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## Annual Survey of Virginia Law: Criminal Law and Procedure

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## CRIMINAL LAW AND PROCEDURE\*

*Michael Edmund O'Neill\*\**

### I. INTRODUCTION

The Commonwealth of Virginia is so named (as opposed to being denominated simply a “state”) because the term “commonwealth” is used to indicate a government in which “supreme power is vested in the people.”<sup>1</sup> That term is particularly apt, for in what better way does a government provide for the common weal of its people than by protecting them against crime, while at the same time respecting their individual rights and liberties? This is a delicate balance, one that is reflected in this survey of the most recent developments in Virginia criminal law and procedure. The legislative enactments and judicial decisions examined here portray the careful quest to resolve the tensions inherent between respect for the individual and the need for efficient law enforcement.

General legal surveys of this kind are always difficult to construct, because while they furnish useful information to the practitioner, they seldom provide a framework by which to evaluate legal trends. Nevertheless, the legal developments summarized herein represent only incremental changes and reveal Virginia governmental institutions’ generally careful and pragmatic approach to legal innovation.

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\*\* Assistant Professor of Law, George Mason University School of Law; Commissioner for the United States Sentencing Commission; B.A., *summa cum laude*, 1987, Brigham Young University; J.D., 1990, Yale Law School. The views expressed in this article are my own, and thus cannot be attributed to the Sentencing Commission. This article summarizes select criminal law and procedure decisions issued by the Supreme Court of Virginia and the Court of Appeals of Virginia (sitting en banc) between July 1, 1999, and June 30, 2000. In addition, it surveys a number of the more important criminal law enactments from the 2000 Session of the Virginia General Assembly. I would like to thank Todd Heflin for his invaluable research assistance.

1. THE HORNBOOK OF VIRGINIA HISTORY 88 (Emily J. Salmon & Edward D.C. Campbell, Jr., eds., 4th ed. 1994).

## II. JUDICIAL DECISIONS

### A. *Constitutional Criminal Procedure*

Despite the fact that the overwhelming number of criminal prosecutions brought in the United States occur in state, rather than federal, courts,<sup>2</sup> it is the United States Constitution—not analogous state charters—that dominates criminal procedure. Since the dawning of the Warren Court, and the dramatic expansion of criminal defendants' rights under the Federal Constitution, and the concurrent application of those rights to the states through the Fourteenth Amendment, it has been accepted that the Bill of Rights establishes a basic core of procedural (and substantive) protections that states may not violate. Nevertheless, most states, including the Commonwealth of Virginia, possess their own constitutions that provide important protections for criminal defendants. The Virginia Constitution, for example, contains analogues to the Fourth Amendment's protection against unreasonable searches and seizures,<sup>3</sup> the Fifth Amendment's protection against compelled self-incrimination,<sup>4</sup> and the Sixth Amendment's various procedural protections.<sup>5</sup> With the predominance of federal constitutional law, however, and its displacement of state law in criminal prosecutions, Virginia constitutional provisions rarely receive mention in state court decisions. That is a problem perhaps worth remedying, particularly if litigants seek to encourage more broadly based protections than those afforded under the Federal Constitution. Perhaps, as the United States Supreme Court becomes increasingly hesitant to expand the Bill of Rights' protections beyond those expressly enumerated, we will see state courts turn more frequently to their own constitutions

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2. In 1996, for example, there were 997,970 felony convictions in state courts. U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1998 431 (Kathleen Maguire & Ann L. Pastore eds., 1998). During the same period there were only 43,883 felony convictions in United States District Courts. *Id.* at 402. Thus, there were over twenty state convictions for every federal conviction obtained during 1996, which translates into roughly only 4.2% of all criminal convictions being secured at the federal level. *See id.* This number corresponds to recently reported figures that there are approximately 35,000 federal prosecutions every year, making up fewer than 5% of all prosecutions nationally. Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 970 (1997).

3. *See* VA. CONST. art. I, § 10.

4. *See* VA. CONST. art. I, § 8.

5. *See id.*

for guidance.<sup>6</sup> That having been said, the following discussion will use the federal Constitution as its organizing framework.

