# University of Richmond Law Review

Volume 30 | Issue 5

Article 6

1996

# Annual Survey of Virginia Law: Criminal Law and Procedure

Cullen D. Seltzer

Follow this and additional works at: http://scholarship.richmond.edu/lawreview Part of the <u>Criminal Law Commons</u>, and the <u>Criminal Procedure Commons</u>

# **Recommended** Citation

Cullen D. Seltzer, Annual Survey of Virginia Law: Criminal Law and Procedure, 30 U. Rich. L. Rev. 1281 (1996). Available at: http://scholarship.richmond.edu/lawreview/vol30/iss5/6

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

#### CRIMINAL LAW AND PROCEDURE

Cullen D. Seltzer\*

#### I. INTRODUCTION

This article discusses recent Virginia cases and legislative developments in the area of criminal law and procedure. The article discusses cases from April of 1995 to July of 1996 and legislative changes effective July 1, 1996. This article does not discuss federal developments. Nor does the article discuss death penalty issues, as that area of the law is sufficiently particularized that, for purposes of manageability, it falls outside the scope of this discussion.

#### II. FOURTH AMENDMENT<sup>1</sup>

1. The sections denoted by reference to one of the first ten amendments to the United States 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 United States 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 does expressly apply to the States. See Duncan v. Louisiana, 391 U.S. 145, 149 (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

<sup>\*</sup> Assistant Public Defender, Richmond, Virginia. B.A., 1990, Mary Washington College; J.D., 1993, T.C. Williams School of Law, University of Richmond. The author wishes to gratefully acknowledge the assistance of the Office of the Public Defender for the City of Richmond which provided the research resources from which the majority of this article draws, as well as an environment which encourages thoughtful consideration and debate of the law. In particular, the author is grateful to the contributions of Susan Hansen, Deputy Public Defender for the City of Richmond; Patricia Nagel, Assistant Public Defender for the City of Richmond; Patricia Nagel, Assistant Public Defender for the City of Richmond; and Maureen White, who each assisted in preparing timely summaries of recent cases and legislative developments. Of course, I am always grateful to my wife Rosemary G. Seltzer who, improbably and inexplicably, continues to put up with me.

#### A. Probable Cause

Relying in part on the notion that a magistrate's determination of probable cause is, on appeal, entitled to great deference, the Virginia Court of Appeals in Cherry v. Commonwealth<sup>2</sup> affirmed the search of a home pursuant to a search warrant. In Cherry, police obtained a warrant to search a UPS package that a drug dog indicated contained marijuana.<sup>3</sup> On opening the package, the police found that it did indeed contain marijuana. The package was then resealed. After obtaining a second warrant to search the address where the package was sent, undercover police officers delivered the package. The second anticipatory warrant authorized search of the address for marijuana and provided that "UPON DELIVERY OF SAID PACKAGE, EXECUTION OF THIS SEARCH WARRANT IS GRANTED."4 After recovering the unopened package from the home, police then searched the remainder of the house and found other incriminating evidence.<sup>5</sup> The court of appeals held that the language "said package" did not limit the scope of the authorized search, but only limited the time at which the search could begin.<sup>6</sup> The court of appeals further held that the large amount of marijuana found in the package gave rise to probable cause to search the entire home since the magistrate could have inferred that such a large amount of contraband would only be sent to a place of significant drug trafficking.<sup>7</sup>

An anonymous tipster's report that a black male in a camouflage jacket was selling drugs at a particular location was, in

- 2. 21 Va. App. 132, 462 S.E.2d 574 (1995).
- 3. See id. at 135, 462 S.E.2d at 575.
- 4. Id., 462 S.E.2d at 576.
- 5. Id. at 136, 462 S.E.2d at 576.
- 6. Id. at 138, 462 S.E.2d at 577.

7. Id., 462 S.E.2d at 577. In Commonwealth v. Wotherspoon, 36 Va. Cir. 112 (Fairfax County 1995), the circuit court held that the knock and announce rule is inapplicable where police employ a ruse to accomplish a "peaceful and reasonable" entry into a home in order to execute a search warrant and announce their presence and identification before entering.

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.

Farmer v. Commonwealth,<sup>8</sup> confirmed by police inasmuch as they saw a person resembling the person described by the tipster at the location described by the tipster.<sup>9</sup> The police also observed the person behave in a manner consistent with that exhibited by drug dealers the police had previously seen.<sup>10</sup> When the suspect saw the police and began to flee, police had reasonable suspicion to believe him to be engaging in illegal conduct, and pursued him.<sup>11</sup> When the person's flight "took on a desperate air," police had probable cause to search and arrest him, and it was not "particularly important that the search preceded the arrest rather than vice versa."<sup>12</sup>

In Janis v. Commonwealth,<sup>13</sup> the court of appeals had occasion to explore the parameters of the good faith exception to the exclusionary rule, which rule requires exclusion at trial of evidence seized during a search unaccompanied by a valid warrant. In Janis, the affidavit in support of a search warrant, "while not a 'bare bones' affidavit, failed to provide a 'nexus"" between the evidence giving rise to probable cause and the place to be searched.<sup>14</sup> Moreover, the officer's good faith reliance on the warrant obtained by way of the defective affidavit did not save the search.<sup>15</sup> The court of appeals held that "'the warrant was based on an affidavit "so lacking in indicia of probable cause" as to render official belief in its existence unreasonable."<sup>16</sup> Nor did the fact that the affiant was aware of facts he did not include in the affidavit save the search, since the court of appeals was obliged to look to the "warrant

1996]

<sup>8. 21</sup> Va. App. 111, 462 S.E.2d 564 (1995).

<sup>9.</sup> Id. at 113, 462 S.E.2d at 565.

<sup>10.</sup> Id.

<sup>11.</sup> Id. at 115, 462 S.E.2d at 566.

<sup>12.</sup> Id. at 115-16, 462 S.E.2d at 566 (quoting Rawlings v. Kentucky, 448 U.S. 98, 111 (1980)). In James v. Commonwealth, 22 Va. App. 740, 473 S.E.2d 90 (1996), the court of appeals affirmed a conviction stemming from a pat-down search of a passenger of an automobile which had been driven by a person for whom there existed a valid arrest warrant. The court of appeals reasoned that the defendant's pattern of "jittery" behavior was sufficient to give rise to a permissible pat-down of the defendant. Id. at 745-46, 473 S.E.2d at 92.

<sup>13. 22</sup> Va. App. 646, 472 S.E.2d 649 (1996).

<sup>14.</sup> Id. at 652, 472 S.E.2d at 653.

<sup>15.</sup> Id. at 653, 472 S.E.2d at 653.

<sup>16.</sup> Id. (citations and emphasis omitted).

and affidavit on their face" to determine whether probable cause existed.<sup>17</sup>

The police must wait more than two or three seconds after knocking at a dwelling before forcing their entry in order to execute a search warrant.<sup>18</sup> Moreover, a "no-knock" entry is not warranted where the only exigency in favor of such an entry is "the readily disposable nature of the contraband which is the object of the search."<sup>19</sup>

In *Thomas v. Commonwealth*,<sup>20</sup> the court of appeals confirmed that the Commonwealth bears the burden of establishing that a roadblock is "safe and objective in its operation, employ[s] neutral criteria, and [does] not [permit] standardless unbridled discretion by the police officer in the field."<sup>21</sup> Moreover, when a vehicle stops within thirty yards of a roadblock and the roadblock is visible from the location where the vehicle has stopped, and when the "only direction of travel available to the vehicle was to the roadblock," the vehicle has stopped within the "roadblock's zone."<sup>22</sup>

17. Id. at 655, 472 S.E.2d at 654 (citation and emphasis omitted). The court of appeals reasoned:

The Court of Appeals for the Ninth Circuit stated that the *Leon* [good faith] exception does not extend "to allow the consideration of facts known only to an officer and not presented to a magistrate. The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate."

When the officers have not presented a colorable showing, and the warrant and affidavit on their face preclude reasonable reliance, the reasoning of *Leon* does not apply. To permit the total deficiency of the warrant and affidavit to be remedied by subsequent testimony concerning the subjective knowledge of the officer who sought the warrant would, we believe, unduly erode the protections of the fourth amendment.

Id. at 654-55, 472 S.E.2d at 653-54 (citation and emphasis omitted).

18. Hargrave v. Commonwealth, 21 Va. App. 320, 322, 464 S.E.2d 176, 177 (1995).

19. Id. at 326, 464 S.E.2d at 179.

20. 22 Va. App. 735, 473 S.E.2d 87 (1996).

21. Id. at 739, 473 S.E.2d at 89 (quoting Simmons v. Commonwealth, 238 Va. 200, 203, 380 S.E.2d 656, 658 (1989)).

22. Id.

In Buck v. Commonwealth,<sup>24</sup> police officers in a high drug area saw the defendant standing on a corner, and then get into a car as a passenger and ride around the block. Three or four minutes later, the defendant was let out of the car a block from his original location. According to the police officers, that behavior was consistent with a pattern of drug dealing. When the police approached Buck, he made a motion to his mouth and began to flee. That conduct in the aggregate gave the police a reasonable suspicion of Buck's drug dealing which justified his detention.<sup>25</sup> The court of appeals also held that the police officers' observation of Buck making a chewing motion after he was seized gave rise to probable cause to force Buck's mouth open to seize what police could reasonably believe to be drugs.<sup>26</sup>

Similarly, in *Williams v. Commonwealth*,<sup>27</sup> police who had information that the defendant bought a round-trip airline ticket from Newport News to New York and who observed the defendant flee on being approached by the police after his return to Newport News, had reasonable suspicion to believe possible criminal activity was afoot.<sup>28</sup> Flight, though not evidence in and of itself of criminal activity, "may otherwise color apparently innocent conduct and, under appropriate circumstances, give rise to reasonable suspicion of criminal activity."<sup>29</sup>

27. 21 Va. App. 263, 463 S.E.2d 679 (1995).

28. Id. at 265-67, 463 S.E.2d at 680-81.

29. Id. at 266-67, 463 S.E.2d at 680-81 (quoting Buck v. Commonwealth, 20 Va. App. 298, 303, 456 S.E.2d 534, 536 (1995)).

Stop

<sup>23.</sup> Terry v. Ohio, 392 U.S. 1 (1968).

<sup>24. 20</sup> Va. App. 298, 456 S.E.2d 534 (1995).

<sup>25.</sup> Id. at 303, 456 S.E.2d at 536.

<sup>26.</sup> Id. at 304, 456 S.E.2d at 536-37. Note that the dissent agreed that the officers in this case "may have had the authority" to detain Buck, but that they did not have probable cause to force his mouth open since a chewing motion is consistent with lawful conduct, and his flight "while displaying a fear of or alienation from the police, did not indicate that he possessed cocaine or other drugs." Id. at 305, 456 S.E.2d at 537.

#### 1286 UNIVERSITY OF RICHMOND LAW REVIEW [Vol. 30:1281

In *Freeman v. Commonwealth*,<sup>30</sup> the court of appeals held that a police officer could rely on his twenty-one years of experience in reasonably suspecting that a defendant who drove ten to fifteen miles per hour *below* the speed limit in a fifty-five mile per hour zone, and who weaved, over a two mile distance, three or four times in his *own* lane, was intoxicated.<sup>31</sup>

The court of appeals held in a series of cases that anonymous tipsters may, under certain circumstances, give rise to reasonable suspicion of crime. In O'Toole v. Commonwealth,<sup>32</sup> the court of appeals affirmed a conviction which rested on a reliable, confidential informant's report of what an unknown person reported to the known informant.<sup>33</sup> The known confidential informant had previously given reliable information which had been based in part on what third parties told the known informant.<sup>34</sup> In O'Toole, police were able to confirm the informant's report that a particular truck would be in a particular area at a particular time and that a particular person was. as predicted by the informant, in the truck prior to police stopping the truck from which stop contraband was ultimately discovered. The court of appeals held that that degree of corroboration gave rise to reasonable suspicion to lawfully effect a stop of the vehicle.35

In Gregory v. Commonwealth,<sup>36</sup> an anonymous tipster reported that a person wearing particular clothing near a particular car and at a particular location was dealing drugs. Police were able to confirm that the defendant resembled the person reported and was at the location and near the car reported, but did not see any evidence of contraband or other illegal activity.<sup>37</sup> A police officer then approached the defendant and said "good

<sup>30. 20</sup> Va. App. 658, 460 S.E.2d 261 (1995).

<sup>31.</sup> Id. at 661-62, 460 S.E.2d at 263; cf. Hall v. Commonwealth, 22 Va. App. 226, 468 S.E.2d 693 (1996) (holding that a police officer who had reason to believe the defendant was armed, because he saw what he believed to be a pistol near the defendant, did not have reason to believe the defendant was armed once he discovered the pistol was in fact a toy).

<sup>32. 20</sup> Va. App. 540, 458 S.E.2d 595 (1995), affd en reh'g, 22 Va. App. 1, 467 S.E.2d 819 (1996) (en banc).

<sup>33.</sup> Id. at 542, 458 S.E.2d at 596.

<sup>34.</sup> Id.

<sup>35.</sup> Id. at 544, 458 S.E.2d at 597.

<sup>36. 22</sup> Va. App. 100, 468 S.E.2d 117 (1996).

<sup>37.</sup> Id. at 104, 468 S.E.2d at 119.

morning," to which the defendant responded "What?" as the defendant walked away. The officer, who was in his patrol car, then observed that the defendant's hand was closed and the officer then seized the defendant. The court of appeals held that the defendant's post-encounter conduct with the police was sufficiently suspicious when considered in combination with the anonymous tipster's report to justify a temporary detention.<sup>38</sup> The dissent observed that the officer had detected no evidence of illegal activity and that the defendant's refusal to communicate with the police was his right and gave rise to no additional suspicion.<sup>39</sup>

In Scott v. Commonwealth,<sup>40</sup> the court of appeals lowered the threshold for permissible anonymous tipster-based stops where some imminent danger might justify the detention. In Scott, police received an anonymous tip that a black man wearing a white t-shirt and black shorts was brandishing a firearm at a laundromat. When police arrived a minute later, the defendant, wearing the described clothing, was seen leaving the laundromat. Police then stopped the defendant. The court of appeals held that the officer's confirmation of the defendant's clothing and location rendered the tip sufficiently reliable, in the context of the "imminent danger" reported by the tipster, to permit an investigative detention.<sup>41</sup>

In Commonwealth v. Spencer,<sup>42</sup> the court of appeals reminded lawyers that when gauging the reasonableness of a traffic stop, it pays to closely scrutinize the nature of the offense arousing police suspicion. In Spencer, police officers stopped a car in the City of Richmond for failure to display a city property tax decal required by the City of Richmond. The record established, however, that other cities and counties in the Commonwealth did not require such decals.<sup>43</sup> Since police did not establish that the vehicle they stopped was registered in a political subdivision requiring property tax decals, the police did

<sup>38.</sup> Id. at 110, 468 S.E.2d at 123.

