) granting of a separate trial at request of person indicted jointly with others, 4) continuance granted on motion of defendant or by his concurrence, 5) inability of jury to agree on a verdict. VA. CODE ANN. § 19.2-243 (Repl. Vol. 1975).

482. *Woodward v. Commonwealth*, 214 Va. 495, 499, 201 S.E.2d 785, 788-89 (1974).

utory right to a speedy trial either inadvertently or deliberately.⁴⁸³ The defendant's incarceration in a Virginia prison is also not an excuse encompassed by the statute.⁴⁸⁴ In such a situation he would be subject to transfer under process issued by the trial court and would, therefore, be available for trial. The court will not exclude all excuses not specifically enumerated, but it has construed these exceptions very narrowly. For an excuse to be accepted, it must include circumstances *in pari ratione* with those expressly allowed.⁴⁸⁵ Failure to invoke the statute until after entry of final judgment is a waiver of the rights under the statute.⁴⁸⁶

If a case does not fall under the statute either because there has been no indictment or because the time limit was complied with and yet the defendant feels he was denied his constitutional right to a speedy trial, the court may apply the balancing test of *Barker* to determine if the right was denied.⁴⁸⁷ The factors to be assessed are the length of delay, the reasons for delay, defendant's assertion of his right and prejudice to the defendant.⁴⁸⁸ Prior to *Barker* the prevailing rule was that if a defendant failed to demand a speedy trial the right was deemed waived. Virginia was one of only eight states which had rejected this demand rule.⁴⁸⁹ The Supreme Court considered the rule inconsistent with the principle that fundamental rights must be waived knowingly and intelligently; therefore, it rejected the demand rule in *Barker* and held that failure to demand a trial was only one factor to be considered.⁴⁹⁰

The Virginia Supreme Court applied this test in three cases during the past ten years. Its decisions indicate a trend toward more liberal application of the test in favor of the defendant, especially with regard to the

483. *Id.*

484. *Knott v. Commonwealth*, 215 Va. 531, 211 S.E.2d 86 (1975).

485. *Id.*

486. *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969). The Virginia statute incorporates all of the elements recommended by the ABA Speedy Trial Standard before those recommendations were drafted in 1968. Poulas & Coleman, *Speedy Trial Slow Implementation: The ABA Standards in Search of a Statehouse*, 28 HASTINGS L. J. 357, 371, 373 (1976-1977). The ABA had recommended that statutes establish a specific time limit and define the point at which the time began to run, limit the situations in which delay would be excused, eliminate any requirement that the defendant show prejudice, limit waiver only to failure to declare denial prior to trial and provide a remedy of absolute discharge.

487. The arrest of a defendant constitutes the initiation of prosecution for the purposes of the *Barker* test. *Dillingham v. United States*, 423 U.S. 64 (1975); *Fowlkes v. Commonwealth*, 218 Va. 763, 766, 240 S.E.2d 662, 664 (1978).

488. *Barker v. Wingo*, 407 U.S. at 530.

489. *Flanary v. Commonwealth*, 184 Va. 204, 35 S.E.2d 135 (1945).

490. 407 U.S. at 530.

factor of prejudice. In *Whitlock v. Superintendent*⁴⁹¹ the court looked at prejudice only as it affected the defendant's ability to contest on the merits and concluded that since the only witnesses to die were prosecution witnesses, there was no prejudice to the defendant and no denial of his right to a speedy trial. In *Miller v. Commonwealth*⁴⁹² the court stated that prejudice had three different facets to it: 1) oppressive pretrial incarceration; 2) anxiety and concern of the accused; and 3) impairment of defense on the merits. Although it did emphasize that the third concern was the most important, the court showed a willingness to recognize the other types of prejudice which a defendant may encounter.⁴⁹³ The court found that the defendant had established no prejudice since the defendant was not in custody and all hearings were on record. If the court had taken this view of prejudice in *Whitlock*,⁴⁹⁴ the holding would most probably have been different. *Whitlock* was imprisoned in Maryland while pending trial in Virginia. Even though already incarcerated, he could still suffer from undue and oppressive incarceration because if found guilty, he might have been allowed to serve his sentences concurrently. Also the anxiety and concern of public accusation might be intensified if already in prison.⁴⁹⁵

It is important to note that *Miller* involved a *nolle prosequi* and thus prompted consideration of *Klopfer v. North Carolina*.⁴⁹⁶ In *Klopfer* the Supreme Court held that a *nolle prosequi* with leave to prosecute at a later time denied the defendant a right to a speedy trial, as the pendency of the indictment might subject the defendant to public approbation and deprive him of employment. The Virginia court pointed out that under Virginia law a *nolle prosequi* discharged the accused from liability on the indictment and, therefore, did not prejudice him through subjection to public scorn.⁴⁹⁷

In *Fowlkes v. Commonwealth*⁴⁹⁸ the court went even further than it did in *Miller* and held that there were certain forms of prejudice that were inevitably present in every case.⁴⁹⁹ In addition to prejudice to the defense on the merits, the delay could interfere with the defendant's liberty, disrupt his employment, drain his finances, create anxiety and subject him

491. 213 Va. 429, 192 S.E.2d 802 (1972).

492. 217 Va. 929, 234 S.E.2d 269 (1977).

493. *Id.* at 936, 234 S.E.2d at 274.

494. See note 491 *supra* and accompanying text.

495. See *Smith v. Hooey*, 393 U.S. 374 (1969).

496. 386 U.S. 213 (1967).

497. *Miller v. Commonwealth*, 217 Va. 929, 234 S.E.2d 269 (1977).

498. 218 Va. 763, 240 S.E.2d 662 (1978).

499. *Id.* at 771, 240 S.E.2d at 667.

to public scorn. These forms of prejudice required no proof.⁵⁰⁰ In support of this proposition the court cited the concurring opinion in *Barker*.⁵⁰¹ The majority had held that no affirmative demonstration of prejudice was necessary to prove denial.⁵⁰² The concurring opinion adopted by the Virginia court went one subtle step further and declared that certain forms of prejudice would be assumed to exist in every case. The court then held that the only proper remedy would be dismissal of the indictment: a remedy not unique where constitutional rights are involved.⁵⁰³

This liberal approach to the speedy trial right might seem inconsistent with the law and order approach which the Virginia Supreme Court has taken where other constitutional rights are involved. However, the Virginia court, as did the United States Supreme Court in *Barker*, views this constitutional guarantee as protecting societal, as well as individual right. "The public has a substantial stake in the speedy conviction of the guilty and prompt vindication of the innocent."⁵⁰⁴ It serves to preserve the means of proving the charge, reduces institutional costs and the exposure to danger and will insure the maximum deterrent effect of the prosecution and conviction.⁵⁰⁵ This concern with protecting societal rights is consistent with the law and order approach.

G. Conclusion

Virginia Supreme Court decisions in the pre-trial areas of criminal procedure in the past decade clearly reflect its conservative law and order approach. In general, it has applied the minimum safeguards for individual constitutional rights which are consistent with vindicating societal rights and preserving effective law enforcement practices. The court's emphasis has been on obtaining the most reliable information by the most efficient means and has not taken many opportunities to discourage any specific questionable police practice. Very often the court's conservative approach in a certain area has been subsequently affirmed or adopted by the United States Supreme Court and more often the Virginia court's decisions merely follow those of the Supreme Court. Thus Virginia's decisions have been consistent with the increasingly conservative trend of the

500. *Id.*

501. See 407 U.S. at 537 (White, J., concurring).

502. *Id.* at 533.

503. *Fowlkes v. Commonwealth*, 218 Va. 763, 772, 240 S.E.2d 662, 667 (1978). After the defendant has challenged a delay as being unreasonable, the court will shift the burden to the prosecution to show what delay was attributable to the defendant and what delay, attributable to the prosecution, was justifiable. *Id.* at 766, 240 S.E.2d at 664.

504. *Id.* at 769, 240 S.E.2d at 667 (1978).

505. *Id.*

Supreme Court during the seventies.

IV. CRIMINAL PROCEDURE DURING AND FOLLOWING TRIAL

A. Introduction

This section of the note focuses primarily on the decisions of the Virginia Supreme Court over the past decade in the area of criminal procedure during and immediately following trial. While an attempt has been made to report on the trend of the decisions, it appears, as mentioned above, that any changes that have occurred are not the result of a change in philosophy on the part of the court but rather are the result of: 1) United States Supreme Court decisions; 2) legislative changes by the Virginia General Assembly; or 3) a deference to the trial court's discretion. While a number of states have found matters of criminal procedure an area futile for successful enlargement of federal constitutional rights,⁵⁰⁶ utilizing state constitutional provisions in combination with the adequate state ground doctrine,⁵⁰⁷ Virginia has not, preferring instead not to depart from the federal minimum guarantees.

B. Right to Counsel

The sixth amendment⁵⁰⁸ guarantees the right to counsel in all federal and state⁵⁰⁹ prosecutions that result in actual imprisonment.⁵¹⁰ An indi-

506. For an exhaustive listing of cases illustrating the California court's willingness to rely on its own constitution, see Falk, *Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 277 nn.16 & 17, 278 n.18 (1973). For a survey identifying some representative state court departures from the federal minimum guarantees of the fourth, fifth, and sixth amendments see Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather than Federal Law*, 15 AM. CRIM. L. REV. 339 (1978) [hereinafter cited as *Stepping Into the Breach*]. See also Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596 (1979).

507. "The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. . . . [I]f a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all over the decision despite the presence of federal issues." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 n.80 (1977). See *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

508. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

509. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel in a criminal felony trial applicable to the states via fourteenth amendment); VA. CODE ANN. § 19.2-157 (Cum. Supp. 1980) (duty of court to inform accused of his right to counsel).

510. See *Scott v. Illinois*, 440 U.S. 367 (1979) (no right to appointed counsel unless indigent defendant is actually deprived of liberty); *Argersinger v. Hamlin*, 407 U.S. 25 (1972)

gent, therefore, who cannot afford to retain counsel is entitled to appointed counsel.⁵¹¹ Virginia has codified this right but requires a prior statement of indigence by all persons charged with a felony⁵¹² or a non-felonious offense⁵¹³ who seek court-appointed counsel. Section 19.2-161 of the Virginia Code provides a penalty for false swearing to such a statement,⁵¹⁴ and code section 19.2-163 likewise provides that “[i]f the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as part of the costs of prosecution and, if collected, the same shall be paid to the Commonwealth, or the county, city, or town, as the case may be.”⁵¹⁵ The constitutionality of such state recoupment laws for counsel fees and expenditures paid for indigent defendants has been an issue debated at the national level.⁵¹⁶ The Virginia Supreme Court upheld Virginia’s recoupment statute in *Wicks v. City of Charlottesville*⁵¹⁷ stating that “no court has yet held that every constitutional right or privilege should be available to all persons without any cost or obligation on their part.”⁵¹⁸ In upholding the statutory scheme, the Virginia court compared two decisions by the United States Supreme Court regarding recoupment stat-

(no incarceration permitted unless defendant has been afforded right to counsel).

511. *Powell v. Alabama*, 287 U.S. 45 (1932) (sixth amendment guarantees right to appointed counsel).

512. VA. CODE ANN. § 19.2-159 (Cum. Supp. 1980) provides:

If the accused shall claim that he is indigent, and the charge against him is a felony, the court shall ascertain by oral examination of the accused and other competent evidence whether or not the accused is indigent . . . and if the court thereby determines that such accused is indigent . . . the court shall provide the accused with a statement which shall contain the following:

“I have been advised this ____ day of _____, 19____, by the (name of court) court of my right to representation by counsel in the trial of the charge pending against me; I certify that I am without means to employ counsel and I hereby request the court to appoint counsel for me” _____ (signature of accused).

The court shall execute the said statement under oath, and the said court shall appoint competent counsel to represent the accused in the proceeding against him, including an appeal, if any, until relieved or replaced by other counsel.

513. VA. CODE ANN. § 19.2-160 (Cum. Supp. 1980). The language of this section is similar to § 19.2-159 except it applies when the charge against the accused is a misdemeanor. It further provides for a waiver of the right to counsel.

514. VA. CODE ANN. § 19.2-161 (Repl. Vol. 1975).

515. VA. CODE ANN. § 19.2-163 (Cum. Supp. 1980).

516. See *Fuller v. Oregon*, 417 U.S. 40 (1974); *James v. Strange*, 407 U.S. 128, 132-33 (1972).

517. 215 Va. 274, 208 S.E.2d 752 (1974), *appeal denied*, 421 U.S. 901 (1975). The statute at issue in *Wicks* was former Code § 14.1-184.1 (currently codified at VA. CODE ANN. § 19.2-163 (Cum. Supp. 1980)).

518. *Id.* at 280, 208 S.E.2d at 757.

utes. The court noted that in *Fuller v. Oregon*,⁵¹⁹ the Oregon recoupment statute was approved because "it was designed to insure that only those who actually become capable of repaying the state will ever be obliged to do so."⁵²⁰ On the other hand, the Kansas statute at issue in *James v. Strange*⁵²¹ was disapproved by the Supreme Court because the "statute deprived an indigent defendant of the protective exceptions available to other civil judgment debtors."⁵²²

The scope of the right to counsel has been expanded by the United States Supreme Court both in terms of the proceedings to which it applies and the stages at which the right to counsel attaches. The Supreme Court has held that counsel must be available at each critical stage of the criminal proceeding⁵²³ as well as in the first appeal of right.⁵²⁴ The Virginia court itself, while recognizing this right, has chosen not to expand the right beyond the requirements articulated by the Supreme Court⁵²⁵ and has instead left that decision within the discretion of the trial court. In *Cooper v. Haas*,⁵²⁶ the Virginia court stated that it was "within the sound discretion of the trial court whether to appoint counsel to appeal the denial of the petition for habeas corpus."⁵²⁷

In *Argersinger v. Hamlin*,⁵²⁸ the United States Supreme Court extended the right to counsel to all indigent defendants accused of misdemeanors which result in a jail sentence. In *Potts v. Superintendent of Virginia State Penitentiary*⁵²⁹ the Virginia court dealt with the applica-

519. 417 U.S. 40 (1974).

520. 215 Va. at 278, 208 S.E.2d at 756.

521. 407 U.S. 128 (1972).

522. 215 Va. at 278, 208 S.E.2d at 756. In the *Strange* opinion, Mr. Justice Powell distinguished the Virginia recoupment statute from the Kansas statute: "In Virginia . . . the amount paid to court-appointed counsel is assessed only against convicted defendants as a part of costs, although the majority of state recoupment laws apply whether or not the defendant prevails." 407 U.S. at 133. Noting the "wide differences in the features of these statutes," the Court declined to issue a pronouncement on "their general validity." *Id.*

523. See, for example, notes 326-29, 347-54, 360-75 *supra* and accompanying text.

524. *Douglas v. California*, 372 U.S. 353 (1963).

525. In *Smith v. Superintendent State Penitentiary*, 214 Va. 359, 200 S.E.2d 523 (1973), the court held that the right to counsel extended to recidivism proceedings under VA. CODE ANN. § 53-296 (Repl. Vol. 1978). This holding was required by *Chewning v. Cunningham*, 368 U.S. 443 (1962), where the Supreme Court held that the rules followed concerning the appointment of counsel in other types of criminal trials were equally applicable to Virginia's recidivism proceeding. Section 53-296 has since been repealed by 1979 Va. Acts, ch. 411.

526. 210 Va. 279, 170 S.E.2d 5 (1969).

527. *Id.* at 281, 170 S.E.2d at 7.

528. 407 U.S. 25 (1972). The rule set out in *Argersinger* was further clarified in *Scott v. Illinois*, 440 U.S. 367 (1979).

529. 213 Va. 432, 192 S.E.2d 780 (1972).

tion of the rule set forth in *Argersinger* and held that it should only be applied prospectively and did not mandate retroactive application.⁵³⁰ However, *Potts* was effectively overruled by *Berry v. City of Cincinnati*,⁵³¹ where the United States Supreme Court in interpreting the effect of *Argersinger* announced that those persons convicted prior to that decision would be "entitled to the constitutional rule enunciated" therein.⁵³²

The Virginia Supreme Court faced the issue of retroactive application of *Argersinger* for a second time in *Whorley v. Commonwealth*.⁵³³ Although recognizing that *Berry* overruled their previous decision in *Potts*,⁵³⁴ the court held that *Argersinger* did not apply to the facts of the current case. In *Whorley*, the defendant on November 4, 1970, was adjudged a habitual offender under Virginia Code section 46.1-387.7⁵³⁵ resulting in the revocation of his driver's license for a period of ten years. The determination of his status of habitual offender was based in part on a conviction on September 26, 1969, for driving under the influence at which trial he had not been represented by counsel. At the time he was declared a habitual offender, November of 1970, he was further warned that any conviction for operating a motor vehicle in Virginia during this ten year period could result in a sentence of one to five years in the state penitentiary. Subsequently on January 6, 1973, Whorley operated his car without a valid license and was involved in a "hit and run accident." The trial court sentenced Whorley to one year in the penitentiary after it determined that the defendant had been previously adjudicated a habitual offender. Whorley appealed this decision to the Virginia Supreme Court arguing that his status as a habitual offender should be declared void because he had not been afforded representation by counsel during a prior conviction for drunken driving, which, as previously mentioned, had led to his being adjudicated a habitual offender.⁵³⁶ The Virginia court in affirming Whorley's conviction for one year held that *Argersinger's* retroactive effect was inapplicable here because: 1) a proceeding under Virginia's Habitual Offender Act, such as the one in which Whorley had been involved and at which he had been adjudicated a habitual offender based in part on a conviction for driving under the influence at which he was not

530. *Id.* at 433, 192 S.E.2d at 781. Potts sought to have a 1968 conviction for non-support declared void because he was denied his sixth amendment right to counsel. He was indigent at the time of trial and was not represented by counsel. *Id.*

531. 414 U.S. 29 (1973).

