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Annual Survey of Virginia Law: Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

*Cullen D. Seltzer**

I. INTRODUCTION

The past year has been an active one for the Virginia courts and General Assembly in the areas of criminal law and procedure. Developments include cases regarding the allowance of expert assistance to indigent criminal defendants and a defendant's right to a new trial based on after-discovered evidence. Driving under the influence [DUI] defendants are no longer entitled to their choice of a blood or breath test as a function of the implied consent law, and for felons convicted of committing an offense after December 31, 1994, parole is no longer an option. This article surveys these and other legislative and judicial developments in Virginia criminal law. Although this article is intended to survey significant developments over the past year, the reader is cautioned to bear in mind several important caveats.

First, the constraints of time and publication schedules prohibit a survey of cases and legislative developments before April

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The author is indebted to a number of people for their assistance, knowing or otherwise, in the preparation of this survey. The general structure of the article is borrowed from that employed by Steven D. Benjamin who wrote a survey of Criminal Law in Virginia for this publication two years ago. The Office of the Public Defender for the City of Richmond, which has the good fortune to have employed many talented and insightful attorneys, has aided not only in providing an environment which values and requires thoughtful consideration of developing law, but in providing timely and concise summaries of recent case law. Deputy Public Defender Susan Hansen and Assistant Public Defenders Maureen White and Cheryl Frydrychowski were of particular assistance in this regard. All of the attorneys and staff in Richmond's Office of the Public Defender aided by sharing their experiences with and insight into the practice of criminal law. Finally, my greatest debt is owed to Rosemary Seltzer, my wife, without whose patience and support I could not have completed this work.

1994 and after April 1995. Significantly, by the time this article is published, legislative enactments effective July 1, 1995 will have been in effect for several months and are not discussed in this article. Second, this article does not purport to survey the development of the criminal law in the federal courts even though those courts do have occasion to interpret state law, as well as federal constitutional law, which is frequently binding upon, and certainly persuasive in, the Virginia courts. Third, and finally, this author's views of what developments are significant, and what the implications of those developments may be, are those of the author alone; there is no real substitute for reading the law as the law-makers, from whatever branch of government they may be, have written it.

II. FOURTH AMENDMENT¹

A. *Probable Cause*

In *Jones v. Commonwealth*,² the Court of Appeals of Virginia reversed a conviction for possession of cocaine where the contraband was discovered on the defendant's person incident to an arrest for trespassing, but the court held that the police did not have probable cause for the arrest. The arresting officer was told by the defendant and bystanders that the defendant was not trespassing, but was visiting a friend who lived at the

1. The sections denoted by reference to one of the first ten amendments to the federal Constitution are, of course, simply a shorthand means of describing what component of the Fourteenth Amendment's due process clause is at issue. This is necessarily so because the first ten amendments to the federal Constitution do not apply to the states; rather many of the protections afforded by those amendments have been incorporated into the due process clause of the Fourteenth Amendment, which expressly applies to the states. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.") (emphasis added); JEROLD H. ISRAEL, ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 33-34 (1993) ("The first eight amendments were enacted as limitations solely upon the federal government.") The modern trend in incorporation theory is that of "selective incorporation" whereby rights deemed to be "fundamental" are "incorporated into the Fourteenth Amendment and applied to the states to the same extent that [they] appl[y] to the federal government." *Id.* at 43.

2. 18 Va. App. 229, 443 S.E.2d 189 (1994).

apartment complex, which was posted "No Trespassing."³ These statements rendered unreasonable the officer's belief that the defendant was trespassing.⁴ That the defendant fled when approached by the police did not give rise to an independent basis for probable cause that the defendant was committing a crime.⁵

The court of appeals also affirmed that administrative searches, even in areas which are closely regulated by the state such as mining, may be conducted without probable cause only if some statutory or regulatory provision authorizes the search.⁶

Correctional officers who searched an uncooperative inmate, based on probable cause, permissibly did so by using a medical device designed for opening a person's jaw.⁷ The device, a "jaw-screw," was inserted into a prisoner's mouth when the prisoner refused to open his mouth, which officials believed to contain contraband, and only after other physical efforts to open the prisoner's mouth had been exhausted.⁸ The court took pains to note that the device was used by corrections officers in the manner in which the device was intended to be used—to open a person's mouth.⁹

B. *Reasonable Articulable Suspicion of Crime—The Terry Stop*

In *Logan v. Commonwealth*,¹⁰ the court of appeals, sitting en banc, reversed a panel decision of that court and held that a police officer could rely upon her experience and training in concluding that a broken vent window on a popular make of automobile was indicia that the vehicle had been stolen. The police officer in question was a six year veteran of the police force, had recovered 200 stolen vehicles, knew the Jeep Wagoneer to be a popular vehicle among car thieves, and that

3. *Id.* at 230-31, 443 S.E.2d at 190.

4. *Id.* at 232-33, 443 S.E.2d at 191.

5. *Id.* at 233, 443 S.E.2d at 191.

6. *Burgan v. Commonwealth*, 19 Va. App. 172, 450 S.E.2d 177 (1994).

7. *Archer v. Commonwealth*, 20 Va. App. 87, 455 S.E.2d 280 (1995).

8. *Id.* at 89, 455 S.E.2d at 281.

9. *Id.* at 93, 455 S.E.2d at 283.

10. 19 Va. App. 437, 452 S.E.2d 364 (en banc), *rev'g*, 18 Va. App. 136, 442 S.E.2d 258 (1994).

breaking vent windows was a common means of entry into such vehicles.¹¹

The court of appeals addressed the question of successive stops in *Jha v. Commonwealth*.¹² There, police initially stopped the defendant based on the suspicious circumstances surrounding his late-night presence near a closed store.¹³ On investigation of Jha, police discovered nothing.¹⁴ Jha then told police that he would be leaving in a particular direction.¹⁵ When he left in a different direction, and police discovered other suspicious circumstances near where Jha had last been seen, they stopped him again.¹⁶ Evidence adduced during this second stop was used against Jha during his criminal trial, and Jha protested that the second stop was unlawful.¹⁷ The court disagreed and stated, "[o]nce police found nothing illegal from the first stop, they were not required to ignore the facts that triggered it, and thus, were not precluded from using those facts in establishing probable cause for the second detention."¹⁸

The court of appeals also held in *Peguese v. Commonwealth*¹⁹ that a search of the driver of a car is permissible to secure the officer's safety when the car is stopped to investigate the possible drug activity of the passenger. The court held that "because appellant's proximity to the [drug] buy and because of his association with [the person suspected of buying drugs], [police reasonably concluded that the] appellant was a partici-

11. *Id.* at 439-40, 452 S.E.2d at 366.

12. 18 Va. App. 349, 444 S.E.2d 258 (1994).

13. *Id.* at 350-51, 444 S.E.2d at 259.

14. *Id.* at 351, 444 S.E.2d at 259.

15. *Id.*

16. *Id.*

17. *Id.* at 351, 444 S.E.2d at 260.

18. *Id.* at 354, 444 S.E.2d at 260. Note that the court used the term "probable cause" to describe the information obtained by police for the second stop. That characterization seems to suggest that Jha was under arrest for a crime at the time of the second stop, rather than simply investigatively detained. See *Terry v. Ohio*, 392 U.S. 1 (1968). In setting out the applicable legal standards, however, the court stated that in order to conduct "[a]n investigatory stop . . . [the police must have] a reasonable suspicion that the defendant is engaged in criminal activity." *Jha*, 18 Va. App. at 353, 444 S.E.2d at 260. In light of the fact that Jha's challenge was to the sufficiency of the evidence to prove an "articulable suspicion" one must assume that the holding of the case applies to *Terry* stops. Nothing in the opinion, however, suggests that the logic behind *Jha* would have any less force if applied in a probable cause context.

19. 19 Va. App. 349, 451 S.E.2d 412 (1994).

part in the transaction and possibly armed and dangerous [which in turn] gave rise to an 'inference of dangerousness. . . .'²⁰

C. *Community-Caretaker Function*

Last year, Virginia for the first time recognized an additional exception to the warrant requirement of the Fourth Amendment. In *Barrett v. Commonwealth*,²¹ the court of appeals, en banc, held that the

duty of the police embraces the function of maintaining public order and providing necessary assistance to persons in need or distress. An officer who harbors a *reasonable and articulable suspicion*, based upon observed facts or a credible report, that a citizen is in distress or in need of assistance, may lawfully effect an appropriately brief and limited seizure for the purpose of investigating that suspicion and rendering aid.²²

The court relied in part on the U.S. Supreme Court's opinion in *Cady v. Dombrowski*²³ for the proposition that the search in that case was held to be permissible because it was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."²⁴ One *Barrett* dissenter observed that *Cady* and the other U.S. Supreme Court cases cited by the majority in support of a community-caretaking exception, arose "in the context of police activities occurring after an otherwise valid seizure of an automobile."²⁵

20. *Id.* at 353, 451 S.E.2d at 414. The dissent disagreed and observed: "The majority concludes that a police officer may reasonably believe that one is armed and dangerous from one's presence at a suspected drug transaction and the suspicion that one's companion possesses an unknown controlled substance. Existing law does not, in my opinion, extend so far." *Id.* at 354, 451 S.E.2d at 414-15 (Barrow, J., dissenting). For good or for ill, the law apparently does so extend now.

21. 18 Va. App. 773, 447 S.E.2d 243 (1994).

22. *Id.* at 778, 447 S.E.2d at 246 (emphasis added).

23. 413 U.S. 433 (1973).

24. *Barrett*, 18 Va. App. at 777, 447 S.E.2d at 245 (quoting *Cady*, 413 U.S. at 441).

25. *Id.* at 779, 447 S.E.2d at 247 (Elder, J., dissenting).

Of the two dissenting opinions in *Barrett*, one complained that "community-caretaking" was too nebulous a concept to permit what the majority conceded was a seizure within the meaning of the Fourth Amendment.²⁶ The other dissenting opinion did not quarrel with the notion of community-caretaking in general, but rather took issue with the majority's conclusion that the trooper in this case had a reasonable suspicion that the defendant's vehicle was in distress.²⁷ The trooper, who first saw Barrett's vehicle stopped on the shoulder of a roadway, and then moving slowly, partly on the shoulder and partly on private property, testified that "it seemed odd since it was [his] impression that the vehicle could have pulled onto the roadway."²⁸ If that were so, wondered the dissent, how could the trooper have believed the vehicle or its occupants were in distress?²⁹

Upon reviewing the en banc decision of the court of appeals, the Supreme Court of Virginia answered that question in the negative.³⁰ The supreme court held that Barrett's "odd" conduct, without more, was insufficient to give rise to a reasonable suspicion that he was in need of police assistance.³¹ The supreme court, therefore, found it unnecessary to reach the question of whether a "community-caretaker" doctrine exists.³² That notwithstanding, the supreme court, unlike the court of appeals, declined to characterize the community-caretaker doctrine as following from *Cady v. Dombrowski*.³³ Rather, the supreme court noted that *Cady, South Dakota v. Opperman*,³⁴ and *Colorado v. Bertrine*,³⁵ all of which were cited by the court of appeals, each "involved the admissibility of incriminating evidence discovered during a standard police procedure [not a "community-caretaking" stop] of inventorying property that had properly

26. *Id.* (Elder, J. dissenting).

27. *Id.* at 780, 447 S.E.2d at 247 (Coleman, J., dissenting).

28. *Id.* (Coleman, J., dissenting).

29. *Id.* (Coleman, J., dissenting).

30. *Barrett v. Commonwealth*, No. 941711, 1995 WL 545886 (Va. Sept. 16, 1995). Note that discussion of this opinion is the sole case in this survey which was handed down after April 1995.