<sup>39.</sup> Id. at 114-15, 468 S.E.2d at 124-25 (Benton, J., dissenting).

<sup>40. 20</sup> Va. App. 725, 460 S.E.2d 610 (1995).

<sup>41.</sup> Id. at 729-30, 460 S.E.2d at 613.

<sup>42. 21</sup> Va. App. 156, 462 S.E.2d 899 (1995).

<sup>43.</sup> Id. at 159-60, 462 S.E.2d at 901.

#### 1288 UNIVERSITY OF RICHMOND LAW REVIEW [Vol. 30:1281

not have a reasonable suspicion that the car was being driven in violation of the decal statute.<sup>44</sup>

#### C. Seizure

A trial judge may permissibly conclude that a person was seized when one of four undercover police officers exits an unmarked car, walks briskly toward the person, and follows the person onto the porch of a house he is attempting to enter but cannot on account of the door being locked, and then demands of the defendant, "What's in your hand pal?"<sup>45</sup> Although in plain clothes, the police officer wore, in plain view, his police identification on a chain around his neck and his sidearm on his hip. The question of the defendant's seizure arose in an unusual procedural context in that the trial judge first found the defendant to be seized, which finding was reversed on interlocutory appeal by the Commonwealth.<sup>46</sup> On remand, the trial judge adhered to his initial finding of seizure but held that he was bound by the prior ruling of the court of appeals.<sup>47</sup> When the defendant then appealed the denial of his suppression motion, based on his unlawful seizure, the court of appeals again reversed the trial judge and held that his finding of seizure was a permissible one.<sup>48</sup> Central to the court of appeals' final holding was the deference it paid to the trial judge's fact finding ability and his "advantage . . . of seeing [the police officer] in person, of observing his demeanor, and of assessing his inflection as he described his conduct and questions."49

A police officer who approaches a person without a show of force and simply to check on the person's health need have no suspicion at all; but taking that person's license to run a records check is a seizure of the person since no reasonable person would believe he could leave without his license, particularly if he were driving.<sup>50</sup>

44. Id.

<sup>45.</sup> Satchell v. Commonwealth, 20 Va. App. 641, 644, 460 S.E.2d 253, 254 (1995) (en banc).

<sup>46.</sup> Id. at 644-45, 460 S.E.2d at 254-55.

<sup>47.</sup> Id. at 646, 460 S.E.2d at 255.

<sup>48.</sup> Id. at 649, 460 S.E.2d at 257.

<sup>49.</sup> Id.

<sup>50.</sup> Richmond v. Commonwealth, 22 Va. App. 257, 468 S.E.2d 708 (1996); cf. Commonwealth v. Smithers, 36 Va. Cir. 132 (Richmond 1995) (denying a motion to

#### D. Scope of the Exclusionary Rule

In Anderson v. Commonwealth,<sup>51</sup> a defendant found himself in the happy position of having the fruits of an unlawful search and seizure suppressed from evidence in his trial for possession of cocaine. His happiness turned to dismay, however, on learning that the previously excluded evidence would be used against him during a proceeding to revoke the suspension of a previously suspended sentence for a prior, unrelated charge.<sup>52</sup> On the basis of the illegally obtained evidence, Anderson's previously suspended sentence of twenty years in the penitentiary was revoked.<sup>53</sup>

The court of appeals and the Supreme Court of Virginia refused to find error in the trial court's admission of the evidence. The appellate courts reasoned that the rationale behind the exclusionary rule, to "deter future unlawful police conduct,"<sup>54</sup> did not have much force in a probation or suspended sentence revocation proceeding because no evidence in Anderson's case suggested the unlawful search by the police was in bad faith.<sup>55</sup> The court of appeals, in Johnson v. Commonwealth,<sup>56</sup> extended the rationale of Anderson to probation revocation proceedings.<sup>57</sup>

51. 20 Va. App. 361, 457 S.E.2d 396 (1995), affd, 251 Va. 437, 470 S.E.2d 862 (1996).

52. Id. at 363, 457 S.E.2d at 397.

53. Id.

54. Id. at 364, 457 S.E.2d at 397 (quoting United States v. Janis, 428 U.S. 433, 446 (1976)).

55. Id. at 365, 457 S.E.2d at 398.

56. 21 Va. App. 172, 462 S.E.2d 907 (1995).

57. Judge Benton's dissent in Johnson applies with equal force to Anderson and bears repeating in significant part here:

By failing to apply the exclusionary rule, this Court adopts a policy that denigrates judicial and governmental integrity. A court proceeding which results in a denial of liberty from "evidence secured through . . . a flagrant disregard of the procedure [devised to protect constitutional rights] . . . cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." The Court overlooks the police officer's violation of the constitution simply because the officer testified that Johnson was unknown to him when he stopped Johnson. "If the Government becomes a lawbreaker, it breeds contempt for law; it

suppress evidence discovered when police demanded of a car's driver his operator's license even though the person suspected of criminal activity was the car's passenger).

#### **III. FIFTH AMENDMENT**

In Novak v. Commonwealth,58 the court of appeals considered whether a juvenile was in custody, thereby triggering the requirement that he be read the warnings contemplated by Miranda v. Arizona.<sup>59</sup> The court of appeals concluded that because the defendant was accompanied by his mother, voluntarily came to police headquarters on two separate occasions, and had previously been advised that he was not a suspect in the murder being investigated, his third voluntary visit to police headquarters did not constitute custodial interrogation.<sup>60</sup> The majority acknowledged that the police persuaded Novak's mother to leave during the interrogation of Novak, but concluded that that fact was insufficient to render the interrogation a custodial one.<sup>61</sup> The dissenting opinion reasoned that Novak's vouthfulness, that the interrogation took place in a small closed room at police headquarters, that Novak's mother asked to be present and was asked by police to leave, that the interrogating detective lied to Novak, and that when Novak's mother left the room the interrogating detective moved his chair closer to Novak and between Novak and the door, all combined to render the interrogation a custodial one.<sup>62</sup>

In *Midkiff v. Commonwealth*,<sup>63</sup> the Supreme Court of Virginia approved the admissibility of the defendant's statement to police, while in custody, over Midkiff's challenge that the statement was taken in violation of his right to remain silent.<sup>64</sup> During the course of Midkiff's interrogation he stated, "I'll be honest with you, I'm scared to say anything without talking to a lawyer," and "I don't got to answer that, Dick [the first name

- 61. Id. at 386-87, 457 S.E.2d at 408-09.
- 62. Id. at 399, 457 S.E.2d at 414 (Benton, J., dissenting).
- 63. 250 Va. 262, 462 S.E.2d 112 (1995).

64. Id. at 264, 462 S.E.2d 112, 113-14. Midkiff challenged the admissibility of his statement under the broad rubric of the *Miranda* doctrine which contemplates both Fifth and Sixth Amendment guarantees. Midkiff's Sixth Amendment challenge is discussed *infra* notes 81-87 and accompanying text.

invites every man to become a law unto himself; it invites anarchy.<sup>m</sup> Id. at 178-79, 462 S.E.2d at 911 (Benton, J., dissenting) (alteration in original) (cita-

*Id.* at 178-79, 462 S.E.2d at 911 (Benton, J., dissenting) (alteration in original) (citations omitted).

<sup>58. 20</sup> Va. App. 373, 457 S.E.2d 402 (1995).

<sup>59. 384</sup> U.S. 436 (1966).

<sup>60.</sup> Novak, 20 Va. App. at 385-86, 457 S.E.2d at 408.

of an interrogator], you know."65 The Supreme Court of Virginia initially acknowledged that *Miranda*<sup>66</sup> requires that if a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.<sup>367</sup> The supreme court went on to say, however, that "Miranda should not be read so strictly as to require the police to accept as conclusive any statement, no matter how ambiguous, as a sign that the suspect desires to cut off questioning."<sup>68</sup> The supreme court held that Midkiff's statement. "I'll be honest with you, I'm scared to say anything without talking to a lawyer . . . [b]ecause I, I got hoodooed big time back in, when I was in, now, don't get me wrong ...," was a mere expression of reservations about answering questions, but not an invocation of his right to remain silent.<sup>69</sup> The supreme court similarly held that Midkiff's statement, "I don't got to answer that, Dick, you know," was "simply an affirmation that Midkiff understood his right to remain silent."70 The supreme court did not explain why, contextually, it would make sense for Midkiff to elect, when he did, to explain to the police his depth of understanding.<sup>71</sup>

In 1994, the court of appeals held in *Husske v. Common*wealth,<sup>72</sup> a panel opinion, that inculpatory statements made by

66. Miranda v. Arizona, 384 U.S. 436 (1966).

70. Id. at 268, 462 S.E.2d at 116.

72. 19 Va. App. 30, 448 S.E.2d 331 (1994), withdrawn and superseded on reh'g, 21 Va. App. 91, 462 S.E.2d 120 (1995).

<sup>65.</sup> Id. at 265, 462 S.E.2d at 114.

<sup>67.</sup> Midkiff, 250 Va. at 267, 462 S.E.2d at 115 (quoting Miranda, 384 U.S. at 473-74).

<sup>68.</sup> Id. (quoting Lamb v. Commonwealth, 217 Va. 307, 312, 227 S.E.2d 737, 741 (1976)).

<sup>69.</sup> Id. (alteration in original). Following Midkiff's statement, "... now, don't get me wrong ... " the opinion quotation recites that "(recorder is turned off)." Id. at 265, 462 S.E.2d at 114. Why the recorder should be stopped or malfunction at such an apparently crucial moment is unexplained by the opinion.

<sup>71.</sup> In Riddick v. Commonwealth, 22 Va. App. 136, 468 S.E.2d 135 (1996), a defendant filling out a rights waiver form answered "no" to the printed statement saying he desired to waive his rights and make a statement. Id. at 140, 468 S.E.2d at 136-37. The interrogating officer asked, "[Y]ou do not want to talk to me, Mr. Riddick?" to which the defendant responded that he misunderstood the form and that he did want to talk to the police. Id., 468 S.E.2d at 137. The court of appeals held that the officer's question, "[Y]ou do not want to talk to me, Mr. Riddick," was "unlikely to elicit an 'incriminating response" and therefore was not an unlawful resumption of interrogation. Id. at 145-46, 468 S.E.2d at 140.

a defendant as part of court-ordered counseling could not be used against the defendant in a subsequent criminal matter.<sup>73</sup> Husske had been required to participate in sex-offender counseling as a condition of his suspended sentence.<sup>74</sup> On en banc review of the panel decision, however, an equally divided court affirmed the judgment of the trial court admitting the statements.<sup>75</sup> No opinion explaining the divisions in the court of appeals accompanied the order affirming the admission of the statements. In September of 1996, however, the Supreme Court of Virginia affirmed the trial court's holding.<sup>76</sup> The supreme court reasoned that the Fifth Amendment privilege against selfincrimination is not, in circumstances such as Husske's, selfexecuting, and that a defendant who "desires the protection of the privilege [against self incrimination]... must claim it or [he] will not be considered to have been "compelled" within the meaning of the Amendment.""77 The supreme court then observed that since "no one required Husske 'to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent," no Fifth Amendment violation stemmed from admitting Husske's statements made to his counselor in court-ordered treatment.78

In light of the supreme court's holding, the defense bar would do well to exercise caution in referring clients to pre- and posttrial treatment programs as a condition of suspended sentences or bail, and in advising clients on how to cooperate with probation officers involved in preparing pre-sentence reports and in supervising probation or parole. Such caution may disadvantage clients who have needs that these sorts of programs can address, and negatively affect their sentencing proceedings. Nevertheless, these risks need to be weighed against the potential for damaging self-incrimination problems in the future. Prosecutors,

<sup>73.</sup> Id. at 54, 448 S.E.2d at 344.

<sup>74.</sup> Id. at 47, 448 S.E.2d at 341.

<sup>75.</sup> Husske v. Commonwealth, 21 Va. App. 91, 462 S.E.2d 120 (1995).

<sup>76.</sup> Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996).

<sup>77.</sup> Id. at 214, 476 S.E.2d at 927 (quoting Minnesota v. Murphy, 465 U.S. 420, 427 (1984)).

<sup>78.</sup> Id. at 217, 476 S.E.2d at 928-29. The court of appeals panel majority, in coming to a contrary holding, relied in part on the testimony from Husske's counselor that Husske's failure to be fully forthcoming and participatory in his counseling would result in a violation of the conditions of his suspended sentence. See Husske, 19 Va. App. at 52, 448 S.E.2d at 343-44.

by the same token, may no doubt profit from the disclosures made by certain defendants as part of court-ordered counseling.

#### IV. SIXTH AMENDMENT

A defendant may waive his right to appear at his trial if his absence is occasioned by his own flight in the middle of trial.<sup>79</sup> Such flight by the defendant constituted a "knowing and voluntary waiver" of his right to be present at trial, and his flight should not be permitted to disrupt the "proper administration of criminal justice."<sup>80</sup>

Midkiff v. Commonwealth,<sup>81</sup> discussed above in the section on the Fifth Amendment, also discussed the right to counsel dimension of the Miranda protections. The Supreme Court of Virginia began with the premise that only a "clear and unambiguous assertion of the right to counsel" necessarily triggers an immediate cessation of questioning.<sup>82</sup> The supreme court then observed that, in its prior decisions, "Do you think I need an attorney here?"83 "You did say I could have an attorney if I wanted one?"84 and "Didn't you say I have the right to an attorney?"<sup>85</sup> all "fell short of being clear assertions of the right to counsel."86 The supreme court concluded that Midkiff's statement, "I'm scared to say anything without talking to a lawyer." expresse[d] his reservation about the wisdom of continuing the interrogation without consulting a lawyer [but did] not clearly and unambiguously communicate a desire to invoke his right to counsel."87 The supreme court also found Davis v. United States<sup>88</sup> to stand for the proposition that "Maybe I should talk

<sup>79.</sup> Barfield v. Commonwealth, 20 Va. App. 447, 457 S.E.2d 786 (1995).