532. *Id.* at 29-30.

533. 215 Va. 740, 214 S.E.2d 447 (1975).

534. *Id.* at 741-42, 214 S.E.2d at 448.

535. See VA. CODE ANN. § 46.1-387.7 (Repl. Vol. 1980).

536. 215 Va. at 740-41, 214 S.E.2d at 448.

represented by counsel, is *not* a criminal proceeding; 2) a previous conviction and a habitual offender adjudication bear only indirectly on the criminal process that places such an offender in peril of imprisonment; 3) Whorley's liberty was not jeopardized by a conviction for drunk driving which led to the habitual offender status—his liberty was jeopardized as a result of his voluntary involvement in the commission of a criminal act, *i.e.*, driving an auto after being adjudged a habitual offender; 4) to set aside his prior conviction would give him a preferred position over any other "motor vehicle offender who suffered imposition of a fine only . . . [R]eason, logic and the orderly administration of justice . . . require that an uncounseled misdemeanor conviction" be distinguished from a sentence of imprisonment and be invulnerable to an *Argersinger* challenge.⁵³⁷ In reaching its decision the court approved and adopted the Fourth Circuit's⁵³⁸ holding that *Argersinger* "excises from an uncounseled misdemeanor conviction only direct or collateral consequences which relate to the loss of liberty and imprisonment. An uncounseled misdemeanor conviction, although resulting in imprisonment, is not invalid *per se*, and consequential civil disabilities are not invalid."⁵³⁹ Therefore, had Whorley been incarcerated for his original drunk driving conviction, he would have been able to challenge the sentence of imprisonment because he had not been afforded counsel as required by *Argersinger*. However, he would have been unable to attack the uncounseled misdemeanor conviction by itself.⁵⁴⁰

In *Whorley* the Virginia court pointed to the language in *Argersinger* which stated that "no person *may be imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"⁵⁴¹ (emphasis added). For the Virginia court this

537. *Id.* at 746-47, 214 S.E.2d at 450-51.

538. *Morgan v. Juvenile & Dom. Rel. Ct. Halifax Co., Va.*, 491 F.2d 456 (4th Cir. 1974); *Marston v. Oliver*, 485 F.2d 705 (4th Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *Ferguson v. Gathright*, 485 F.2d 504 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974).

539. 215 Va. at 744, 214 S.E.2d at 449.

540. In *Whorley*, the court noted that "throughout its opinion in *Argersinger* the Supreme Court . . . reiterated its intent to abrogate not the uncounseled misdemeanor conviction but the subsequent sentence of imprisonment." 215 Va. at 744-45, 214 S.E.2d at 450. The Virginia court likewise pointed to the following language in *Argersinger*: "We hold, therefore, that absent a knowing and intelligent waiver, *no person may be imprisoned for any offense*, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 215 Va. at 745, 214 S.E.2d at 450, *quoting* 407 U.S. at 37.

541. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), *cited in* 215 Va. at 745, 214 S.E.2d at 450 (emphasis supplied). *See also* *Scott v. Illinois*, 440 U.S. 367 (1979) (plurality opinion holding actual imprisonment is the line defining the constitutional right to appointment of counsel and not the potential for imprisonment).

meant the defining line was actual imprisonment; however, some sister states have nevertheless adopted the principle of providing counsel in cases where conviction *may* result in imprisonment, although apparently *Argersinger* does not require such a holding.⁵⁴² Some states have also provided such by statutory law.⁵⁴³

1. Waiver of Right to Counsel

A defendant may waive the right to counsel if made "knowingly and intelligently" but a "heavy burden" is on the state to prove that an effective waiver has occurred.⁵⁴⁴ The Supreme Court has held that the sixth amendment guarantees the right of a defendant to represent himself without counsel but such a defendant must also waive his right to appointed counsel.⁵⁴⁵ In *Green v. Commonwealth*,⁵⁴⁶ the defendant refused to discuss the case with his court-appointed attorney and was adjudged in contempt for impeding "the orderly progress of justice."⁵⁴⁷ Court-appointed counsel was relieved and the trial was continued for the appointment of a new attorney. The Virginia Supreme Court reversed and dismissed the contempt proceeding, holding that the finding of contempt was not warranted. Under the circumstances of the case, the trial court should have "ordered the trial to proceed with Green as his own counsel . . . [and directed court-appointed counsel] to sit at counsel table and to give Green such advice . . . as the reluctant client requested. Considerations of due process and right to counsel require no more."⁵⁴⁸

2. Effective Counsel

"It has long been recognized that the right to counsel is the right to effective assistance of counsel."⁵⁴⁹ The Supreme Court requires that an attorney's advice regarding guilty pleas must be "within the range of

542. *Potts v. Estelle*, 529 F.2d 450 (5th Cir. 1976).

543. *McInturf v. Horton*, 85 Wash. 2d 704, 538 P.2d 499 (1975) (although the court applied state law, the court also cited *Argersinger* as requiring the right to appointment of counsel in misdemeanor prosecutions).

544. *Brewer v. Williams*, 430 U.S. 387 (1977); *Lemke v. Commonwealth*, 218 Va. 870, 241 S.E.2d 789 (1978); *White v. Commonwealth*, 214 Va. 559, 203 S.E.2d 443 (1974).

545. *Faretta v. California*, 442 U.S. 806 (1975).

546. 211 Va. 727, 180 S.E.2d 531 (1971).

547. *Id.* at 728, 180 S.E.2d at 532. The indigent defendant was fined \$50 and sentenced to 10 days in jail.

548. *Id.* at 728, 180 S.E.2d at 533. The court noted that although the defendant's conduct was not the type to be encouraged, such conduct did not place "the court in a position of having to preserve its power or vindicate its dignity." *Id.* at 728, 180 S.E.2d at 532.

549. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

competence demanded of attorneys in criminal cases,"⁵⁵⁰ but has otherwise left the determination of effective assistance of counsel to the "good sense and discretion"⁵⁵¹ of trial courts.

Courts vary in the standard articulated. At the federal level, the First, Fifth and Ninth Circuits have defined the standard as "reasonably effective assistance."⁵⁵² The Fourth and Sixth Circuits have defined the standard as "assistance within the range of competence" while the Eighth Circuit has defined the standard as "the exercise of customary skills and diligence of a reasonably competent attorney under similar circumstances."⁵⁵³ The Seventh Circuit has defined the standard for effectiveness as "performance that meets a minimum professional standard."⁵⁵⁴ "Only the Second and Tenth Circuits still apply the traditional standard under which only conduct that shocks the court's conscience or makes a farce and mockery of justice will constitute ineffective assistance."⁵⁵⁵

Slayton v. Weinberger,⁵⁵⁶ a 1973 decision, is the most recent case in which the Virginia Supreme Court expressly articulated the standard for effective counsel. The defendant in *Slayton* had been convicted of performing an illegal abortion. This conviction was set aside, however, when the trial court granted the defendant's petition for a writ of habeas corpus on the grounds that the defendant had not been represented by competent counsel.⁵⁵⁷ In reversing the order and dismissing the writ of habeas corpus, the court articulated the traditional "farce and mockery" standard for determining effective assistance of counsel: "Ordinarily one

550. *Id.* at 771.

551. *Id.* In the Court's view, "a defendant's plea of guilty based on reasonably competent advice [was] an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." *Id.* at 770. But, the Court admonished trial courts that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases. . . ." *Id.* at 771.

552. Project, *Ninth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1978-1979*, 68 *Geo. L.J.* 279, 492 (1979).

553. *Id.*

554. *Id.* at 493.

555. *Id.*

556. 213 Va. 690, 194 S.E.2d 703 (1973).

557. *Id.* at 691, 194 S.E.2d at 704. The trial court made the following findings of fact as its basis for finding ineffective representation and awarding the writ: 1) that the attorneys appointed to represent the defendant did not interview material witnesses; 2) that one attorney never appeared at any hearing or trial; 3) that some sort of collusion was manufactured to reflect that defendant was working as an undercover agent; 4) that there was no basis for this foundation; and 5) that the foundation was manufactured with the consent and knowledge of the defendant's attorneys. *Id.*

is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial.⁵⁵⁸ The court in *Slayton* cited *Root v. Cunningham*,⁵⁵⁹ a Fourth Circuit decision, as precedent for the traditional farce and mockery standard. Since that time, however, the Fourth Circuit has expressly disavowed *Root* and the farce and mockery test.⁵⁶⁰ As previously mentioned, the Fourth Circuit now judges the effectiveness of counsel by the "assistance within range of competence" standard.⁵⁶¹ Dicta in the recent case of *Hummel v. Commonwealth*⁵⁶² indicates that the Virginia Supreme Court may have likewise departed from the traditional farce and mockery standard.⁵⁶³

The Virginia Supreme Court has refrained from establishing a presumption that late appointment of counsel gives rise to insufficient representation,⁵⁶⁴ though it has "criticiz[ed] the practice of appointing counsel on the day of trial."⁵⁶⁵ While some courts in other jurisdictions have adopted such a presumption,⁵⁶⁶ Virginia's position would seem consistent with the United States Supreme Court which refused to adopt such a presumption in *Chambers v. Maroney*.⁵⁶⁷

While incompetency of appointed counsel may be a defense to conviction in certain circumstances, where a defendant prevents appointed counsel from participating in the trial, he waives his right to claim this defense on appeal.⁵⁶⁸ Thus in *Walker v. Commonwealth*,⁵⁶⁹ counsel was appointed to represent the defendant, who subsequently asked that new counsel be appointed on the ground that he and the appointed attorney

558. *Id.* at 691, 194 S.E.2d at 704. The court held that the trial court's findings were not supported by the record and that the defendant was not prejudiced when one of his retained lawyers, as agreed, did not appear in court. *Id.* at 692-94, 194 S.E.2d at 705-06.

559. 344 F.2d 1 (4th Cir. 1965).

560. *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

561. *Id.* See note 552 *supra* and accompanying text.

562. 219 Va. 252, 247 S.E.2d 385 (1978), *cert. denied*, 440 U.S. 935 (1979).

563. "It [the Constitution] does guarantee that [the defendant] will be *adequately* represented by a competent attorney." *Id.* at 258, 247 S.E.2d at 388.

564. See *Ford v. Peyton*, 209 Va. 203, 163 S.E.2d 314 (1968); *Blowe v. Peyton*, 208 Va. 68, 155 S.E.2d 351 (1967); *Peyton v. Fields*, 207 Va. 40, 147 S.E.2d 762 (1966); *Whiteley v. Commonwealth*, 205 Va. 251, 135 S.E.2d 823 (1964).

565. *Wynn v. Peyton*, 211 Va. 515, 518, 178 S.E.2d 676, 678 (1971).

566. *Fields v. Peyton*, 375 F.2d 624 (4th Cir. 1967); *Housden v. Leverette*, 241 S.E.2d 810 (W. Va. 1978).

567. 399 U.S. 42 (1970).

568. *Walker v. Commonwealth*, 214 Va. 258, 199 S.E.2d 518 (1973).

569. *Id.*

were "incompatible." The lower court refused the request to appoint new counsel based solely on the ground of incompatibility. The defendant refused to cooperate with appointed counsel throughout the trial and was thereafter convicted and sentenced. On appeal the supreme court held that: 1) the ground of incompatibility alone was insufficient to require the appointment of new counsel; and 2) that where counsel had been appointed and the defendant refused to cooperate with the attorney effectively preventing counsel from participating in the trial, the defendant "waived his right to claim incompetency on the part of counsel at trial."⁵⁷⁰

C. *Right to a Jury Trial*

The sixth amendment guarantees that in all criminal prosecutions an accused shall have the right to trial by an impartial jury.⁵⁷¹ In *Duncan v. Louisiana*⁵⁷² the United States Supreme Court held that the sixth amendment right of trial by jury extended to trials in a state court under the due process clause of the fourteenth amendment. However, prior to *Duncan* the Virginia Supreme Court recognized the right of trial by jury based on Virginia's constitution.⁵⁷³

Regarding the right to trial by jury in a two-tiered system, the Virginia Supreme Court in *Manns v. Commonwealth*⁵⁷⁴ held that the sixth amendment guarantee of a jury trial is satisfied "by the appeal of right and trial *de novo* procedure" under Virginia law, and that the accused has no right to a jury trial in the lower tier of Virginia's "two-tier" system. In *Manns*, the court reasoned that though *Duncan* made the sixth amendment right to jury trial applicable to the states, it did not make all "federal jury trial standards" applicable to the states. Citing two recent United States Supreme Court cases⁵⁷⁵ approving state jury standards different from those required in federal courts, the *Manns* court concluded that the rule set down by the Supreme Court in *Callan v. Wilson*,⁵⁷⁶ providing for a right

570. *Id.* at 259, 199 S.E.2d at 519.

571. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .").

572. 391 U.S. 145 (1968).

573. VA. CONST. of 1902, § 8 (current version at art. I, § 8 (1971)). See *Gaskill v. Commonwealth*, 206 Va. 486, 144 S.E.2d 293 (1965).

574. 213 Va. 322, 191 S.E.2d 810 (1972).

575. *Apodaca v. Oregon*, 406 U.S. 404 (1972) (conviction in state court on 10 votes of 12-member jury satisfies sixth amendment right to jury trial); *Williams v. Florida*, 399 U.S. 78 (1970) (jury of six within state court satisfies requirements of sixth amendment).

576. 127 U.S. 540 (1888) (jury right established at both stages of two-tier court system in District of Columbia).

to a jury in the first level of a two-tier court system, was a federal standard and not applicable to state courts.⁵⁷⁷ While the court's holding in *Manns* drew criticism,⁵⁷⁸ the United States Supreme Court has since held under similar facts that the accused is not deprived of his fourteenth amendment right to jury trial.⁵⁷⁹

While the availability and form of jury trials vary from state to state,⁵⁸⁰ Virginia courts are constitutionally mandated to convict a person only after the unanimous consent of the jury.⁵⁸¹ It is interesting to note that this is a higher standard than that adopted by the United States Supreme Court in *Apodaca v. Oregon*,⁵⁸² which provides that the sixth amendment does not require a unanimous jury.⁵⁸³

1. Waiver of Right to a Jury Trial

The right to jury trial may be waived⁵⁸⁴ but the waiver must be express and intelligent.⁵⁸⁵ A growing number of jurisdictions provide that the judge, through discussion with the defendant, must satisfy himself that the defendant's waiver is made knowingly and voluntarily.⁵⁸⁶ Virginia's Supreme Court has not, yet, set such procedures for the trial courts, but Virginia's constitution⁵⁸⁷ and statutes⁵⁸⁸ do provide that the waiver must

577. *Manns v. Commonwealth*, 213 Va. at 324, 191 S.E.2d at 811.

578. Note, *Criminal Procedure, Eighteenth Annual Survey of Developments in Virginia Law: 1972-1973*, 59 VA. L. REV. 1400, 1509-10 (1973). A division of opinion also existed among state courts concerning the validity of denying a jury in the initial stage of the two-tier procedure. Compare *State v. Holliday*, 109 R.I. 93, 280 A.2d 333 (1971) with *Manns v. Commonwealth*, 213 Va. 322, 191 S.E.2d 810 (1972).

579. *Ludwig v. Massachusetts*, 427 U.S. 618 (1976) (Massachusetts' two-tier court system, under which person accused of certain crime is first tried in the lower tier, where no trial by jury is available, and is, thereafter, entitled to trial *de novo* by jury in the second tier, does not deprive accused of fourteenth amendment right to a jury trial).

580. Note, *Stepping into the Breach*, *supra* note 506, at 378.

581. VA. CONST., art. I, § 8 ("That in criminal prosecutions a man hath a right to . . . an impartial jury . . . without whose unanimous consent he cannot be found guilty.").

582. 406 U.S. 404 (1972).

583. *Id.* at 410-12 (conviction on 10 votes of 12-member jury satisfies sixth amendment right to jury trial).

584. *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968).

585. *Patton v. United States*, 281 U.S. 276, 312 (1930). Under Rule 23(a) of the *Federal Rules of Criminal Procedure*, waiver of the right to jury trial must be in writing, consented to by the government, and approved by the court. FED. R. CRIM. P. 23(a).

586. See *Clummei v. Commonwealth*, 1979 Mass. Adv. Sh. 1838, as cited in Goldsmith & Ryan, *A Survey of Court Approved Procedures Designed to Secure the Accused's Right to a Fair Trial*, 65 MASS. L. REV. 7, 16 (1980).

587. VA. CONST., art. I, § 8 provides:

If the accused plead not guilty, he may, with his consent and the concurrence of the

be consented to by the judge and the Commonwealth's Attorney. Therefore, a defendant does not have an unqualified right to a nonjury trial. If a judge believes that a particular case is especially suited to a jury trial, he can deny the defendant's request to have the court try the case, thereby subjecting the defendant to jury sentencing in the event he is found guilty.

Neither Virginia's constitution nor its statutes state whether the accused can withdraw his waiver of a jury trial. Generally, in other states withdrawal of the defendant's waiver of a jury trial is within the discretion of the trial court.⁵⁸⁹ The rule often followed is that "if an accused's application for withdrawal of waiver is made in due season so as not to substantially delay or impede the cause of justice, the trial court should allow the waiver to be withdrawn."⁵⁹⁰ Despite the lack of constitutional or statutory authority, the Virginia Supreme Court has likewise applied this rule and held that the "trial judge abused his judicial discretion in denying the defendant [who made a motion to withdraw his waiver eleven days before the trial] the right to withdraw his waiver of a jury trial."⁵⁹¹

The Virginia Supreme Court during the past decade also had occasion to deal with the collateral issue of whether a defendant at a new trial on the issue of punishment alone was entitled to have a jury determine his sentence where the defendant had waived his right to a jury at the original trial. The court held in *Fogg v. Commonwealth*⁵⁹² that while there was

Commonwealth's Attorney and of the court entered of record, be tried by a smaller number of jurors, or waive a jury. In the case of such waiver or plea of guilty, the court shall try the case.