31. *Id.* at *3.

32. *Id.*

33. 413 U.S. 433 (1973).

34. 428 U.S. 364 (1976).

35. 479 U.S. 367 (1976).

been taken into custody.³⁶ The supreme court characterized the Commonwealth's position as urging "an exten[sion] of [*Cady*] to validate investigative stops and detentions of persons not evidently engaged in criminal activity, but who apparently need some policy assistance.³⁷ In light of the supreme court's holding that the trooper in *Barrett* did not have a reasonable suspicion that Barrett was in distress, the court's discussion of the import of *Cady*, *Opperman* and *Bertrine* can only be characterized as dicta, albeit highly persuasive dicta given the unanimity of the supreme court's decision.

The court of appeals in *Barrett*, however, clearly indicated that a majority of that court believes that community-caretaker is the law. Indeed, the loss to the court of appeals of Judges Koontz and Barrow has resulted in two fewer court of appeals votes for the *Barrett* dissenters.³⁸ Since the supreme court declined to hold community-caretaker invalid per se, the court of appeals remains free to declare it the law in an appropriate case. Given the clear indication of a majority of the court of appeals to embrace community-caretaker in what was a very close case, defense counsel would do well to prepare for future community-caretaker cases with an eye towards that doctrine's continued vitality. Defense counsel would also do well, given that the court of appeals demonstrated an inclination to fashion a hypothetical basis for a caretaker stop, to establish precisely what the officer suspects might be awry.³⁹ Similarly

36. *Barrett*, 1995 WL 545886, at *2.

37. *Id.*

38. Note that Justice Koontz did not participate in the decision of *Barrett* in the supreme court. The opinion was authored by Justice Koontz's predecessor, Justice Whiting who "prepared the opinion in this case prior to the effective date of this retirement on August 12, 1995." *Id.* at *1 n.1.

39. The court of appeals majority recited that "Lyons pulled behind the [moving] truck and activated his flashing lights. He testified that his only purpose was to determine whether the driver was experiencing mechanical problems and not to investigate any perceived violation of the law." *Barrett v. Commonwealth*, 18 Va. App. 773, 774, 447 S.E.2d 243, 244 (1994). The majority stated, without suggesting that these theories were in fact in the trooper's mind,

The trooper reasonably concluded that the occupants of the truck might need help. The driver could have been easing a malfunctioning truck up the shoulder, hoping to find assistance. The occupants could have been injured or sick. They might have been people whose safety would be jeopardized by being stranded on the highway. All these possibilities were consistent with the situation confronting Trooper Lyons. Had he simply

Commonwealth's attorneys would do well to remember that community-caretaker may yet result in the admission of evidence otherwise unlawfully obtained.

From the discussion by the Judges and Justices of the appellate courts, two more things about the new community-caretaker exception can be fairly predicted. First, the analytical paradigm employed in *Terry* stop cases, reasonable articulable suspicion, will be employed in caretaker cases. Second, the dispute over what facts give rise to a reasonable suspicion⁴⁰ remains a hotly contested one.

D. *Seizure*

The long-standing test for determining whether a person is seized is to examine whether a reasonable person in the defendant's position would feel free to leave the police.⁴¹ Applying that test, however, has proved more troublesome. The court of appeals demonstrated its trouble with this analytical paradigm with its apparently inconsistent conclusions in two recent cases. In *Watson v. Commonwealth*,⁴² the court concluded that a person initially stopped by police because of his vague resemblance to a suspect in a drug case, but who was later released and instructed to drive his own car to another location where police were waiting and where he was immediately arrested, was seized for the entire time, including the time when Watson was driving his own car. The key to the court's ruling

passed by without inquiry or the offer of assistance, he would have failed in his duty to offer the alert, kindly helping hand that our society rightly expects of its police officers.

Id. at 778, 447 S.E.2d at 246.

Note also, however, that an officer's subjective impressions are not what give rise to lawful cause for a seizure; rather the test is one of *objective* reasonableness. See *Scott v. United States*, 436 U.S. 128, 138 (1978); *Limonja v. Commonwealth*, 8 Va. App. 532, 537-38, 383 S.E.2d 476, 480 (1989).

40. See *supra* note 10-11 and accompanying text (discussing *Logan v. Commonwealth*).

41. "A voluntary police-citizen encounter becomes a seizure for Fourth Amendment purposes 'only if, in view of all of the circumstances . . . a *reasonable person* would have believed that he was not free to leave.'" *Wechsler v. Commonwealth*, 20 Va. App. 162, 170, 455 S.E.2d 744, 747 (1995) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

42. 19 Va. App. 659, 454 S.E.2d 358 (1995).

was that Watson was allowed to drive only after agreeing to accompany police to the other location, and that his car was flanked by police cars on the way to the other location.⁴³

By contrast, in *Johnson v. Commonwealth*,⁴⁴ police officers who were conducting a valid *Terry* investigative stop of the defendant did not convert that stop into a full blown arrest by ordering the defendant out of his vehicle and placing him in handcuffs. Johnson argued that once placed in handcuffs, the subsequent, purportedly consensual, search of his person was unlawful.⁴⁵ The court reasoned that because “[i]t was dark [and] Johnson is a large, powerful man . . . suspected of carrying a weapon,” the restraint employed by the police did not elevate the *Terry* stop to a more intrusive full-blown arrest.⁴⁶ The effect of the *Johnson* and *Watson* holdings is to suggest that sometimes a defendant can be closely restrained and plainly not free to leave, and still not be under arrest, and depending on the circumstances, a defendant can actually be driving his own car, alone, and be seized. These cases provide ample ammunition to defense counsel and prosecutors alike, in the ongoing battle regarding what constitutes an arrest. But these cases provide little hope that arrests, temporary detentions, and consensual non-Fourth Amendment implicating encounters, will be clearly and predictably distinguishable anytime soon.⁴⁷

III. FIFTH AMENDMENT

Last year, the court of appeals affirmed that a seventeen-year-old juvenile need not necessarily have the presence of a parent or legal counsel in order to voluntarily make statements

43. *Id.* at 661, 454 S.E.2d at 360.

44. 20 Va. App. 49, 455 S.E.2d 261 (1995).

45. *Id.* at 53, 455 S.E.2d at 263-64. *See, e.g., Florida v. Royer*, 460 U.S. 491, 501 (1983) (holding that voluntarily made statements that are the product of an illegal arrest are inadmissible.)

46. *Johnson*, 20 Va. App. at 55, 455 S.E.2d at 265. *See Thomas v. Commonwealth*, 16 Va. App. 851, 856-57, 434 S.E.2d 319, 323 (1993) (requiring that police procedures and investigative methods attendant to a *Terry* stop be calculated to confirm or dispel suspicion of crime quickly and with minimal intrusion).

47. *See Wechsler v. Commonwealth*, 20 Va. App. 162, 455 S.E.2d 744, (1995) for a concise explanation of the analytical distinctions between consensual encounters, investigative detentions based on reasonable suspicion, and arrests based on probable cause.

to police.⁴⁸ Similarly, a defendant in custody, who executed a rights waiver, was held to have voluntarily confessed, notwithstanding statements by the state police investigator that "you and I are the only one[s] in the room" and that the investigator "was not going to spill [his] guts" about the defendant.⁴⁹ A defendant who invoked his Fifth Amendment right to remain silent during a non-custodial interrogation, but who twelve days later made inculpatory statements, voluntarily made the statements, and they were admissible against him at his trial.⁵⁰ Central to the court's ruling was that the first encounter with the police was voluntary, and that twelve days lapsed between the first and second encounters during which time the defendant was not incarcerated.⁵¹

In *Husske v. Commonwealth*,⁵² the court of appeals came to a contrary conclusion regarding the admissibility of the defendant's inculpatory statements. Husske was first convicted of two "peeping-tom" violations, for which offenses he received suspended jail sentences.⁵³ The court of appeals, on review of the record, found that a condition of the suspended sentences was that Husske fully participate in counseling sessions with a local social service agency, the progress of which was to be reported to the general district court where Husske was first convicted.⁵⁴ During one counseling session, Husske's wife urged Husske to tell his counselor what was really bothering him.⁵⁵ After additional probing by the counselor, Husske confessed to a rape.⁵⁶ The counselor reported Husske's admission to the authorities who in turn prosecuted Husske for that offense for

48. *Roberts v. Commonwealth*, 18 Va. App. 554, 445 S.E.2d 709 (1994).

49. *Gwaltney v. Commonwealth*, 19 Va. App. 468, 471, 452 S.E.2d 687, 689 (1995).

50. *Tipton v. Commonwealth*, 18 Va. App. 832, 447 S.E.2d 539 (1994).

51. *Id.* at 834-36, 447 S.E.2d 540-42.

52. 19 Va. App. 30, 448 S.E.2d 331 (1994). This case has been argued before the court of appeals en banc, but as yet no decision affirming or reversing the panel decision has been handed down.

53. *Id.* at 47, 448 S.E.2d at 340.

54. *Id.*

55. *Id.* at 48, 448 S.E.2d at 341.

56. *Id.*

which Husske was convicted.⁵⁷ On appeal Husske challenged the admissibility of his confession.⁵⁸

The court of appeals concluded that Husske's participation in the counseling program was compulsory as a function of his suspended sentence on the "peeping-tom" charges, and held that the statement was admitted against Husske in violation of his Fifth Amendment right to remain silent.⁵⁹ The court reasoned that by forcing Husske to choose between active jail time, if his suspended sentence were revoked for non-compliance with court-ordered counseling, and exercising his right to remain silent, was too coercive an environment in which to make a knowing and intelligent waiver of the right to remain silent.⁶⁰

In *Hines v. Commonwealth*,⁶¹ the court of appeals again considered the application of the Fifth Amendment in the context of the *Miranda* decision. During his interrogation, Hines "became aggravated and said he wanted to return to his jail cell and speak with his attorney."⁶² The interrogating detective then asked Hines "whether [Hines was] going to be a witness or a defendant in the matter."⁶³ Hines then made incriminating statements. Later, another detective who was in the room for the entire discussion asked Hines if he understood his *Miranda* rights, and Hines replied that he did.⁶⁴ Hines then made additional incriminating statements regarding the crime the second detective was investigating.⁶⁵ The court of appeals held that the first detective's inquiry regarding whether Hines was to be a witness or a defendant was "reinitiation [by the officer] of the dialogue that Hines sought to terminate."⁶⁶ The

57. *Id.* at 48, 448 S.E.2d at 341-42.

58. *Id.*

59. *Id.* at 54, 448 S.E.2d at 345.

60. *Id.* at 52, 448 S.E.2d at 343.

61. *Hines v. Commonwealth*, 19 Va. App. 218, 450 S.E.2d 403 (1994). See *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that interrogation of a defendant must cease on invocation by the defendant of the right to counsel). Once an accused has invoked the right to counsel, the accused is not subject to re-interrogation absent the provision of counsel to the accused or re-initiation of the interrogation by the accused. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

62. *Hines*, 19 Va. App. at 220, 450 S.E.2d at 403.

63. *Id.*

64. *Id.*

65. *Id.* at 220, 450 S.E.2d at 404.