<sup>80.</sup> Id. at 451, 457 S.E.2d at 788.

<sup>81. 250</sup> Va. 262, 462 S.E.2d 112 (1995).

<sup>82.</sup> Id. at 266, 462 S.E.2d at 115.

<sup>83.</sup> Mueller v. Commonwealth, 244 Va. 386, 396, 422 S.E.2d 380, 387 (1992).

<sup>84.</sup> Eaton v. Commonwealth, 240 Va. 236, 250, 397 S.E.2d 385, 393 (1990), cert. denied, 502 U.S. 824 (1991).

<sup>85.</sup> Poyner v. Commonwealth, 229 Va. 401, 410, 329 S.E.2d 815, 823, cert. denied, 474 U.S. 865 (1985).

<sup>86.</sup> Midkiff, 250 Va. at 266, 462 S.E.2d at 115.

<sup>87.</sup> Id. at 267, 462 S.E.2d at 115.

<sup>88.</sup> Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350 (1994). The Davis majority held that in the absence of a clear and unambiguous invocation of the right to counsel, questioning may continue. Id. at \_\_, 114 S. Ct. at 2357. The officers in Davis

to a lawyer,' was not an invocation of the right to counsel and, therefore, subsequent statements by the accused did not need to be suppressed."<sup>89</sup>

In Griswold v. Commonwealth,<sup>90</sup> the Supreme Court of Virginia struck out to set a bright line test for determining the admissibility of prior uncounseled (i.e., actually uncounseled or unaccompanied by a waiver of the right to counsel) convictions in subsequent proceedings. Simply put, the absence of counsel, or a waiver thereof, renders a conviction "constitutionally infirm" if the conviction resulted in *actual* incarceration.<sup>91</sup> Such a conviction may not be used as the predicate of a future offense at the guilt or innocence stage,<sup>92</sup> or to enhance punishment as part of a record of convictions at a sentencing phase.<sup>93</sup> An uncounseled conviction resulting in only a suspended sentence or presumably even a sentence resulting in years of *potential* incarceration, is not constitutionally infirm and is admissible in a future proceeding.<sup>94</sup>

89. *Midkiff*, 250 Va. at 266-67, 462 S.E.2d at 115. The record in *Midkiff*, unlike that in *Davis*, did not suggest that follow up questioning by police of Midkiff related to clarifying his ambiguous statement.

90. 252 Va. 113, 472 S.E.2d 789 (1996), rev'g, 21 Va. App. 22, 461 S.E.2d 411 (1995) (en banc).

91. Id. at 115-16, 472 S.E.2d at 790.

92. For example, as a predicate first offense in a charge, as was Griswold's, of driving under the influence having previously been convicted of a like offense.

93. Griswold, 252 Va. at 116, 472 S.E.2d at 790.

94. See id. at 117, 472 S.E.2d at 791. How to determine whether a prior conviction was counseled is entirely a bird of another feather. In *Commonwealth v. Stich*, 35 Va. Cir. 196 (Fairfax 1994), the circuit court adhered, by agreement of the parties, to the analysis governing how to appraise a trial chronology for speedy trial purposes, and held that in assessing whether there was an appearance or waiver of counsel in an earlier conviction, a trial court is bound by the official record of the earlier proceeding, and may not entertain new evidence on that issue. *Id.* at 196-98.

did the majority one better, however, and their subsequent questioning, once confronted by an equivocal response regarding a desire for counsel, was confined to an attempt to clarify the suspect's intention. *Id.* at \_\_, 114 S. Ct. at 2356-57. Four concurring Justices in *Davis*, however, would have sanctioned further questioning after an equivocal statement regarding counsel only if the subsequent questioning was of the variety designed to clarify the suspect's intentions regarding counsel. *Id.* at \_\_, 114 S. Ct. at 2364.

# V. DOUBLE JEOPARDY<sup>95</sup>

In Lyles v. Commonwealth,<sup>96</sup> the defendant waived his right to counsel before beginning his trial for reckless driving. After arraignment, after the defendant entered a plea of not guilty, and after the first witness began to testify, the trial judge inquired of the Commonwealth's Attorney if he was waiving any possible jail sentence. The Commonwealth's Attorney responded that he was not, and the trial judge then advised the parties he was continuing the case for the defendant to retain an attorney. When the trial resumed more than a month later, Lyles contended that the resumed proceeding was in violation of his guarantee against double jeopardy. The decision to grant the continuance, the court of appeals held, was for the benefit of the defendant, was not prejudicial, and was within the discretion of the trial judge.<sup>97</sup>

On multiple occasions this past year, the Supreme Court of Virginia and court of appeals considered whether a mistrial may result in jeopardy so as to bar re-trial. In *Allen v. Commonwealth*,<sup>98</sup> a jury convicted the defendant of grand larceny and sentenced him accordingly.<sup>99</sup> The trial judge dismissed the jury, and then, on motion of the Commonwealth, declared a mistrial due to the fact that one of the jurors did not reside in the jurisdiction where the trial was conducted.<sup>100</sup> Defense counsel agreed that the jury was improper, but argued against retrial on jeopardy grounds. The supreme court held first that the jury's verdict was a verdict of conviction, which placed the defendant in jeopardy even though it was "not followed by any judgment."<sup>101</sup> The supreme court further held that the defect in seating the non-resident juror was insufficient to give rise to manifest necessity for a mistrial.<sup>102</sup> Therefore, the defendant's

<sup>95.</sup> 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 as a distinct subject area.

<sup>96. 21</sup> Va. App. 187, 462 S.E.2d 915 (1995).

<sup>97.</sup> Id. at 191, 462 S.E.2d at 917.

<sup>98. 252</sup> Va. 105, 472 S.E.2d 277 (1996).

<sup>99.</sup> Id. at 107, 472 S.E.2d at 278.

<sup>100.</sup> Id.

<sup>101.</sup> Id. at 109, 472 S.E.2d at 279 (citation omitted).

<sup>102.</sup> Id. at 110, 472 S.E.2d at 280.

# 1296 UNIVERSITY OF RICHMOND LAW REVIEW [Vol. 30:1281

first trial precluded his subsequent trials and sentencing.<sup>103</sup>

In Tyler v. Commonwealth,<sup>104</sup> the court of appeals confirmed that a mistrial declared in the absence of manifest necessity will bar retrial because of the guarantee against double jeopardy.<sup>105</sup> In Tyler, a jury returned inconsistent verdicts of manslaughter and use of a firearm in the commission of murder. On the prompting of the Commonwealth's Attorney, the trial judge ordered the jury to deliberate further in order to reconcile its verdicts. Remarkably, the jury deadlocked, and the trial judge declared a mistrial over the defendant's objection. The court of appeals held that because the inconsistent verdicts were not grounds for invalidating the jury's verdicts, no manifest necessity existed for declaring a mistrial, and retrial was barred.<sup>106</sup> Similarly, where a trial judge erroneously declared a mistrial on account of a mistaken belief that the defendant had improperly attempted to cross-examine "a very material witness" for the Commonwealth, the mistrial barred the defendant's re-trial.<sup>107</sup>

In a decision awaited by DUI practitioners around the Commonwealth, the court of appeals in *Tench v. Commonwealth*<sup>108</sup> decided in an eight to one *en banc* opinion that the "administrative" suspension<sup>109</sup> of a DUI arrestee's driver's license for

- 104. 21 Va. App. 702, 467 S.E.2d 294 (1996).
- 105. Id. at 707, 467 S.E.2d at 296.
- 106. Id.
- 107. Brandon v. Commonwealth, 22 Va. App. 82, 86, 467 S.E.2d 859, 861 (1996).
- 108. 21 Va. App. 200, 462 S.E.2d 922 (1995) (en banc).

109. Effective January 1, 1995, certain persons arrested for driving under the influence shall have their privilege to drive suspended immediately for a period of seven days after the date of the offense. VA. CODE ANN. § 46.2-391.2 (Repl. Vol. 1996). Typically, the trial of a DUI will take place long after the expiration of the seven days.

<sup>103.</sup> Id. The supreme court did not dismiss the prosecution against Allen, but rather remanded the case to the trial court for sentencing on the first verdict of guilt. Id. The jury in that first trial recommended a sentence of twelve months in jail on a charge of breaking and entering, and two years imprisonment on a charge of grand larceny. Id. at 107, 467 S.E.2d at 278. After the mistrial was declared on account of the non-resident juror, the defendant was tried a second time which resulted in a hung jury and another mistrial. Id. A third trial also resulted in a mistrial due to a police officer's testimony that the defendant had refused to make a statement. This testimony violated the defendant's right not to incriminate himself. Finally, in a fourth trial, the defendant was convicted and sentenced to a total of thirteen years imprisonment. Id. at 108, 467 S.E.2d at 278.

seven days is not "punishment" within the meaning of the Double Jeopardy Clause, and does not bar a subsequent prosecution for the underlying DUI.<sup>110</sup> The court of appeals reasoned that the seven day suspension operated to protect the public from intoxicated drivers and to reduce alcohol related accidents. In so concluding, the court of appeals rejected the argument, predicated essentially on the holdings of a trilogy of U.S. Supreme Court cases—United States v. Halper,<sup>111</sup> Austin v. United States,<sup>112</sup> and Department of Revenue of Montana v. Kurth Ranch<sup>113</sup>—that a nominal civil sanction is punishment within the meaning of the Double Jeopardy Clause, if its purpose was at all to exact retribution for past misconduct or deter future misconduct, and consequently ought to bar a subsequent prosecution for the same offense.<sup>114</sup> In Brame v. Commonwealth,

Ancillary issues regarding the administrative suspension statute also prompted significant litigation efforts. See e.g. Commonwealth v. Teganini, 38 Va. Cir. 143 (Fairfax County 1995) (finding in administrative suspension challenge that no probable cause existed for breath test is not collateral estoppel bar to DUI prosecution); Commonwealth v. Repp, 36 Va. Cir. 473 (Albemarle County 1995) (finding that no right exists to appeal to a circuit court the general district court's affirmance of administrative suspension).

The analysis has also been applied to habitual offender proceedings. See, e.g., Commonwealth v. Jacobsen, 36 Va. Cir. 315 (Loudoun County 1995) (same proposition); Commonwealth v. Simpson, 37 Va. Cir. 42 (Alexandria City 1995) (holding that double jeopardy does not bar being declared a habitual offender).

111. 490 U.S. 435 (1989).

112. 509 U.S. 602 (1993).

113. 511 U.S. 767, 114 S. Ct. 1937 (1994).

114. Id. at \_\_, 114 S. Ct. 1937, 1948. The lower-court arguments in the so-called DUI Double Jeopardy cases engaged not only the question of whether the administra-

<sup>110.</sup> Tench, 21 Va. App. at 208, 462 S.E.2d at 925. The so-called "DUI Double Jeopardy" cases spawned seemingly endless rounds of litigation and debate around the Commonwealth. See e.g., Commonwealth v. Wright, 36 Va. Cir. 494 (Richmond City 1995) (holding that administrative suspension is punitive and a separate proceeding from the related DUI trial, but that the elements of the two prosecutions were not necessarily the same); Commonwealth v. House, 38 Va. Cir. 36 (Fairfax County 1995) (administrative suspension is punishment but not a separate proceeding from DUI trial); City of Fredericksburg v. Eutsler, 36 Va. Cir. 460 (Fredericksburg City 1995) (administrative suspension is not punitive); Commonwealth v. Dederer, 38 Va. Cir. 52 (Fairfax County 1995) (administrative suspension, though punitive, is not a separate proceeding from DUI prosecution, nor is it the same offense as DUI); Town of Leesburg v. Etchells, 37 Va. Cir. 155 (Loudoun County 1995) (administrative suspension not punishment); Commonwealth v. Jacobson, 36 Va. Cir. 438 (Arlington County 1995) (administrative suspension is neither punishment nor separate proceeding from DUI prosecution); Commonwealth v. Branham, 36 Va. Cir. 357 (Orange County 1995) (administrative suspension is not punishment nor a separate proceeding from related DUI trial).

#### 1298 UNIVERSITY OF RICHMOND LAW REVIEW [Vol. 30:1281

the Supreme Court of Virginia<sup>115</sup> came to the same conclusion as the court of appeals, and specifically concluded that a sanction "need not be exclusively remedial" in order to not be punishment within the meaning of the Double Jeopardy clause.<sup>116</sup>

# VI. TRIALS

#### A. Discovery

The Rules of the Supreme Court of Virginia afford some discovery to persons accused of a crime in the Commonwealth.<sup>117</sup> In *Ramirez v. Commonwealth*,<sup>118</sup> a child sexual abuse case, the court of appeals emphasized the limited nature of that discovery. Ramirez had sought discovery of documents in the possession of the Department of Social Services relating to the allegations pending against him. Rule 3A:11 of the Supreme Court of Virginia gives criminal defendants access to certain documentary evidence in the Commonwealth's possession, but specifically removed from the scope of the rule "statements made by Commonwealth witnesses or prospective . . . witnesses to agents of the Commonwealth . . . in connection with the investigation or prosecution of the case . . . . "<sup>119</sup> The court of appeals reasoned that the Department of Social Services was, by operation of law, an agency involved in the investigation of

tive suspension was punishment, but also whether it constituted a separate proceeding from the DUI prosecution, and whether the administrative suspension required proof of the same elements as a DUI prosecution. See supra note 110. The court of appeals, ruling that administrative suspension did not constitute punishment, did not reach these latter issues.

<sup>115. 252</sup> Va. 122, 476 S.E.2d 177 (1996).