This section vests in the trial court discretion to determine whether to accept a waiver of jury trial. *McClung v. Weatherholtz*, 351 F. Supp. 5 (W.D. Va. 1972) (judge imposed jury trial).

588. VA. CODE ANN. § 19.2-257 (Repl. Vol. 1975) ("[In a felony case] if the accused plead not guilty, with his consent after being advised by counsel and the concurrence of the attorney for the Commonwealth and of the court entered of record, the court shall hear and determine the case without the intervention of a jury."); VA. CODE ANN. § 19.2-258 (Repl. Vol. 1975) (The language of this section is identical to the wording above except that it applies in cases of a misdemeanor).

589. See *Wadlington v. State*, 164 Ind. App. 255, 328 N.E.2d 458 (1975); *State v. Daigle*, 220 Kan. 639, 556 P.2d 400 (1976); 47 AM. JUR. 2d *Jury* § 70 (1969).

590. 47 AM. JUR. 2d *Jury*, at 687. See also *People v. Melton*, 125 Cal. App. 2d Supp. 901, 271 P.2d 962 (1954); *Butler v. State*, 97 Ga. 404, 23 S.E. 822 (1896).

591. *Thomas v. Commonwealth*, 218 Va. 553, 556, 238 S.E.2d 834, 836 (1977) (J. Compton dissented stating that such discretion should be undisturbed since it is not clearly an abuse of discretion).

592. 215 Va. 164, 207 S.E.2d 847 (1974). The court cited *Williams v. New York*, 337 U.S. 241 (1949) which held that nothing in the Constitution of the United States gave the defendant the right to have his punishment fixed by a jury. The court distinguished *Huggins v.*

a constitutional right to have a jury determine the guilt or innocence of the accused, there was no corresponding constitutional right, either under the Virginia constitution or the federal constitution to a jury trial limited to the issue of punishment. Thus, where a defendant voluntarily, knowingly, and intelligently waives his right to a jury trial at his original trial, and a higher court subsequently overturns only that portion of the decision relating to punishment, a new trial on the issue of punishment alone is in effect a continuation of the original trial, and the defendant is not entitled to a jury trial on that issue.⁵⁹³

D. Jury Selection

Virginia's constitution guarantees to an accused a trial by an impartial jury of his vicinage,⁵⁹⁴ one which is free from prejudice either for or against him.⁵⁹⁵ The United States Supreme Court has refined this definition indicating that an impartial jury is "a jury drawn from a fair cross section of the community;"⁵⁹⁶ the selection system may not systematically exclude any distinctive groups present therein.⁵⁹⁷ This is not to say, however, that the "juries actually chosen must mirror the community and reflect various distinctive groups in the population."⁵⁹⁸ The Supreme Court, likewise, has held that the sixth amendment (and correspondingly the fourteenth amendment) provides a defendant with standing to object to

Commonwealth, 213 Va. 327, 191 S.E.2d 734 (1972), *Hodges v. Commonwealth*, 213 Va. 316, 191 S.E.2d 794 (1972) and *Snider v. Cox*, 212 Va. 13, 181 S.E.2d 617 (1971) where a jury trial was held on punishment alone. In those cases, however, the defendants did not waive a jury on the original trial as defendant Fogg had.

593. *Id.* at 167, 207 S.E.2d at 850.

594. VA. CONST., art. I, § 8. The word "vicinage" as used in the Constitution, "corresponds with the territorial jurisdiction of the court in which the venue of the crime is laid." *Karnes v. Commonwealth*, 125 Va. 758, 762, 99 S.E. 562, 563 (1919).

595. *Breeden v. Commonwealth*, 217 Va. 297, 227 S.E.2d 734 (1976) (The court reiterated that the "constitutional guarantee is reinforced by legislative mandate and by the rules of this Court; veniremen must 'stand indifferent in the cause.'") *Id.* at 298, 227 S.E.2d at 735. *See also Poindexter v. Commonwealth*, 218 Va. 314, 237 S.E.2d 139 (1977) (The court held that the trial court did not err in granting the Commonwealth's motion to change venue from Louisa County because the affidavits introduced by the Commonwealth concluded that a fair and impartial trial was not possible in Louisa County. A change of venue is a matter within the sound discretion of the court).

596. *See Taylor v. Louisiana*, 419 U.S. 522 (1975) (system that operates to exclude women from jury duty does not provide fair cross section of community and hence violates sixth amendment).

597. *Id.* at 530-31.

598. *Id.* at 538 (defendant not entitled to jury of any particular composition). *Accord, Brown v. Commonwealth*, 212 Va. 515, 184 S.E.2d 786 (1971), *vacated on other grounds*, 408 U.S. 940 (1972) (defendant who is black is not constitutionally entitled to have members of his race on the jury which tried him); *Swain v. Alabama*, 380 U.S. 202 (1965).

the exclusion of a distinctive group from jury selection even if the defendant is not a member of that group and cannot demonstrate any actual prejudice resulting from exclusion.⁵⁹⁹ *Peters v. Kiff*,⁶⁰⁰ the first of several United States Supreme Court cases concerning standing to object to jury selection, held that "whatever his race, a criminal defendant has standing to challenge the system used to select his . . . jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law."⁶⁰¹ The Virginia Supreme Court, in dicta, "construe[d] that decision to be limited to cases involving discriminatory racial exclusion in the jury selection process."⁶⁰² However, this narrow reading was later refuted in *Taylor v. Louisiana*⁶⁰³ when the Supreme Court cited *Peters v. Kiff* as standing for the rule that a defendant has standing to object to the exclusion of any distinctive group from jury selection.

The Virginia Supreme Court has strictly and consistently interpreted the right of an accused to an "impartial jury,"⁶⁰⁴ a right guaranteed in the Virginia constitution⁶⁰⁵ and reinforced by legislative mandate⁶⁰⁶ as well as

599. See *Duren v. Missouri*, 439 U.S. 357, 359 n.1 (1979) (men have standing re exclusion of women); *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975) (men have standing to object to jury selection system excluding women); *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (any criminal defendant, regardless of race, may challenge the exclusion of any race in jury selection system though no prejudice be shown). *But cf.* *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977) (when challenge to jury selection system based on equal protection grounds, defendant must belong to the underrepresented group).

600. 407 U.S. 493 (1972) (plurality opinion).

601. *Id.* at 504 (The defendant was white. Case was remanded to hear the merits as to whether blacks were systematically excluded from jury selection.).

602. *Quick v. Harris*, 214 Va. 632, 634, 202 S.E.2d 869, 871 (1974), *cert. denied*, 420 U.S. 907 (1975) (the court held that the rule in *Peters v. Kiff* should not be retroactively applied).

603. 419 U.S. 522 (1975) (emphasis added).

604. *Salina v. Commonwealth*, 217 Va. 92, 225 S.E.2d 199 (1976) (A stockholder in a corporation is not only incompetent to act as a juror in a case where the corporation is a party, he is likewise incompetent to serve where the corporation has a direct pecuniary interest in the controversy.). The holding by the court in *Salina* is consistent with the rule generally recognized. 47 AM. JUR. 2d *Jury*, § 325 (1969). See also *Farrar v. Commonwealth*, 201 Va. 5, 109 S.E.2d 112 (1959) (Defendant requested a separate trial and jury from another defendant. The court held it was prejudicial error to overrule the defendant's pre-trial motion to exclude from the venire eight jurors who were on the venire called in the case against the other defendant.).

605. VA. CONST. art. I, § 8.

606. VA. CODE ANN. § 8.01-357 (Repl. Vol. 1977) assures defendant right to an impartial jury drawn from "a panel [of twenty] free from exceptions."; VA. CODE ANN. § 8.01-358 (Repl. Vol. 1977) "[I]f it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn . . . in his stead for the trial."

rules of court.⁶⁰⁷ The defendant is assured a right to an impartial trial drawn from a "panel [of twenty] free from exceptions"⁶⁰⁸ and it is prejudicial error for the trial court to force a defendant to use the preemptory strike⁶⁰⁹ to exclude a venireman who is not free from exception.⁶¹⁰ Generally the question of whether or not a venireman should be excluded for cause⁶¹¹ is within the sound discretion of the court,⁶¹² but where appropriate that discretionary judgment will be reversed. Thus in *Breeden v. Commonwealth*,⁶¹³ the Virginia court held that a prospective juror should have been struck from the jury panel before the Commonwealth's Attorney and defense counsel were allowed their preemptory strike, because she stated that the defense counsel would "have to prove to [her] that [the defendant] was innocent."⁶¹⁴ The fact that she was later removed from the jury panel by preemptory strike did not make the trial judge's initial failure to remove her harmless error. The court indicated that jurors need not be totally ignorant of the facts,⁶¹⁵ but any reasonable doubt that a venireman does not "stand indifferent in the cause" must be resolved in favor of the accused.⁶¹⁶

Selection of an impartial jury in a trial involving an ethnic or minority defendant often raises the spectre of racial prejudice and the question of whether the defendant has the right to ask prospective jurors about their personal stance on racial differences. In *Lewis v. Commonwealth*,⁶¹⁷ the Virginia Supreme Court held that a black defendant accused of violent crimes against a white security guard was not entitled to include specific questions about racial prejudice during voir dire absent a showing that

607. VA. SUP. CT. R. 3A: 20(b) "The court, on its own motion or following a challenge for cause, may excuse a prospective juror if it appears he is not qualified, and another shall be drawn or called and placed in his stead for the trial of that case."

608. See note 91 *supra*.

609. For law concerning preemptory strike see, VA. CODE ANN. § 19.2-262(3), (4) (Cum. Supp. 1980); VA. SUP. CT. R. 3A:20(c).

610. *Breeden v. Commonwealth*, 217 Va. 297, 227 S.E.2d 734 (1976) as cited in *Justus v. Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980).

611. VA. SUP. CT. R. 3A:20(b).

612. *Slade v. Commonwealth*, 155 Va. 1099, 1106, 156 S.E. 388, 391 (1931), cited in *Wayne v. Commonwealth*, 219 Va. 683, 690, 251 S.E.2d 202, 206 (1979), cert. denied, 442 U.S. 924 (1979) (judge would not eliminate juror because he was poorly educated).

613. 217 Va. 297, 227 S.E.2d 734 (1976).

614. *Id.* at 300, 227 S.E.2d at 736.

615. *Id.* The court was not concerned that the venirewoman had read newspaper accounts on the case to be tried but whether she was able to view the case with an impartial state of mind.

616. *Id.* at 298, 227 S.E.2d at 735 (quoting VA. CODE ANN. § 8-208.28 (Cum. Supp. 1976), as amended by VA. CODE ANN. § 8.01-358 (Repl. Vol. 1977)).

617. 218 Va. 31, 235 S.E.2d 320 (1977).

there was "any likelihood [that] racial prejudice might affect" the trial.⁶¹⁸ The court relied on the United States Supreme Court case of *Ristaino v. Ross*⁶¹⁹ which upheld a position similar to that taken by the court in *Lewis*. Despite this stance taken by the Supreme Court, many state courts have held that it is necessary, or at least proper, for the prospective jurors to be questioned with respect to racial prejudice⁶²⁰ recognizing among other reasons that the courts should not "sweep under the rug" the reality that certain persons are prejudiced against blacks.⁶²¹ Other states, while allowing general inquiries into racial prejudice, have held that where the prospective juror gives a negative answer to such an inquiry it is unnecessary to call further attention to the defendant's race by asking subsequent questions dealing specifically with racial prejudice.⁶²²

Capital cases present another unique issue involving whether a juror may be excluded for his personal views on the death penalty. Applying the rule set forth by the United States Supreme Court in *Witherspoon v. Illinois*,⁶²³ the Virginia Supreme Court has held that "[v]eniremen may not constitutionally be excluded for cause 'simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'"⁶²⁴ Irrevocable commitment, however, to vote against the death penalty is a prerequisite to exclusion.⁶²⁵ In cases where a new trial has been granted for failure of the trial court to exclude veniremen who "absolutely" objected to the death penalty, the trial is limited to the question of punishment. Punishment is determined by a jury if the jury was not waived in the original trial.⁶²⁶

618. *Lewis v. Commonwealth*, 218 Va. 31, 36, 235 S.E.2d 320, 323 (1977) (citing *Ristaino v. Ross*, 424 U.S. 589 (1976)). The *Lewis* court noted that the defendant was unable to point to racial factors such as existed in *Ham v. South Carolina*, 409 U.S. 524 (1973) where the defendant thought the police were "out to get him" for his civil rights activities.

619. 424 U.S. 589 (1976); see note 618 *supra*.

620. See *Commonwealth v. Core*, 370 Mass. 369, 348 N.E.2d 777 (1976) (court stated its preference that judges conduct a special examination of prospective jurors in any case which involves inter-racial violence). See also *Matthews v. State*, 276 A.2d 265 (Del. Sup. 1971); *Mize v. State*, 131 Ga. App. 538, 206 S.E.2d 530 (1974); *Commonwealth v. Foster*, 221 Pa. Super. 426, 293 A.2d 94 (1972); see generally Annot., 94 A.L.R.3d 15 (1979).

621. *Commonwealth v. Foster*, 221 Pa. Super. 426, 293 A.2d 94, 95-96 (1972).

622. *State v. Young*, 238 S.C. 115, 119 S.E.2d 504 (1961), *cert. denied*, 368 U.S. 868 (1961).

623. 391 U.S. 510 (1968).

624. *Smith v. Commonwealth*, 219 Va. 455, 463, 248 S.E.2d 135, 140 (1978), *cert. denied*, 441 U.S. 967 (1979).

625. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979); *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979); *Lewis v. Commonwealth*, 218 Va. 31, 235 S.E.2d 320 (1977).

626. *Snider v. Cox*, 212 Va. 13, 181 S.E.2d 617 (1971). *But cf. Fogg v. Commonwealth*, 215

The Virginia Supreme Court rejected the contention that a judge must *only* ask whether any venireman's scruples to capital punishment were such that they would refuse to vote for imposition of the death penalty.⁶²⁷ The defendant in *Brown v. Commonwealth*⁶²⁸ asserted that in first asking whether there were any veniremen who had scruples about, or were opposed to, the imposition of capital punishment, the trial judge allowed the Commonwealth's Attorney to identify and then dismiss by peremptory challenge veniremen with only slight objections to the death penalty. The court focused on defendant's allegation that the prosecution had used the information uncovered by the preliminary questioning in determining when to exercise its peremptory challenges. Relying upon language in the United States Supreme Court case of *Swain v. Alabama*,⁶²⁹ the Virginia court held that the burden would fall heavily on the defendant to show prejudicial error before the court would inquire into the prosecutor's motives for use of its peremptory challenges.⁶³⁰ The *Brown* decision is important as an interpretation of the purpose of the peremptory challenge system. Giving each side an equal number of arbitrary challenges tends to produce a jury acceptable to both; permitting numerous inquiries into the motives behind the challenges would seriously threaten the practical value of this system.⁶³¹

E. Control of Jury

Although adverse pretrial and trial publicity may deny a defendant his right to trial by an impartial jury, the jury's exposure to publicity does not presumptively deprive a defendant of this right.⁶³² When the possibility of prejudicial publicity exists, the trial judge has the affirmative duty to ascertain its extent and effect and to remedy the situation. To counter-

Va. 164, 207 S.E.2d 847 (1974) (jury trial was denied in trial on punishment only because defendant had waived the right to jury in the original trial).

627. *Brown v. Commonwealth*, 212 Va. 515, 184 S.E.2d 786 (1972), *vacated on other grounds*, 408 U.S. 940 (1972).

628. *Id.*

629. 380 U.S. 202 (1965) (Constitution does not require examination of prosecutor's reason for exercising peremptory challenges to strike all blacks from jury panel); *cf.* *United States v. Durham*, 587 F.2d 799, 801 (5th Cir. 1979) (although prosecution used peremptory challenges to strike all blacks from particular jury, conviction affirmed because defendant made no showing of systematic exclusion of blacks from jury service).

630. 212 Va. at 518, 184 S.E.2d at 788.

631. Note, *Criminal Procedure, Seventeenth Annual Survey of Developments in Virginia Law: 1971-1972*, 58 VA. L. REV. 1158, 1233 (1972).

632. *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (determination that defendant's trial fundamentally unfair based on totality of circumstances rather than presumption that jury's exposure to publicity denies due process).

act any adverse publicity the trial judge, within his discretion, may grant a change of venue in order to ensure a fair and impartial trial.⁶³³ Only where the record clearly shows an abuse of discretion will the court's ruling on the motion for change of venue be reversed.⁶³⁴

"[J]urors . . . may not, during the trial, properly read newspaper stories or listen to media reports discussing the proceedings."⁶³⁵ However, "[w]here there is no substantial reason to fear prejudice, a trial court is not required to question jurors concerning their possible exposure to information outside the courtroom."⁶³⁶ "In the absence of some showing of juror exposure to prejudicial information, it will be presumed that the jury followed instructions to avoid such exposure."⁶³⁷ However, "upon a showing that such jurors have read or heard news accounts of the proceedings, the test to be used by the trial court in determining if a mistrial or a new trial should be ordered is whether under the circumstances there has been interference with a fair trial."⁶³⁸ "[W]hether such media information brought to the jury's attention results in prejudice to the defendant rests in the sound discretion of the trial court."⁶³⁹ Thus, in *Thompson v. Commonwealth*,⁶⁴⁰ the Virginia Supreme Court upheld the trial court's finding of no prejudice where jurors had read a newspaper article during the trial. The court felt the "jury learned no material new facts on the subject from the newspaper article."⁶⁴¹ By making such a finding, the court found it "unnecessary . . . to set forth a procedure to be followed in a situation where prejudicial publicity is involved."⁶⁴² Before stating its conclusion, the court did note that the Fourth Circuit required private questioning of each juror exposed to the prejudicial publicity.⁶⁴³ It should

633. *Newcomer v. Commonwealth*, 220 Va. 64, 255 S.E.2d 485 (1979); *Poindexter v. Commonwealth*, 218 Va. 314, 237 S.E.2d 139 (1977); VA. CODE ANN. § 19.2-251 (Repl. Vol. 1975).