66. *Id.* at 221, 450 S.E.2d at 404.

statement by the detective was also held to be interrogation in light of the fact that the detective knew, or should have known, that the statement was "reasonably likely to elicit an incriminating response from the suspect."⁶⁷ Therefore, all of the statements, including the statement made after the second detective re-inquired regarding Hines's understanding of his *Miranda* rights, were inadmissible.⁶⁸

IV. SIXTH AMENDMENT

Relying on the recent United States Supreme Court case of *Nichols v. United States*,⁶⁹ the court of appeals affirmed a conviction for second-offense DUI⁷⁰ where the certified copy of the prior conviction indicated that the defendant was represented by counsel, but did not explicitly show that his plea of guilty was knowing and voluntary.⁷¹ Applying the "presumption of regularity," the court of appeals held that:

[T]he Commonwealth satisfies its burden of going forward when it produces a properly certified conviction from a court of competent jurisdiction which appears on its face to be a valid final judgment, provided that in all felony cases and those misdemeanor proceedings where imprisonment

67. *Id.* at 222, 450 S.E.2d at 405 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (footnote omitted)).

68. *Id.*

When the officer continued the dialogue without first giving Hines access to his lawyer, the statements that he elicited did not follow upon a valid waiver of Hines's Fifth Amendment rights. "It is best presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' [of custodial interrogation] and not the purely voluntary choice of the suspect."

Id. (quoting *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)); see also *Commonwealth v. Fowler*, 34 Va. Cir. 25 (Alexandria City 1994) (holding that invocation of right to counsel rendered all subsequent statements inadmissible). Compare the decision in *Hines* with the holding in *Bailey v. Commonwealth*, 20 Va. App. 236, 456 S.E.2d 144 (1995), where the defendant was represented by counsel prior to making a statement to police, but the statement was initiated by the defendant and the defendant signed a waiver. The defendant's subsequent statement, therefore, was admissible.

69. 114 S. Ct. 1921 (1994).

70. Driving under the influence of alcohol or other intoxicants. VA. CODE ANN. § 18.2-266 (Cum. Supp. 1995).

71. *James v. Commonwealth*, 18 Va. App. 746, 446 S.E.2d 900 (1994).

resulted, there is evidence establishing that the defendant was represented by or properly waived counsel in the earlier criminal proceeding.⁷²

Later, in *Griswold v. Commonwealth*,⁷³ the court of appeals interpreted *Nichols* to require proof that a prior misdemeanor conviction, used to enhance punishment, was counseled regardless of whether the conviction resulted in actual or suspended jail time.⁷⁴ The court of appeals interpreted the language "sentenced to a term of imprisonment" to include a jail sentence imposed and conditionally suspended.⁷⁵ Judge Koontz, now Justice Koontz of the Supreme Court of Virginia, dissented and argued that a suspended jail sentence is "the mere threat of imprisonment," which *Scott v. Illinois* had held to be the threshold beyond which a defendant had no constitutional right to appointed counsel.⁷⁶ Accordingly, Judge Koontz would have permitted a prior uncounseled misdemeanor conviction to be used to enhance punishment in a future case so long as the prior conviction did not result in an actual jail sentence.⁷⁷ Even by the majority's reasoning, a prior uncounseled misdemeanor conviction which resulted in neither actual nor suspended jail time would be admissible in a future proceeding to enhance punishment. Therefore, in jurisdictions where suspended jail time is rarely revoked for repeat misdemeanants, prosecutors would do well to seek no jail time at all and thereby avoid the requirement in a future proceeding of proving that the first conviction was counseled.

Griswold also stands for the proposition that proof of a waiver of counsel must be clear and that the Commonwealth bears

72. *Id.* at 746, 446 S.E.2d at 904 (citing *Burgett v. Texas*, 389 U.S. 109, 114 (1967)). "A silent record or the mere naked assertion by an accused that his prior counseled plea was not made knowingly and intelligently is insufficient [to render the prior conviction inadmissible]." *Id.*

73. 19 Va. App. 477, 453 S.E.2d 287 (1995).

74. *Id.* at 482, 453 S.E.2d at 289-90. By order dated March 9, 1995, the court of appeals agreed to hear this case en banc. No opinion has, at the time of this writing, been issued from the full court of appeals.

75. *Id.* at 482, 453 S.E.2d at 289 (citing *United States v. Reilley*, 948 F.2d 648, 653-54 (10th Cir. 1991)).

76. *Id.* at 485-86, 453 S.E.2d at 291-92. (Koontz, J., dissenting) (citing *Scott v. Illinois*, 440 U.S. 367 (1979)).

77. *Id.* (Koontz, J., dissenting).

that burden. Even though the warrant indicating the prior conviction was marked that the defendant pled guilty "per p/a," which the trial judge understood to mean "plea agreement," the trial judge could not take judicial notice that the local Commonwealth's Attorney would not enter into a plea agreement with an uncounseled defendant and therefore that some attorney must have appeared on behalf of the defendant.⁷⁸

A similar inquiry was also resolved in favor of the defendant in *Harris v. Commonwealth*.⁷⁹ Harris was forty-two years old, college-educated and, though not licensed to practice law, in fact had a law degree.⁸⁰ The record revealed that Harris "possessed a great deal of confidence in his ability to represent himself and professed his capabilities to the trial court."⁸¹ Moreover, Harris signed a form waiving his right to counsel in the general district court.⁸² No such waiver was signed in the circuit court, however, and in light of the fact that the circuit court trial was de novo and included different rules and procedures particularly the right to trial by jury, the trial court was required to "independent[ly] inquir[e] as to whether Harris knowingly and intelligently waived his right to counsel."⁸³ The trial judge's failure to so inquire required reversal.⁸⁴

V. DUE PROCESS OF LAW

Husske v. Commonwealth,⁸⁵ discussed above with regard to the Fifth Amendment privilege against self-incrimination, was also notable for its contribution to the body of law providing for indigent persons' access to the tools of a proper defense. In *Husske*, the government relied in large part on DNA evidence to link Husske to a rape committed by a man the victim was unable to identify except in very general terms.⁸⁶ Before trial,

78. *Id.* at 484, 453 S.E.2d at 290-91.

79. 20 Va. App. 194, 455 S.E.2d 759 (1995).

80. *Id.* at 196, 455 S.E.2d at 760.

81. *Id.* at 198, 455 S.E.2d at 761.

82. *Id.* at 196, 455 S.E.2d at 760.

83. *Id.* at 198, 455 S.E.2d at 761 (citing *Van Zant v. Gondles*, 596 F. Supp. 484, 487-88 (E.D. Va. 1983)).

84. *Id.* at 199, 455 S.E.2d at 761.

85. 19 Va. App. 30, 448 S.E.2d 331 (1994).

86. *Id.* at 32-33, 448 S.E.2d at 332-33.

Husske asked for the appointment of an expert in DNA to assist him at trial.⁸⁷ The trial judge refused, but appointed as co-counsel "the most knowledgeable member of the local bar in the area of forensic DNA application."⁸⁸ On appeal, the court of appeals relied on the U.S. Supreme Court's decision in *Ake v. Oklahoma* for the proposition that once an indigent defendant in a case makes a proper showing of the need for expert assistance, the trial judge deprives the defendant of due process of law in refusing to provide such an expert.⁸⁹ Although the defendant is not entitled to the expert of his choice, the court of appeals rejected the theory that *Ake* is limited in its application to death penalty cases or cases involving psychiatric evidence.⁹⁰ The court observed that DNA science is complicated, such that the Commonwealth secured the presence of two experts at trial, and that Husske had proffered hundreds of pages of cases and transcripts relating to specific areas of controversy in DNA science.⁹¹ At this writing, the court of appeals has heard oral argument in this case en banc, but no decision has been handed down.⁹²

The court of appeals also affirmed that an indigent defendant is entitled to a transcript of his trial, which ended in a mistrial, if the Commonwealth later attempts to re-try the defendant.⁹³ Central to the court's ruling was that the defendant needed a transcript to mount an effective defense in the second trial because the victim's testimony from the first trial differed

87. *Id.* at 32, 448 S.E.2d at 332.

88. *Id.* at 32, 448 S.E.2d at 333.

89. *Id.* at 33-34, 448 S.E.2d at 333-34 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)).

90. *Id.* at 34-35, 448 S.E.2d at 333-34.

91. *Id.* at 44-46, 448 S.E.2d at 339-40; see also *Commonwealth v. Russell*, 33 Va. Cir. 436 (Fairfax County 1994) (holding that a defendant is not constitutionally entitled to an opportunity to make an ex parte showing of a need for expert assistance, even if the denial of an ex parte hearing results in disclosure of potential defenses to the Commonwealth's Attorney).

92. Telephone Interview with Clerk's office of the Virginia Court of Appeals (June 26, 1995). Compare *Husske* with the decision in *Chichester v. Commonwealth*, 248 Va. 311, 448 S.E.2d 638 (1994), handed down the same month, which concluded that the defendant had no Sixth Amendment right to the assistance of a court-appointed investigator where the defendant did not state in what way the lack of investigative help violated his Sixth Amendment rights.

93. *Anderson v. Commonwealth*, 19 Va. App. 208, 450 S.E.2d 394 (1994).

in some respects from his testimony at the second trial.⁹⁴ The trial judge's complaint that the public defender's office has a budget of its own, and could therefore presumably afford a transcript, was held to be an insufficient reason to deny Anderson a transcript at the court's expense.⁹⁵

Although initially observing that a defendant has no general constitutional right to discovery in a criminal case, the court of appeals construed Article I, Section 8 of the Virginia Constitution to afford a state constitution due process right to "call for evidence in his favor," including the right of a defendant to enter onto the property of a third party to view and photograph a crime scene.⁹⁶ That holding, in *Henshaw v. Commonwealth*, represents a significant departure from prior court holdings that the protections afforded by the Virginia Constitution's guarantees of due process and equal protection are co-extensive with those of the United States Constitution.⁹⁷ The significance

94. *Id.* at 212, 450 S.E.2d at 396.

95. *Id.* at 210, 450 S.E.2d at 395.

96. *Henshaw v. Commonwealth*, 19 Va. App. 338, 451 S.E.2d 415 (1994).

97. In *Tri-Pharmacy, Inc. v. United States*, the Supreme Court of Virginia stated:

In *Hall v. Commonwealth*, 138 Va. 727, 733, 121 S.E. 154, 155, we expressed the view that the purpose of these statutes (then embodied in Acts 1920, ch. 345, p. 516) was to protect and enforce the rights of the citizens guaranteed to them by Article I, § 10 of the Virginia Constitution; and in *Zimmerman v. Bedford*, 134 Va. 787, 802, 115 S.E. 362, 366, we said that their requirements were the same in substance as those contained in the Fourth Amendment to the Federal Constitution.

203 Va. 723, 728, 127 S.E.2d 89, 92 (1962) (footnote omitted).

Compare, however, that language to this discussion in *Benderson Development Co. v. Sciortino*:

It is true that for a long period of our history, the Equal Protection clause was interpreted by both federal and state courts in language that bore marked similarities to the analysis we made of statutes under the special-laws prohibition contained in the Virginia Constitution. *But the two are not the same.* The Fourteenth Amendment to the Federal Constitution, of which the Equal Protection clause is a part, was declared ratified in 1868, during the period of Reconstruction. Its purpose was the prevention of racial discrimination by state legislatures. Although it was, in later years, extended to apply to other kinds of state legislation, the Supreme Court of the United States has, based upon considerations of federalism, been markedly deferential to state laws which make economic classifications, when those laws have been challenged on Equal Protection grounds. *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977); *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Ferguson v. Skrupa*, 372 U.S. 726 (1963). *McGowan v. Maryland*, for instance, held that Maryland's Sunday-closing law would

of the departure, however, is limited at least somewhat by the fact that the court relied, in some cases indirectly, on federal case law interpreting the federal guarantee of due process.⁹⁸ Whether subsequent cases will rely on *Henshaw* as a source of a new or distinct basis for substantive guarantees remains to be seen.⁹⁹

Finally, the Supreme Court of Virginia, following the teachings of *Simmons v. South Carolina*,¹⁰⁰ held that it was a denial of due process not to inform a jury in a capital case that the defendant, if sentenced to life in prison, was ineligible for parole.¹⁰¹

offend the Equal Protection clause "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." 366 U.S. 420, 425. On the other hand, federal equal-protection analysis as applied to "suspect classifications," has become far more stringent than analysis of economic legislation. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982).