<sup>116.</sup> Id. at 128, 476 S.E.2d at 180. In Simmons v. Commonwealth, 252 Va. 118, 475 S.E.2d 806 (Va. 1996), the supreme court also rejected a collateral estoppel defense arising from the administrative suspension of a driver's license. There, in a breath test refusal case, the defendant contended that Commonwealth's taking of his operator's license through a 46.2-391.2 administrative suspension triggered a collateral estoppel bar to the Commonwealth's subsequent taking of his license for a year. The supreme court concluded, however, that the administrative suspension was "not a judgment by a court of competent jurisdiction," and therefore no collateral estoppel bar was raised to a subsequent judicial action based on the same facts and issues. Id. at 120-21, 475 S.E.2d at 807.

<sup>117.</sup> See VA. S. CT. R. 3A:11 (Repl. Vol. 1996).

<sup>118. 20</sup> Va. App. 292, 456 S.E.2d 531 (1995).

<sup>119.</sup> VA. S. CT. R. 3A:11(b)(2) (Repl. Vol. 1996) (emphasis added).

the case against Ramirez, and consequently, the witness statements given to DSS were not discoverable by virtue of Rule 3A:11.<sup>120</sup>

In Lane v. Commonwealth,<sup>121</sup> the court of appeals concluded that the Commonwealth, in violation of Rule 3A:11, failed to disclose to the defense a statement made by the defendant which was contrary to the defendant's account at trial.<sup>122</sup> When the Commonwealth introduced the statement at trial, which was inconsistent with Lane's trial theory of self-defense, Lane moved to exclude it from evidence on account of the discovery violation. The court of appeals held, however, that the remedy for a discovery violation was within the discretion of the trial judge.<sup>123</sup> Lane refused to accept the trial judge's offer of a continuance and did not move for a mistrial; instead he "sought only [the] suppression of the truth.<sup>"124</sup> The court of appeals held that "[u]nder those circumstances, the admission of the statement into evidence did not unjustly prejudice Lane's presentation of his defense."<sup>125</sup>

In Bottoms v. Commonwealth,<sup>126</sup> the court of appeals affirmed the vitality of Virginia Code section 19.2-187 which provides that, as a condition precedent to the admission of a certificate of analysis, the Commonwealth is required, upon the request of the defendant, to deliver a copy of the certificate to the defendant seven days prior to trial.<sup>127</sup> Bottoms made a timely request, but the Commonwealth failed to timely deliver the certificate prior to trial.<sup>128</sup> During trial, the Commonwealth moved to introduce the certificate, and Bottoms objected

<sup>120.</sup> Ramirez, 20 Va. App. at 296, 456 S.E.2d at 533. Note that the scope of discovery in a criminal case has a constitutional dimension. See Brady v. Maryland, 373 U.S. 83 (1963). However, Ramirez's allegation that he was denied exculpatory evidence was held to be unfounded by the court of appeals and was not material to the Rule 3A:11 discussion.

<sup>121. 20</sup> Va. App. 592, 459 S.E.2d 525 (1995).

<sup>122.</sup> Id. at 593-94, 459 S.E.2d at 526.

<sup>123.</sup> Id. at 595, 459 S.E.2d at 527 (citing Frye v. Commonwealth, 231 Va. 370, 383-84, 345 S.E.2d 267, 277 (1986) (citations omitted)).

<sup>124.</sup> Id.

<sup>125.</sup> Id.

<sup>126. 20</sup> Va. App. 466, 457 S.E.2d 796 (1995).

<sup>127.</sup> Id. at 468-69, 457 S.E.2d 797 (citing VA. CODE ANN. § 19.2-187(ii) (Repl. Vol. 1995)).

<sup>128.</sup> Id. at 468, 457 S.E.2d at 796-97.

# 1300 UNIVERSITY OF RICHMOND LAW REVIEW [Vol. 30:1281

on the ground that the Commonwealth had not complied with section 19.2-187.<sup>129</sup> The trial judge offered to continue the matter for seven days, or to allow the defendant an opportunity to view the certificate before continuing with the trial.<sup>130</sup> Bottoms noted his objection to admission of the certificate under either circumstance. The court of appeals agreed that section 19.2-187 required delivery "at least seven days *prior* to . . . trial," and therefore held that the certificate was improperly admitted.<sup>131</sup>

# B. Expert Testimony and Assistance

In *Farley v. Commonwealth*,<sup>132</sup> the court of appeals found error in a trial judge's refusal to permit a defendant's expert testimony.<sup>133</sup> The defendant, a hunter who killed a hunting companion, appealed his conviction for involuntary manslaughter on the ground that his expert was not allowed to testify about how the defendant could have mistaken his companion for a turkey. Farley proffered expert testimony on "closure, [the brain's] tendency . . . when in receipt of ambiguous stimuli, to complete an image for the person based on the ambiguous stimuli even though the image does not actually exist."<sup>134</sup> The court of appeals concluded that the expert's testimony would have aided the jury in explaining Farley's misperception, and that the testimony, though helpful, would not have invaded the jury's province as fact-finder since the jury remained free to believe or disbelieve Farley's account of events.<sup>135</sup>

In Taylor v. Commonwealth,<sup>136</sup> the court of appeals held that it was not error for an expert to testify that the victim in a sexual battery case suffered from post-traumatic stress disorder and that such a disorder is consistent with having recently suffered a traumatic event.<sup>137</sup> Similarly, in Brown v. Common-

130. Id.

<sup>129.</sup> Id. at 468, 457 S.E.2d at 797.

<sup>131.</sup> Id. at 469, 457 S.E.2d at 797 (alteration in original).

<sup>132. 20</sup> Va. App. 495, 458 S.E.2d 310 (1995).

<sup>133.</sup> Id. at 497, 458 S.E.2d at 311.

<sup>134.</sup> Id. at 500, 458 S.E.2d at 312.

<sup>135.</sup> Id. at 502, 458 S.E.2d at 313.

<sup>136. 21</sup> Va. App. 557, 466 S.E.2d 118 (1996).

<sup>137.</sup> Id. at 564-65, 466 S.E.2d at 121-22.

*wealth*,<sup>138</sup> the court of appeals held that it was error to not permit expert testimony that a Commonwealth's witness suffered from an antisocial personality disorder, a symptom of which is to have no regard for the truth.<sup>139</sup>

In Jenkins v. Commonwealth,<sup>140</sup> the court of appeals concluded that an expert's testimony that the victim in an aggravated sexual battery case had been sexually abused was improper expert opinion testimony on the ultimate fact in issue.<sup>141</sup> The *en banc* majority concluded, however, that the error was harmless since the expert's testimony was corroborated by the child-victim's "bizarre sexually-oriented behavior," "the child's familiarity with sexual acts," and the defendant's admission of participation in a sexual episode with the child.<sup>142</sup>

Husske v. Commonwealth,<sup>143</sup> discussed above in the Fifth Amendment section, was a panel opinion from the court of appeals holding that an indigent defendant was entitled, as a function of due process, to expert assistance in a case turning on DNA evidence. On *en banc* review by the court of appeals, an equally divided court, without explanation, affirmed the trial court's refusal to provide expert assistance.<sup>144</sup>

On review of that decision, the Supreme Court of Virginia rejected the notion that a defendant's right to expert assistance is "implicated only in those cases where the defendant's sanity at the time he committed an offense is seriously in question."<sup>145</sup> The supreme court held that, in order to have "an adequate opportunity to present [his] claims fairly within the adversary system," Due Process requires that indigent defen-

144. Husske v. Commonwealth, 21 Va. App. 91, 462 S.E.2d (1995); see supra notes 72-79 and accompanying text.

145. Husske v. Commonwealth, 252 Va. 203, 212, 476 S.E.2d 920, 926 (1996).

<sup>138. 22</sup> Va. App. 316, 469 S.E.2d 90 (1996).

<sup>139.</sup> Id. at 321-23, 469 S.E.2d at 92-93.

<sup>140. 22</sup> Va. App. 508, 471 S.E.2d 785 (1996) (en banc).

<sup>141.</sup> Id. at 517-18, 471 S.E.2d at 790.

<sup>142.</sup> Id. at 518, 471 S.E.2d at 790. "Appellant confessed that while holding the child on his lap, he began to have sexual fantasies about the child. Appellant admitted that he placed his hand on the child's penis and held it there for a minute, during which time appellant had sexual thoughts about having oral sex with the child when the child was older." Id.

<sup>143. 19</sup> Va. App. 30, 448 S.E.2d 331 (1994); see supra notes 72-79 and accompanying text.

#### 1302 UNIVERSITY OF RICHMOND LAW REVIEW [Vol. 30:1281

dants have "the basic tools of an adequate defense," and that "in certain instances, these basic tools may include the appointment of non-psychiatric experts [to aid the defense]."<sup>146</sup> The supreme court concluded, however, that Husske had not made a sufficient threshold showing of need for a DNA expert and that the trial court had, therefore, not erred in refusing expert DNA assistance.<sup>147</sup> The supreme court's holding opens the door to defense motions, on the part of indigent defendants, for expert assistance in nearly any case in which there is a demonstrable need for such assistance. The supreme court at the same time, however, set tight parameters for establishing such need:

We hold that an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," and that he will be prejudiced by the lack of expert assistance. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial.<sup>148</sup>

146. Id. at 211, 476 S.E.2d at 925 (citing Ake v. Oklahoma, 470 U.S. 68, 77 (1985); Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

147. Id. at 213, 476 S.E.2d at 926. Although the supreme court majority characterized Husske's statement of need for expert assistance as "generalized statements in his motions," id., the dissent noted that "at the conclusion of the Commonwealth's evidence, [Husske] proffered some 400 pages of court opinions and testimony 'taken in various other cases' that dramatized the nature and dimensions of the DNA dispute prevalent at that time in the scientific community." Id. at 219, 476 S.E.2d at 930 (footnote omitted).

148. Id. at 211-12, 476 S.E.2d at 925 (citations omitted) (quoting Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985)). "Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided." Id. at 212, 476 S.E.2d at 925 (quoting North Carolina v. Mills, 420 S.E.2d 114, 117 (1992)). The supreme court's required threshold showing appears to be greater than the ordinary requirements of relevance (i.e., probative of a material issue). Moreover, the supreme court's standard of review of whether denial of expert assistance—which is ostensibly a function of the constitutional guarantee of due process—is essentially the same as that which the supreme court applies for non-constitutional error. See Lavinder v. Commonwealth, 12 Va. App. 1003, 1005, 407 S.E.2d 910, 911 (1991) (non-constitutional error is harmless if it appears a fair trial and substantial justice were had, a lesser standard than that applied to constitutional error which is reversible unless "harmless beyond a reasonable doubt.")

# C. Jurors and Juror Selection

"Every prospective juror must stand indifferent to the cause, 'and any reasonable doubt as to a juror's qualifications must be resolved in favor of the accused."<sup>149</sup> A juror who had heard that the defendant "may have committed a criminal offense," and who would hear the evidence with some "slight predisposition" against persons charged with sex offenses because a relative had been a victim of a sex crime, was not indifferent to the cause beyond a reasonable doubt and the trial court should have struck the juror for cause.<sup>150</sup> In Williams v. Commonwealth,<sup>151</sup> the en banc court of appeals affirmed a conviction notwithstanding the seating of a correctional officer in the trial of a defendant charged with inflicting bodily injury on an employee of a correctional facility on the theory that a juror's employment, without more, should not result in an inference of bias.<sup>152</sup>

150. Id. at 393, 464 S.E.2d at 537-38.

151. 21 Va. App. 616, 466 S.E.2d 754 (1996) (en banc), rev'g, 19 Va. App. 600, 453 S.E.2d 575 (1995).

152. Id. at 618, 466 S.E.2d at 756. The panel opinion in Williams observed:

Nevertheless, *per se* exclusions are recognized. A person is disqualified from serving as a juror in a criminal case if he or she is related to the victim in the case because the "feelings" of a victim's relations are "generally... excited by a personal wrong" to the victim, even though the victim is not a party to the proceeding. This principle extends to disqualify even a stockholder in a bank which is the victim of the crime of larceny by check. Moreover, a prospective juror's bias may arise from having the same occupation as the victim and, as a result, sharing a significant risk of being a future victim of the same crime.

In this case, the prospective juror and the victim shared an occupation which equally exposed them to a unique and significant risk of being a victim of the crime with which the defendant was charged. The risk is not one shared by the public at large.

This shared risk promotes a kinship between the prospective juror and the correctional guard who was the victim, not unlike that of a familial kinship. This relationship would, not unexpectedly, cause the "feelings" of the correctional guard on the panel to be "excited" by the injury to the victim, with whom he would closely identify. Declarations of impartiality by such a prospective juror would do little to assure that the jury was "as free from suspicion as possible." The appearance of bias

<sup>149.</sup> Clements v. Commonwealth, 21 Va. App. 386, 392, 464 S.E.2d 534, 537 (1995).

In Jenkins v. Commonwealth,<sup>153</sup> a juror revealed, in the middle of trial, that he knew the defendant from having worked with him ten years prior and that the juror and the defendant had velled at one another once over a disagreement. The juror also stated that knowing the defendant would not affect his verdict because he "already had a decision made." When later asked by the trial judge if he had prejudged the case before the case was submitted to the jury as a whole for deliberation, the juror first stated that he had "taken in everything, you know, I'm just weighing and balancing in my own head." Then later, when asked if he could deliberate, the juror responded in the affirmative. The court of appeals held that since the juror stated he could deliberate and that he did not bear the defendant any animus, and since the record did not reflect whether a vote for guilt or innocence would flow from the juror's "potential prejudgment of the case" the trial judge was not required to declare a mistrial.<sup>154</sup>

In *Riley v. Commonwealth*,<sup>155</sup> a trial for the rape of a young female jogger, the Commonwealth peremptorily struck "women who are most unlike the victim in terms of age [because] many times [in rape cases] the elderly female jurors have difficulty accepting certain aspects of the cases, and they have a difficult time considering the evidence and reaching a verdict of guilt."<sup>156</sup> Although the court of appeals held that age was a permissible basis for exercising a peremptory challenge, the prosecutor's striking of women based on stereotypical views of how women would think or react was constitutionally impermissible.<sup>157</sup> "The fact that the Commonwealth used age to identify which women to strike does not overcome the constitutional infirmity."<sup>158</sup>

In Charity v. Commonwealth,<sup>159</sup> the court of appeals agreed

- 154. Id. at 516-17, 471 S.E.2d at 789.
- 155. 21 Va. App. 330, 464 S.E.2d 508 (1995).
- 156. Id. at 334, 464 S.E.2d at 510.
- 157. Id. at 335-37, 464 S.E.2d at 510-11.
- 158. Id. at 336, 464 S.E.2d at 510.
- 159. 22 Va. App. 582, 471 S.E.2d 821 (1996), reh'g granted, and opinion with-

would remain indelible. Consequently, we hold that a correctional guard is disqualified per se from serving on a jury considering a charge of violating Code § 18.2-55.