634. *Newcomer v. Commonwealth*, 220 Va. 64, 255 S.E.2d 487 (1979).

635. *Thompson v. Commonwealth*, 219 Va. 498, 500, 247 S.E.2d 707, 708 (1978).

636. *Waye v. Commonwealth*, 219 Va. 683, 701, 251 S.E.2d 202, 213 (1979) *citing* *United States v. Hankish*, 502 F.2d 71, 77 (4th Cir. 1974).

637. *Id.* at 701, 251 S.E.2d at 213 *citing* *United States v. Pomponio*, 517 F.2d 460, 463 (4th Cir. 1975), *cert. denied*, 423 U.S. 1015 (1975).

638. 219 Va. at 500, 247 S.E.2d at 708; *see* *Annot.*, 31 A.L.R.2d 417, 420-21 (1953).

639. 219 Va. at 500, 247 S.E.2d at 708 *citing* *Marshall v. United States*, 360 U.S. 310, 312 (1959); *see* *Asbury v. Commonwealth*, 211 Va. 101, 106, 175 S.E.2d 239, 242 (1970).

640. 219 Va. 498, 247 S.E.2d 707 (1978).

641. *Id.* at 505-06, 247 S.E.2d at 710-11. The additional information obtained by the jury from the newspaper article included (1) the punishment imposed on defendant for an earlier felony, (2) the fact that he was on unsupervised probation at the time of the crime, and, (3) disclosure that the defendant and the victim were engaged in an argument. *Id.* at 506, 247 S.E.2d at 711.

642. *Id.* at 505, 247 S.E.2d at 710.

643. *United States v. Hankish*, 502 F.2d 71 (1974), *cited in* *Thompson v. Commonwealth*,

also be noted that the court in *Thompson* has been criticized for judging the information non-prejudicial without engaging in the approved procedure for determining prejudice.⁶⁴⁴ By skipping this procedural step, the court may have overlooked the actual impact of the article.⁶⁴⁵

Many courts have adopted procedures for questioning jurors where prejudicial publicity is involved.⁶⁴⁶ There is general agreement, however, that inquiry of any sort need only be undertaken where the court finds that the outside publicity read or seen by the jurors is in fact prejudicial.⁶⁴⁷ Virginia, while following this view,⁶⁴⁸ has failed to establish a standard for determining what is prejudicial, instead leaving such a decision to the discretion of the trial court on a case-by-case basis.⁶⁴⁹ Other states, however, have adopted a standard for determining prejudicial material by distinguishing between publicity which reports fairly and accurately on what took place in the courtroom in front of the jury as opposed to publicity which deals with matters not brought to the jury's attention in open court.⁶⁵⁰

219 Va. at 504, 247 S.E.2d at 710. It should be noted that the ABA's *Standards Relating to Fair Trial and Free Press* go even further and require "a juror who has seen or heard reports of potentially prejudicial material [to] be excused if the material in question would furnish grounds for a mistrial if referred to in the trial itself." ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.5(f) (1968).

644. Note, *Criminal Procedure, Twenty-Fourth Annual Survey of Developments in Virginia Law, 1978-1979*, 66 VA. L. REV. 167, 267 (1980).

645. *Id.*

646. See *United States v. Perrotta*, 553 F.2d 249-50 (1st Cir. 1977); *Commonwealth v. Jackson*, — Mass. —, 1978 Mass. Adv. Sh. at 3076.

647. *United States v. Hankish*, 502 F.2d 71, 77 (1974) (The court cited the following cases which recognized that the trial judges did not have to question jurors unless there was substantial reason to fear prejudice: *Gordon v. United States*, 438 F.2d 858 (5th Cir.), *cert. denied*, 404 U.S. 828 (1971); *United States v. Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), *cert. denied*, 386 U.S. 919 (1967)).

648. See note 637 *supra* and accompanying text.

649. See note 639 *supra* and accompanying text.

650. Compare *Martin v. United States*, 528 F.2d 1157 (4th Cir. 1975) (newspaper article not prejudicial where information contained in it was already brought to the attention of the jury at trial) and *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976) with *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968). See also *Marshall v. United States*, 360 U.S. 310, 312 (1959).

Closely akin to the issue of jury contamination is the right to a public trial guaranteed under the U.S. CONST. amend. V and the VA. CONST. art. I, § 8. For various views as to who holds this right compare *Richmond Newspapers v. Virginia*, 100 S. Ct. 2814 (1980) (right to attend criminal trial is implicit in guarantees of first amendment) with *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (members of the public do not have an enforceable right to a public trial that can be asserted independently of the parties). See also *Cumbee v. Commonwealth*, 219 Va. 1132, 254 S.E.2d 112 (1979) (act of clearing the courtroom violated defendant's constitutional right to a public trial).

F. Self-Incrimination

The Constitution of Virginia states that a person shall not be "compelled in any criminal proceeding to give evidence against himself."⁶⁵¹ The privilege is applicable in criminal proceedings as well as civil proceedings which might expose that person to a criminal prosecution.⁶⁵² The accused in a criminal case cannot be compelled to take the stand. If the accused does not take the stand, no comment may be made by the prosecution which will call attention to this fact.⁶⁵³ Indirect references, however, such as a prosecutor's comment that there is "no explanation" of certain aspects of the case, may be permissible.⁶⁵⁴ The circumstances of the particular case and the language used will determine the objectionability of such a statement to be determined on the basis of whether the jury would naturally take it to be a comment on the failure of the accused to testify.⁶⁵⁵

Related to the issue of commenting on the defendant's failure to take the stand in a criminal proceeding is the collateral issue of what steps may or should be taken to correct the situation where such a statement has been made. The steps needed to rectify such a situation appear to depend on who made the statements. If the judge comments improperly on the defendant's failure to testify, the Virginia Supreme Court has held that immediately advising the jury that the defendant has the right not to testify may be sufficient to overcome any prejudicial effect of the statement.⁶⁵⁶ If, however, the prosecution makes remarks in violation of the defendant's right to remain silent, the question is whether a mere instruction to the jury will correct the prejudicial nature and effect of such a comment and whether such an instruction should be given over the defendant's objection to its being given. In *Hines v. Commonwealth*⁶⁵⁷ the

651. VA. CONST. art. I, § 8. The Virginia provision parallels a similar provision of U.S. CONST. amend. V.

652. Despite the apparent limitation to criminal trials, the privilege against self-incrimination has long been construed to apply to any proceeding, civil or criminal, which might expose that person to a criminal prosecution. *Cullen v. Commonwealth*, 65 Va. (24 Gratt.) 624, 628 (1873).

653. VA. CODE ANN. § 19.2-268 (Repl. Vol. 1975) ("[F]ailure to testify shall create no presumption against him [defendant], nor be the subject of any comment before the court or jury by the prosecuting attorney."). See also *Griffin v. California*, 380 U.S. 609 (1965) which held that "the Fifth Amendment . . . [and] its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615.

654. *Hines v. Commonwealth*, 217 Va. 905, 907, 234 S.E.2d 262, 263-64 (1977).

655. *Id.*

656. *Johnson v. Commonwealth*, 212 Va. 579, 186 S.E.2d 53 (1972).

657. 217 Va. 905, 234 S.E.2d 262 (1977).

Virginia Supreme Court held that a trial court did not commit reversible error by instructing the jury, over the defendant's objection, that the defendant's failure to testify at trial could not be used as a basis for presuming guilt.⁶⁵⁸ The defendant argued "that when the court voluntarily gave such an instruction, it magnified appellant's [Hines'] failure to testify and raised certain adverse inferences in the minds of the jurors which would not otherwise have occurred."⁶⁵⁹ Recognizing the division of authority⁶⁶⁰ which exists on whether such an instruction should be given over the defendant's objection, the Virginia Supreme Court, consistent with its philosophy of deferring to the discretion of the trial court, stated that "[w]hile the better practice is that it not be given over defendant's objection, there will be cases in which a cautionary instruction may be given by a court in the exercise of its sound discretion . . . where no prejudice will result."⁶⁶¹ Such a holding leaves open the questions of (1) what are the proper occasions for giving such an instruction over the defendant's objections, and (2) what constitutes prejudice to the defendant resulting from the instruction. It would seem to be the better alternative to leave the decision to the defendant, since failure to give a cautionary instruction can harm only him.

A comment on the failure to testify may, however, be proper under the "invited error" doctrine, where the accused or the accused's counsel has first called the jury's attention to the matter.⁶⁶² In *Lincoln v. Commonwealth*,⁶⁶³ defendant's counsel, in his summation, represented to the jury that the defendant did not testify because "we don't feel that you gentleman of the jury are going to convict this man based on the evidence of two convicted felons" and because "*we didn't think it was necessary in*

658. Because the defendant objected to a statement made by the prosecutor, and because the jury might possibly have construed the argument of the prosecuting attorney as a reference to the failure of the accused to testify, the court gave the cautionary instruction. *Id.* at 907, 234 S.E.2d at 264.

659. *Id.* at 908, 234 S.E.2d at 264.

660. 217 Va. at 909-10, 234 S.E.2d at 264-65. The court cited the following cases which held that in a joint trial, a court must give the instruction to a jury upon request of one codefendant, even where other codefendants may object. *United States v. Epperson*, 485 F.2d 514 (9th Cir. 1973); *United States v. Schroeder*, 433 F.2d 846 (8th Cir. 1970), *cert. denied*, 401 U.S. 943 (1971); *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). Cases holding that it is not erroneous to give the instruction over the defendant's objections, even when there are no codefendants requesting it, include *United States v. Williams*, 172 U.S. App. D.C. 290, 521 F.2d 950 (1975); *United States v. Bailey*, 526 F.2d 139 (7th Cir. 1975).

661. 271 Va. at 911, 234 S.E.2d at 266.

662. *Lincoln v. Commonwealth*, 217 Va. 370, 228 S.E.2d 688 (1976).

663. *Id.*

*this case.*⁶⁶⁴ By so doing, the defense invited the prosecution's response, which did not go beyond meeting the argument advanced by the defense.

While the accused who knowingly and willingly⁶⁶⁵ takes the stand waives the right against self-incrimination,⁶⁶⁶ one who takes the stand in the absence of the jury to testify as to such collateral matters as venue or the admissibility of a confession does not waive the privilege.⁶⁶⁷ However, where a witness has waived the privilege by testifying at a trial, that testimony may be introduced at a second trial involving the same issue.⁶⁶⁸

By voluntarily taking the stand the accused opens himself up to attempts by the prosecutor to impeach his testimony.⁶⁶⁹ The prosecutor may ask a defendant who testifies in a criminal proceeding the number of times he has been convicted of a felony but not the names of the felonies other than perjury, nor the nature or details thereof.⁶⁷⁰ In this situation, a defendant in a criminal trial who has been convicted of one or more felonies is not subject to as comprehensive cross-examination as non-defendant witnesses since witnesses other than the accused may be questioned on the number and nature, but not the details, of any felony convictions.⁶⁷¹ This is an exception to the statutory language which states that an accused who testifies "shall be subject to cross-examination as any other witness."⁶⁷²

Unlike criminal defendants, other witnesses cannot avoid taking the

664. *Id.* at 371-72, 228 S.E.2d at 690 (court's emphasis).

665. *Powell v. Commonwealth*, 167 Va. 558, 189 S.E. 433 (1937).

666. VA. CODE ANN. § 19.2-268 (Repl. Vol. 1975). *See Reid v. Commonwealth*, 213 Va. 790, 195 S.E.2d 866 (1973).

667. *Washington v. Commonwealth*, 214 Va. 737, 204 S.E.2d 266 (1974). *See also C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA* § 69 at 147 (1977).

668. C. FRIEND, *supra* note 667, § 69 at 147.

669. "The right to cross-examine implies the right to impeach the credibility of the accused under the same rules applicable to any other witness." *Carson v. Commonwealth*, 188 Va. 398, 407, 49 S.E.2d 704, 708 (1948). *But see* note 671 *infra* and accompanying text.

670. *Sadoski v. Commonwealth*, 219 Va. 1069, 1071, 254 S.E.2d 100, 101 (1979). The holding in *Sadoski* is consistent with *Harmon v. Commonwealth*, 212 Va. 442, 185 S.E.2d 48 (1971). *Harmon*, however, overruled *Hicks v. Commonwealth*, 157 Va. 939, 161 S.E. 919 (1932) insofar as *Hicks* permitted the Commonwealth to identify the felony of which the accused previously had been convicted.

Courts in other jurisdictions have also permitted a defendant who is testifying to be asked the number of his felony convictions. *See State v. Hall*, 233 Iowa 1268, 11 N.W.2d 481 (1943); *State v. Midell*, 39 Wis. 2d 733, 159 N.W.2d 614 (1968).

671. *Hummel v. Commonwealth*, 217 Va. 548, 550, 231 S.E.2d 216, 217 (1977), *cert. denied*, 440 U.S. 935 (1979).

672. VA. CODE ANN. § 19.2-268 (Repl. Vol. 1975).

stand by asserting the privilege.⁶⁷³ However, having taken the stand, witnesses have a right to refuse to answer particular questions that call for incriminating statements.⁶⁷⁴ If the witness does elect to answer the question, the privilege is waived as to the details of the events he relates but the privilege is not waived as to collateral criminal activity.⁶⁷⁵

Generally, "where the witness can be offered complete immunity from prosecution for a crime, that witness cannot assert the privilege against self-incrimination in order to avoid testifying about that crime."⁶⁷⁶ However, "the restrictions on the application of this principle are exceedingly stringent and rigidly enforced because of the great value placed by our law upon the privilege against self-incrimination."⁶⁷⁷

G. Sentencing, Probation and Parole

Virginia has traditionally been considered a jury sentencing state.⁶⁷⁸ While the General Assembly restructured the sentencing provisions in 1975⁶⁷⁹ expanding the judge's responsibilities in the sentencing process,⁶⁸⁰

673. *Worrells v. Commonwealth*, 212 Va. 270, 183 S.E.2d 723 (1971). A material witness was excused from testifying on the ground of self-incrimination. The court recognized as a general proposition that the defendant is usually permitted to pose individual questions to the witness and if the witness asserted this fifth amendment privilege against answering, the court would then determine whether the answers would have been incriminating. However, since the accused did not proffer individual questions, the court would not reverse for failure of the trial court to follow the above course. In the absence of a proposed relevant question calling for a nonincriminating answer, the court would not reverse for the alleged error of excusing the witness upon the general assertion of his fifth amendment privilege.

674. *Id.* 8 J. WIGMORE, EVIDENCE § 2268 (McNaughton rev. ed. 1961). Usually a witness must assert his fifth amendment privilege to each question posed. Any answer which would provide even a "single remote link" in a chain which would ultimately expose the witness to criminal prosecution is incriminating for this purpose. *Langhorne v. Commonwealth*, 76 Va. 1012, 1022 (1882).

675. *Woody v. Commonwealth*, 214 Va. 296, 199 S.E.2d 529 (1973).

676. C. FRIEND, *supra* note 667, § 69 at 147-48 (1977).

677. *Id.*

678. For the history of Virginia's jury sentencing statutes as they existed prior to the passage of the 1975 amendments, see Comment, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 970-76 (1967).

679. The General Assembly overhauled the Criminal Procedure Title of the Virginia Code which resulted in Title 19.1 being replaced by Title 19.2.

680. See VA. CODE ANN. § 19.2-298 (Cum. Supp. 1980) (which makes it the judge's function to "pronounce" the sentence); VA. CODE ANN. § 19.2-299 (Repl. Vol. 1975) (provides for a presentencing investigation and hearing upon the court's own motion or upon the motion of the defendant). *But cf.* J. Gilbreath, *The Constitutionality of Harsher Sentences on Retrial in Virginia*, 62 VA. L. REV. 1337, 1339 (1976) (proposes that the 1975 revisions makes Virginia more appropriately considered as a judge-sentencing rather than a jury-sentencing state).

the present Code still provides that the sentence "[w]ithin the limits prescribed by law . . . shall be ascertained by the jury, or by the court in cases tried without a jury."⁶⁸¹ The method of having one trial for guilt and punishment, both determined by the jury has been held to be constitutional;⁶⁸² Virginia is one of only a few states which provides for jury sentencing in non-capital cases.⁶⁸³ There has been much discussion as to whether Virginia should remain a jury sentencing state⁶⁸⁴ but a departure from this would be the prerogative of the General Assembly and not Virginia's Supreme Court.

The jury must set the punishment within limits prescribed by the law as instructed by the judge and the instructions covering the range of punishment must follow the indictment.⁶⁸⁵ It is established judicial precedent in Virginia that where the sentence imposed is in excess of that prescribed by law, that part of the sentence which is excessive is invalid.⁶⁸⁶ The entire sentence is not void ab initio because of the excess, but is good as far as the power of the court extends.⁶⁸⁷

681. VA. CODE ANN. § 19.2-295 (Repl. Vol. 1975).

682. *Bloodgood v. Commonwealth*, 212 Va. 253, 183 S.E.2d 737 (1971) (court relied on *McGautha v. California*, 402 U.S. 183 (1971) in holding a jury's determination of guilt and punishment in a single trial does not impair the right of an accused to an impartial jury in contravention of the sixth amendment); *Johnson v. Commonwealth*, 208 Va. 481, 158 S.E.2d 725 (1968) (with facts similar to *McGautha*, unitary jury trial does not violate the fifth and fourteenth amendments).