## 1. The Fourth Amendment

### a. Abandoned Contraband

In *Cochran v. Commonwealth*,<sup>7</sup> the Supreme Court of Virginia reaffirmed the rule that an en banc court of appeals, when equally divided, must affirm the trial court's judgment.<sup>8</sup> The court further held that the defendant had abandoned his drugs, and thus the trial court did not err in denying his suppression motion.<sup>9</sup>

In *Cochran*, a deputy sheriff "was dispatched to a parking lot to meet an unknown person who had called concerning recovery of stolen property."<sup>10</sup> When the deputy arrived at the parking lot, he noticed three men in a car parked near a public telephone.<sup>11</sup> The deputy asked the driver if anyone had called the police.<sup>12</sup> Before he received a response, Cochran started to get out of the car.<sup>13</sup> The deputy, however, asked him to remain seated while he "talked to the driver."<sup>14</sup> As the deputy spoke with the driver, Cochran again opened the car door.<sup>15</sup> Although the deputy instructed him to stay in the car, Cochran once again attempted to exit the vehicle.<sup>16</sup> As he stepped from the vehicle, Cochran shoved a bluish-colored bag under the car, which the deputy retrieved.<sup>17</sup> Inside, the deputy found three small plastic bags and a film canister, which were subsequently determined to contain illegal drugs.<sup>18</sup> The supreme court held that the defendant's efforts to

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6. The classic discussion of the importance of state constitutions in the protection of citizens' rights may be found in Justice William J. Brennan's *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

7. 258 Va. 604, 521 S.E.2d 287 (1999), *cert. denied*, 120 S. Ct. 1692 (2000).

8. *Id.* at 606, 521 S.E.2d at 288.

9. *See id.* at 608, 521 S.E.2d at 289.

10. *Id.* at 607, 521 S.E.2d at 289.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 607-08, 521 S.E.2d at 289.

18. *Id.* at 608, 521 S.E.2d at 289.

exit the car demonstrated that he was not within the officer's control, and thus pursuant to *California v. Hodari D.*,<sup>19</sup> the bag had been abandoned.<sup>20</sup>

#### b. Consent to a Body-Cavity Search

In *Hughes v. Commonwealth*,<sup>21</sup> the Court of Appeals of Virginia, sitting en banc, held that the defendant, who had consented to a pat-down search of his person and a "visual inspection" inside his underwear, did not by the same token consent to a body-cavity search.<sup>22</sup> *Hughes* is one of those cases that reminds me why I attended law school as opposed to the police academy. After receiving a tip that a "very light complected male with dark wavy hair wearing blue jeans and a white shirt" was selling drugs on "320 West Grace Street," police officers spied an individual matching that description at that location.<sup>23</sup> They approached him and indicated that they had received a tip that he was selling drugs.<sup>24</sup> The officers asked if they could frisk Hughes because the informant had told them he "was keeping the money in his left pocket, and . . . drugs . . . in his underwear."<sup>25</sup> Hughes denied the accusation, and consented to a pat-down search of his person.<sup>26</sup> The officers discovered a considerable amount of cash in the defendant's left pocket, and asked whether they could check inside his underwear.<sup>27</sup> Hughes agreed to allow the officers to "check further."<sup>28</sup> After the officer found nothing "in the front of [Hughes's] underwear," the officer noted "it's got to be behind you," and thus asked Hughes if he didn't "mind going ahead and bending over."<sup>29</sup> Although Hughes did not verbally respond, he leaned over.<sup>30</sup> The officer told the defendant to cough, and then spotted a plastic bag protruding "halfway" from Hughes's anus.<sup>31</sup>

In response to Hughes's contention that the scope of his con-

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19. 499 U.S. 621 (1991).

20. *Cochran*, 258 Va. at 608, 521 S.E.2d at 289.

21. 31 Va. App. 447, 524 S.E.2d 155 (Ct. App. 2000).

22. *Id.* at 457, 524 S.E.2d at 160.

23. *Id.* at 452-53, 524 S.E.2d at 158.

24. *Id.* at 453, 524 S.E.2d at 158.

25. *Id.* at 452-53, 524 S.E.2d at 158.