<sup>19</sup> Va. App. at 603-04, 453 S.E.2d at 577 (citations and footnote omitted).

<sup>153. 22</sup> Va. App. 508, 471 S.E.2d 785 (1996).

with the defendant that the trial judge had erroneously insisted on personally asking all questions of the venire during voir dire, and refused to allow the defendant's lawyer to ask the questions directly.<sup>160</sup> By statute, counsel may personally question the venire during voir dire.<sup>161</sup> Since, however, the trial judge asked each of the questions submitted to him in writing by defense counsel, and no other prejudice was apparent, the court of appeals held the error to be harmless.<sup>162</sup> The dissent countered that a case such as this "defies harmless error analysis," since, "[a]t the heart of an attorney's right to voir dire the venire is the attorney's well-founded desire to engage in one-onone interaction with a potential juror, and thereby to personally analyze all of the attendant variables inherent in such an interaction."163 It is important to note that the present precedental value of *Charity* is uncertain as the opinion was withdrawn and a rehearing granted.

161. VA. CODE ANN. § 8.01-358 (Repl. Vol. 1992).

162. Charity, 22 Va. App. 582, 471 S.E.2d 821 (1996) (publication pages not available).

163. Id. (publication pages not available) (Benton, J., dissenting). The dissent went on to observe:

A judge's role as authority figure in the courtroom exacerbates the [courtroom's intimidating atmosphere], because many prospective jurors are afraid to say anything that might displease the judge.

The task of the lawyer conducting the voir dire is to create an atmosphere that encourages honest and straightforward answers that reveal the prospective juror's personality, experiences, and attitudes. This can be done by establishing a relationship with prospective jurors that conveys an attitude of respect and recognition of them as individuals. . . .

The attorney's tone of voice and demeanor is an important determinant of the kind of relationship she or he will have with prospective jurors.

Id. at n.6. (Benton, J., dissenting) (citation omitted).

drawn, July 24, 1996 (available on Westlaw).

<sup>160.</sup> Id. (publication pages not available) The trial judge, when asked by defense counsel for the opportunity to personally question the venire, responded that he would not allow that and said, "[t]hat's what I've always done, and that's what I'm going to do." Id. (publication pages not available) (Benton, J., dissenting). The majority, in a footnote, observed, "The trial judge's action in this case is deeply troubling, not simply because of the error involved, but because it may have been in deliberate disregard of a known statutory directive." Id. at n.3 (publication pages not available).

#### D. Other Evidentiary Issues

If the Commonwealth is required to prove a material issue in a criminal case, the defendant is not entitled to have that evidence sanitized. In a prosecution for escape, the Commonwealth carries the burden of proving that the defendant was lawfully in custody at the time of the alleged escape.<sup>164</sup> Therefore, the court of appeals held, in *Johnson v. Commonwealth*,<sup>165</sup> that the Commonwealth could permissibly introduce into evidence the bench warrant for the defendant's arrest which was the predicate for the escape charge.<sup>166</sup> Since the trial judge need not sanitize the admissible evidence, there was no abuse of discretion in admitting the bench warrant complete with the information on it that the defendant had failed to appear for a sentencing hearing on unrelated felony charges.<sup>167</sup>

Section 19.2-271.2 of the Virginia Code was amended in 1996 to transfer the spousal privilege in criminal cases from the accused spouse to the testifying spouse and removed the requirement that a spouse seek the consent of his partner before testifying against the partner.<sup>168</sup>

# E. Juvenile Justice

The past year has seen sweeping reforms in the area of juvenile justice. Only a summary recital of some of the most conspicuous changes will be covered here.<sup>169</sup> Perhaps the most

169. The public sentiment that juvenile justice procedures and policies required reform is manifest in the Final Report of the Governor's Commission on Juvenile Justice Reform. GOVERNOR'S COMMISSION ON JUVENILE JUSTICE REFORM, FINAL RE-PORT (December 20, 1995) [hereinafter Governor's Commission Report]. That report observed that protection of society from crime is a clear priority of Governor Allen's administration, that crime committed by juveniles is increasingly common and serious, that "[t]eenagers who commit heinous felonies such as murder, rape, and robbery

<sup>164.</sup> VA. CODE ANN. § 18.2-478 (Repl. Vol. 1996).

<sup>165. 21</sup> Va. App. 102, 462 S.E.2d 105 (1995).

<sup>166.</sup> Id. at 105-07, 462 S.E.2d at 126-27.

<sup>167.</sup> Id. at 106-07, 462 S.E.2d at 127.

<sup>168.</sup> VA. CODE ANN. § 19.2-271.2 (Cum. Supp. 1996). The statute left intact the exception to the spousal privilege in cases where the offense in question is alleged to have been committed by one spouse against the other, against a minor child of either, and in forgery and sexual assault cases. *Id.*; see VA. CODE ANN. § 19.2-271.2 (Repl. Vol. 1995).

significant is the change in the way that Juvenile and Domestic Relations Courts are divested of jurisdiction over certain cases. Prior to July 1, 1996, children fourteen years of age or older accused of crimes could have their cases transferred for trial to the circuit court (such transfer carries the possibility of adult disposition) only after a judicial finding (i) of probable cause that the juvenile committed the offense and (ii) that the juvenile was "not a proper person to remain within the jurisdiction of the juvenile court" or that the offense was one sufficiently serious to presumptively merit trial as an adult.<sup>170</sup>

After July 1, 1996, juveniles fourteen years of age or older who are charged with capital murder, first or second degree murder, murder by lynching or aggravated malicious wounding, on a showing of probable cause, will have their cases automatically transferred to the circuit court for trial as an adult.<sup>171</sup> Where a juvenile fourteen years of age or older is charged with felony murder, injury by mob, abduction, malicious wounding, malicious wounding of a police officer, poisoning, products adulteration, robbery, carjacking, rape, forcible sodomy, or object sexual penetration, the decision whether to transfer the case to the circuit court lies within the discretion of the

1996]

should be tried and sentenced as adults." *Id.* at 2. The report also concluded that the juvenile justice system, prior to this year's reform

fail[ed] to adequately punish juvenile offenders. Juvenile judges simply lack the sanctions needed for heinous crimes like homicide, rape and robbery. At the other extreme, juvenile courts too often fail to act decisively with young offenders who are just taking their first steps down the path of lawlessness. Yet it is these early offenders, if dealt with decisively, who are most likely to benefit from meaningful opportunities for reform. When the juvenile courts do impose a sentence on a defendant, too often the only alternatives available are assignment to probation under the nominal supervision of an overworked probation officer, or commitment to an overcrowded and understaffed juvenile correctional center.

Id. at 5. Section 16.1-277 of the Virginia Code was amended in 1996 to reflect that in addition to the "the welfare of the child and the family, the safety of the community and the protection of the rights of victims are the paramount concerns of the Commonwealth." VA. CODE ANN. § 16.1-227 (Repl. Vol. 1996).

<sup>170.</sup> VA. CODE ANN. § 16.1-269.1 (Cum. Supp. 1994). The class of offenses for which transfer was possible without a determination of the propriety of a juvenile remaining in the juvenile system was specifically enumerated by the former statute. Id. The former statute also permitted trial as an adult of juveniles who had previously been tried as an adult. Id.

<sup>171.</sup> VA. CODE ANN. § 16.1-269.1(B) (Repl. Vol. 1996).

Commonwealth's Attorney.<sup>172</sup> In either the automatic transfer cases or prosecutor transfer cases, a finding that there is no probable cause or a dismissal of the case in the juvenile court is no bar to the subsequent indictment of the juvenile.<sup>173</sup> The procedure for transfer of all other felonies remains the same as the pre-1996 law.<sup>174</sup>

Juveniles who are not transferred to circuit court for trial as adults, may be committed to the custody of the Department of Juvenile Justice (formerly the Department of Youth and Family Services)<sup>175</sup> for an indeterminate period, to be determined by the Department, but as of July 1, 1996, for no longer than thirty-six months.<sup>176</sup> Juveniles deemed to be serious offenders pursuant to section 16.1-285.1 may be committed for a determinate period by the sentencing judge, either in the juvenile court or in circuit court, for up to seven years but no longer than the juvenile's twenty-first birthday.<sup>177</sup>

As of July 1, 1996 juvenile court proceedings involving adults or juveniles fourteen years of age or older, charged with an offense that would be a felony if committed by an adult, shall be open to the public but may, for good cause shown, be closed.<sup>178</sup> The records of proceedings finding juveniles guilty of a delinquent act which would be a felony if committed by an adult shall no longer be expunged.<sup>179</sup>

In *Cheeks v. Commonwealth*,<sup>180</sup> the court of appeals held that a juvenile was entitled, as a function of procedural due process of law, to be notified of the time and place of the hearing convened to determine whether to transfer his case from the jurisdiction of the Juvenile and Domestic Relations Court to the Circuit Court.<sup>181</sup> Such a transfer would result in exposing

<sup>172.</sup> VA. CODE ANN. § 16.1-269.1(C) (Repl. Vol. 1996).

<sup>173.</sup> VA. CODE ANN. § 16.1-269.1(D) (Repl. Vol. 1996).

<sup>174.</sup> VA. CODE ANN. § 16.1-269.1(A) (Repl. Vol. 1996); see VA. CODE ANN. § 16.1-269.1(A) (Cum. Supp. 1994).

<sup>175.</sup> VA. CODE ANN. § 66.1 (Cum. Supp. 1996).

<sup>176.</sup> VA. CODE ANN. § 16.1-285 (Repl. Vol. 1996).

<sup>177.</sup> VA. CODE ANN. § 16.1-285.1(C) (Repl. Vol. 1996).

<sup>178.</sup> VA. CODE ANN. § 16.1-302(C) (Repl. Vol. 1996).

<sup>179.</sup> VA. CODE ANN. § 16.1-306(A) (Cum. Supp. 1996); VA. CODE ANN. § 19.2-388(B) (Cum. Supp. 1996).

<sup>180. 20</sup> Va. App. 578, 459 S.E.2d 107 (1995).

<sup>181.</sup> Id. at 586, 459 S.E.2d at 110-11; see also Karim v. Commonwealth, 21 Va.

1996]

the juvenile to the spectrum of potential adult sanctions, including lengthy penitentiary time, for his criminal conduct. The court of appeals reasoned that the provisions of the transfer statute are "mandatory and jurisdictional" and not merely "directory and procedural."<sup>182</sup> Moreover, the transfer proceeding conducted in the juvenile's absence was sufficiently defective as to not be cured by the trial judge's after-the-fact offer to receive whatever evidence the juvenile cared to offer on the issue of transfer.<sup>183</sup> Nor did the juvenile's refusal to accept the trial judge's offer waive his objection to the defective transfer proceeding.<sup>184</sup>

#### F. Miscellaneous

In 1996 the General Assembly created a rebuttable presumption that persons charged with, and previously convicted of distribution or transportation of drugs or acts of violence, in the preceding sixteen years, will not appear at trial or are a danger to the public.<sup>185</sup>

#### VII. CRIMES

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

#### A. Traffic Offenses

In Travis v. Commonwealth,<sup>186</sup> the court of appeals elaborated on its holding in Bishop v. Commonwealth<sup>187</sup> that a per-

App. 652, 466 S.E.2d 772 (1996), affd en banc, 22 Va. App. 767, 473 S.E.2d 103 (1996) (holding that parents must also be given notice of a transfer hearing); Douglas v. Commonwealth, 19 Va. App. 324, 451 S.E.2d 49 (1994) (holding that the trial court is required to review the juvenile court transcript or conduct a hearing before a transfer).

<sup>182.</sup> Cheeks, 20 Va. App. at 584, 459 S.E.2d at 110.

<sup>183.</sup> Id. at 585-86, 459 S.E.2d at 110-11.

<sup>184.</sup> Id.

<sup>185.</sup> VA. CODE ANN. § 19.2-120 (Cum. Supp. 1996).

<sup>186. 20</sup> Va. App. 410, 457 S.E.2d 420 (1995).

<sup>187. 20</sup> Va. App. 206, 455 S.E.2d 765 (1995).

son who operates a motor vehicle while intoxicated within the meaning of Virginia Code section 18.2-266 is not *per se* operating so as to "endanger the life, limb, or property, of another" which, after having been declared a habitual offender, would elevate the misdemeanor of operating a motor vehicle while intoxicated to a felony.<sup>188</sup> The court of appeals in *Travis* concluded that evidence of the defendant's intoxication in combination with evidence of his "weaving within his lane of traffic and even 'over the left line" was sufficient to prove that the driving "of itself . . . endanger[ed] the life, limb, or property of another."<sup>189</sup>

If a court erroneously permits admission of a certificate of analysis of a defendant's breath sample in a DUI prosecution, that error can be harmless.<sup>190</sup> Nevertheless, the court of appeals stated in *Castillo v. Commonwealth*,<sup>191</sup> where the evidence is neither so overwhelming as to prove the defendant's guilt even in the absence of the improperly admitted certificate, nor so weak as to render the evidence insufficient as a matter of law absent the certificate, the error is not harmless since the court could not say "what effect the breathalyzer evidence had on the trial court's decision."<sup>192</sup>

In Stacy v. Commonwealth,<sup>193</sup> the court of appeals held that the results of a preliminary breath test administered by police in the field are admissible at a pretrial motion to suppress evidence for want of probable cause notwithstanding the statutory bar to admission of such evidence in any "prosecution."<sup>194</sup> The court of appeals reasoned that a motion to suppress was not a prosecution within the meaning of the statute proscribing admission of the preliminary breath test.<sup>195</sup> The court of appeals' reasoning is sound inasmuch as a rule proscribing the admissibility of the preliminary breath test in all court proceed-

<sup>188.</sup> Id. at 211-12, 455 S.E.2d at 767-68.