683. Other states allowing juries to sentence include: Alabama, ALA. CODE § 18-22 (1975); Arkansas, ARK. STAT. ANN. § 43-2306 (Repl. Vol. 1977); Kentucky, KY. REV. STAT. ANN. § 9.84 (Baldwin 1978); Mississippi, MISS. CODE ANN. § 97-3-53 (Cum. Supp. 1980); Missouri, MO. ANN. STAT. § 557.036 (Vernon 1979); Oklahoma, OKLA. STAT. ANN. tit. 22, § 926 (West 1958); Tennessee, TENN. CODE ANN. § 40-2707 (Repl. Vol. 1975); Texas, TEX. CRIM. PRO. CODE ANN. art. 37.07 (Vernon Cum. Supp. 1978).

684. Giorno, *Sentencing in Criminal Cases: How Great the Need for Reform?*, 13 U. RICH. L. REV. 899, 908 (1979); Comment, *Jury Sentencing in Virginia*, 53 VA. I. REV. 968 (1967).

685. *Whaley v. Commonwealth*, 214 Va. 353, 200 S.E.2d 556 (1973). The indictment in the case charged the defendant with breaking and entering with intent to commit larceny or a felony. It did not charge that the burglary was committed with the intent to commit rape. Therefore the applicable punishment was prescribed under Code § 18.1-89 and not § 18.1-88. The court's instruction, however, was erroneous because it permitted the punishment prescribed under § 18.1-88.

686. *Crutchfield v. Commonwealth*, 187 Va. 291, 46 S.E.2d 340 (1948). In a prosecution under the maiming act, the accused was allowed to plead guilty to unlawful assault and was sentenced to three years confinement in the penitentiary. The sentence was in excess of that prescribed by law but only the excess was held invalid. It was recognized that a court may impose a valid sentence in substitution for one that is void, even though the execution of the void sentence has begun.

687. *Royster v. Smith*, 195 Va. 228, 77 S.E.2d 855 (1953).

Thus, in *Deagle v. Commonwealth*,⁶⁸⁸ where the jury had imposed a sentence of ten years in the penitentiary and a one thousand dollar fine, either of which were valid but not both, the Virginia Supreme Court deferred to the discretion of the trial court which upheld the ten year confinement and deleted the fine. In contrast to this decision are the previously decided cases of *Hodges v. Commonwealth*⁶⁸⁹ and *Huggins v. Commonwealth*.⁶⁹⁰ In both of these cases the defendants were found guilty and sentenced to death. Subsequently, the United States Supreme Court declared the death penalty unconstitutional⁶⁹¹ which rendered the sentences in the aforementioned cases void. Instead of taking it upon itself to interpret what the jury in its sentencing had intended, the Virginia court declined to summarily reduce the death sentences to life imprisonment, the highest penalty then available under the Supreme Court's decision.⁶⁹² In distinguishing between the results reached in *Hodges* and *Huggins* with those reached in *Deagle*, the court noted that with respect to reducing the death penalty to life imprisonment, it "would be sheer speculation" to conclude that the jury would fix the punishment at life had the death penalty not been permissible,⁶⁹³ whereas in *Deagle*, "common sense and reason dictate[d] that the jury would have imposed the greater sentence had it been required to choose between the two punishments."⁶⁹⁴ The distinction is perhaps more clear if one points to the fact that the cases appear to have turned on the Virginia Supreme Court's deference to the trial courts' discretion.

Present Virginia law establishes six classes of felonies and four classes of misdemeanors and prescribes maximum and minimum punishments for each category.⁶⁹⁵ Punishment imposed in each case is to be determined in light of its own particular facts.⁶⁹⁶ Therefore, evidence of the result of another defendant's trial for the same crime is irrelevant to the determination by the jury of the appropriate punishment for the defendant whose sentence is being weighed.⁶⁹⁷ While the eighth amendment prohibits the imposition of cruel and unusual punishment on those con-

688. *Deagle v. Commonwealth*, 214 Va. 304, 199 S.E.2d 509 (1973).

689. *Hodges v. Commonwealth*, 213 Va. 316, 191 S.E.2d 794 (1972).

690. *Huggins v. Commonwealth*, 213 Va. 327, 191 S.E.2d 734 (1972).

691. *Furman v. Georgia*, 408 U.S. 238 (1972).

692. 213 Va. 316, 191 S.E.2d 794; 213 Va. 327, 191 S.E.2d 734. The court noted in *Hodges* that the "jury might well have agreed upon 99 years as it did in the *Ferguson* murder." 213 Va. at 321, 191 S.E.2d at 797.

693. *Id.*

694. 214 Va. at 306, 199 S.E.2d at 511.

695. VA. CODE ANN. § 18.2-11 (Repl. Vol. 1975 & Cum. Supp. 1980).

696. *Fogg v. Commonwealth*, 215 Va. 164, 207 S.E.2d 847 (1974).

697. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979).

victed of a crime,⁶⁹⁸ the standard for analyzing the constitutionality of a statutory scheme of punishment for noncapital offenses varies, but all result in deference being given to the legislature.⁶⁹⁹ With respect to capital offenses, the United States Supreme Court now holds that the death penalty is not cruel and unusual punishment *per se*;⁷⁰⁰ however, it may not be imposed under procedures that create a substantial risk of its arbitrary and capricious application.⁷⁰¹ The Virginia Supreme Court took a long hard look at Virginia's statutory law⁷⁰² for sentencing procedures in capital cases, including the imposition of the death penalty, in *Smith v. Commonwealth*.⁷⁰³ The court felt that changes enacted by the General Assembly in the statutory scheme of sentencing process "insure[d] that the death penalty would not be imposed in an arbitrary or capricious manner."⁷⁰⁴ Furthermore the court, citing several United States Supreme Court decisions, held the 1977 laws and changes thereunder in the sentencing process to be constitutional under both the fourteenth and the eighth amendments.⁷⁰⁵

In addition to the various positions regarding sentencing and procedure taken by the Virginia court outlined above, a 1975 amendment by the General Assembly⁷⁰⁶ expanded the role of pre-sentencing reports in the sentencing process. The prior statute required the court to order a pre-sentence report only if requested by a defendant after a guilty plea or a conviction in a non-jury trial on a charge involving a death sentence or at

698. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

699. *Compare* Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974) (in which the Fourth Circuit used a proportionality analysis considering the punishment excessive only if the legislative purpose can be achieved by using a less severe penalty. The court also considered punishments imposed for other offenses and punishments in other jurisdictions for the same crime) *with* Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978) (where the court said the proportionality test should only be applied to life sentences; otherwise the court would defer to the legislature unless the punishment was so disproportionate to the crime that it shocked human sensibilities). *See also* Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 263 (1980) (in considering the life sentence of an appellant, the court said the legislative scheme should be upheld if it has any-rational basis).

700. *Gregg v. Georgia*, 428 U.S. 153 (1976).

701. *See* *Furman v. Georgia*, 408 U.S. 238 (1972).

702. VA. CODE ANN. § 19.2-264.2 to 264.5 (Cum. Supp. 1980).

703. 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 442 U.S. 932 (1979).

704. *Id.* at 475, 248 S.E.2d at 147.

705. *Id.* at 476-79, 248 S.E.2d at 148.

706. 1975 VA. ACTS, ch. 371, amending VA. CODE ANN. § 59-278.1 (Repl Vol. 1974), *codified at* VA. CODE ANN. § 19.2-299 (Cum. Supp. 1980). *See also* VA. SUP. CT. R. 3A:25(c).

least ten years imprisonment.⁷⁰⁷ The new statute provides the option of a pre-sentence report for all who are convicted of a felony.⁷⁰⁸ The Virginia Supreme Court has held that denial of a pre-sentence report where requested is reversible error and the case will be remanded for re-sentencing.⁷⁰⁹

1. Harsher Sentencing in Trial De Novo

In Virginia, a person convicted of a misdemeanor in a court not of record has a statutory privilege to a trial de novo in a court of record.⁷¹⁰ In *Johnson v. Commonwealth*,⁷¹¹ the Virginia Supreme Court held that an increased sentence imposed in a court of record over the sentence imposed in the court not of record does not violate due process. The issue was raised by the defendants because of the holding by the United States Supreme Court in *North Carolina v. Pearce*⁷¹² that due process forbids the imposition of a harsher sentence upon retrial where there is a "realistic likelihood" that the increased punishment is the result of "vindictiveness" on the part of the sentencing authority. The Virginia court held in *Johnson* that *Pearce* was not applicable because there was no vindictiveness in the imposition of the sentence.⁷¹³ In the *Pearce* case the judge was the sentencing authority in both trials. In *Johnson*, a jury fixed the sentence in the second trial and "[t]o assume that the jurors even knew of the sentences imposed [at the first trial] would assume they had information not rightfully theirs."⁷¹⁴ The Virginia court noted that the defendant's appeal to the court of record is not an appeal in the usual sense of the word but was an exercise of the unqualified right to a trial de novo, which gave them a second full opportunity for acquittal.⁷¹⁵ The reasoning used by the Virginia court was upheld in *Colten v. Kentucky*.⁷¹⁶ In that

707. 1974 VA. ACTS, ch. 121, codified at VA. CODE ANN. § 53-278.1 (Repl. Vol. 1974).

708. See note 706 *supra*.

709. *Jenkins v. Commonwealth*, 220 Va. 104, 255 S.E.2d 504 (1979) (citing *Smith v. Commonwealth*, 217 Va. 329, 228 S.E.2d 557 (1976)).

710. VA. CODE ANN. § 16.1-132, -136 (Repl. Vol. 1975).

711. 212 Va. 579, 186 S.E.2d 53 (1972).

712. 395 U.S. 711 (1969).

713. 212 Va. at 585, 186 S.E.2d at 57-58.

714. *Id.*

715. *Id.* at 585-86, 186 S.E.2d at 57-58. Addressing the appellant's contention that the harsher sentence imposed an unconstitutional "chilling effect" on the right to a trial de novo, the court noted that appellants had begged the question: the trial de novo is a privilege granted by the legislature and not a constitutional right. Thus any "chilling effect" on the exercise of that privilege fails to transgress the constitutional guarantee of due process. *Id.*

716. 407 U.S. 104 (1972).

case the United States Supreme Court held that the standards of *Pearce* did not apply to a two-tier system.⁷¹⁷ The Court further clarified the *Pearce* decision in *Chaffin v. Stynchcombe*⁷¹⁸ where it held that the principles enunciated in *Pearce* do not apply when the sentence in a second trial following an appeal is imposed by the jury.

2. Probation and Suspension of Sentence

The jury is not empowered by statute to grant suspension of its sentence or probation but only to assess punishment "[w]ithin the limits prescribed by law."⁷¹⁹ Furthermore, a jury is prohibited from adding to its verdict a recommendation that the judge suspend or probate the sentence.⁷²⁰ The judge, however, has long had statutory authority to grant probation or suspension "if there are circumstances in mitigation of the offense, or it appears compatible with the public interest."⁷²¹ As a result of the 1975 amendments, an entirely new provision in Title 19.2 gives discretionary authority to the judge "whether [sitting] with or without jury, [to] suspend imposition of sentence or suspend the sentence in whole or part and in addition [to] place the accused on probation."⁷²² While the Virginia Supreme Court has had little cause to review the statutory authority given judges concerning suspension of sentences and probation, some changes have evolved as the result of the trial court's use of this discretionary power.⁷²³ For example, a unique sentencing alternative for misdemeanants has been developed by one general district court in Richmond, Virginia. The court has requested Offender Aid and Restoration (OAR) of Richmond, a private, non-profit, community-based correctional agency, to create a service offering a greater range of sentencing alternatives.⁷²⁴

The Virginia Supreme Court has extended its principle of requiring a

717. *Id.* at 112-19.

718. 412 U.S. 17 (1973).

719. VA. CODE ANN. § 19.2-295 (Repl. Vol. 1975).

720. See *McCann v. Commonwealth*, 174 Va. 429, 4 S.E.2d 768 (1939).

721. VA. CODE ANN. § 53-272 (Repl. Vol. 1978). However, it appears that this section is not often invoked by trial judges who, in light of the evident legislative preference for jury sentencing existent at the time of its enactment, are hesitant to substitute their views for those of the jury. Comment, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 974 (1967). See *Abdo v. Commonwealth*, 218 Va. 473, 237 S.E.2d 900 (1977) (affirming the power under this section as discretionary with the court).

722. VA. CODE ANN. § 19.2-303 (Repl. Vol. 1975).

723. Davila & Mordhorst, *Sentencing Alternatives for Virginia General District Courts*, 11 U. RICH. L. REV. 769 (1977).

724. *Id.* at 770.

summary judicial hearing before revocation of a parole⁷²⁵ to hold that "fundamental fairness" dictates that a summary judicial hearing be conducted before extending a probation period.⁷²⁶ At the time of this holding, the statute providing for an increase of probation did not proscribe such a procedure but the court read this statute⁷²⁷ in conjunction with the section providing for revocation of probation⁷²⁸ and concluded that the same rationale that led to a judicial requirement of a summary hearing prior to revocation should apply in the case of an extension. The Virginia General Assembly has since provided statutory changes to this effect.⁷²⁹

3. Parole

Just as the jury is not empowered to grant suspension or probation,⁷³⁰ neither can it take the effect of parole into consideration when it imposes its sentence. When asked by the foreman what part of a sentence a person would have to serve before being paroled, the judge must respond only that the jury should impose sentence within the limits fixed by law, as appears to be just, and what might happen afterward is of no concern.⁷³¹

Under current statutory law, a prisoner sentenced to confinement in a state correctional institution is eligible for parole after serving one-fourth of the term imposed.⁷³² Eligibility does not necessarily guarantee that parole will be granted, since it is the parole board which is responsible for granting or denying parole. Even though its decisions must be based upon established criteria,⁷³³ the board has wide discretion in determining the

725. See *Griffin v. Cunningham*, 205 Va. 349, 136 S.E.2d 840 (1964).

726. *Cook v. Commonwealth*, 211 Va. 290, 176 S.E.2d 815 (1970).

727. VA. CODE ANN. § 53-273 (Repl. Vol. 1967) (currently codified at § 19.2-304 (Repl. Vol. 1975)).

728. VA. CODE ANN. § 53-275 (Repl. Vol. 1967) (currently codified at § 19.2-306 (Repl. Vol. 1975)).

729. 1974 Va. Acts, ch. 205. See generally VA. CODE ANN. §§ 53-230 to -290.10 (Repl. Vol. 1978) dealing with probation and parole.

730. See note 719 *supra* and accompanying text.

731. *Hinton v. Commonwealth*, 219 Va. 492, 247 S.E.2d 704 (1978). The general rule announced by *Hinton* had earlier been set forth by *Coward v. Commonwealth*, 164 Va. 639, 178 S.E. 797 (1935) where it was stated that the trial court should not inform the jury that its sentence, once imposed and confirmed, may be set aside or reduced by some other arm of the State. *Id.* at 646, 178 S.E. at 800. See also Annot., 35 A.L.R.2d 769.

732. VA. CODE ANN. § 53-251 (Repl. Vol. 1978 & Cum. Supp. 1980). In 1979, the law was amended to extend the time in which repeat offenders become eligible for parole.

733. See *Franklin v. Shields*, 399 F. Supp. 309 (W.D. Va.), *cert. denied*, 423 U.S. 1037 (1975) (holding that as a matter of procedural due process of law, inmates must be afforded access to the information and criteria upon which a parole board reaches its decision to

exact release. While there are many who complain about the parole board and its effectiveness,⁷³⁴ changes in this area are of a legislative nature. The Virginia Supreme Court has had few cases over the past decade concerning issues related to parole.

H. Right to Appeal

Statutory law in Virginia provides that "[a] writ of error shall lie in a criminal case to the judgment of a circuit court or the judge thereof, from the Supreme Court."⁷³⁵ The Virginia Supreme Court has held that this statute does not require an appeal as a matter of right.⁷³⁶ The purpose of the section is merely to confer upon the Virginia Supreme Court the appellate jurisdiction called for by Virginia's constitution;⁷³⁷ it "grants only the right to seek to invoke . . . appellate jurisdiction and does not mean that the jurisdiction may be invoked in every case."⁷³⁸ Nor does the due process clause of the fourteenth amendment require that a petitioner must be granted a writ of error as a matter of right.⁷³⁹ The United States Supreme Court has held that the right to appellate review is not a necessary element of due process.⁷⁴⁰

In *Saunders v. Reynolds*,⁷⁴¹ the defendant argued that the appeal process in Virginia is a violation of the equal protection clause of the fourteenth amendment because persons similarly situated were not treated alike. Two grounds for such violation were asserted. First, defendant argued that the standard of review applied by the Virginia court, that is,

grant or deny parole).

734. Comment, *Sentencing in Criminal Cases: How Great the Need for Reform?*, 13 U. RICH. L. REV. 899, 911 (1979).

735. VA. CODE ANN. § 19.2-317 (Repl. Vol. 1975).

736. *Saunders v. Reynolds*, 214 Va. 697, 204 S.E.2d 421 (1974); *Peyton v. King*, 210 Va. 194, 169 S.E.2d 569 (1969).

737. VA. CONST. art. VI, § 1 reads in part:

Subject to such reasonable rules as may be prescribed as to the course of appeals and other procedural matters, the Supreme Court shall, by virtue of this constitution, have appellate jurisdiction in cases involving the constitutionality of a law under this constitution or the Constitution of the United States and in cases involving the life or liberty of any person.