By contrast, the special-laws prohibitions contained in the Virginia Constitution are aimed squarely at economic favoritism, and have been so since their inception.

236 Va. 136, 146, 372 S.E.2d 751, 756 (1988) (emphasis added).

98. *Henshaw*, 19 Va. App. at 344-45, 451 S.E.2d at 418-19 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985); *United States v. Nixon*, 418 U.S. 683 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

99. Notwithstanding the holding in *Henshaw* that the trial judge erred in refusing to permit the defendant an opportunity to view and photograph the crime scene, the court held that the error was harmless under the circumstances of the case which included an extensive opportunity to cross-examine the Commonwealth's witnesses regarding the crime scene and photographs introduced by the Commonwealth. *Id.* at 347-48, 451 S.E.2d at 420-21. Similarly, in *Johnson v. Commonwealth*, the court of appeals held that the trial judge erred in conditioning a proper severance of trials on the defendant's agreement not to wear his military uniform, which the court held he had a First Amendment right to do. 19 Va. App. 441, 163, 165 449 S.E.2d 819, 820-21 (1994). Like in *Henshaw*, however, the error was held to be harmless. *Id.* at 166, 449 S.E.2d at 821.

100. *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994).

101. *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995). *Compare Mickens with Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (1994) (coming to an opposite conclusion where the defendant, at the time of his sentencing, did not have the requisite three prior violent felony convictions in order to bar his eligibility for parole).

VI. DOUBLE JEOPARDY¹⁰²

In *Wild v. Commonwealth*,¹⁰³ the court of appeals affirmed a prisoner's conviction for inflicting bodily injury upon a correctional officer while an inmate of a state correctional facility in violation of Va. Code section 18.2-55. Relying on *United States v. Halper*,¹⁰⁴ Wild alleged that because he had been administratively punished for that conduct¹⁰⁵ the prosecution under section 18.2-55 was barred by the Double Jeopardy Clause.¹⁰⁶ The court of appeals disagreed and held that the administrative proceeding was not a judicial proceeding, and served to "maintain institutional order," both of which factors disqualified the proceeding from being a punitive, judicial proceeding.¹⁰⁷ As relevant to Wild's circumstance, the Double Jeopardy Clause only afforded protection against multiple judicial proceedings which are also punitive in nature.¹⁰⁸

Whether an administrative sanction can be punishment is an issue that has arisen in the context of DUI prosecutions for offenses committed since January 1, 1995. Effective January 1, 1995, section 46.2-391.2 provides that persons for whom an arrest warrant is issued by a magistrate for DUI shall have

102. The Fifth Amendment to the United States Constitution provides a guarantee against double jeopardy. U.S. CONST. amend. V. Since the Fifth Amendment is so frequently associated with the privilege against self-incrimination, double jeopardy is discussed here as a distinct subject area.

103. 18 Va. App. 716, 446 S.E.2d 626 (1994).

104. 490 U.S. 435 (1989).

105. "The Department of Corrections, after an adjustment committee hearing, placed Wild in isolation for fifteen days and revoked ninety days of his previously earned 'good time credit.'" *Wild*, 18 Va. App. at 717, 446 S.E.2d at 626-27 (1994).

106. *Id.* at 718, 446 S.E.2d at 627.

107. *Id.* at 719, 446 S.E.2d at 627.

108. The opinion in *Wild* did not recite the elements of the offense for which Wild was administratively "adjust[ed]." Since the overruling of *Grady v. Corbin*, in order for double jeopardy to apply, the defendant must allege that he has been prosecuted for the same offense twice; merely being prosecuted twice for the same *conduct* raises no double jeopardy bar. *United States v. Dixon*, 113 S.Ct. 2849 (1993), *overruling Grady v. Corbin*, 495 U.S. 508 (1990).

The court in *Wild* affirmed that "[t]he prohibition against double jeopardy affords three protections. [It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Wild*, 18 Va. App. at 718, 446 S.E.2d at 627 (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)).

their privilege to operate a motor vehicle administratively suspended for seven days.¹⁰⁹ Several courts have considered the

109. VA. CODE ANN. § 46.2-391.2 (Repl. Vol. 1994). The statute provides as follows:

A. If a breath test is taken pursuant to § 18.2-268.2 or any similar ordinance of any county, city or town and the results show a blood alcohol content of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath, or the person refuses to submit to the breath test in violation of § 18.2-268.3 or any similar local ordinance, and upon issuance of a warrant by the magistrate for a violation of § 18.2-266 or § 18.2-268.3, or any similar local ordinance, the person's license shall be suspended immediately for seven days or in the case of (i) an unlicensed person, (ii) a person whose license is otherwise suspended or revoked, or (iii) a person whose driver's license is from a jurisdiction other than the Commonwealth, such person's privilege to operate a motor vehicle in the Commonwealth shall be suspended immediately for seven days.

A law-enforcement officer, acting on behalf of the Commonwealth, shall serve a notice of suspension personally on the arrested person. When notice is served, the arresting officer shall promptly take possession of any driver's license held by the person and issued by the Commonwealth and shall promptly deliver it to the magistrate. Any driver's license taken into possession under this section shall be forwarded promptly by the magistrate to the clerk of the general district court of the jurisdiction in which the arrest was made together with the warrant or warrants, the results of the breath test, if any, and the report required by subsection B. A copy of the notice of suspension shall be forwarded forthwith to both the general district court of the jurisdiction in which the arrest was made and the Commissioner. Transmission of this information may be made by electronic means.

The clerk shall promptly return the suspended license to the person at the expiration of the seven-day suspension. Whenever a suspended license is to be returned under this section or § 46.2-391.4, the person may elect to have the license returned in person at the clerk's office or by mail to the address on the person's license or to such other address as he may request.

B. Promptly after arrest and service of the notice of suspension, the arresting officer shall forward to the magistrate a sworn report of the arrest that shall include (i) information which adequately identifies the person arrested and (ii) a statement setting forth the arresting officer's grounds for belief that the person violated § 18.2-266 or a similar local ordinance or refused to submit to a breath test in violation of § 18.2-268.3 or a similar local ordinance. The report required by this subsection shall be submitted on forms supplied by the Supreme Court.

C. Any person whose license or privilege to operate a motor vehicle has been suspended under subsection A may, during the period of the suspension, request the general district court of the jurisdiction in which the arrest was made to review that suspension. The court shall review the suspension within the same time period as the court hears an appeal from an order denying bail or fixing terms of bail or terms of recognizance, giving this matter precedence over all other matters on its docket. If the person proves to the court by a preponderance of the evidence that

question and concluded that prosecution for DUI does not violate the Double Jeopardy Clause, notwithstanding an administrative suspension of a defendant's operator's license.¹¹⁰ At least one other general district court judge has held that the administrative suspension of a driver's operator's license is punishment within the meaning of the Double Jeopardy Clause.¹¹¹ Although *Wild* suggested that "maintenance of institutional order" is a goal separate and apart from punishment, as that term is employed in the double jeopardy context, the

the arresting officer did not have probable cause for the arrest, or that the magistrate did not have probable cause to issue the warrant, the court shall rescind the suspension, and the clerk of the court shall forthwith (i) return the suspended license, if any, to the person unless the license has been otherwise suspended or revoked, (ii) deliver to the person a notice that the suspension under § 46.2-391.2 has been rescinded and (iii) forward to the Commissioner a copy of the notice that the suspension under § 46.2-391.2 has been rescinded. Otherwise, the court shall affirm the suspension. If the person requesting the review fails to appear without just cause, his right to review shall be waived.

The court's findings are without prejudice to the person contesting the suspension or to any other potential party as to any proceedings, civil or criminal, and shall not be evidence in any proceedings, civil or criminal.

D. If a person whose license or privilege to operate a motor vehicle is suspended under subsection A is convicted under § 18.2-266 or any similar local ordinance during the seven-day suspension imposed by subsection A, and if the court decides to issue the person a restricted permit under subsection E of § 18.2-271.1, such restricted permit shall not be issued to the person before the expiration of the seven-day suspension imposed under subsection A.

Id.

110. *Commonwealth v. Tench*, No. CR95-429-00M (Henrico Circuit Court March 22, 1995) (holding that administrative suspension is neither a prosecution nor punishment within the meaning of double jeopardy). Letter from J.R. Zeplon, Judge, Ninth Judicial District, Commonwealth of Virginia, to Michael E. M. Ginty, Asst. Commonwealth's Attorney (Mar. 16, 1993) (on file with the *University of Richmond Law Review*).

111. *Commonwealth v. Hess*, No. T95-1367, T95-1368 (Orange County General District Court April 7, 1995) (holding that administrative suspension operates as double jeopardy bar to subsequent DUI prosecution). The argument that a subsequent DUI prosecution is violative of the guarantee against double jeopardy is predicated on a trilogy of recent U.S. Supreme Court cases which, in combination, suggest that a nominally civil sanction, if intended to deter future malfeasance or exact a measure of retribution for past malfeasance, can be punishment within the meaning of the Double Jeopardy Clause. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, (1994); *Austin v. United States*, 111 S. Ct. 2801 (1993); *United States v. Halper*, 490 U.S. 435 (1989). See also James L. Dam, *Ninth Circuit Reaffirms 'Double Jeopardy' Opinion*, *LAWYERS WEEKLY USA*, June 19, 1995, at 1; David Reed, *Law Puts DUI Convictions In Jeopardy*, *RICHMOND TIMES-DISPATCH*, April 11, 1995, at B4.

deference accorded to prison administrators in the maintenance of those institutions arguably limits the applicability of *Wild* to prisoners' double jeopardy claims.¹¹²

Lastly, the Supreme Court of Virginia refused to find any statutory or constitutional right of a defendant to an interlocutory appeal in order to raise a double jeopardy challenge to a prosecution.¹¹³ The court expressly rejected the notion that such a right ought to exist on account of the fact that the purpose of the Double Jeopardy Clause is to protect against the expense and stigma which inures to an accused during a second trial for the same offense.¹¹⁴

VII. TRIALS

The timing of trials was an issue taken up on several occasions by the court of appeals. A trial judge did not abuse his discretion in granting a prosecutor's request for a *nonleprosequi* in order to evade the time limits for prosecution required by the Virginia speedy trial statute.¹¹⁵ Similarly, the statutory speedy trial time limits do not begin anew when a case is remanded from an appellate court to the trial court, and therefore, the defendant may not challenge the re-trial as tardy under the speedy trial statute.¹¹⁶

The courts also had occasion to review the parameters of the circuit courts' jurisdiction to hear certain matters. In *Pope v. Commonwealth*,¹¹⁷ the court of appeals held that in a prosecution for forgery¹¹⁸ where the victim of the offense was the defendant's brother, section 16.1-241(J)¹¹⁹ requires that the

112. See *Washington v. Harper*, 494 U.S. 210 (1990) (holding that prison regulations which impinge on prisoners' constitutional rights are valid if reasonably related to legitimate penological interests, which is a less restrictive standard than that ordinarily applied to constitutional infringements).

113. *West v. Commonwealth*, 249 Va. 241, 445 S.E.2d 159 (1995).

114. *Id.* at 242, 445 S.E.2d at 159-60.

115. *Arnold v. Commonwealth*, 18 Va. App. 218, 443 S.E.2d 183 (1994).

116. *Morgan v. Commonwealth*, 19 Va. App. 637, 453 S.E.2d 914 (1995).