<sup>189.</sup> Travis, 20 Va. App. at 417, 457 S.E.2d at 423 (quoting VA. CODE ANN. § 462-357(B)(2) (Repl. Vol. 1996)).

<sup>190.</sup> See Overbee v. Commonwealth, 227 Va. 238, 315 S.E.2d 242 (1984).

<sup>191. 21</sup> Va. App. 482, 465 S.E.2d 146 (1995).

<sup>192.</sup> Id. at 490, 465 S.E.2d at 150 (quoting Durant v. City of Suffolk, 4 Va. App. 445, 449, 358 S.E.2d 732, 734 (1987)).

<sup>193. 22</sup> Va. App. 417, 470 S.E.2d 584 (1996).

<sup>194.</sup> Id. at 423-24, 470 S.E.2d at 587.

<sup>195.</sup> Id. at 423, 470 S.E.2d at 587.

Persons convicted of DUI may now be required to install an ignition interlock device on their motor vehicles as a condition of receiving a restricted license.<sup>196</sup> The device measures a person's breath alcohol content and prevents operation of the car if the test is positive for alcohol. After having received a first conviction for DUI, all persons must now attend the Virginia Alcohol Safety Action Program.<sup>197</sup>

#### B. Guns

In Main v. Commonwealth,<sup>198</sup> the court of appeals concluded that a weapon is concealed, within the meaning of the statute proscribing possession of a concealed weapon,<sup>199</sup> if "[i]t was hidden from all except those with an unusual or exceptional opportunity to view it."<sup>200</sup> That rule applies even if the gun's handle is "extending outside of [the defendant's] pocket" where the handle was "covered by [a] duffle bag."<sup>201</sup>

It is reversible error to refuse to instruct a jury that a defendant cannot be convicted of use of a firearm in the commission of malicious wounding if the jury acquits the defendant on the predicate charge of malicious wounding, but convicts instead on the lesser-included offense of attempted unlawful wounding.<sup>202</sup> Unlawful wounding is simply not one of the enumerated offenses in Virginia Code section 18.2-53.1 which proscribes the use of a firearm in the commission of certain felonies, including malicious wounding.<sup>203</sup> The trial judge's obligation to properly instruct the jury on that question exists independently of a clear request for such an instruction by the defendant or any other party.<sup>204</sup>

In a prosecution for use of a firearm in the commission of a

<sup>196.</sup> VA. CODE ANN. § 18.2-270.1 (Repl. Vol. 1996).

<sup>197.</sup> VA. CODE ANN. § 18.2-271.1 (Repl. Vol. 1996).

<sup>198. 20</sup> Va. App. 370, 457 S.E.2d 400 (1995)(en banc).

<sup>199.</sup> VA. CODE ANN. § 18.2-308 (Repl. Vol. 1996).

<sup>200.</sup> Main, 20 Va. App. at 372-73, 457 S.E.2d at 402.

<sup>201.</sup> Id. at 372, 457 S.E.2d at 402.

<sup>202.</sup> Johnson v. Commonwealth, 20 Va. App. 547, 458 S.E.2d 599 (1995) (en banc).

<sup>203.</sup> Id. at 554, 458 S.E.2d at 602.

<sup>204.</sup> Id. at 553-54, 458 S.E.2d at 602.

felony,<sup>205</sup> the Commonwealth must prove that the defendant actually used a firearm.<sup>206</sup> That standard is met when a bank teller testifies that the defendant handed the teller a note, told her to give him the money, and "pointed to his pocket . . . [a]nd that indicated to [the teller] there was a gun, like he had stated in his note."<sup>207</sup> Although the victim's mere perception or belief that the defendant was armed is insufficient to prove the defendant used a firearm, a defendant's admission in conjunction with the victim's perception is sufficient.<sup>208</sup>

In *Miller v. Commonwealth*,<sup>209</sup> the defendant was convicted of a first offense use of a firearm in the commission of a felony.<sup>210</sup> Between the time he was found guilty of that offense and his sentencing on that offense, the defendant was found guilty in another jurisdiction of a first offense use of a firearm in the commission of a felony.<sup>211</sup> In the first prosecution, instead of sentencing the defendant to the statutorily prescribed sentence of three years in prison for a first offense, the trial judge sentenced the defendant as a second time offender (based on the defendant's conviction before sentencing) to five years.<sup>212</sup> The court of appeals affirmed the sentence on the theory that the recidivist provision of the statute was intended to enhance punishment at the time of sentencing.<sup>213</sup>

<sup>205.</sup> VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 1996).

<sup>206.</sup> Yarborough v. Commonwealth, 247 Va. 215, 441 S.E.2d 342 (1994).

<sup>207.</sup> Elmore v. Commonwealth, 22 Va. App. 424, 426, 470 S.E.2d 588, 589 (1996). 208. Id. at 428-29, 470 S.E.2d 590; see also McBride v. Commonwealth, 22 Va. App. 730, 732-35, 473 S.E.2d 85, 86-87 (1996) (holding that defendant who "push[ed]' something 'up against [the victim's] back" and stated, "Don't turn around or I'll shoot" used a firearm within the meaning of Virginia Code section 18.2-53.1, even though the victim never saw what it was that the defendant used). The holding in McBride appears to conflict with the holding of the Supreme Court of Virginia in Yarborough v. Commonwealth, 247 Va. 215, 441 S.E.2d 342 (1994), which held that in a section 18.2-53.1 prosecution, the Commonwealth must prove use of an actual firearm. Id. at 218, 441 S.E.2d at 344. The victim's testimony of seeing "something protruding . . . from [the] pocket of [the defendant's] jacket," the defendant's statement, "This is a stickup," and his pointing of some unseen object at the victim were insufficient to prove use of an actual firearm. Id.

<sup>209. 22</sup> Va. App. 497, 471 S.E.2d 780 (1996).

<sup>210.</sup> Id. at 499-500, 471 S.E.2d at 781.

<sup>211.</sup> Id. at 500, 471 S.E.2d at 781.

<sup>212.</sup> Id. at 498-99, 471 S.E.2d at 780-81.

<sup>213.</sup> Id. at 501, 471 S.E.2d at 782.

#### C. Drugs

The court of appeals in Jones v. Commonwealth<sup>214</sup> affirmed a conviction for second offense distribution of cocaine. That the defendant had not been convicted of the first distribution prior to his arrest for the second did not render the evidence insufficient.<sup>215</sup> Moreover, the fact that Jones's first conviction for distribution of cocaine was reversed on appeal, during the pendency of his appeal of the second conviction, was a matter the court of appeals refused to address since the question was not presented in Jones's petition for appeal, and therefore the court of appeals was without jurisdiction to hear the question.<sup>216</sup> Also in Jones, the court of appeals held that defendant's distribution of cocaine was proved by circumstantial evidence where the evidence proved that the informant, who left police without cocaine, walked to the defendant and returned to the police with cocaine.<sup>217</sup> That the informant did not testify he bought drugs from the defendant and was out of police view for a period of time did not break the chain of circumstantial evidence in light of the absence of evidence that the informant could have acquired the drugs somewhere other than from the defendant.<sup>218</sup>

The chain of custody in a drug case is not broken simply because other police officers have access to the arresting officer's drug locker.<sup>219</sup> Also, the fact that the analyzing laboratory returns the contraband to the police officer by UPS, instead of the U.S. Postal Service, does not give rise to any presumption of irregularity.<sup>220</sup>

The General Assembly in 1996 criminalized, and made pun-

<sup>214. 21</sup> Va. App. 435, 464 S.E.2d 558 (1995) (en banc).

<sup>215.</sup> See id. at 439-40, 464 S.E.2d at 560.

<sup>216.</sup> Id. at 437 n.1, 464 S.E.2d at 559 n.1.

<sup>217.</sup> Id. at 444, 464 S.E.2d at 562-63.

<sup>218.</sup> Id.

<sup>219.</sup> Brown v. Commonwealth, 21 Va. App. 552, 556, 466 S.E.2d 116, 118 (1996).

<sup>220.</sup> Id. at 556-57, 466 S.E.2d at 118. In Commonwealth v. Scott, 38 Va. Cir. 446 (Richmond City 1996), the circuit court held that the 3.96 pounds of material, the majority of which was leaf marijuana and some of which was comprised of seeds and stems (which, by statutory definition, are not marijuana), was sufficient to prove that the weight of marijuana was in excess of one-half ounce. Id. at 453-54.

#### 1314 UNIVERSITY OF RICHMOND LAW REVIEW [Vol. 30:1281

ishable as a Class 5 felony, maintenance of a fortified drug house—a structure which is substantially modified to prevent lawful entry by the police—used for the illegal trafficking of drugs, and the object of a valid search warrant.<sup>221</sup>

#### D. Sex Crimes

Where a sixteen-vear-old girl is diagnosed as mentally retarded, with an IQ ranging between fifty-eight and seventy, a twenty-seven-year-old man who has sex with her does not necessarily do so "through the use of [her] mental incapacity" as proscribed by section 18.2-61 of the Virginia Code.<sup>222</sup> The court of appeals, in Adkins v. Commonwealth,<sup>223</sup> concluded that in order to show a violation of the statute, the Commonwealth must prove that the victim's "mental incapacity" was such as to preclude her understanding "the nature and consequences of the sexual act involved."<sup>224</sup> The court of appeals reasoned that in enacting section 18.2-61 the legislature did not intend to "unfairly punish the sexual partners of those mentally impaired or mentally retarded persons who have a basic understanding of the act and consequences of sexual intercourse and are capable of making a volitional choice to engage or not engage in such conduct."225

In Howard v. Commonwealth,<sup>226</sup> a separate case construing the same statute, the court of appeals held that a fifteen-year-

225. Adkins, 20 Va. App. at 345, 457 S.E.2d at 388.

226. 21 Va. App. 473, 465 S.E.2d 142 (1995).

<sup>221.</sup> VA. CODE ANN. § 18.2-258.02 (Repl. Vol. 1996).

<sup>222.</sup> Adkins v. Commonwealth, 20 Va. App. 332, 337, 457 S.E.2d 382, 384 (1995) (quoting VA. CODE ANN. § 18.2-61(A)(ii) (Repl. Vol. 1996)). Virginia Code § 18.2-61 states in relevant part: "A. If any person has sexual intercourse with a complaining witness who is not his or her spouse . . . (ii) through the use of the complaining witness's mental incapacity or physical helplessness . . . he or she shall be guilty of rape." VA. CODE ANN. § 18.2-61(A) (Repl. Vol. 1996).

<sup>223. 20</sup> Va. App. 332, 457 S.E.2d 382 (1995).

<sup>224.</sup> Id. at 343, 457 S.E.2d at 387 (quoting VA. CODE ANN. § 18.2-67.10(3) (Cum. Supp. 1994)). In an unrelated sex-offense case involving a minor child, the court of appeals, in refusing to find a confrontation clause violation arising from the cross-examination of the victim, gave the practical advice that a child's "responsiveness could not have been enhanced by being told to 'spit it [(her testimony]] out,' to go back to your favorite subject [(the alleged sex offense)] again,' or 'you must like the judge a lot better than me." Crump v. Commonwealth, 20 Va. App. 609, 616, 460 S.E.2d 238, 241 (1995).

old girl's high degree of intoxication did not render her "physically helpless" so as to be unable to consent to sexual intercourse.<sup>227</sup> The evidence in *Howard* proved the girl's refusal to have oral sex with someone other than the defendant; her solicitation to have sex with other people at the party; her participation in sexual relations with other people at the party, including Howard; and that the girl never told Howard she did not want to have sex with him. The girl's subsequent intense vomiting and intermittent consciousness did not prove her physical helplessness at the time of the conduct involving the defendant.<sup>228</sup>

In *Clifton v. Commonwealth*<sup>229</sup> the court of appeals held that although the consent of the complainant is a defense to rape, the defendant's mere reasonable perception of the complainant's consent is not.<sup>230</sup> The court of appeals reasoned that although the defendant must have the specific intent to commit rape, that requirement is satisfied by "proof that the accused knowingly and intentionally committed the acts constituting the elements of rape."<sup>231</sup> Consent is not an element of rape but rather a defense which requires a showing that the complainant in fact consented and not simply that the defendant thought she did.<sup>232</sup> The dissent in *Clifton* countered that if the defendant reasonably believed that the complainant consented then the jury should have been instructed to acquit.<sup>233</sup> The majority, according to the dissent, essentially rendered rape a strict liability crime akin to statutory rape since the

<sup>227.</sup> Id. at 479, 465 S.E.2d at 145.

<sup>228.</sup> Id. at 480-81, 465 S.E.2d at 145-46. In reversing Howard's conviction, the court of appeals concluded, "[[t]he conduct of [appellant] cannot be condoned. It was disgraceful. It was enough to shame one steeped in moral infamy. But he was not tried for that. Rape was the charge laid at his door and the Commonwealth's evidence fail[ed] to sustain it." Id. at 481, 465 S.E.2d at 146 (citation omitted). In Commonwealth v. Culbreath, 36 Va. Cir. 188 (Fairfax County 1995), the circuit court held that, though the defendant's conduct was "deplor[able]" and the victim's suffering "regret[able]," where consent is accomplished by the defendant impersonating another, the charge of rape cannot be sustained. Id. at 188.

<sup>229. 22</sup> Va. App. 178, 468 S.E.2d 155 (1996).

<sup>230.</sup> Id. at 184, 468 S.E.2d at 158.

<sup>231.</sup> Id.

<sup>232.</sup> Id.