738. *Peyton v. King*, 210 Va. at 197, 169 S.E.2d at 571-72, cited in *Saunders v. Reynolds*, 214 Va. at 699, 204 S.E.2d at 423. See also *Smith v. Commonwealth*, 161 Va. 1112, 1115, 172 S.E. 286, 287 (1934).

739. *Saunders v. Reynolds*, 214 Va. at 699, 204 S.E.2d at 423. See *McCue v. Commonwealth*, 103 Va. 870, 1008, 49 S.E. 623, 632 (1905).

740. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

741. 214 Va. 697, 204 S.E.2d 421 (1974).

that no appeal will be refused where there is shown to have existed substantial possibility of injustice, has shifted from a determination on the merits to a determination based upon societal importance. In support of this contention, statistics were cited showing the rapid increase in the number of petitions filed and the decrease in the percentage of petitions granted.⁷⁴² It was stated that "the statistics suggest that in the face of its increasing workload the Court has altered the criterion for granting appeals, so that a denial can no longer be considered a 'merits' determination."⁷⁴³ The Virginia court acknowledged in the *Saunders* opinion the increased number of petitions and a disproportionate decrease in the percentage of petitions granted. The cause cited, however, for the apparent imbalance was the "increase in the number of *frivolous* petitions presented,"⁷⁴⁴ not a withdrawal from the "merit" review. The statement that the "merit" standard still prevails for acceptance of appeals was echoed by a study conducted by the National Center for State Courts on Appellate Justice in which Virginia was one of four appellate courts studied.⁷⁴⁵

Secondly, the defendant in *Saunders* argued that Virginia's appellate process violates the equal protection clause of the fourteenth amendment because a person convicted of a misdemeanor in a court not of record is given an automatic appeal to a higher court while a person originally convicted in a court of record has no such right to an automatic appeal to a higher court.⁷⁴⁶ The Virginia court refused to accept this argument stating that all persons convicted of a crime have equal access to the Supreme Court regardless of whether the crime was classified as a felony or

742. 214 Va. at 700, 204 S.E.2d at 423 citing *Lilly & Scalia, Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 14 (1971).

743. *Id.*

744. 214 Va. at 701, 204 S.E.2d at 424. The increase of frivolous petitions was blamed on "newly-enunciated constitutional principles and the extension of rights of the indigent defendant who, merely upon his statement that he desires an appeal from the judgment of conviction, is now entitled to seek an appeal notwithstanding the obvious lack of merit of his claims." *Id.*

745. G. Lilly, *Appellate Justice Project* (National Center for State Courts 1974) as cited in *Saunders v. Reynolds*, 214 Va. at 701-02, 204 S.E.2d at 424. With reference to Virginia's standard that an appeal will be granted in every case where there exists substantial possibility of injustice in the lower court, the report observed:

The justices indicate that this standard still prevails. The Appellate Justice staff saw no evidence to the contrary, although the statistics indicating a decline in the percentage of petitions granted gave rise to an inference that the standard of review has changed. . . . In fact, this decline in percentage may be attributable to a large number of frivolous appeals.

Id. n.36 (under the heading "The Nature of the Caseload and Workload").

746. 214 Va. at 702, 204 S.E.2d at 425.

misdeemeanor. The right of misdemeanants convicted in a court not of record to an automatic "appeal" to a court of record and a trial de novo, has a rational objective serving both a legitimate state interest and the rights of the defendant, including right to trial by jury.⁷⁴⁷ Therefore, the Virginia court concluded, the appellate process does not set "unreasoned distinctions" which "impede open and equal access to the courts," a limitation set by the United States Supreme Court for appellate review.⁷⁴⁸ In cases, however, where the death penalty has been imposed, the convicted defendant is entitled to automatic review as a result of statutory law.⁷⁴⁹

Where a person has voluntarily and intelligently plead guilty in the circuit court and is sentenced in proceedings devoid of jurisdictional questions to a term within the range fixed by law, the Virginia court has held that he is not entitled to appeal his conviction.⁷⁵⁰ Jurisdictions are split on the issue of allowing or denying appeals where a guilty plea was initially entered.⁷⁵¹

Although a right to appeal is not constitutionally compelled,⁷⁵² a state which provides such a procedure may not deny access to its appellate courts because of a defendant's indigency, and must provide both a free transcript⁷⁵³ and the assistance of counsel.⁷⁵⁴ The Virginia Supreme Court

747. *Id.* at 702-03, 204 S.E.2d at 425-26.

748. *Rinaldi v. Yeager*, 384 U.S. 305 (1966), *cited in* 214 Va. at 702, 204 S.E.2d at 425. In *Rinaldi* the Supreme Court stated:

This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

384 U.S. at 310.

749. VA. CODE ANN. § 17-110.1(A) (Repl. Vol. 1975 & Cum. Supp. 1980); VA. SUP. CT. R. 5:20 (applied in *Giarrantano v. Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980).

750. *Burton v. Peyton*, 210 Va. 484, 171 S.E.2d 822 (1970); *Ringley v. Commonwealth*, 210 Va. 413, 172 S.E.2d 124 (1970); *Peyton v. King*, 210 Va. 194, 169 S.E.2d 569 (1969); *Bryant v. Peyton*, 210 Va. 199, 169 S.E.2d 460 (1969).

751. *Compare Ramey v. State*, 199 So. 2d 104, 106 (Fla. App. 1967) ("accused in criminal case has a legal right to a review of a judgment of conviction entered against him, though he had waived trial by jury and pleaded guilty") *with* *Cohen v. State*, 235 Md. 62, 200 A.2d 368, *cert. denied*, 379 U.S. 844 (1964) (only objections to trial court's jurisdiction and that the indictment does not constitute an indictable offense survive a plea of guilty). *See also* ABA PROJECT ON STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *Criminal Appeals*, 1.3(a) (1974) (which calls for a defendant's right to seek review of a conviction based on a plea of guilty).

752. *See* note 739 *supra* and accompanying text.

753. *Griffin v. Illinois*, 351 U.S. 12 (1956); VA. CODE ANN. § 19.2-326 (Repl. Vol. 1975 & Cum. Supp. 1980) (payment of expenses of appeals of indigent defendants).

754. *Douglas v. California*, 372 U.S. 353 (1963); VA. CODE ANN. § 19.2-326 (Repl. Vol. 1975

has recognized that a defendant who indicates a desire to appeal is "entitled to the assistance and cooperation of counsel for that purpose."⁷⁵⁵

I. Conclusion

While the supreme courts of some states have developed procedural guidelines to be followed by trial courts in criminal proceedings,⁷⁵⁶ the Virginia Supreme Court has left many standards to the discretion of the trial courts. For example, appointment of counsel for indigents beyond that which is mandated by the United States Supreme Court, is left to the discretion of the trial court.⁷⁵⁷ Further, whether or not there should be a change of venue due to pre-trial publicity⁷⁵⁸ or a disqualification of a member of the jury due to reading a prejudicial news report⁷⁵⁹ is also within the discretion of the trial court. Whether or not a cautionary instruction should be given to the jury alerting them to the accused's right not to testify⁷⁶⁰ is a decision of the trial judge and not left to the preference of the accused.⁷⁶¹ The philosophy of the Virginia court seems to be one of applying the minimum constitutional standards as articulated by the Supreme Court without requiring procedures which go beyond such standards.⁷⁶² The wisdom of such a philosophy is not commented on here as clearly there are good arguments for both sides.

V. SUBSTANTIVE CRIMINAL LAW

A. Introduction

The purpose of this section is to examine the decisions of the Virginia Supreme Court during the past decade in the area of substantive criminal law, with special attention being given to decisions which are likely to be

& Cum. Supp. 1980).

755. *Ferby v. Peyton*, 210 Va. 129, 131, 169 S.E.2d 438, 439 (1969). See notes 511-21 *supra* and accompanying text.

756. See Goldsmith & Ryan, *supra* note 586. See also Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, *supra* note 506; Note, *Stepping into the Breach*, *supra* note 506; Falk, *Foreward: The State Constitution: A More than Adequate Non-Federal Ground*, *supra* note 506.

757. See notes 526 & 527 *supra* and accompanying text.

758. See notes 633 & 634 *supra* and accompanying text.

759. See note 639 *supra* and accompanying text.

760. See note 661 *supra* and accompanying text.

761. See note 660 *supra* and accompanying text.

762. See notes 556-63 *supra* and accompanying text (with respect to the standard for effective counsel); note 574 *supra* (no jury required at first stage of "two tier" system); and note 711 *supra* and accompanying text (harsher sentencing allowed in trial *de novo*); note 751 *supra* and accompanying text (person who pleads guilty not entitled to appeal).

of interest to the criminal attorney. The decisions dealing with evidence and criminal procedure are not covered in this section. While not every aspect of criminal law has been addressed by the court during the past decade, decisions by the court did provide answers to many pertinent questions.

B. Crimes Against Persons

1. Felony Murder

Virginia has two felony-murder statutes.⁷⁶³ Section 18.2-32 of the Code provides that "[m]urder . . . in the commission of, or attempt to commit, arson, rape, robbery or abduction . . . is murder in the first degree. . . ." Section 18.2-33 provides that "[t]he killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act . . . is murder in the second degree. . . ."

To convict one of felony-murder it is unnecessary to prove malice, premeditation or intent.⁷⁶⁴ The purpose behind making felony-murder rather easy to prove is, undoubtedly, to deter life threatening conduct by those who engage in crime. Since the statutory offenses⁷⁶⁵ can be proven by showing that a defendant killed someone while in the commission of, or attempted commission of a felony, a critical question in felony-murder cases is at what point is the perpetration of the felony or attempted felony terminated. This factor is important in determining whether or not application of the statutes is appropriate.

The Virginia Supreme Court addressed this question in the case of *Haskell v. Commonwealth*.⁷⁶⁶ The defendants in *Haskell* argued that once the felony had been abandoned, a subsequent killing can no longer be felony-murder.⁷⁶⁷ In asserting this position, the defendants relied upon the minority view in the United States: a killing committed during an escape, after abandonment of the felony, does not fall under the felony-murder rule.⁷⁶⁸ The Virginia Supreme Court, however, followed the ma-

763. VA. CODE ANN. §§ 18.2-32 to -33 (Repl. Vol. 1975 & Cum. Supp. 1980).

764. *Painter v. Commonwealth*, 210 Va. 360, 171 S.E.2d 166 (1969); *Wooden v. Commonwealth*, 208 Va. 629, 159 S.E.2d 623 (1968); *Commonwealth v. Jones*, 28 Va. (1 Leigh) 598 (1829).

765. VA. CODE ANN. §§ 18.2-32 to -33 (Repl. Vol. 1975 & Cum. Supp. 1980).

766. 218 Va. 1033, 243 S.E.2d 477 (1978). *Haskell* and his friends attempted to rob a hitchhiking sailor they had picked up in their car. Unable to do so, and hampered in their escape by the angry victim, *Haskell* shot and killed the sailor.

767. *Id.* at 1039, 243 S.E.2d at 480-81.

768. To support their view, the defendants cited *People v. Jackson*, 20 N.Y.2d 440, 385 N.Y.S.2d 8, 231 N.E.2d 722 (1967) and *People v. Marwig*, 227 N.Y. 382, 125 N.E. 535 (1919).

majority view. This view, referred to as the *res gestae* doctrine, holds that "where the killing is so closely related to the felony in time, place and causal connection as to make it part of the same criminal enterprise"⁷⁶⁹ the killing will be felony-murder. Under the majority view adopted by the court, the scope of section 18.2-32 would appear to include any escape. However, the court indicated that it would deviate from this rule if the facts and circumstances of a particular case should dictate.⁷⁷⁰ The supreme court's decision in *Haskell* appears to be reasonable, for while following the majority view, the facts of each case will determine whether the rule will be applied.

Virginia's other felony-murder statute, section 18.2-33, applies to homicides committed during the commission of any felony not enumerated in section 18.2-32.⁷⁷¹ Section 18.2-33 applies to accidental, as well as intentional homicides, and is a catch-all statute. Its scope was examined by the Virginia Supreme Court in the case of *Doane v. Commonwealth*.⁷⁷²

In *Doane* the Commonwealth argued that larceny was a continuing offense for purposes of applying the felony-murder rule. The court, however, ruled that larceny was a continuing offense only for the purpose of venue and not for purposes of applying the felony-murder rule.⁷⁷³ Had the court ruled that larceny was a continuous offense, a nexus would have existed between the felony and the homicide.⁷⁷⁴ The defendant argued, on the other hand, that the court should apply the rule in manslaughter cases requiring proximate cause to cases under section 18.2-33.⁷⁷⁵ Since the court ruled that larceny was not a continuing offense for purposes of the felony-murder rule, the court did not reach the question of whether a causal connection or nexus is required.⁷⁷⁶

For a survey of state law concerning the termination of the felony for purposes of the felony-murder rule, see Annot., 58 A.L.R.3d 851 (1974).

769. 218 Va. at 1043-44, 243 S.E.2d at 482-83.

770. We do not say, however, that in every case a homicide committed during escape from a felony must be construed, as a matter of law, to come within the felony-murder statute. Usually, as in the present cases, the question will present an issue of fact to be determined from the evidence.

Id. at 1044, 243 S.E.2d at 484.

771. VA. CODE ANN. §§ 18.2-32 to -33 (Repl. Vol. 1975 & Cum. Supp. 1980).

772. 218 Va. 500, 237 S.E.2d 797 (1977). The defendant was charged under § 18.2-33 after he stole an automobile which the following day, nearly three hundred miles away, he crashed into another car killing one of the occupants of the other vehicle.

773. *Id.* at 502, 237 S.E.2d 798.

774. *Id.*

775. *Id.*

776. *Id.* at 502-03, 237 S.E.2d at 798-99.

The *Doane* case was the first decision by the court under section 18.2-33 and the decision provides little guidance for the practicing criminal attorney. The court did not define the term "nexus" or state when a showing of nexus would suffice or when a causal connection would be required. The *res gestae* test, adopted for cases arising under section 18.2-32, could be applied to cases under section 18.2-33; however, since many of the felonies which apply to section 18.2-33 are not life threatening, a requirement of causal connection may be more appropriate in many cases.⁷⁷⁷

2. Involuntary Manslaughter

Involuntary manslaughter is an accidental killing which occurs as a result of an unlawful, though not felonious, act; or as a result of a lawful act performed in an improper manner.⁷⁷⁸ The application of this definition was the subject of several Virginia Supreme Court decisions during the past decade.⁷⁷⁹

The court's decision in *King v. Commonwealth*⁷⁸⁰ would appear to be of particular interest to the criminal attorney representing a defendant in an involuntary manslaughter prosecution.⁷⁸¹ In *King*, the defendant was convicted of involuntary manslaughter as a result of her car's collision with another vehicle. Although the accident occurred late at night, the evidence showed that defendant did not have headlights turned on at the time of the accident.⁷⁸² In an earlier opinion, *Beck v. Commonwealth*,⁷⁸³ the supreme court had ruled that "[w]hen the Commonwealth predicates the charge [of involuntary manslaughter] upon violation of a statute, it must only show that such violation was the proximate cause of the homicide."⁷⁸⁴ However, in *King* the supreme court held that the mere violation of a safety statute,⁷⁸⁵ without more, will not justify a finding of involun-

777. For a thorough discussion of the felony-murder rule, see WHARTON'S CRIMINAL LAW §§ 145-49, at 201-23 (14th ed. C. Torcia 1979).

778. *Lewis v. Commonwealth*, 211 Va. 684, 179 S.E.2d 506 (1971).

779. *King v. Commonwealth*, 217 Va. 601, 231 S.E.2d 312 (1977); *Delawder v. Commonwealth*, 215 Va. 55, 196 S.E.2d 913 (1973); *Lewis v. Commonwealth*, 211 Va. 684, 179 S.E.2d 506 (1971).

780. 217 Va. 601, 231 S.E.2d 312 (1977).

781. Involuntary manslaughter is a common law offense. It is punished as a Class 6 felony by VA. CODE ANN. § 18.2-36 (Repl. Vol. 1975).

782. 217 Va. at 602-03, 231 S.E.2d at 313-14.

783. 216 Va. 1, 216 S.E.2d 8 (1975).

784. *Id.* at 2, 216 S.E.2d at 10 (citing *Goodman v. Commonwealth*, 153 Va. 943, 951, 161 S.E. 168, 170 (1930)).

785. VA. CODE ANN. § 46.1-268 (Repl. Vol. 1974) requires the use of headlights on all motor vehicles using a highway at night.

tary manslaughter regardless of whether the violation is the proximate cause of the homicide.⁷⁸⁶ The court ruled that violation of a safety statute which is the proximate cause of an accident will justify a finding of involuntary manslaughter only when the violation amounts to criminal negligence. The court defined criminal negligence as negligence "so gross, wanton, and culpable as to show a reckless disregard for human life."⁷⁸⁷ While holding that failure to turn on headlights did not amount to criminal negligence, the court left unanswered the question of which violations of statutes would justify a finding of criminal negligence.⁷⁸⁸

The Virginia Supreme Court's decision in *King* represents a change from its earlier decision in *Beck*. In *Beck*, the court appeared to hold that violation of a statute was per se sufficient to prove involuntary manslaughter saying:

[T]he degree of intoxication is a circumstance relevant to a determination of the question whether, in light of all other circumstances, the act of driving an automobile was such an improper performance of a lawful act as to constitute negligence so gross and culpable as to indicate a callous disregard of human life. But because the evidence was sufficient to show . . . a violation of Code § 18.1-54 [driving under the influence], and that this was the proximate cause of the homicide, we need not decide that question.⁷⁸⁹

On the basis of *King* it now appears that a statutory violation must be one which involves criminal negligence before a conviction of involuntary manslaughter can result. The decision is a rational one because it recognizes that many statutory violations are relatively minor and may not by themselves justify a finding of involuntary manslaughter. On the other hand, the decision of when a statutory violation is criminal negligence is left to the trier of fact and may result in inconsistent findings. Since the court in *King* did not overturn *Beck* it is clear that driving under the influence will be criminal negligence;⁷⁹⁰ however, only future decisions will determine whether violations of other statutes constitute such negligence as to warrant criminal sanctions.