117. 19 Va. App. 130, 449 S.E.2d 269 (1994).

118. VA. CODE ANN. § 18.2-172 (Repl. Vol. 1988). The court went to some pains to note that this forgery section, unlike other forgery statutes in the Code of Virginia, required proof that the forgery operated to the prejudice of another. *Pope*, 19 Va. App. at 133, 449 S.E.2d at 270.

119. The court of appeals made the following observation regarding the jurisdiction

defendant's preliminary hearing to determine probable cause be held in the local juvenile and domestic relations court.¹²⁰ The Attorney General argued that because the Commonwealth was the "victim" in all criminal prosecutions, the prosecution need not have begun in juvenile and domestic relations court and could permissibly have begun, as it did, in the general district court.¹²¹ The court rejected that argument by noting that if that were true, then the juvenile and domestic relations court would never exercise jurisdiction pursuant to section 16.1-241(J) which construction would render the statute a nullity.¹²² In *Moreno v. Commonwealth*,¹²³ the Supreme Court of Virginia held on habeas corpus review, that the Virginia courts did not have jurisdiction to try the defendant because the defendant's conduct, though it would be criminal if committed in Virginia, took place entirely outside of Virginia. The defendant's conduct of selling drugs to a person, who in turn distributed the drugs in Virginia with the defendant's knowledge, did not have the immediate result of a crime taking place in Virginia.¹²⁴

The past year also proved that selecting a jury panel is a process filled with traps for the unwary and ripe for appellate review. In *Commonwealth v. DeHart*,¹²⁵ the court of appeals en banc, affirmed a panel decision holding that a trial judge who improperly failed to strike a juror for cause committed

of the juvenile and domestic relations courts:

By statute, the juvenile and domestic relations district courts have exclusive original jurisdiction in the following matters:

All offenses in which one family or household member is charged with an offense in which another family or household member is the victim. In prosecution for felonies over which the court has jurisdiction, jurisdiction shall be limited to determining whether or not there is probable cause. For purposes of this subsection, "family or household member," as defined in § 16.1-228, shall also be construed to include parent and child, stepparent and stepchild, brothers and sisters, and grandparent and grandchild, regardless of whether such persons reside in the same home.

Pope, 19 Va. App. at 132, 449 S.E.2d at 270 (quoting VA. CODE ANN. § 16.1-241(J) (Repl. Vol. 1988 & Cum. Supp. 1995)).

120. *Id.* at 133-34, 449 S.E.2d at 270-71.

121. *Id.*

122. *Id.*

123. 249 Va. 16, 452 S.E.2d 653 (1995).

124. *Id.* at 18-20, 452 S.E.2d at 655.

125. 20 Va. App. 213, 456 S.E.2d 133 (1995) (en banc), *aff'g*, 19 Va. App. 139, 449 S.E.2d 59 (1994).

reversible error notwithstanding the fact that the Commonwealth's Attorney later exercised one of his peremptory strikes to remove the juror. The decision rested on the notion that a defendant is entitled to a venire of potential jurors who can sit impartially in the matter at hand, and the presence of one juror who cannot serve impartially deprives the defendant of his full complement of unbiased jurors regardless of which jurors are struck by whom.¹²⁶ In *Griffin v. Commonwealth*,¹²⁷ a juror stated during voir dire that he believed the defendant in a criminal trial bore the burden of proving his innocence. The juror, later in voir dire, stated that he had "misspoke[n]" in his earlier statement and that "I believe that people . . . have to be proven guilty, not that they are guilty when they are charged. *I think that's the answer to your question.*"¹²⁸ The court of appeals held that the juror's later statements were a result of leading questions by the trial judge and the prosecutor which "taint[ed] the reliability of the juror's [later] responses."¹²⁹ The court therefore refused to defer to the trial judge's fact finding that the juror properly understood the burden of proof.¹³⁰

In *Buck v. Commonwealth*,¹³¹ the Supreme Court of Virginia added to the long line of cases interpreting the U.S. Supreme Court's decision in *Batson v. Kentucky*¹³² and considered the proper allocation of the burden of proof in challenging a prosecutor's race-neutral reasons for striking a juror as pretextual. The court held that the party challenging an allegedly race-based strike has the burden of showing that the explanation is simply a pretext for a race-based strike; that burden is not one the trial court must take up "in the absence of defense counsel's identification of a false or pretextual reason for the peremptory strikes."¹³³

126. *Id.* at 213-14, 456 S.E.2d at 134.

127. 19 Va. App. 619, 454 S.E.2d 363 (1995).

128. *Id.* at 624, 454 S.E.2d at 365.

129. *Id.* at 625, 454 S.E.2d at 366 (quoting *McGill v. Commonwealth*, 10 Va. App. 237, 242, 391 S.E.2d 597, 600 (1990)).

130. *Id.* at 626, 454 S.E.2d at 367.

131. 247 Va. 449, 443 S.E.2d 414 (1994).

132. 476 U.S. 79 (1986).

133. *Buck*, 247 Va. at 453, 443 S.E.2d at 416. The court held that Buck's challenges to the prosecutor's race-neutral explanations as pretextual, which on appeal were detailed in their factual basis, were not sufficiently articulated by trial counsel's

In *James v. Commonwealth*,¹³⁴ handed down the same day as *Buck*, the Supreme Court of Virginia also held that a prosecutor permissibly exercised a peremptory strike on a venireman "perceived to be sympathetic to persons facing possible incarceration," which perception was based on the venireman's "employment and visible display of a religious symbol."¹³⁵ Justice Hassell dissented from the court's opinion in part on the ground that the "Supreme Court of Virginia ought not condone religious discrimination practiced in the courts of this Commonwealth, particularly in light of Virginia's historical role in the development of the constitutional right of free exercise of religion."¹³⁶ Only one month later, the majority's position may have found some slight support from the U.S. Supreme Court in *Davis v. Minnesota*,¹³⁷ when the Court refused to hear a case involving a religion-based exercise of a peremptory strike.¹³⁸

statement: "My concern was that the jurors are not representative of the population. There were three blacks on the panel. We now only have one, and I would think more significant reasons than what was given should be shown." Therefore *Buck's* arguments regarding the inconsistencies and inaccuracies in the prosecutor's race-neutral explanations were procedurally barred. *See also James v. Commonwealth*, 247 Va. 459, 442 S.E.2d 396 (1994):

The importance of meaningful review of proffers made by both the defendant and the prosecution at each step of a *Batson* challenge cannot be [over]stated. Nevertheless, often the actual sequence of events at trial merges the separate procedural steps as well as the determinations required of a court.

. . . .

Consolidation of various steps does not invalidate the process as long as the consolidation does not adversely impact the rights of any party.

Id. at 462, 442 S.E.2d at 398; *see also Simpson v. Commonwealth*, 20 Va. App. 174, 455 S.E.2d 749 (1995) (holding that an all-white venire does not deprive an African American defendant of equal protection rights).

134. 247 Va. 459, 442 S.E.2d 396 (1994).

135. *Id.* at 461, 442 S.E.2d at 398.

136. *Id.* at 464, 442 S.E.2d at 399-400 (Hassell, J., dissenting). Justice Hassell was the sole dissenter in both *James* and *Buck*. *See Buck*, 247 Va. at 454, 443 S.E.2d at 417 (Hassell, J., dissenting).

137. 114 S. Ct. 2120 (1994).

138. Justice Ginsburg, concurring in the denial of certiorari, noted the Minnesota Supreme Court's observation that "[o]rordinarily . . . inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper." *Id.* at 2120. Justice Thomas, joined by Justice Scalia, argued that the Supreme Court's recent extension of the *Batson* protections to gender-based discrimination in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) compelled a grant of certiorari in order for the Supreme Court to consider the application of *Batson* to religious-based peremptory strikes. *Davis*, 114 S. Ct. at 2120. The denial of certiorari

Perhaps the most significant long-range development in the conduct of criminal trials in Virginia is the introduction of bifurcated trials to all jury trials in all felony cases.¹³⁹ Beginning in July of last year, jury trials in felony cases will have two phases—one for determination of guilt or innocence and another for setting punishment.¹⁴⁰ In felony cases, the defendant's entire criminal record is admissible, so long as the Commonwealth can provide to the jury properly certified copies of conviction orders.¹⁴¹ As a condition of the admissibility of the conviction orders, the Commonwealth must provide to the defense certified copies of the orders fourteen days prior to trial.¹⁴² The bifurcated system has long been employed in capital cases,¹⁴³ and its introduction into general criminal practice¹⁴⁴ is consistent with Virginia's new truth-in-sentencing scheme.¹⁴⁵ The risks now associated with a jury trial are of course heightened for defendants with significant criminal records.

Whether a trial judge is bound to set aside a jury verdict on the defendant's claim that evidence discovered after trial would have proved significant to the trial also proved to be a bone of some contention, and one largely resolved on a fact-specific basis. In *Kirby v. Commonwealth*,¹⁴⁶ the defendant successfully moved to set aside his conviction on the ground that the defense only learned after trial that the police informant used to

in *Davis* should not be read to foreclose future U.S. Supreme Court challenges to religion-based strikes, as the Court has frequently warned against inferring too much from a denial of certiorari. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

139. VA. CODE ANN. § 19.2-295.1 (Repl. Vol. 1990).

140. *Id.*

141. *Id.*

142. *Id.* The Code of Virginia permits the Commonwealth to prove prior traffic offenses in jury trials by submitting a copy of the defendant's prior traffic record. VA. CODE ANN. § 46.2-943 (Repl. Vol. 1994). Whether that system comports with the Sixth Amendment has yet to be explicitly decided. *See supra* notes 64-68 and accompanying text (discussing the *Griswold* case and its requirement that prior convictions offered to enhance punishment must first be shown to have been counseled or that the defendant freely and voluntarily waived counsel).

143. VA. CODE ANN. § 19.2-264.4 (Repl. Vol. 1990).

144. Note that there is no bifurcated trial system for misdemeanor criminal trials.

145. *See infra* notes 219-233 and accompanying text (discussing abolition of parole and truth-in-sentencing).

146. 19 Va. App. 332, 451 S.E.2d 53 (1994).

secure the defendant's conviction had previously been implicated in fabricating evidence in other cases.

Kirby came on the heels of the court of appeals panel decision in *Hopkins v. Commonwealth*,¹⁴⁷ which resulted in a remand for a new trial based on after-discovered evidence that another person had committed the murder for which the defendant had been convicted. On a rehearing en banc, however, the court of appeals affirmed the trial judge's ruling that the new evidence was in the form of testimony so riddled with inconsistencies and previous deceit that it was incredible and such that it would not have the effect of an opposite result on retrial.¹⁴⁸ The court affirmed the trial judge's finding of "incredibility," notwithstanding the fact that the witnesses implicating the third party were blood relations in some cases to the third party, in another case to the victim, and included the third party himself.¹⁴⁹ The en banc majority emphasized, however, that the confessing third party had given a prior, sworn, contradictory statement and that the testimony of the other after-discovered witnesses was inconsistent at best.¹⁵⁰ The panel majority had held that those sorts of credibility determinations were for a jury to resolve; the en banc majority held that the trial judge properly made the finding as part of his review to ascertain whether an opposite result would be obtained if the matter were retried with the after-discovered evidence included.¹⁵¹

VIII. CRIMES

Both the courts and the General Assembly made significant contributions to defining what amounts to crime this past year.

147. 19 Va. App. 1, 448 S.E.2d 316, (1994), *rev'd en banc*, 20 Va. App. 242, 456 S.E.2d 147 (1995).

148. *Hopkins v. Commonwealth*, 20 Va. App. 242, 456 S.E.2d 147 (1995).