<sup>233.</sup> See id. at 189-91, 468 S.E.2d at 160-61 (Benton, J., dissenting).

defendant's state of mind regarding the complainant's consent is now immaterial.<sup>234</sup>

## E. Larceny and Robbery

Robbery requires not just the employment of force in the commission of a larceny, but the force or intimidation must be directed toward the victim's person.<sup>235</sup> So held the court of appeals in *Winn v. Commonwealth*,<sup>236</sup> where the evidence proved that the defendant took the victim's purse "very strongly" from her shoulder and arm, but that no struggle ensued and the matter lasted only seconds.<sup>237</sup> The court of appeals, in adopting the majority view of the states, reasoned that "[t]he touching or violation necessary to prove [robbery] may be indirect, but cannot result merely from the force associated with the taking.<sup>238</sup>

Grand larceny from the person is not a lesser-included offense of robbery. The court of appeals has held that since value is an element of grand larceny but not of robbery, and force or intimidation is an element of robbery but not of grand larceny, a defendant cannot be convicted of grand larceny in a prosecution for robbery where the charge of robbery is struck for want of evidence of force or intimidation.<sup>239</sup> The court of appeals has also concluded, however, that robbery by its definition does include the offense of petit larceny since that offense does not require proof of value and is therefore entirely subsumed within the offense of robbery.<sup>240</sup>

<sup>234.</sup> Id. at 189, 468 S.E.2d at 159 (Benton, J., dissenting).

<sup>235.</sup> Winn v. Commonwealth, 21 Va. App. 179, 181-82, 462 S.E.2d 911, 912 (1995).

<sup>236. 21</sup> Va. App. 179, 462 S.E.2d 911 (1995).

<sup>237.</sup> See id. at 181, 462 S.E.2d 912.

<sup>238.</sup> Id. (quoting Bivins v. Commonwealth, 19 Va. App. 750, 752, 454 S.E.2d 741, 742 (1995) (citation omitted)).

<sup>239.</sup> See Graves v. Commonwealth, 21 Va. App. 161, 164, 462 S.E.2d 902, 903 (1995), aff d en banc, 22 Va. App. 262, 468 S.E.2d 710 (1996).

<sup>240.</sup> See 21 Va. App. at 166-67, 462 S.E.2d at 904-05. The court of appeals did leave open the possibility that grand larceny *could* be a lesser-included offense of robbery had the indictment alleged the value of the stolen property:

Because the indictment against Graves did not set forth allegations of value or of theft from the person [i.e., larceny from the person, not robbery], it did not charge grand larceny from the person. Therefore, grand larceny from the person was not a lesser offense included within the

In Bruce v. Commonwealth,<sup>241</sup> the court of appeals held that in a breaking and entering prosecution, the breaking need not be from the outside into the building.<sup>242</sup> Bruce broke into his estranged girlfriend's home through the front door, but without the intent to assault with a deadly weapon, the offense with which he was charged. While there, he conceived of the intent to so assault her and then opened and walked out the back door, retrieved a gun, and re-entered through the still open back door. The court of appeals held that the exit from the home was a breaking and that the breaking took place with the requisite intent to assault.<sup>243</sup>

## F. Murder

In Haywood v. Commonwealth,<sup>244</sup> the defendant, who was driving in a highly dangerous manner, came frighteningly close to killing or doing serious injury to two police officers who were attempting to apprehend him.<sup>245</sup> The court of appeals held, however, that since the circumstantial evidence proved that the defendant's intent could have been to escape, the evidence did not prove beyond a reasonable doubt the defendant's specific intent to kill which was a necessary element of his convictions for attempted capital murder.<sup>246</sup>

In *Rivers v. Commonwealth*,<sup>247</sup> the court of appeals outlined the parameters of accomplice liability in a case stemming from a gunfight between the defendant and a third party. The two men shot at each other and Rivers's rival accidentally killed an innocent bystander. Rivers did not share the killer's intention. In fact, he had an opposite one. Therefore, Rivers could not be a principal in the second degree to the killing.<sup>248</sup> Nor does a theory of transferred intent apply to Rivers since Rivers did not

Id. at 166, 462 S.E.2d at 904.

242. Id. at 270, 469 S.E.2d at 67-68.

- 244. 20 Va. App. 562, 458 S.E.2d 606 (1995).
- 245. Id. at 564-65, 458 S.E.2d at 607.
- 246. See id. at 567-68, 458 S.E.2d at 608-09.
- 247. 21 Va. App. 416, 464 S.E.2d 549 (1995).
- 248. Id. at 421-22, 464 S.E.2d at 551.

robbery specification of the indictment.

<sup>241. 22</sup> Va. App. 264, 469 S.E.2d 64 (1996).

<sup>243.</sup> Id. at 269-70, 469 S.E.2d at 67.

accidentally shoot the victim; rather, Rivers's opponent did.<sup>249</sup> Nor does the felony-murder rule apply to this case since liability under that theory lies "only where the act of killing is either actually or constructively committed by a felon or by someone acting in concert with him or in furtherance of a common design or purpose."<sup>250</sup> The court of appeals further categorically rejected adoption of the "provocative act murder" theory in which a person who does not intend a killing, but who acts in such a way as to "likely cause death," thereby provoking a third party to reasonably kill in response to the act, is guilty of murder.<sup>251</sup> The court of appeals reasoned that the legislature, not the courts, is the appropriate forum for amending the common-law concept of felony-murder.<sup>252</sup>

The court of appeals also held that there is no such crime as attempted felony-murder.<sup>253</sup> The court of appeals reasoned in *Goodson v. Commonwealth*<sup>254</sup> that the malice required for felony-murder-where a homicide takes place during a felony-is implied "from the actor's intent to commit the underlying felony."<sup>255</sup> However, where no homicide takes place, and only an attempt is alleged, the Commonwealth must prove a specific intent to kill; therefore, the rationale behind felony-murder is inapplicable to an attempt crime.<sup>256</sup>

.

To satisfy the "actus reus" element of this crime the defendant or one of his confederates must commit an act which provokes a third party into firing the fatal shot. To satisfy the "mens rea" element, the defendant or his confederate must know this act has a "high probability" not merely a "foreseeable probability" of eliciting a life-threatening response from the third party.

<sup>249.</sup> Id. at 422, 464 S.E.2d at 551.

<sup>250.</sup> Id. at 423, 464 S.E.2d at 552 (emphasis added) (citing Wooden v. Commonwealth, 222 Va. 758, 763-65, 284 S.E.2d 811, 814-16 (1981)).

<sup>251.</sup> Id. at 425, 464 S.E.2d at 553 (citing People v. Gilbert, 408 P.2d 365, 373-74 (1965), rev'd on other grounds, 388 U.S. 263 (1967)). The court of appeals, in rejecting the "provocative act murder" theory, recited from In re Aurelio R., 212 Cal. Rptr. 868 (Cal. Ct. App. 1985), for an explanation of that theory:

Rivers, 21 Va. App. at 425, 464 S.E.2d at 553 (quoting In re Aurelio R., 212 Cal. Rptr. at 870-71).

<sup>252.</sup> Rivers, 21 Va. App. at 427, 464 S.E.2d at 554.

<sup>253.</sup> See Goodson v. Commonwealth, 22 Va. App. 61, 467 S.E.2d 848 (1996).

<sup>254.</sup> Id.

<sup>255.</sup> Id. at 76, 467 S.E.2d at 855.

<sup>256.</sup> See id.

## G. Generally

The court of appeals came to grips in Cook v. Commonwealth<sup>257</sup> with what constitutes the sine qua non of crime. There the defendant appealed his conviction for attempted second degree murder. The offense occurred in August of 1993. In July of 1993, the General Assembly elevated the maximum punishment for second degree murder from twenty to forty years.<sup>253</sup> Section 18.2-26 prescribes the punishments for attempted crimes by reference to the maximum possible penalty for the underlying offense.<sup>259</sup> The version of section 18.2-26 in effect at the time of Cook's offense included no penalty at all for attempted felonies wherein the underlying felony carried a maximum penalty of forty years.<sup>260</sup> Since "[Cook's] conduct may have been proscribed by statute, it was an offense without a penalty," and because crimes are comprised of both "forbidden conduct and a prescribed penalty," Cook was erroneously convicted for conduct which constituted no crime at the time of the offense.<sup>261</sup>

In Lawless v. County of Chesterfield,<sup>262</sup> the court of appeals relied on the notion that cities and counties in Virginia derive their authority to legislate from the State and that localities' legislation which exceeds or contradicts the parameters of that authorized by the State is unlawful.<sup>263</sup> The court of appeals therefore reversed a criminal conviction stemming from breach of a county landfill regulation.<sup>264</sup>

- 262. 21 Va. App. 495, 465 S.E.2d 153 (1995).
- 263. Id. at 499, 465 S.E.2d at 154-55.

<sup>257. 20</sup> Va. App. 510, 458 S.E.2d 317 (1995).

<sup>258.</sup> Id. at 512, 458 S.E.2d at 318.

<sup>259.</sup> VA. CODE ANN. § 18.2-26 (Cum. Supp. 1994); Cook, 20 Va. App. at 512, 458 S.E.2d at 318.

<sup>260.</sup> Cook, 20 Va. App. at 512, 458 S.E.2d at 318.

<sup>261.</sup> Id. at 512-13, 458 S.E.2d at 318-19 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW  $\S$  1.2(d) (1986)).

<sup>264.</sup> Id. at 502-03, 465 S.E.2d at 156. Considerations of due process also limit the government's authority to legislate: the circuit court of the City of Virginia Beach, in *Commonwealth v. Hyatt*, held that a state statute criminalizing picketing in front of a residence was an unconstitutional abridgement of free speech. 37 Va. Cir. 384 (Va. Beach City 1995).

In Granger v. Commonwealth,<sup>265</sup> the court of appeals affirmed the high burden the Commonwealth faces in circumstantial evidence cases. In Granger, the defendant's fingerprints on a broken bottle of Canadian Mist found next to the victim—who was missing cash, had a head wound and was lying in a pool of his own blood—were insufficient to prove the defendant was the criminal agent.<sup>266</sup> The court of appeals held that the Commonwealth had failed to "exclude the hypothesis that [the defendant] may have handled the bottle for an innocent purpose before the robbery."<sup>267</sup>

In Castell v. Commonwealth,<sup>268</sup> the court of appeals concluded that "custody," as that term is employed in search and seizure inquiries, does not necessarily have the same meaning in Virginia's escape from custody statute.<sup>269</sup> There the defendant, apprised by the police of their intention to arrest him and only an inch from the grasp of one officer, fled from the police. The court of appeals concluded that, for purposes of securing a conviction for escape from custody, "custody does not require direct physical restraint," and set the standard for gauging custody as whether "a person of ordinary intelligence and understanding would know that he was not free to leave."270 The en banc dissent argued that prior Fourth Amendment cases from the Supreme Court of Virginia have held that a person's failure to submit to a show of police authority renders the encounter something less than a seizure and that the penal statute governing escapes ought to be construed strictly against the Commonwealth and consistent with prior decisions of the courts.<sup>271</sup>

268. 21 Va. App. 78, 461 S.E.2d 438, rev'g en banc, 19 Va. App. 615, 454 S.E.2d 16 (1995) (construing Virginia Code § 18.2-479(B)).

269. See id. at 81-82, 461 S.E.2d at 439.

270. Id. at 82, 461 S.E.2d at 439; see also Johnson v. Commonwealth, 21 Va. App. 102, 462 S.E.2d 125 (1995).

271. Castell, 21 Va. App. at 84-85, 461 S.E.2d at 441 (Benton, J., dissenting). The dissenters also relied upon sections 19.2-77 and 18.2-479(B) of the Virginia Code, for the proposition that the legislature in drafting the escape from custody statute intended to equate custody with physical control. *Id.* 

The decision in Castell resulted in there being a different meaning for custody within the Fourth Amendment context and the statutory context. The en banc majority's rationale appears to sanction this result:

Mr. X is approached at random, and without suspicion, by the po-

<sup>265. 20</sup> Va. App. 576, 459 S.E.2d 106 (1995).

<sup>266.</sup> Id. at 577-78, 456 S.E.2d at 106-07.

<sup>267.</sup> Id. at 577, 459 S.E.2d at 106.

The General Assembly in 1996 elevated the offense of obstruction of justice without force to a Class 2 misdemeanor and thereby rendered that offense jailable.<sup>272</sup>

In Newton v. Commonwealth,<sup>273</sup> the court of appeals held that a victim's multiple cuts, some of which required treatment with stitches and one of which was still "obvious and visible' and not covered, even by his beard" five months after the event were sufficient to prove aggravated malicious wounding.<sup>274</sup> Section 18.2-51.2 of the Virginia Code, the malicious wounding statute, was amended in 1991 from requiring the victim to be "totally and permanently disabled," to requiring a showing only of "severe[] injur[y] and . . . permanent and significant physical impairment."<sup>275</sup>

#### VIII. SENTENCING AND OTHER REMEDIES

If a sentencing court suspends imposition or execution of a sentence, or a portion thereof, the period of suspension may be articulated by the sentencing court.<sup>276</sup> In the absence of such

- 272. VA. CODE ANN. § 18.2-460(A) (Repl. Vol. 1996).
- 273. 21 Va. App. 86, 462 S.E.2d 117 (1995).
- 274. Id. at 89, 462 S.E.2d at 118.

276. VA. CODE ANN. § 19.2-306 (Repl. Vol. 1995 & Cum. Supp. 1996).

lice. The police yell to Mr. X that he is under arrest and attempt to seize him, but Mr. X escapes their grasp and runs two feet away. Thus far, for Fourth Amendment purposes, no seizure has taken place. See California v. Hodari D., 499 U.S. 621 (1991); Woodson v. Commonwealth, 245 Va. 401, 429 S.E.2d 27 (1993). At that moment the police close to within an inch of Mr. X at which time he discards what the police recognize to be contraband. The police yell again to Mr. X that he is under arrest, but Mr. X continues to run. Mr. X can be prosecuted for both possession of the contraband, since it was not discovered during an unlawful seizure, and for escape since he should have known that the second command to stop indicated he was not free to leave.