In addition to the requirement of criminal negligence, the act constituting such negligence must be shown to be the proximate cause of the

786. "[V]iolation of a safety statute amounting to mere negligence . . . is not sufficient to support a conviction of involuntary manslaughter." 217 Va. at 606-07, 231 S.E.2d at 316.

787. *Id.* at 607.

788. The court stated that "intentional, willful, and wanton violation of safety statutes, resulting in death however, will justify conviction of involuntary manslaughter The degree of negligence must be more than ordinary negligence." *Id.* at 606.

789. 216 Va. at 5, 216 S.E.2d at 10-11.

790. 217 Va. at 606, 231 S.E.2d at 316.

homicide.⁷⁹¹ The Virginia Supreme Court examined the question of proximate cause as it relates to involuntary manslaughter in a 1973 decision, *Delawder v. Commonwealth*.⁷⁹²

In *Delawder* the defendant was racing his vehicle against another car when the other car apparently hit the defendant's vehicle causing him to lose control and kill a pedestrian.⁷⁹³ The defendant argued that the proximate cause of the homicide was the intervening negligence of the other driver who hit his car, causing it to go out of control.⁷⁹⁴ The court rejected this argument and held that where two negligent acts occur together they are concurring causes and neither is an intervening act which would relieve liability. Furthermore, the court indicated that if the acts were separate, the defendant would still be liable where the second act was foreseeable.⁷⁹⁵

The Virginia Supreme Court's decision in *Delawder* that an intervening act must be independent and unforeseeable to relieve liability was based on established precedents in Virginia law.⁷⁹⁶ The decision also reflects the majority opinion in the United States.⁷⁹⁷

3. Rape

The Virginia Supreme Court decided several non-statutory rape cases during the past decade.⁷⁹⁸ Non-statutory rape is a crime of force,⁷⁹⁹ an element often at issue. Illustrative of the manner in which Virginia law addresses the issue of force is the Virginia Supreme Court's decision in *Jones v. Commonwealth*.⁸⁰⁰

In *Jones*, the defense argued that the element of force was not present because no weapons were shown, no blows struck, and the victim did not

791. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW §§ 78, 79, at 591-92, 596-600 (1972) [hereinafter cited as W. LAFAVE & A. SCOTT].

792. 215 Va. 55, 196 S.E.2d 913 (1973).

793. *Id.* at 56-57, 196 S.E.2d at 914-15.

794. *Id.* at 57, 196 S.E.2d at 914-15.

795. *Id.* at 58, 196 S.E.2d at 915.

796. See *Scott v. Simms*, 188 Va. 808, 51 S.E.2d 250 (1949) (intervening act must be unforeseeable to relieve liability); *Schools v. Walker*, 187 Va. 619, 47 S.E.2d 418 (1948) (concurring cause will not relieve liability).

797. W. LAFAVE & A. SCOTT, *supra* note 791, § 35, at 258-63.

798. *Jones v. Commonwealth*, 219 Va. 983, 252 S.E.2d 370 (1979); *Schrum v. Commonwealth*, 219 Va. 204, 246 S.E.2d 893 (1978); *Willis v. Commonwealth*, 218 Va. 560, 238 S.E.2d 811 (1977); *Barnett v. Commonwealth*, 216 Va. 200, 217 S.E.2d 828 (1975).

799. VA. CODE ANN. § 18.2-61 (Repl. Vol. 1975) provides in part: "If any person carnally know a female . . . against her will, by force . . . [he shall be guilty of rape]."

800. 219 Va. 983, 252 S.E.2d 370 (1979).

scream or fight the defendants. The court stated that in deciding whether the element of force was present the inquiry should be whether or not the victim was willing.⁸⁰¹ The court also said that there must be "some array or show of force in form sufficient to overcome resistance, but the woman is not required to resist to the utmost of her physical strength, if she reasonably believes resistance would be useless and result in serious bodily harm to her."⁸⁰² In determining the amount of resistance required of a victim, the court will examine the circumstances of the case, including the "relative physical condition" of the parties and the "degree of force manifested."⁸⁰³ It is also possible for the crime of rape to be proven where "no positive resistance" by the victim is shown, if the evidence shows the crime was perpetrated without her consent. In affirming the defendants' convictions, the Virginia Supreme Court noted that evidence that the victim was taken to a remote area, told to submit "whether you like it or not," ordered to disrobe by two persons physically stronger than her and finally forced to escape by jumping from a moving car half-dressed was sufficient evidence to convict.⁸⁰⁴

4. Robbery

Robbery is a common law offense in Virginia. It is defined as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."⁸⁰⁵ A crime of violence and a crime against property, robbery was the subject of several Virginia Supreme Court decisions during the past decade.⁸⁰⁶

Of particular interest was the court's decision in *Johnson v. Common-*

801. *Id.* at 986, 252 S.E.2d at 372.

802. *Id.* (quoting *Davis v. Commonwealth*, 186 Va. 936, 946, 45 S.E.2d 167, 171 (1947)).

803. 219 Va. at 986, 252 S.E.2d at 372.

804. *Id.* at 986-87, 252 S.E.2d at 372-73. This case is typical of earlier decisions by the court in rape cases. See *Bradley v. Commonwealth*, 196 Va. 1126, 86 S.E.2d 828 (1955); *Davis v. Commonwealth*, 186 Va. 936, 45 S.E.2d 167 (1947). *Jones* demonstrates that Virginia treats this controversial crime in a manner which is fair to both the victim and the accused. Virginia, like a majority of jurisdictions, has discarded the old requirement that the victim had to resist to the utmost of her physical ability. WHARTON'S CRIMINAL LAW, *supra* note 777, § 288, at 35. Moreover, victims are not discouraged from bringing charges by requirements of proof which are impossible to meet and the accused is protected by the requirement that the actual or constructive force be proven.

805. *Durham v. Commonwealth*, 214 Va. 166, 168, 198 S.E.2d 603, 605 (1973) (quoting *Mason v. Commonwealth*, 200 Va. 253, 254, 105 S.E.2d 149, 150 (1958); *Jones v. Commonwealth*, 172 Va. 615, 618, 1 S.E.2d 300, 301 (1939)).

806. *E.g.*, *Cox v. Commonwealth*, 218 Va. 689, 240 S.E.2d 524 (1978); *Jones v. Commonwealth*, 218 Va. 18, 235 S.E.2d 313 (1977); *Crawford v. Commonwealth*, 217 Va. 595, 231 S.E.2d 309 (1977); *Johnson v. Commonwealth*, 215 Va. 495, 211 S.E.2d 71 (1975).

wealth.⁸⁰⁷ In *Johnson*, the court examined the scope of the common law definition of robbery to determine who could be a victim of the crime. The defendant in *Johnson* forced a saleslady and two cashiers at gunpoint to empty the cash drawers of an office.⁸⁰⁸ The defendant was charged with robbing the saleslady. He appealed his conviction, arguing that since the saleslady "had nothing to do with the money," it was impossible, under the common law definition, for him to have robbed her.⁸⁰⁹

The Virginia Supreme Court disagreed with the defendant's analysis of the common law definition of robbery. The court held that robbery was accomplished whenever force or violence, are used to take property from someone whose right of possession is superior to that of the robber.⁸¹⁰ Therefore, an employee, even though her duties did not include collection or accounting, had a duty to protect her employer's property and thus, had constructive possession of the property.⁸¹¹ The court's decision in *Johnson* was a rational one based on its facts and fully in accord with prior Virginia law.⁸¹²

C. *Crimes Against Property and Crimes Involving Fraud*

The Virginia Criminal Code contains an extensive number of statutes forbidding various property crimes and fraudulent practices.⁸¹³ A number of these statutes were the subject of decisions by the Virginia Supreme Court during the past decade. Like the previous section dealing with crimes against persons, this section will analyze a number of the court's decisions with the hope that such an examination will aid those interested in criminal law in Virginia.

1. Larceny

Larceny is the wrongful or fraudulent taking and carrying away of the personal property of some intrinsic value belonging to another, without his assent and with the intent to permanently deprive the owner of the property.⁸¹⁴ While larceny is a common law offense, the Code provides for different punishments depending upon whether or not the property is

807. 215 Va. 495, 211 S.E.2d 71 (1975).

808. *Id.* at 495, 211 S.E.2d at 72.

809. *Id.* at 496, 211 S.E.2d at 72.

810. *Id.*

811. *Id.* at 496-97, 211 S.E.2d at 72-73.

812. *See Durham v. Commonwealth*, 214 Va. 166, 168, 198 S.E.2d 603, 605-06 (1973).

813. VA. CODE ANN. §§ 18.2-77 to -246 (Repl. Vol. 1975 & Cum. Supp. 1980).

814. *Skeeter v. Commonwealth*, 217 Va. 722, 232 S.E.2d 756 (1977).

taken from the person, and the value of the property taken.⁸¹⁵

In the 1977 case of *Lund v. Commonwealth*,⁸¹⁶ the Virginia Supreme Court applied the common law definition of larceny to computer crime⁸¹⁷ and found it inapplicable. In *Lund*, the defendant was convicted of grand larceny in the theft of computer time, cards, and printouts.⁸¹⁸ The Virginia Supreme Court reversed the defendant's conviction holding that computer time and services could not be the subject of larceny since they could not be taken and carried away and in and of themselves had no tangible value.⁸¹⁹ This decision left a serious gap in Virginia law in light of the increasing role computers play in society. Fortunately, the Virginia General Assembly recognized the problem and passed section 18.2-98.1.⁸²⁰ The section states that "[c]omputer time or services or data processing services or information or data stored in connection therewith is hereby defined to be property which may be the subject of larceny under section 18.2-95 or section 18.2-96, or embezzlement under section 18.2-111, or false pretenses under section 18.2-178."⁸²¹ This section should prevent further problems of the type encountered in *Lund*.

Larceny by false pretense is a crime in which the offender not only obtains possession of property, but the title to the property as well. Larceny by false pretenses was the subject of several Virginia Supreme Court decisions during the past decade.⁸²² The case of *Cunningham v. Commonwealth*⁸²³ provides a good discussion of the offense.

In *Cunningham*, the defendant paid for a car by check and received title to it. Later, the same day, she cancelled her check at the bank. However, the next day when she went to pick up the car, she did not mention

815. VA. CODE ANN. §§ 18.2-95 to -96 (Cum. Supp. 1980). Section 18.2-95 defines grand larceny as the taking from the person of another property or money valued at five dollars or more or the taking of property or money, not from the person of another, valued at two hundred dollars or more. Section 18.2-96 defines petit larceny as the taking of property or money from the person of another valued at less than five dollars or the taking of property or money not from the person of another valued at less than two hundred dollars.

816. 217 Va. 688, 232 S.E.2d 745 (1977).

817. See generally Nycum, *Legal Problems of Computer Abuse*, 1977 WASH. U.L.Q. 527, 536, which states that the development of computer technology has created the opportunity for wrongs to be committed for which there are inadequate legal remedies.

818. 217 Va. at 688-89, 232 S.E.2d at 746.

819. *Id.* at 691-93, 232 S.E.2d at 748.

820. 1978 Va. Acts, ch. 686 (codified at VA. CODE ANN. § 18.2-98.1 (Cum. Supp. 1980)).

821. *Id.*

822. *E.g.*, *Cunningham v. Commonwealth*, 219 Va. 399, 247 S.E.2d 683 (1978); *Riebert v. Commonwealth*, 218 Va. 511, 237 S.E.2d 803 (1977); *Bourgeois v. Commonwealth*, 217 Va. 268, 227 S.E.2d 714 (1976).

823. 219 Va. 399, 247 S.E.2d 683 (1978).

the fact that she had cancelled payment. Defendant was subsequently convicted of larceny by false pretenses.⁸²⁴ To prove the crime of false pretenses the state must establish: "(1) an intent to defraud; (2) an actual fraud; (3) use of false pretenses for the purpose of perpetrating the fraud; and (4) accomplishment of the fraud by means of the false pretenses used for the purpose."⁸²⁵ The defendant in *Cunningham* argued that the alleged offense was completed on the day she took title to the car and that the evidence failed to show an intent to defraud at that time.

The court disagreed with the defendant's contention, holding instead that the crime was complete the next day when defendant took possession of the car.⁸²⁶ The *Cunningham* decision, interpreting the crime to have been committed the day after the check was cancelled, avoided a problem encountered in some jurisdictions: since this crime involves the misrepresentation of a present or past fact, had the offense been completed upon receiving title, the cancelling of the check would have been a future act and the crime of false pretenses would not have been committed.⁸²⁷

2. Bad Checks

The ability of Virginia's bad check law⁸²⁸ to protect banks from their own customers was the subject of the Virginia Supreme Court's decision in *Warren v. Commonwealth*.⁸²⁹ The defendant in *Warren* was convicted of attempting to cash a worthless check at her own bank. As a defense she contended that one could not be convicted under section 18.2-181 for cashing a worthless check at her own bank because the bank should be responsible for the information in its own records.⁸³⁰ The defendant's argument that the bank was contributorily negligent was supported by several decisions in other jurisdictions.⁸³¹

824. *Id.*

825. *Id.* at 401-02, 247 S.E.2d at 684.

826. *Id.* There was evidence that the defendant was unhappy with the transaction and called the car dealer seeking to have him return her check. The defendant took possession of the car, thus completing the offense with knowledge that she had cancelled her check.

827. See W. LAFAVE & A. SCOTT, *supra* note 791, § 92, at 679-80.

828. VA. CODE ANN. § 18.2-181 (Repl. Vol. 1975 & Cum. Supp. 1980) which states:

Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for payment of money, upon any bank . . . knowing, at the time . . . that the maker or drawer has not sufficient funds in, or credit with, such bank . . . for the payment of such check, . . . although no express representation is made in reference thereto, shall be guilty of larceny.

829. 219 Va. 416, 247 S.E.2d 692 (1978).

830. *Id.* at 419-20, 247 S.E.2d at 693-94.

831. *Id.* at 420-21, 247 S.E.2d at 694-95. The defendant cites *State v. Mullin*, 225 N.W.2d

The supreme court rejected the defendant's argument ruling that contributory negligence was a civil law doctrine inapplicable in a criminal case. The court held that while a bank has discretionary power to charge a worthless check against an account, it is under no duty to do so.⁸³²

In refusing to reverse the defendant's conviction in *Warren*, the court logically applied section 18.2-181. The court undoubtedly recognized that with the growth of branch banking it would be extremely difficult for banks to check each customer's account whenever the customer cashes a check.⁸³³

D. Crimes Against Health and Safety

In Virginia, as in the rest of the nation, drug abuse offenses became an increasing problem for the courts and legislature in the past decade.⁸³⁴ The Virginia Supreme Court often reviewed drug convictions, many of which involved the distribution and possession of controlled substances.⁸³⁵

1. Distribution of Controlled Substances⁸³⁶

A question addressed by the supreme court on several occasions during the past decade concerned whether possession of a significant quantity of illegal drugs necessarily demonstrates an intent to distribute them. In *Sharp v. Commonwealth*,⁸³⁷ the court ruled that a conviction for posses-

305 (Iowa 1975) (bank legally cannot be deceived when its responsible employees knew an account was overdrawn); *Deitle v. State*, 363 S.W.2d 939 (Tex. Crim. 1963) (conviction reversed because teller knew or had means available to check status of customer's account).

832. 219 Va. at 421, 247 S.E.2d at 694-95.

833. *Id.*

834. A study of FBI statistics for the year 1976 alone reveals that out of a total of 9,608,500 arrests in the United States that year, 609,700 involved drug offenses. The number of drug offense arrests were exceeded only by those for drunkenness, larceny/theft, driving under the influence and disorderly conduct. The 1976 arrest figures represent a 10 year increase of 527.7% in drug offense arrests. J. WEISSMAN, *DRUG ABUSE: THE LAW AND TREATMENT ALTERNATIVES* 33-35 (1978).

Virginia began publishing state crime reports in 1975. See VIRGINIA UNIFORM CRIME REPORTING PROGRAM, *CRIME IN VIRGINIA (1975-79)* which shows that 57,890 drug arrests were made in the state from 1975-1979. During the same period, 143,410 arrests for driving under the influence were made.

835. Statutes currently in effect forbidding the distribution and possession of controlled substances are found in VA. CODE ANN. §§ 18.2-248 to -248.2, -250, -250.1 (Repl. Vol. 1975 & Cum. Supp. 1980).

836. Controlled substances are classified in five schedules found in VA. CODE ANN. §§ 54-524.84:4 to .84:12 (Repl. Vol. 1978 & Cum. Supp. 1980).