26. *Id.* at 453, 524 S.E.2d at 158.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

sent did not extend to the body-cavity search, the Court of Appeals of Virginia assumed that the initial frisk and the visual inspection inside his underwear were lawful intrusions into Hughes's privacy.<sup>32</sup> From there, however, things became a bit tricky for the court. Relying principally upon *Moss v. Commonwealth*,<sup>33</sup> in which the court concluded that a defendant's consent to a search of his person did not necessarily confer permission for the police to conduct a strip search,<sup>34</sup> the court held that having Hughes cough and the officer's subsequent removal of the plastic bag from Hughes's anus exceeded the scope of the defendant's consent.<sup>35</sup> Noting that *Taylor v. Commonwealth*<sup>36</sup> held that "strip searches, which are 'peculiarly intrusive,' are constrained by due process requirements of reasonableness and require 'special justification,'"<sup>37</sup> the court determined that the even more intrusive body-cavity searches require additional, explicit consent.<sup>38</sup> The court flatly refused to consider Hughes's bending over at the officer's request as any sort of consent to the body-cavity search because "after Hughes bent over, [the officer] no longer sought Hughes' [sic] consent for the continued search."<sup>39</sup> "Without a request for Hughes to consent," the court explained, "we are not able to find that Hughes voluntarily coughed and of his own free will was allowing [the officer] to visually inspect his anal cavity."<sup>40</sup> The court ruled that as a result of "the highly intrusive and personal nature of body cavity searches . . . consent to such a search will not be inferred from a suspect's silence or apparent acquiescence to an officer's progressively extending the scope of a consensual generalized search."<sup>41</sup> This case is interesting in two important respects. First, it reasonably extends the doctrine it created for strip searches to the far more intrusive body-cavity searches. Second, it places law enforcement officers on notice that they must obtain express consent before conducting such searches.

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32. *Id.* at 456, 524 S.E.2d at 160.

33. 30 Va. App. 219, 516 S.E.2d 246 (Ct. App. 1999).

34. *Id.* at 225, 516 S.E.2d at 249.

35. *Hughes*, 31 Va. App. at 456, 524 S.E.2d at 160.

36. 28 Va. App. 638, 507 S.E.2d 661 (Ct. App. 1998).

37. *Hughes*, 31 Va. App. at 457, 524 S.E.2d at 160 (quoting *Taylor*, 28 Va. App. at 642, 507 S.E.2d at 663).

38. *Id.* at 459, 524 S.E.2d at 161.

39. *Id.*

40. *Id.*

41. *Id.*

## c. Vehicular Stop

In *Reittinger v. Commonwealth*,<sup>42</sup> the Supreme Court of Virginia ruled that, despite the police officer's express statement that the defendant was free to leave following a routine traffic stop, the circumstances in that case were such that "a reasonable person . . . would [not] have considered that he was free to disregard the deputies and simply drive away."<sup>43</sup> Here, the defendant was stopped because his van had only one operable headlight.<sup>44</sup> The deputy decided to forgo issuing a citation, and instead gave Reittinger a verbal warning and then told him that he was "free to go."<sup>45</sup> Immediately after telling Reittinger he could leave, however, the deputy asked whether he had any contraband in the vehicle.<sup>46</sup> The defendant replied in the negative, but the deputy nevertheless asked for permission to search the van.<sup>47</sup> The deputy repeated his request twice more, but Reittinger, rather than verbally respond, stepped from the van.<sup>48</sup> The deputy saw what he described as a "large bulge" in the defendant's pants pocket and conducted a pat-down search.<sup>49</sup> He felt something that he believed could have been a weapon and ordered Reittinger to empty his pockets.<sup>50</sup> The defendant did as he was told, and removed "an object that proved to be a smoking pipe containing marijuana residue."<sup>51</sup>

Although the Rockbridge County Circuit Court determined that the initial seizure was illegal, it concluded that the pat-down search was necessary for the deputy's protection, and thus refused to suppress the evidence.<sup>52</sup> The Court of Appeals of Virginia agreed.<sup>53</sup> The Supreme Court of Virginia, however, held that despite the fact that the deputy told Reittinger he was free to leave,

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42. 260 Va. 232, 532 S.E.2d 25 (2000).