<sup>275.</sup> Id., 462 S.E.2d at 119 (quoting VA. CODE ANN. § 18.2-51.2). The court of appeals reasoned that "Title 55.1 of the Code, entitled Persons with Disabilities, defines 'physical impairment' as 'any physical condition . . . or cosmetic disfigurement which is caused by bodily injury," and that the victim's injuries in Newton fit that definition which the legislature presumably knew prior to enactment of the section 18.2-51.2 amendment. Id. at 90, 462 S.E.2d at 119. The court of appeals also held permissible the fact-finder's inference of the permanency of the victim's injuries based on their number, the number of stitches required, and the fact that they were visible five months after the incident causing them. Id. The court of appeals also noted that appellant apparently conceded the permanence of the injuries at trial. Id. n.1, 462 S.E.2d at 119 n.1.

an expression, the period is presumptively equivalent to the amount of time the defendant could have been sentenced for the crime for which he was convicted.<sup>277</sup> In Briggs v. Commonwealth,<sup>278</sup> a trial judge initially suspended imposition of sentence, on a charge carrying a maximum of ten years in a state correctional facility. Almost two years later, the trial judge timely and permissibly revoked that suspension. That first revocation resulted in the defendant being sentenced to a term of ten years, with five years suspended. Twelve years after the defendant was initially convicted, the trial court revoked the suspended execution of the remaining sentence. The defendant complained that the trial court was without jurisdiction to do so since the second revocation occurred after the expiration of ten years from the date of his initial conviction. The court of appeals held, however, that the remedial nature of Virginia Code section 19.2-306, which authorizes the suspended imposition and execution of sentences, required a broad construction and that when the first revocation resulted in an imposed sentence. that triggered the running of a new ten year period in which the defendant was liable to have his suspended execution of sentence revoked.<sup>279</sup>

Bifurcated jury trials for all non-capital felonies, a procedure established in 1994,<sup>280</sup> remained an issue ripe for appellate review and a hot-bed of judicial and legislative activity. The twin messages of *Riley v. Commonwealth*<sup>281</sup> and *Pierce v. Commonwealth*<sup>282</sup> appear to be that (1) administration of the bifurcated trial procedure is one left to the discretion of the trial court and (2) the raison d' etre of a separate sentencing proceeding is to inject truth into the jury's sentencing inquiry. In *Riley*, the court of appeals held that section 19.2-295.1 was procedural, not substantive in nature and therefore a defendant whose alleged offense took place before bifurcated jury trials came about nevertheless properly faced such a trial since that was the procedure in effect at the time of trial.<sup>283</sup> In *Pierce*,

277. Id.

279. Id. at 343-44, 464 S.E.2d at 514.

281. 21 Va. App. 330, 464 S.E.2d 508 (1995).

<sup>278. 21</sup> Va. App. 338, 464 S.E.2d 512 (1995).

<sup>280.</sup> See VA. CODE ANN. § 19.2-295.1 (Cum. Supp. 1996).

<sup>282. 21</sup> Va. App. 581, 466 S.E.2d 130 (1996).

<sup>283.</sup> Riley, 21 Va. App. at 337-38, 464 S.E.2d at 511.

1996]

the court of appeals held that a defendant could permissibly introduce evidence at the sentencing phase of a bifurcated trial even if the Commonwealth elected not to do so.<sup>284</sup> At the sentencing phase of a trial the Commonwealth may permissibly introduce evidence of the kind of sentences the defendant received for prior offenses.<sup>285</sup> At sentencing, the Commonwealth may also introduce convictions for offenses committed by the defendant *after* the time of the offense for which the defendant is on trial without violating the constitutional prohibition against *ex post facto* laws.<sup>286</sup>

The court of appeals in Daye v. Commonwealth<sup>287</sup> held that defendants are not entitled to a so-called "slow guilty plea." Dave had pled not guilty, but on a finding of guilt by the jury, sought to withdraw his not guilty plea, amend his plea to guilty, and thereby avoid jury sentencing. The trial judge refused to accept the withdrawal and the court of appeals affirmed that a motion to withdraw a guilty plea, made after a jury returns a verdict of guilty, is not timely.<sup>288</sup> If fourteen days notice of the Commonwealth's intention to introduce prior convictions at sentencing is not provided to the defendant, as required by section 19.2-295.1, but the prior convictions are admissible at the guilt phase (for example to prove the defendant's status as a felon in a prosecution for possession of a firearm by a convicted felon), the jury may nonetheless consider the prior offenses at the sentencing phase.<sup>289</sup> If a jury is unable to agree as to punishment, and if the court, the defendant and the attorney for the Commonwealth all agree, the court may fix the defendant's punishment.<sup>290</sup> Finally, the Commonwealth may permissibly have a rebuttal argument at the sentencing phase.<sup>291</sup>

286. Bunn v. Commonwealth, 21 Va. App. 593, 598-99, 466 S.E.2d 744, 746 (1996). 287. 21 Va. App. 688, 467 S.E.2d 287 (1996).

- 290. VA. CODE ANN. § 19.2-295.1 (Cum. Supp. 1996).
- 291. Griffin v. Commonwealth, 22 Va. App. 622, 472 S.E.2d 285 (1996).

<sup>284.</sup> Pierce, 21 Va. App. at 584-85, 466 S.E.2d at 131-32 (1996). In 1995, the General Assembly amended Virginia Code section 19.2-295.1 to reach the same result. This change was in effect at the time of the decision in *Pierce. See* VA. CODE ANN. § 19.2-295.1 (Repl. Vol. 1995).

<sup>285.</sup> See Gilliam v. Commonwealth, 21 Va. App. 519, 465 S.E.2d 592 (1996).

<sup>288.</sup> Id. at 692-93, 467 S.E.2d at 289.

<sup>289.</sup> Gilley v. Commonwealth, 21 Va. App. 740, 744, 467 S.E.2d 312, 313 (1996).

In 1995, the first implementation of Virginia's new sentencing guidelines were adopted to provide uniformity among sentencing courts for felonies, to account for the impact of the 1995 law ending parole, to effect stiffer sentences for many of the most violent crimes, and to better effect the policy goal of truth in sentencing. While the new Virginia Criminal Sentencing Commission, which drafts sentencing guidelines and monitors their implementation, expected that 1995 statistics would not fully reflect the efficacy of the new guidelines due to the length of time required to bring a felony to trial and final disposition,<sup>292</sup> the Commission reported that circuit court judges sentenced offenders in accordance with the recommended guidelines in seventy-five percent of cases.<sup>293</sup> Of those cases where judges departed from the guideline recommendation, fifty-eight percent resulted in sentences higher than the guidelines and forty-two percent resulted in sentences lower than the guidelines.<sup>294</sup> Judges complied with the guidelines in larceny cases most frequently and in rape cases least frequently.<sup>295</sup>

# IX. APPEALS

Satchell v. Commonwealth<sup>296</sup> posed a number of interesting appellate review questions. Satchell first considered the implications of a Commonwealth's interlocutory appeal, pursuant to Virginia Code section 19.2-408, on a defendant's subsequent direct appeal of his conviction.<sup>297</sup> The court of appeals held that the Commonwealth's interlocutory appeal, limited in scope, could have no stare decisis effect on the defendant's subsequent direct appeal of his conviction since the Commonwealth's appeal, by statute, "shall not preclude a defendant, if he is convicted, from requesting the Court of Appeals or Supreme Court on direct appeal to reconsider an issue which was the subject of the pretrial appeal."<sup>298</sup> The effect of the Satchell holding is to

- 296. 20 Va. App. 641, 460 S.E.2d 253 (1995) (en banc).
- 297. Id. at 643, 460 S.E.2d at 254.

<sup>292. 1995</sup> VA. CRIM. SENTENCING COMM'N, ANN. REP. 37 (1995).

<sup>293.</sup> Id. at 41.

<sup>294.</sup> Id.

<sup>295.</sup> Id. at 42. Different judicial circuits complied at different rates. The 20th and 7th Circuits complied 88% and 86% of the time respectively. The 29th and 18th Circuits, by comparison, complied only 56% and 60% of the time. Id. at 52-53.

<sup>298.</sup> Id. at 647, 460 S.E.2d at 256 (quoting VA. CODE ANN. § 19.2-409 (Repl. Vol.

render the Commonwealth's interlocutory appeal essentially an advisory opinion since it cannot control the outcome of the subsequent direct appeal.<sup>299</sup>

The second appellate review question posed by Satchell is how to determine the appropriate standard of review. The trial judge, after the case was reversed and remanded by the court of appeals, denied Satchell's renewed motion to suppress, but continued to adhere to his earlier factual findings. The appellate axiom that evidence on appeal is viewed in the light most favorable to the party prevailing below (here the Commonwealth) ran afoul in Satchell of the equally well settled axiom that deference is owed to the fact finder's factual findings. In resolving this tension, the court of appeals stated, "[u]nder th[e]se circumstances, we adopt for this case a standard of review deferential to the trial court's factual findings and confine our inquiry to whether those findings are supported by credible evidence."300 Although the standard articulated by the court of appeals proved workable in Satchell, the court might have spared itself some future confusion by simply stating that, on appeal, deference is owed to the trial judge's fact findings. Such a rule is consistent with why ordinarily the evidence is viewed in the light most favorable to the prevailing party below since, ordinarily, the factual findings are consistent with the prevailing party's position.<sup>301</sup>

1995)).

300. Satchell, 20 Va. App. at 648, 460 S.E.2d at 256.

<sup>299.</sup> See also Cherry v. Commonwealth, 21 Va. App. 132, 462 S.E.2d 574 (1995), for the proposition that stare decisis is not a bar to reconsideration on direct appeal of an issue previously adjudicated in an interlocutory appeal since, in Cherry, the parties to the interlocutory appeal were the same as those in the interlocutory appeal and stare decisis applies only "if the parties are different, though the [issue] be the same." Id. at 137, 462 S.E.2d at 576 (quoting Steinman v. Clinchfield Coal Corp., 121 Va. 611, 623, 93 S.E. 684, 688 (1917)). The court of appeals stated, in a footnote, that the Commonwealth had raised neither res judicata nor law of the case as potential bars to consideration of the same issue on direct appeal. Id. n.3, 462 S.E.2d at 576 n.3. The Cherry court also cited, however, to Satchell for the proposition that "an appellant is entitled to have the full Court 'reconsider an issue which was the subject of a pretrial appeal." Id., 462 S.E.2d at 576-77 (citation omitted).

<sup>301.</sup> Id. The question left unanswered by Satchell is the procedural anomaly that resulted from the court hearing the case *en banc* prior to any decision from the three judge panel to which the case was initially referred and before which the case was initially argued. The *en banc* majority stated simply: "[T]hinking that the issues concerning the effect of our decision on interlocutory appeals and the review mandate of Code § 19.2-409 required a prompt full-Court decision, on motion of two members of

In Commonwealth v. Rodgers,<sup>302</sup> the court of appeals, consistent with past practice, narrowly construed the Commonwealth's right to an interlocutory appeal. The court of appeals held that since a trial judge's decision to suppress evidence was based on collateral estoppel, and not on any of the statutorily enumerated bases giving rise to a potential interlocutory appeal (which include double jeopardy grounds), the Commonwealth could not appeal the trial court's suppression of evidence.<sup>303</sup>

The court of appeals in James v. Commonwealth<sup>304</sup> acknowledged that, in accordance with the United States Supreme Court's holding in accordance with Ornelas v. United States,<sup>305</sup> determinations of warrantless probable cause and reasonable suspicion shall be reviewed *de novo* on appeal.<sup>306</sup>

I also disagree with the process by which this appeal was considered en banc. Following Satchell's conviction, this appeal followed the usual procedure. When a panel granted the petition for appeal, the appeal was assigned to a panel of three judges who considered the appeal on the record after briefing and oral argument. An opinion was prepared with one judge dissenting. When the opinions were filed in the clerk's office, the dissenting judge requested that the entire Court reconsider the appeal en banc. The Court determined to withhold release of the panel's decision and to consider the appeal anew en banc. I believe that there are sound jurisprudential reasons to avoid a mechanism that allows a dissenting judge to initiate an en banc consideration after a panel has decided a case and before the panel releases its decision.

Although the statutory provisions for hearing a case en banc state that "the Court may sit en banc. . . at any time," [VA. CODE ANN.] § 17-116.02(D), the procedure employed to take this case en banc squandered scarce judicial resources. More importantly, however, the procedure employed in this case graphically demonstrates the need for this Court to set standards for en banc review that are published and available to all litigants. All members of the Bar should be informed that assignment of a case to a panel and the panel's consideration of an appeal do not preclude en banc consideration before the panel renders its decision. Although I believe that this process negates the efficiency of the panel process, I also believe that this Court has an obligation to inform the Bar of the procedures that it employs to consider cases en banc.

Id. at 650 n.1, 460 S.E.2d at 257-58 n.1 (Benton, J., concurring).

- 302. 21 Va. App. 745, 467 S.E.2d 813 (1996).
  - 303. Id. at 747, 467 S.E.2d at 814-15.
  - 304. 22 Va. App. 740, 473 S.E.2d 90 (1996).
  - 305. 116 S. Ct. 1657 (1996).

the panel, we decided to consider this case *en banc." Id.* at 643, 460 S.E.2d at 254. In a concurring opinion, Judge Benton observed:

<sup>306.</sup> James, 27 Va. App. at 743, 473 S.E.2d at 91 (quoting Ornelas, 116 S. Ct. at 1663).

1996]

Getting one's appeal heard in Virginia's appellate courts, much less winning on appeal, remains a daunting proposition. In 1995, 2,081 petitions for appeal were filed in criminal cases in the Virginia Court of Appeals.<sup>307</sup> In 1995, the court of appeals granted 350 petitions for appeal and thereby agreed to hear those cases on their merits.<sup>308</sup> In 1995, the court of appeals reversed, in some measure, only 118 criminal convictions.<sup>309</sup> Even less promising for criminal defendants, in 1995 the Supreme Court of Virginia received 935 criminal petitions, and in that same calendar year, granted a writ of appeal in only eight.<sup>310</sup>

#### X. CONCLUSION

The criminal law is a body that evolves with great speed and with great volume. Those facets of its development remain both its greatest reward and challenge and its greatest curse.

<sup>307.</sup> Letter from Stephanie W. Vassar, Office Manager, Clerk's Office of the Virginia Court of Appeals, (June 20, 1996) (on file with the author).

<sup>308.</sup> Id.

<sup>309.</sup> Id.

<sup>310.</sup> Telephone interview with Virginia Supreme Court Clerk's Office (Aug. 23, 1996) (regarding 1995 Virginia Supreme Court Year End statistics).