837. 213 Va. 269, 192 S.E.2d 217 (1972).

sion with intent to distribute could not be based solely on the amount of drugs in the defendant's possession.⁸³⁸ The trial court conviction in *Sharp* was based upon a statute, stating, in part, that "[a] conviction . . . may be based solely upon evidence as to the quantity . . . possessed."⁸³⁹ The Virginia Supreme Court ruling that there was not a sufficient rational connection between quantity possessed and a presumption of intent to distribute, held that the particular section was so vague and uncertain that it violated the due process clauses of the fourteenth amendment and the Virginia Constitution.⁸⁴⁰ However, the court by its decision in *Sharp* did not forbid the use of quantity to prove intent to distribute in all cases, as was made clear by the court's decision in *Hunter v. Commonwealth*.⁸⁴¹

In *Hunter*, the defendant was in possession of a large quantity of heroin when arrested. Relying on the *Sharp* decision, he contended that the evidence was insufficient to convict him of possession with the intent to distribute. The court, however, upheld his conviction stating that quantity was circumstantial evidence which may be relevant to show intent and that *Sharp* did not foreclose any consideration of quantity.⁸⁴²

The court in *Hunter*, in addition to the quantity of the drug, considered other circumstantial evidence, such as how the heroin was packaged and where it was located.⁸⁴³ Thus, if *Hunter* stands for the proposition that quantity may be taken into account in conjunction with other factors to prove intent, the decision appears consistent with *Sharp*.⁸⁴⁴

An apparent contradiction exists, however, between *Sharp* and *Hunter*. The *Hunter* court stated that "quantity, when greater than the supply ordinarily possessed by a narcotics user for his personal use is a circumstance which, standing alone, may be sufficient to support a finding of intent to distribute"⁸⁴⁵ while in *Sharp* a statute allowing intent to be shown by quantity alone was declared unconstitutional.⁸⁴⁶ Are *Sharp* and

838. *Id.* at 272, 192 S.E.2d at 219.

839. VA. CODE ANN. § 54-524.101(a) (Cum. Supp. 1971) (repealed by 1972 Va. Acts, ch. 798).

840. 213 Va. at 271-72, 192 S.E.2d at 218-19.

841. 213 Va. 569, 193 S.E.2d 779 (1973).

842. *Id.* at 570, 193 S.E.2d at 780. The court cites *United States v. Childs*, 463 F.2d 390, 393 (4th Cir. 1972), *cert. denied*, 409 U.S. 968 (1972) which held constitutional a jury instruction that intent to distribute might be inferred "from possession of large quantity of marijuana, among . . . all other facts and circumstances in this case . . ."

843. 213 Va. at 570-71, 193 S.E.2d at 780.

844. *Id.* at 570, 193 S.E.2d at 780.

845. *Id.*

846. *See* note 840 *supra* and accompanying text.

Hunter reconcilable? One commentator states that *Hunter* was a clarification of *Sharp*, brought about to facilitate police work and, possibly, by the different nature of the drugs involved in the two cases.⁸⁴⁷ Whatever the reasons behind the *Hunter* decision, it appears that quantity alone may, in some cases, be sufficient to convict for possession with intent to distribute. In cases where a large quantity of drugs are in the possession of an individual, quantity alone would seem to be sufficient to support a conviction. An example of such a case may be where the individual is transporting a large quantity of drugs in a car trunk. In many cases, other evidence such as packaging will usually be present.

The difficulty with the *Hunter* decision will arise in cases where the trier-of-fact must determine what quantity goes beyond that normally possessed for personal use. A heavy drug user might, conceivably, possess a large quantity of drugs solely for personal use. Another person might possess the same quantity only for the purpose of selling the drugs. Thus, the standard itself invites inconsistent decisions.

Another important issue involving drug distribution is the question of how to determine when distribution is merely an accommodation to another, a minor offense compared to trafficking for profit. The issue arises because sections 18.2-248 and 18.2-248.1⁸⁴⁸ of the Virginia Code provide for different penalties depending upon whether distribution is for profit or an accommodation. Section 18.2-248 provides, in part:

(a) Any person who violates this section with respect to a controlled substance . . . shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; . . . provided, that if such person prove that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II only as an accommodation to another individual . . . and not with intent to profit thereby . . . nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 5 felony.⁸⁴⁹

847. *Eighteenth Annual Survey of Developments in Virginia Law 1972-1973*, 59 VA. L. REV. 1458, 1463-64 (1973). This commentator points to the fact that marijuana was possessed in *Sharp*, while heroin was the drug in *Hunter*; therefore, since heroin is more difficult to obtain, possession of a large quantity might logically infer an intent to distribute.

848. VA. CODE ANN. §§ 18.2-248 to -248.1 (Repl. Vol. 1975 & Cum. Supp. 1980).

849. VA. CODE ANN. § 18.2-248 (Repl. Vol. 1975 & Cum. Supp. 1980). Class 5 felonies are punishable from one to ten years in prison or, in the discretion of the judge or jury, confinement of no more than one year and a fine of no more than one thousand dollars. VA. CODE ANN. § 18.2-10(e) (Repl. Vol. 1975 & Cum. Supp. 1980). VA. CODE ANN. § 18.2-248.1 (Cum. Supp. 1980) makes a similar distinction in penalties for distribution of marijuana for profit

On several occasions during the past decade the Virginia Supreme Court addressed the question of when a defendant charged with distribution was entitled to an accommodation instruction. In *Jefferson v. Commonwealth*,⁸⁵⁰ the court ruled that distribution as an accommodation was a lesser included offense of distribution for profit.⁸⁵¹ As such, the court ruled that the defendant was entitled to an accommodation instruction unless the prosecution had shown beyond a reasonable doubt that distribution was for profit.⁸⁵²

However, a 1973 amendment to the distribution statute placed upon the defendant the burden of proving that a distribution was an accommodation.⁸⁵³ The court in *Gardner v. Commonwealth*⁸⁵⁴ held that the amendment created a rebuttable presumption which the defendant could overcome by introducing evidence to show that there was no intent to profit or induce use or addiction.⁸⁵⁵

The validity of the *Gardner* court's construction of the statute became suspect because of the United States Supreme Court decision in *Mullaney v. Wilbur*.⁸⁵⁶ The Court in *Mullaney* held that a Maine murder law was unconstitutional because it shifted the burden of proof to the defendant on the issue of malice.⁸⁵⁷ This shifting of the burden on "the critical fact in dispute" was found to be in violation of the fourteenth amendment due process clause.⁸⁵⁸

Virginia's distribution for profit presumption was tested in *Stillwell v. Commonwealth*.⁸⁵⁹ Relying upon *Mullaney*, the defendant in *Stillwell* argued that section 18.2-248 of the Virginia Code unconstitutionally placed the burden of proof on him and was vague because it stated no standard of proof. The Virginia Supreme Court rejected *Stillwell's* arguments and in its decision attempted to clarify the profit accommodation controversy which had developed. In affirming the constitutionality of section 18.2-

and distribution as an accommodation.

850. 214 Va. 432, 201 S.E.2d 749 (1974).

851. *Id.* at 434, 201 S.E.2d at 751 (construing VA. CODE ANN. § 54-524.101:1 (Cum. Supp. 1972) (amended by 1973 Va. Acts, ch. 479 to place burden on defendant to show accommodation, repealed by 1975 Va. Acts, ch. 589 and reenacted as VA. CODE ANN. § 18.2-248 (Repl. Vol. 1975) by 1975 Va. Acts, chs. 14, 15)).

852. 214 Va. 432, 201 S.E.2d 749.

853. *See* note 851 *supra*.

854. 217 Va. 5, 225 S.E.2d 354 (1976).

855. *Id.* at 7, 225 S.E.2d at 356.

856. 421 U.S. 684 (1975).

857. *Id.* at 701, 703-04.

858. *Id.* at 704.

859. 219 Va. 214, 247 S.E.2d 360 (1978).

248, the court held that the rebuttable presumption against an accommodation sale or distribution was valid because there was a "rational and reasonable connection . . . between the fact of sale or distribution and the conclusion that it was with intent to profit."⁸⁶⁰ The court reasoned that section 18.2-248 created a single offense, and only after the guilt of the defendant was established did the statute raise a presumption that the distribution or sale was for profit;⁸⁶¹ since the presumption did not apply to the guilt or innocence of the defendant, but only to the severity of punishment, it was held to meet the requirements of *Mullaney*.⁸⁶²

While the constitutional validity of the distribution for profit presumption appears established on the basis of *Stillwell*,⁸⁶³ it still presents a dilemma for the attorney representing a client charged with violation of section 18.2-248. The attorney must weigh the evidence against his or her client; if the evidence is strong, the attorney may be forced to introduce evidence to show an accommodation in an effort to mitigate punishment. Of course, evidence that shows a distribution to be an accommodation is still evidence of distribution. So, in an effort to mitigate punishment the attorney may be forced, in effect, to forfeit any chance of winning an acquittal. Therefore, the attorney faced with this problem must weigh the evidence against a client carefully before introducing evidence to overcome the presumption that the distribution was for profit.

2. Possession of Controlled Substances⁸⁶⁴

Like distribution, possession of controlled substances was also the subject of a number of Virginia Supreme Court decisions during the past decade. Possession of a controlled substance must be intentional and conscious in order to convict a person of illegal drug possession under Virginia law.⁸⁶⁵ However, such possession may be either actual or

860. *Id.* at 219, 247 S.E.2d at 263-64. The rational connection test was enunciated by the court in the *Sharp* decision. See notes 837-38, 840 *supra*.

861. 219 Va. 214, 247 S.E.2d 360 (1978).

862. *Id.* at 223-25, 247 S.E.2d at 365-67. The court cites *Patterson v. New York*, 432 U.S. 197 (1977) which clarified *Mullaney*. In *Patterson*, the Supreme Court upheld the challenged statute which they characterized as allowing mitigation of punishment upon proof of "extreme emotional disturbance" by the defendant as an "affirmative defense."

863. For a discussion of the use of presumptions in Virginia law, see generally C. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* (1977 & Supp. 1980).

864. See note 836 *supra*.

865. VA. CODE ANN. §§ 18.2-250 to -250.1 (Cum. Supp. 1980). Section 18.2-250 states: "It is unlawful for any person knowingly or intentionally to possess a controlled substance" Section 18.2-250.1 contains the same language with respect to marijuana.

constructive.⁸⁶⁶

It is the concept of constructive possession which has been the subject of most of the court's decisions concerning possession. In *Gillis v. Commonwealth*,⁸⁶⁷ the defendant was convicted of possessing marijuana found in a pipe in the apartment he shared with another person.⁸⁶⁸ Under Virginia's possession statutes, ownership or occupancy of a home or vehicle in which a controlled substance is found raises no presumption of illegal possession by the owner or occupant.⁸⁶⁹ However, the court affirmed the defendant's conviction in *Gillis*, holding that the evidence supported an inference that the defendant had constructive possession of the marijuana because it was subject to his "dominion and control."⁸⁷⁰ The court pointed to evidence which suggested that the defendant had the necessary knowledge of the drug's presence,⁸⁷¹ but was silent on the question of intent. Seemingly, a substance could be subject to a person's dominion and control and still not be intentionally in his possession. By failing to clearly address the question of intent, the court made the *Gillis* decision somewhat vague.

This vagueness was remedied in the court's decision in *Burton v. Commonwealth*.⁸⁷² In *Burton* the defendant was convicted of illegal distribution after she brought clothes containing drugs to a friend in jail. The Virginia Supreme Court reversed the conviction holding that "[a]lthough [it was] established that the defendant was in possession of drugs, it was not established beyond a reasonable doubt that she was knowingly and intentionally in possession."⁸⁷³

Following the *Burton* case, the court again had the opportunity to discuss constructive possession. The defendant in *Woodfin v. Common-*

866. The doctrine of constructive possession was established by *Ritter v. Commonwealth*, 210 Va. 732, 173 S.E.2d 799 (1970) (marijuana found in defendant's mailbox). Prior to *Ritter*, it was generally necessary to show "immediate and exclusive control" of the substance. *Id.* at 741, 173 S.E.2d at 805-06.

867. 215 Va. 298, 208 S.E.2d 768 (1974).

868. *Id.* at 299-300, 208 S.E.2d at 769-70.

869. The defendant in *Gillis* was convicted under VA. CODE ANN. § 54-524.101:2 (Cum. Supp. 1972) (repealed by 1975 Va. Acts, ch. 589, reenacted as VA. CODE ANN. § 18.2-250 (Repl. Vol. 1975) by 1975 Va. Acts, chs. 14, 15).

870. 215 Va. at 302, 208 S.E.2d at 771.

871. *Id.* at 301, 208 S.E.2d at 771. The marijuana was in a pipe on a table in plain view. The defendant had been home for over an hour and had a previous conviction for possession which established that he was familiar with marijuana.

872. 215 Va. 711, 213 S.E.2d 757 (1975).

873. *Id.* at 713, 213 S.E.2d at 758.

*wealth*⁸⁷⁴ was charged with possession of cocaine found in the home of a female acquaintance. The court held that the evidence, which showed only that the defendant was a frequent visitor to the house and had some belongings there, was insufficient to convict. The court held that the evidence failed to show dominion and control or "to show that the defendant was aware of the presence and character of the . . . substance."⁸⁷⁵

As in the *Stillwell*⁸⁷⁶ decision dealing with distribution, the Virginia Supreme Court attempted to answer the questions surrounding presumptions and proof of illegal possession in *Clodfelter v. Commonwealth*.⁸⁷⁷ In *Clodfelter*, the defendant was convicted of possession of drugs found in the hotel room he had rented.⁸⁷⁸ The court held that while occupancy of the room "did not create a presumption that he either knowingly or intentionally possessed the drugs . . . it was a circumstance which could be considered . . . along with the other evidence, in determining . . . guilt."⁸⁷⁹ However, the court stated that in order to convict, the Commonwealth must prove beyond a reasonable doubt that the defendant was aware of the "presence and character of the particular substance and was intentionally and consciously in possession of it."⁸⁸⁰

Clodfelter would seem to establish that where constructive possession is involved, it must be shown that the defendant was conscious of the substance and had the necessary intent to possess it before a conviction can result. Therefore, where a conviction is based on constructive possession, the dominion and control of the drug by the defendant apparently must include knowledge and intent.

In light of the court's interpretation of constructive possession and the fact that ownership or occupancy of cars or dwellings does not create a presumption of guilt in possession cases,⁸⁸¹ it would appear that adequate safeguards are provided to protect the innocent. While protecting the innocent, Virginia's possession law is still capable of serving its purpose, which is to curb drug abuse.⁸⁸²

874. 218 Va. 458, 237 S.E.2d 777 (1977).

875. *Id.* at 459-61, 237 S.E.2d at 778-79 (citing *Ritter v. Commonwealth*, 210 Va. 732, 741, 173 S.E.2d 799, 805-06 (1970)).

876. See note 859 *supra* and accompanying text.

877. 218 Va. 619, 238 S.E.2d 820 (1977).

878. *Id.* at 621, 238 S.E.2d at 821.

879. *Id.* at 623, 238 S.E.2d at 822.

880. *Id.* at 622, 238 S.E.2d at 822 (citing *Ritter v. Commonwealth*, 210 Va. 732, 741, 173 S.E.2d at 799, 805-06 (1970)).

881. VA. CODE ANN. §§ 18.2-250 to 250.1 (Cum. Supp. 1980).

882. For a survey of state laws governing the possession of illicit drugs, see Annot., 91 A.L.R.2d 810 (1963) and Annot., 56 A.L.R.3d 948 (1974). For an example of a statute in

3. Driving Under the Influence

Like other forms of drug abuse, the abuse of alcohol has been a serious problem in Virginia during the past decade. The problem of drivers under the influence of alcohol or other drugs is especially troublesome because of the danger to human life.⁸⁸³

The Virginia Supreme Court had an opportunity to consider this problem in the case of *Williams v. City of Petersburg*.⁸⁸⁴ In this case the defendant was found guilty of operating an automobile while under the influence of alcohol. The evidence showed that the defendant was discovered in a parking lot slumped over the steering wheel of his car with the motor running.⁸⁸⁵ On appeal, the defendant argued that the evidence did not show him to be operating or driving the vehicle.⁸⁸⁶ The court affirmed the conviction, following a broad view of the term "operating." The court held that "operating" means "physical control of the vehicle and [the engagement of] machinery of the vehicle which alone, or in sequence, would have activated its motive power."⁸⁸⁷ The broad definition of "operating" a vehicle followed by the court in *Williams* is supported by decisions in other jurisdictions.⁸⁸⁸ It is also consistent with other decisions involving this offense issued by the court during the past decade.⁸⁸⁹ The decision in *Williams* was a logical response by the court to the serious problem the intoxicated driver poses to himself and others.

E. Conclusion

During the past decade, the Virginia Supreme Court has proven to be a conscientious and progressive force in Virginia law. While there have, at times, been inconsistencies in certain decisions, the court has shown a

which ownership or occupancy creates a presumption of illegal possession, see N.Y. PENAL LAW § 220.25 (McKinney 1980).

883. See note 834 *supra*.

884. 216 Va. 297, 217 S.E.2d 893 (1975). *Williams* was charged with violating PETERSBURG CODE § 22-142 (1964), which provides that "[n]o person shall drive or operate any automobile . . . while under the influence of alcohol . . ." The state statute VA. CODE ANN. § 18.2-266 (Cum. Supp. 1980), as amended by VA. CODE ANN. § 18.1-54 (1964), is essentially the same.

885. 216 Va. at 298, 217 S.E.2d at 894.

886. *Id.* at 299, 217 S.E.2d at 895.

887. *Id.* at 301, 217 S.E.2d at 896.

888. See *Jacobson v. State*, 551 P.2d 935 (Alaska 1976); *Rose v. State*, 168 Ind. App. 674, 345 N.E.2d 257 (1976); *State v. Graves*, 269 S.C. 356, 237 S.E.2d 584 (1977).

889. See *Lyons v. City of Petersburg*, 221 Va. 10, 266 S.E.2d 880 (1980); *Nicholls v. Commonwealth*, 212 Va. 257, 184 S.E.2d 9 (1971); *Gallagher v. Commonwealth*, 205 Va. 666, 139 S.E.2d 37 (1968).

willingness to explain and expand prior decisions where necessary. In doing so, the court has kept Virginia's criminal law in the mainstream of modern American law.