149. *Hopkins*, 19 Va. App. at 7, 448 S.E.2d at 319.

150. *Hopkins*, 20 Va. at 249-50, 456 S.E.2d at 150-51.

151. *Id.*

A. *Driving Under the Influence*¹⁵²

Beginning January 1, 1995, the legislature sealed one avenue of attack in DUI cases by ending the scheme whereby a DUI defendant was entitled to his choice of a blood or breath test to determine his blood alcohol content under the implied consent law.¹⁵³ Absent some extenuating circumstance, DUI defendants are now required to take a breath test to determine their blood alcohol content.¹⁵⁴ As noted above, defendants arrested for DUI will find that their operators' licenses have been administratively suspended for seven days.¹⁵⁵ Whether that suspension is punishment within the meaning of the Double Jeopardy Clause, and therefore bars a subsequent prosecution for DUI, has been hotly debated but has not yet been decided by the court of appeals.¹⁵⁶ Also new this year, drivers under the age of twenty-one are subject to a zero-tolerance law; a blood alcohol content of 0.02 or higher earns the underage defendant a suspended license for one year.¹⁵⁷ As of July 1, 1994, a person with a blood alcohol content of 0.08 or higher is presumed to be driving impaired.¹⁵⁸

In a prosecution for felony driving as a habitual offender, which requires proof, in a first offense, that the defendant drove in a manner so as to endanger life, limb, or property of

152. See, VA. CODE ANN. § 18.2-266 (Repl. Vol. 1988 & Cum. Supp. 1995).

153. *Id.* § 18.2-268.2 (Cum. Supp. 1995). See *Breeden v. Commonwealth*, 15 Va. App. 148, 421 S.E.2d 674 (1992) (reversing a conviction where the Commonwealth failed to prove that a blood test was "unavailable" within the meaning of the statute, and consequently depriving the defendant of an opportunity to acquire evidence which might exculpate him). In *Artis v. City of Suffolk*, for example, the defendant drunk driver prevailed on appeal on account of the failure of the arresting officer to give a form listing independent blood testing laboratories to the defendant instead of merely showing the form to him. 19 Va. App. 168, 450 S.E.2d 165 (1994). Defendants who are now without the option to elect to take a blood test are thereby deprived of the incidental benefits of being able to attack the allegedly improper administration of the blood test.

154. VA. CODE ANN. § 18.2-268.2 (Cum. Supp. 1995).

155. See *supra* note 109 and accompanying text.

156. See *supra* notes 110-111 and accompanying text (discussing potential double jeopardy implications for administrative suspension of operator's license statute).

157. VA. CODE ANN. § 18.2-266.1 (Cum. Supp. 1995).

158. VA. CODE ANN. § 18.2-266 (Cum. Supp. 1995), *repealing* VA. CODE ANN. § 18.2-266 (Repl. Vol. 1988). The old statute did not give rise to such a presumption until the defendant had a blood alcohol content of 0.10 or higher.

another;¹⁵⁹ proof that the defendant was driving under the influence of alcohol is insufficient by itself to prove the requisite endangerment.¹⁶⁰ Proof of the DUI does not give rise to a presumption of endangerment; actual endangerment is required.¹⁶¹

B. *Larceny, Burglary and Robbery*

In *Johnson v. Commonwealth*,¹⁶² the court of appeals construed Virginia Code section 18.2-92, breaking and entering of a dwelling house while occupied, to permit a conviction even though the dwelling is not in fact occupied by anyone at the time of the breaking and entering. The dissent pointed out that other burglary statutes, which do not include the limiting phrase "occupied," permit conviction for breaking and entering of a dwelling house, meaning a place where humans live and sleep, without also requiring proof that the building actually contain people when broken into.¹⁶³ Therefore, argued the dissent, "occupied" in section 18.2-92 must mean more than simply a place where humans sleep.¹⁶⁴

In a case of first impression, the court of appeals similarly construed the statute barring larceny from the person.¹⁶⁵ The appellant contended that larceny from the person must require proof that the object stolen from the victim be actually on the victim's person.¹⁶⁶ The court of appeals disagreed and held that "from the person" means only from the victim's "possession and immediate presence."¹⁶⁷ The dissent argued that the common law offense of robbery barred a forcible larceny "from the person" and "from the person's presence" but that the common law understood those phrases to have distinct meanings unto

159. VA. CODE ANN. § 46.2-357(B)(1) (Repl. Vol. 1994 & Cum. Supp. 1995).

160. *Bishop v. Commonwealth*, 20 Va. App. 206, 210, 455 S.E.2d 765, 766 (1995).

161. *Id.* at 212, 455 S.E.2d at 767.

162. 18 Va. 441, 444 S.E.2d 559 (1994) (construing VA. CODE ANN. § 18.2-92 (Repl. Vol. 1988 & Cum. Supp. 1995)).

163. *Id.* at 449-50, 444 S.E.2d at 564 (Benton, J., dissenting).

164. *Id.* at 450-51, 444 S.E.2d at 564 (Benton, J., dissenting).

165. VA. CODE ANN. § 18.2-96(1) (Repl. Vol. 1988 & Cum. Supp. 1995).

166. *Garland v. Commonwealth*, 18 Va. App. 706, 708, 446 S.E.2d 628, 629 (1994).

167. *Id.* at 710, 446 S.E.2d at 630.

themselves.¹⁶⁸ According to the dissent, by construing "from the person," as that phrase is employed in section 18.2-95, to have the common law meaning of both "from the person," and "from the person's presence," the majority ignored the rule of statutory construction that penal statutes ought to be strictly construed against the Commonwealth.¹⁶⁹

In *Bryant v. Commonwealth*,¹⁷⁰ the Supreme Court of Virginia held that the Commonwealth had proved a trespass against the store's constructive possession, by showing that the defendant removed tags and packaging from a product for sale in a store, and therefore, asportation sufficient to prove a larceny. In *Walls v. Commonwealth*,¹⁷¹ the supreme court reversed a conviction for grand larceny¹⁷² on the grounds that an employee of a corporation cannot give his opinion as to the value of property stolen from a corporation unless his opinion is somehow related to his employment; the employee's opinion based on his "personal experience" is insufficient to prove the value of stolen property.

The court of appeals considered two cases dealing with the required proof of intimidation or force in a robbery case. In *Bivins v. Commonwealth*,¹⁷³ the defendant's sudden movement in taking a cash register drawer from in front of a store clerk, though it scared the clerk, was not an overt expression of a present intention to use force or violence against the victim. By contrast, in *Beard v. Commonwealth*,¹⁷⁴ the defendant had property, which was not his own, in his hand, and was confronted by a person who challenged his authority to keep the property. The defendant then used physical force to push the confronting person away.¹⁷⁵ Because "no absolute severance of the property from [the victim's] possession had occurred" when the violence was employed by the defendant, the evidence was sufficient to prove a robbery.¹⁷⁶

168. *Id.* at 711, 446 S.E.2d at 631 (Benton, J., dissenting).

169. *Id.* (Benton, J., dissenting).

170. 248 Va. 179, 445 S.E.2d 667 (1994).

171. 248 Va. 480, 450 S.E.2d 363 (1994).

172. VA. CODE ANN. § 18.2-95 (Repl. Vol. 1988 & Cum. Supp. 1995) (requiring proof that the stolen property was valued in excess of \$200).

173. 19 Va. App. 750, 454 S.E.2d 741 (1995).

174. 19 Va. App. 359, 451 S.E.2d 698 (1994).

175. *Id.* at 361, 451 S.E.2d at 699.

176. *Id.* at 365, 451 S.E.2d at 700-01. Note that this case also held that the

C. *Drugs*

In *Scruggs v. Commonwealth*,¹⁷⁷ the court again undertook to examine what constitutes "constructive possession." The defendant was driving his own car, and the passenger was seated on a shirt, underneath of which were both a set of keys belonging to the passenger and contraband, (both items were in a slit in the car seat).¹⁷⁸ The court concluded that the evidence was insufficient to prove that the defendant knew the contraband to be in the car and intended to exercise dominion and control over it.¹⁷⁹ In another drug case, the court permitted evidence that a trained dog "alerted" to money indicating that the money had traces of cocaine on it which was linked to the defendant and found in close proximity to contraband.¹⁸⁰ The court did not reach the question of whether such evidence is probative in light of the large quantity of U.S. currency, which bears trace amounts of drugs because that question was not adequately raised in the trial court.¹⁸¹

In *Hudak v. Commonwealth*,¹⁸² the court of appeals again affirmed that a successful prosecution for conspiracy is a difficult task. Over a twelve month period, Hudak engaged in four transactions with another person resulting in sales of between 200 and 2000 "hits" of LSD from Hudak to another person.¹⁸³ In the absence of proof regarding the other person's habits of consumption of LSD or expert testimony regarding the potency of an LSD "hit" or how long LSD can be stored, the jury had no evidence on which to conclude beyond a reasonable doubt that Hudak knew, or should have known, his buyer intended to redistribute the LSD.¹⁸⁴ Therefore, the evidence was insufficient

victim's co-worker had a superior right to custody of the stolen property than the defendant, and therefore force used against the co-worker was sufficient to prove robbery. *Id.*

177. 19 Va. App. 58, 448 S.E.2d 663 (1994).

178. *Id.* at 60, 448 S.E.2d at 664.

179. *Id.* at 52-65, 448 S.E.2d at 665.

180. *Hetmeyer v. Commonwealth*, 19 Va. App. 103, 448 S.E.2d 894 (1994).

181. *Id.*

182. 19 Va. App. 260, 450 S.E.2d 769 (1994).

183. *Id.* at 261, 450 S.E.2d at 770.

184. *Id.* at 262-64, 450 S.E.2d at 771.

to prove a conspiracy to distribute LSD between Hudak and his buyer.¹⁸⁵

D. *Murder*

In *Berkeley v. Commonwealth*,¹⁸⁶ the confusing subject of felony-murder was taken up by the court of appeals. The court held that if a death takes place during the commission of a felony and the death is so closely related in time, place, and causal connection to the felony as to make it part of the same criminal enterprise, then the death—even though it might have been committed by another—and the requisite malice to prove murder may be imputed to the defendant.¹⁸⁷ This holding seems to conflict with an earlier holding by the Supreme Court of Virginia that the mere fact that the felony is the proximate cause of the death is insufficient to impute malice to the defendant on a felony-murder theory.¹⁸⁸ Rather in *Wooden v. Commonwealth*, the Supreme Court of Virginia held that felony-murder only applies if the killing was “actually or constructively committed” by the defendant felon “or someone acting in concert with him or in furtherance of a common design or purpose.”¹⁸⁹ The Commonwealth’s Attorney in *Berkeley* specifically disavowed a “concert-of-action” theory of the defendant’s criminal liability for the death.¹⁹⁰

E. *Miscellaneous*

Relying on *Yarborough v. Commonwealth*,¹⁹¹ the court of appeals held in *Sprouse v. Commonwealth*¹⁹² that a defendant who employed a toy gun in a robbery did not use a firearm in the commission of a robbery in violation of Virginia Code sec-

185. *Id.*

186. 19 Va. App. 279, 451 S.E.2d 41 (1994).

187. *Id.* at 287, 451 S.E.2d at 45 (1994).

188. *Wooden v. Commonwealth*, 222 Va. 758, 284 S.E.2d 811 (1981).

189. *Berkeley*, 19 Va. App. at 291, 451 S.E.2d at 47 (Benton, J., dissenting) (quoting John S. Anooshian, Note, *Should Courts Use Principles of Justification and Excuse to Impose Felony—Murder Liability?*, 19 RUTGERS L.J. 451, 461-62 (1988)).

190. *Id.* at 287, 451 S.E.2d at 45 (Benton, J., dissenting).

191. 247 Va. 215, 441 S.E.2d 342 (1994).

192. 19 Va. App. 548, 453 S.E.2d 303 (1995).

tion 18.2-53.1. This holding, though it followed from *Yarborough's* command that proof in a section 18.2-53.1 case requires proof that the defendant actually used a firearm¹⁹³ is at least somewhat at odds with earlier case law, which stated that section 18.2-53.1 was designed to protect not only against the real danger of using a firearm in certain felonies, but against the fear engendered in victims confronted by what they believed to be a firearm.¹⁹⁴ The court of appeals concluded that *Yarborough* represented a departure from prior law.¹⁹⁵

IX. EVIDENCE¹⁹⁶

A. *Prior Bad Acts*

Among the issues engaged by the courts this year, perhaps none was more frequently discussed than the law of prior bad acts. The general rule is that evidence of prior, uncharged misconduct by the defendant is inadmissible against him in a criminal trial.¹⁹⁷ Application of that rule, however, is complicated by the numerous exceptions to it.

In *Jennings v. Commonwealth*,¹⁹⁸ the court of appeals affirmed a trial judge's decision to permit, in a prosecution for abduction with intent to defile and sodomy of a child, evidence that the defendant had previously befriended and sodomized four other teenage boys. The majority held that the "other crimes" evidence was probative of the defendant's intent at the time of the abduction.¹⁹⁹ Judge Barrow, in dissent, observed that if sodomy is a crime so likely to be repeated that evidence

193. *Id.* at 551-52, 453 S.E.2d at 305.

194. See *Holloman v. Commonwealth*, 221 Va. 196, 198, 269 S.E.2d 356, 358 (1980).

195. *Sprouse*, 19 Va. App. at 551, 453 S.E.2d at 306. Cf. *Wilson v. Commonwealth*, No. 0069-94-1, 1995 WL 332198 (Va. App. June 6, 1995) (affirming a § 18.2-53.1 conviction where no gun was ever recovered from the defendant, but where the victim described what appeared to be a gun and the jury permissibly inferred it was a gun).

196. In this section, I attempt to draw the reader's attention to cases dealing with some of the evidentiary concerns frequently encountered in, if not peculiar to, criminal practice, and therefore, some cases treating general evidentiary matters (e.g., application of the hearsay rule) are not highlighted here.

197. See *Kirkpatrick v. Commonwealth*, 211 Va. 269, 176 S.E.2d 802 (1970).

198. 20 Va. App. 9, 454 S.E.2d 752 (1995).

199. *Id.* at 18, 454 S.E.2d at 756.

of a prior sodomy results in little or no prejudice, then the legislature, rather than the courts, ought to fashion a rule of evidence consistent with that notion.²⁰⁰

Where the Commonwealth is required to prove a prior conviction in order to subject the defendant to a statutorily enhanced punishment, the Commonwealth may introduce as many prior convictions as it sees fit, during the guilt phase of the trial, regardless of what number of predicate convictions the enhancement statute requires (e.g. "second or subsequent conviction").²⁰¹ The court of appeals reasoned that this must be so because "the Commonwealth could not know which, if either, of the prior . . . convictions the jury might accept or might be challenged [and therefore], 'it was entitled to utilize its entire arsenal' to satisfy the requirements of [the statute]."²⁰² As a practical matter, the chance that some conviction orders might be disbelieved by a jury is slim indeed. A typical order is plain enough on its face and not readily susceptible to attack, and one properly certified order is not generally any more credible than another.

By contrast, in *Long v. Commonwealth*,²⁰³ the court of appeals held that a defendant charged with more than one crime, only one of which required proof of a prior conviction during the guilt phase of the trial, was entitled to have that charge severed from the remaining charges. The court reasoned that the Rules of the Supreme Court of Virginia vested in the trial court only limited discretion to try separate offenses together, even though arising out of the same transaction.²⁰⁴ That discretion is limited, in part, by the requirement that the offenses be tried together only if justice does not require separate tri-

200. *Id.* at 20, 454 S.E.2d at 757 (Barrow, J., dissenting). In *Rodriguez v. Commonwealth*, the Supreme Court of Virginia similarly concluded that evidence of the defendant's prior drug sales was part of the defendant's general scheme of selling drugs and was intimately connected and blended with the charged offense, and therefore, was properly admitted against the defendant. 249 Va. 203, 454 S.E.2d 725 (1995).

201. *Dotson v. Commonwealth*, 18 Va. App. 465, 445 S.E.2d 492 (1994).

202. *Id.* at 468, 445 S.E.2d at 494 (quoting *Pittman v. Commonwealth*, 17 Va. App. 33, 36, 434 S.E.2d 694, 696 (1993)).

203. 20 Va. App. 223, 456 S.E.2d 138 (1995).

204. *Id.* at 226, 456 S.E.2d at 139 (interpreting VA. SUP. CT. R. 3A:6(b)).

als.²⁰⁵ The court then concluded that justice required separate trials for multiple offenses when one offense requires proof of a prior felony the evidence of which "is suggestive of the defendant's criminal propensity and tends to adversely affect his presumption of innocence."²⁰⁶

B. *Expert Testimony*

In *Price v. Commonwealth*,²⁰⁷ the court of appeals affirmed that an expert's testimony is admissible if, *inter alia*, it is based on the expert's own personal knowledge, facts disclosed in his own testimony, or facts in evidence assumed in a hypothetical question. In *Rodriguez v. Commonwealth*,²⁰⁸ however, the court affirmed a trial judge's refusal to permit expert testimony regarding the fallibility of eyewitness identifications. Rodriguez proffered that his expert, if allowed to testify, would have opined that such identifications are unreliable for a variety of reasons.²⁰⁹ The court held that whether to admit expert testimony concerning eyewitness identification is a matter within the sound discretion of the trial court and that "'men of ordinary intelligence' are capable of understanding the inher-

205. *Id.*

206. *Id.* at 227, 456 S.E.2d at 139. While still a sitting judge of the Fairfax Circuit Court, Judge Rosemarie Annunziata authored an opinion interpreting Va. Code § 19.2-261, which permits the Commonwealth, under certain circumstances, to join defendants together in a single trial if they are charged with crimes arising out of related acts or occurrences. *Commonwealth v. Kruger*, 33 Va. Cir. 369 (Fairfax County 1994). The opinion held that a defendant was entitled to a separate trial when a co-defendant proffered that he would provide exculpatory evidence through his own testimony at the defendant's trial if the two cases were severed. *Id.* at 372.

207. 18 Va. App. 760, 446 S.E.2d 642 (1994).

208. 20 Va. App. 122, 455 S.E.2d 724 (1995).

209. Specifically, Rodriguez proffered that the expert would have testified that: (1) the subjects in photo arrays and live lineups should match the description of the culprit, not the suspect; (2) police fillers should not be used in lineups because they are more confident and homogeneous; (3) anything in a lineup or photo array that makes the suspect stand out as distinctive should be eliminated; (4) a positive lineup identification following a photo array is partially the result of the witness's memory of the photos; (5) a witness will rarely make a different decision in a subsequent identification; (6) misidentification is especially prevalent when stress, poor lighting, or a long delay between the crime and the identification is present; and (7) no correlation exists between an eyewitness's confidence and the accuracy of his identification.

Id. at 124-25, 455 S.E.2d at 725-26.

ent problems with lineup identifications and eyewitness testimony.²¹⁰

One might be forgiven for not knowing that “police fillers should not be used in lineups because they are more confident.” The trial judge in *Rodriguez* found, however, that such knowledge is “common sense . . . simply something everybody knows.”²¹¹ Moreover, the expert’s proffered testimony that there is no link between the accuracy of an identification and the witness’s certainty of the identification is not only contrary to what many “men of ordinary intelligence” might believe, but is in fact contrary to what the U.S. Supreme Court and Virginia courts have long held.²¹² The resolution of just this sort of inquiry—whether witnesses who are certain of their identification are more or less likely to be accurate—is precisely the sort of scientific conclusion expert testimony was designed to aid.²¹³ The court of appeals in *Rodriguez* did allow that a dif-

210. *Id.* at 128, 455 S.E.2d at 728; see also *Commonwealth v. Lemos*, 34 Va. Cir. 312, 315 (Fairfax County 1994) (holding that the eyewitness identification expert who the defendant sought to be court-appointed would have “seriously undermine[d] the traditional function of the jury in this Commonwealth [by eroding the jury’s determination of credibility questions]”).

211. *Rodriguez*, 20 Va. App. at 125, 455 S.E.2d at 726.

212. In *Manson v. Brathwaite*, 432 U.S. 98, 114-16 (1977) and in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), the U.S. Supreme Court emphasized that reviewing courts ought to examine the totality of the circumstances, and more specifically several identifiable factors, in determining the reliability of a witness’ identification, notwithstanding any suggestive identification procedure. These factors are:

[1] [T]he opportunity of the witness to view the criminal at the time of the crime, [2] the witness’ degree of attention, [3] the accuracy of the witness’ prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

Neil, 409 U.S. at 199-200 (emphasis added); see also *Hill v. Commonwealth*, 2 Va. App. 683, 693, 347 S.E.2d 913, 918 (1986) (applying the same standard).

213. The court in *Rodriguez* began its discussion of the admissibility of expert opinion with this statement of the law:

In Virginia, expert opinions are admissible only if

“the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject matter so far partakes of the nature of a science, art or trade as to require a previous habit of experience or study in it to acquire a knowledge thereof.”

Rodriguez, 20 Va. App. at 126, 455 S.E.2d at 726 (quoting *Hubbard v. Commonwealth*, 12 Va. App. 250, 254, 403 S.E.2d 708, 710 (1991)). How many jurors can claim any experience with ascertaining the validity of lineup identifications? If the proffered testimony is contrary to even the U.S. Supreme Court’s assessment of what

ferent result might be obtained if some special circumstance regarding the identification were at issue, such as such as cross-racial identification or identification after observation under stress.²¹⁴

Finally, in several cases, the court of appeals undertook to construe the parameters of Virginia Code section 19.2-187, which permits a properly attested certificate of analysis to state in writing the results of a scientific analysis or examination. Practitioners are likely to see such certificates with extraordinary frequency in drug cases, where the certificate proves that the substance analyzed is in fact contraband, and in DUI cases, where the certificate is used to prove the defendant's blood alcohol content. The court of appeals held that such certificates are not admissible for purposes of conveying an expert's opinion.²¹⁵ Nor is the certificate admissible if defense counsel asks the Commonwealth's Attorney for a copy of the certificate and has not received it seven days prior to trial.²¹⁶ Finally, a certificate that is simply signed by some official, but which does not contain the attestation clause required by the statute, is inadmissible.²¹⁷ A photocopy of the certificate is, however, admissible.²¹⁸

makes an identification valid, how can a typical juror be expected to know the expert's position as a matter of common knowledge?

214. *Rodriguez*, 20 Va. App. at 129, 455 S.E.2d at 728.

215. *Barber v. Commonwealth*, 19 Va. App. 497, 452 S.E.2d 873 (1995).

216. *Copeland v. Commonwealth*, 19 Va. App. 515, 452 S.E.2d 876 (1995).

217. *Frere v. Commonwealth*, 19 Va. App. 460, 452 S.E.2d 682 (1995).

218. *Id.* at 466-67, 452 S.E.2d at 686-87 (applying the best evidence rule). *Cf. Untiedt v. Commonwealth*, 18 Va. App. 836, 447 S.E.2d 537 (1994) (construing Va. Code § 46.2-882, which provided that only a "true copy" of a certificate establishing the accuracy of tuning forks used to calibrate a radar speed detector was admissible at trial to prove the accuracy of the radar device). The court concluded that "true copy" is a term of art which is defined in Virginia Code § 8.01-391(B) and requires that the attestation "aver that the [authenticating official] certify that [he or she] does in fact have [or had] the custody [of the original]." *Id.* at 838, 447 S.E.2d at 538. The court held that § 8.01-391(B) defining "true copy" and § 46.2-882 using the phrase "true copy" must be construed in a consistent manner. *Id.* Practitioners would do well to note that this sophisticated argument, which required a thorough appreciation of disparate titles in the code, was successfully urged by a defendant who appeared pro se.

X. SENTENCING AND OTHER REMEDIES

In *Bailey v. Commonwealth*,²¹⁹ the court of appeals reversed a trial court's revocation of a defendant's suspended sentence when the defendant contended that evidence of drug use in a drug test was attributable to his use prior to receiving his suspended sentence. The court held that because uncontroverted testimony proved that Bailey had consumed cocaine only five days prior to the test which resulted in the trial judge revoking the suspended time (which consumption was also prior to the imposition of the suspended sentence)²²⁰ and because no evidence proved the likely duration of cocaine in a person's body, the trial judge had no basis for concluding that Bailey's positive test for cocaine was attributable to post-sentence consumption.²²¹

The decision in *Bailey* stands in marked contrast to the typically lenient view taken by the courts towards probation and suspended sentence revocation proceedings. The court of appeals in *Carbaugh v. Commonwealth*²²² specifically construed Virginia Code section 19.2-306 to permit revocation of the defendant's suspended sentence during either the "period of probation" or "period of suspension [of sentence]." The court so concluded, notwithstanding an apparent inconsistency in the statute which appeared to permit revocation only during a period of probation, if such probation was imposed.²²³

The most significant development in this area, however, is unquestionably the abolition of parole and concomitant establishment of truth-in-sentencing. For felony offenses committed after January 1, 1995, the defendant is ineligible for parole.²²⁴ This is true regardless of whether the defendant is sentenced to a term of years, months, or days. Felons may continue to earn good-time credits while incarcerated, but must in any event

219. 19 Va. App. 355, 451 S.E.2d 686 (1994).

220. *Id.* at 357-58, 451 S.E.2d at 687.

221. *Id.*

222. 19 Va. App. 119, 449 S.E.2d 264 (1994).

223. *Id.* at 123-25, 449 S.E.2d at 267-68.

224. VA. CODE ANN. § 53.1-165.1 (Repl. Vol. 1994). Although there is no state-wide provision for parole for misdemeanants, the new statute does not affect the manner in which misdemeanants may earn good-time credits in local jails.

serve eighty-five percent of their sentence.²²⁵ This system of good-time credit is a substantial departure from the past practice where some non-violent inmates could earn as much as a day of good-time credit for each day served.²²⁶ Note that the abolition of parole applies only to felonies committed after January 1, 1995; felons who committed offenses prior to that date remain eligible for parole and good conduct credit for those offenses at the same rate as provided under the old system.²²⁷

Though it abolished parole with one hand, the legislature responsibly undertook to modify the existing sentencing guidelines with the other.²²⁸ The guidelines, established by the legislature for 1995, and in the future by the newly created Virginia Sentencing Commission,²²⁹ are based not on the sentences historically imposed, but on sentences historically served.²³⁰

225. *Id.* § 53.1-202.3.

226. *See id.* § 53.1-201.

227. VA. CODE ANN. § 53.1-165.1.

228. VA. CODE ANN. §§ 17-232 to -238 (Cum. Supp. 1995); Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines Effective January 1, 1995 (1995).

229. Code § 17-234(A) provides that the Commission shall consist of 17 members, seven of whom are appointed by the Chief Justice of the Virginia Supreme Court (including six sitting judges or justices and the chair of the Commission who cannot be an active member of the judiciary), three appointed by the Speaker of the House of Delegates, two appointed by the Senate Committee on Privileges and Elections, and four appointed by the Governor. The Attorney General serves by virtue of his office. VA. CODE ANN. § 17-234(A) (Cum. Supp. 1995); Virginia Sentencing Guidelines at 3.

The current members of the Commission are: Chairman Earnest P. Gates, Retired Judge of the 12th Judicial Circuit; Judge F. Bruce Bach of the Nineteenth Judicial Circuit; Robert Bobb, City Manager for Richmond, Virginia; Jo Ann Bruce, Crime Victims Advocate, Ashland, Virginia; Richard Cullen, Attorney, McGuire, Woods, Battle & Boothe; Peter Decker, Jr., Attorney, Decker, Cardon & Thomas; Hon. James Gilmore, III, Attorney General; Frank Ferguson, Counselor to the Attorney General, Attorney General Representative; William H. Fuller, III, Commonwealth's Attorney, City of Danville; Judge George E. Honts, III, Twenty-Fifth Judicial Circuit; Judge J. Samuel Johnston, Twenty-Fourth Judicial Circuit; H. Lane Kneeder, Attorney, Hazel & Thomas; Judge Donald McGlothlin, Jr., Twenty-Ninth Judicial Circuit; Judge William Newman, Seventeenth Judicial Circuit; Rev. George F. Ricketts, Sr., Executive Director, Chaplain Service of the Churches of Virginia, Inc.; Judge Robert W. Stewart, Fourth Judicial Circuit; B. Norris Vassar, Senior Counsel/Legislative Director to Congressman Bobby Scott; Vivian E. Watts, Executive Director, Fairfax, Court Appointed Advocate Program. Virginia Sentencing Guidelines at iii.

230. Virginia Sentencing Guidelines at 4. This methodology has resulted in the somewhat surprising result that the sentences called for in the guidelines are frequently substantially lower than those previously handed down. *Id.* Of course, the difference is that felons under the new guidelines will now serve nearly all of their sentences.

The guidelines do, however, call for substantial, and artificial increases in guideline sentences for certain categories of felons, in particular those with violent criminal histories.²³¹ The new guidelines also represent a fundamental departure from past practices because a trial judge may depart from the guidelines only for reasons specifically stated in writing.²³² Note, however, that the trial judge's failure to comply with the sentencing guidelines is a matter the legislature has specifically stated shall not be a basis for a challenge on appeal.²³³

XI. APPEALS

That the Commonwealth can appeal from an adverse ruling by a circuit court which turned on certain constitutional provisions, but a criminal defendant cannot, does not violate the defendant's Equal Protection rights.²³⁴ As noted above, a criminal defendant has no right at all to an interlocutory appeal.²³⁵

Beginning with Notices of Appeal filed in circuit courts on July 1, 1994, the court of appeals began adhering to a policy for which it already had statutory authority but which it had not previously employed.²³⁶ Petitions in criminal cases are now

231. *Id.* at 5. What the legislature has denominated a violent felony is a matter of some debate, particularly since all breaking and enterings of a dwelling are now considered violent and therefore subject defendants with a record that includes such an offense, to the artificial increase in guideline sentencing otherwise reserved for defendants whose records manifest a more plainly dangerous past (e.g., rape, malicious wounding, murder).

232. VA. CODE ANN. § 19.2-298.01 (Interim Supp. 1995). Class 1 felonies are exempted from this requirement. *Id.* Cf. *Bell v. Commonwealth*, 18 Va. App. 146, 442 S.E.2d 427 (1994) (pre-1995 guidelines were wholly discretionary, and absent a sentence outside the statutorily permissible range, sentencing lies within the discretion of the trial judge).

233. VA. CODE ANN. § 19.2-298.01(F) (Interim Supp. 1995). Whether such a limitation, in light of the requirement that a trial judge must adhere to the guidelines in the absence of a written explanation for a departure, complies with minimal due process requirements is a matter which has not yet been litigated.

234. *Ramey v. Commonwealth*, 19 Va. App. 300, 450 S.E.2d 775 (1994).

235. *West v. Commonwealth*, 249 Va. 241, 455 S.E.2d (1995). *See supra* note 108 and accompanying text (discussing unavailability of interlocutory appeal for purpose of mounting double jeopardy challenge).

236. Telephone Interview with the Clerk's Office of the Virginia Court of Appeals (June 26, 1995).

referred directly to a single judge of the court of appeals who will issue an order either granting the petition or denying it with an explanation.²³⁷ Petitions so granted will be heard on their merits just as granted petitions have been in the past.²³⁸ Denial orders from a single judge become final orders of the court of appeals, from which an appeal may be noted to the Supreme Court of Virginia, after the passage of fourteen days, unless the petitioner elects to argue the petition orally before a three judge panel of the court of appeals.²³⁹ The intermediary step of review by a single judge allows for the more expeditious merits review of petitions clearly deserving close examination, as well as prompt disposition of those plainly lacking merit. It also affords criminal litigants the opportunity to argue their petition before as many as four court of appeals judges, although some of these judges are sure to be from the circuit court bench sitting by designation.²⁴⁰ Whether the three judge panel will feel itself constrained to adhere to the decision of its brother or sister who initially denied the petition remains to be seen.

Appellate practice will also change as a result of two recent changes in the composition of the court of appeals and Supreme Court of Virginia. Judge Lawrence Koontz, Jr. has ascended from the court of appeals to the Supreme Court of Virginia. Judge Bernard Barrow passed away shortly after announcing his retirement from the court of appeals. Both judges could fairly be characterized as philosophically somewhat to the left of center²⁴¹ and how the vacuum they leave will be filled re-

237. VA. CODE ANN. § 17-116.05:2(C)-(D) (Repl. Vol. 1988). Note that by virtue of § 17-166.05:2(D), the explanation for the denial is to come from the panel denying the petition. Practitioners will find, however, that an explanation typically comes from the single judge denying the petition and that frequently the first question counsel for petitioner can expect from the three judge panel calls for counsel's analysis of how the first judge decided the case wrongly.

238. *Id.* § 17-116.07(A).

239. *Id.* §§ 17-116.05:2(D), 17-116.08.

240. VA. CODE ANN. § 17-116.01 (Repl. Vol. 1988 & Cum. Supp. 1995).

241. A thumbnail sketch of how the judges of the court of appeals aligned themselves in terms of judicial philosophy can probably be gleaned from the opinions in the en banc case of *Hughes v. Commonwealth*, 18 Va. App. 510, 446 S.E.2d 451 (1994) (Moon, C.J., joined by Baker, Willis, and Bray, JJ. for the majority to affirm) (Coleman, J., concurring and writing separately) (Barrow, J., joined by Koontz, J., dissenting) (Benton, J., dissenting, and concurring in part with Judge Barrow's dissent) (Elder, J., dissenting, and concurring in part with Judge Barrow's dissent).

mains an open question.²⁴² The legislature has elevated Fairfax Circuit Court Judge Rosemarie Annunziata and Hampton Circuit Court Judge Nelson Overton to the court of appeals.

XII. CONCLUSION

The latter part of 1994 and the beginning of 1995 brought significant, even fundamental, changes to criminal practice in the Commonwealth. By the same token, many of these changes are a direct result of judicial and political philosophies that trace their roots to some of the Commonwealth's longest-held traditions. The tension between old analytical paradigms and new social and political challenges contributes to an ever-evolving and synthesizing body of criminal law. That evolution provides the criminal law practitioner her greatest challenge and her greatest reward.

242. Justice Koontz's ascension to the Commonwealth's highest court is the latest step in a long and remarkable career of selfless service to the bar, the judiciary, and the Commonwealth. His legacy is not yet complete. Judge Barrow leaves the Commonwealth richer for his contributions to a tradition of thoughtful, scholarly, and compassionate judging. The lawyers, both prosecutors and defense attorneys, who had the good fortune to appear before Judge Barrow, will sorely miss him.