43. *Id.* at 237, 532 S.E.2d at 28.

44. *Id.* at 234, 532 S.E.2d at 26.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 236, 532 S.E.2d at 27.

53. *Id.* at 235, 532 S.E.2d at 26; *Reittinger v. Commonwealth*, 29 Va. App. 724, 514 S.E.2d 775 (Ct. App. 1999).

the events transpiring immediately after the deputy made this statement "would suggest to a reasonable person that just the opposite was the case."<sup>54</sup> As a consequence, the court held that "Reittinger was unlawfully seized in violation of his Fourth Amendment rights" and ordered the evidence suppressed.<sup>55</sup>

#### d. Traffic Checkpoints

Traffic checkpoints have become an increasingly familiar weapon in law enforcement's efforts to control drunk driving and to disrupt drug-trafficking. As a result, litigation over their propriety has increased significantly. In *Bass v. Commonwealth*,<sup>56</sup> the Supreme Court of Virginia held: (1) that a driver's alleged evasion of a traffic checkpoint did not violate a statute making it unlawful for a motorist to refuse to stop her vehicle when asked to do so by police; (2) that the checkpoint itself did not fall within the statutory definition of an "other traffic control device;" and (3) that the police did not have a reasonable suspicion of criminal activity to stop the defendant.<sup>57</sup>

In *Bass*, police officers established a checkpoint to stop motorists.<sup>58</sup> An officer observed Bass making a series of legal maneuvers that the officer believed to be a concerted effort to avoid the checkpoint.<sup>59</sup> As a consequence, the officer decided to stop the vehicle pursuant to the department's policy to pull over vehicles being driven in a manner so as to elude a traffic checkpoint.<sup>60</sup> Other than the (subjectively) apparent attempt to avoid the checkpoint, however, the defendant did nothing illegal.<sup>61</sup> As a consequence, the supreme court determined that insufficient grounds existed upon which to stop Bass and that her otherwise legal avoidance of the checkpoint did not violate Virginia Code section 46.2-833.1, which makes it unlawful to "evade any stop sign . . . or other traffic control device."<sup>62</sup> The court declined to

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54. *Reittinger*, 260 Va. at 237, 532 S.E.2d at 28.

55. *Id.*

56. 259 Va. 470, 525 S.E.2d 921 (2000).

57. *Id.* at 476-78, 525 S.E.2d at 924-25.

58. *Id.* at 473, 525 S.E.2d at 922.

59. *Id.* at 473, 525 S.E.2d at 923.

60. *Id.*

61. *Id.*

62. *Id.* at 476-78, 525 S.E.2d at 924-25 (quoting VA. CODE ANN. § 46.2-833.1 (Repl. Vol. 1998)).



construe the checkpoint as being equivalent to a "traffic control device," and thus held that Bass was seized in violation of the Fourth Amendment.<sup>63</sup>

## 2. The Fifth Amendment—Right to Counsel

In *McDaniel v. Commonwealth*,<sup>64</sup> the Court of Appeals of Virginia, sitting en banc, held that the defendant unambiguously invoked his right to counsel after being advised under the *Miranda*<sup>65</sup> warnings.<sup>66</sup> Here, the police arrested McDaniel for burglary and larceny, read him the relevant warnings, but deferred questioning him until later.<sup>67</sup> After searching McDaniel's apartment, the police questioned the defendant, who stated, "I think I would rather have an attorney here to speak for me."<sup>68</sup> The interviewing detective testified that he interpreted McDaniel's statement to be a question, not a request for counsel.<sup>69</sup> The detective informed McDaniel that two witnesses saw him commit the offenses and that McDaniel's accomplice had not only confessed to the crimes, but had also implicated McDaniel in the crime.<sup>70</sup> McDaniel, acknowledging that the police already seemed to "know everything," confessed to committing the crimes.<sup>71</sup>

The trial court found McDaniel's statement sufficiently ambiguous to deny his suppression motion.<sup>72</sup> A panel of the Court of Appeals of Virginia reversed,<sup>73</sup> and upon en banc review, overturned the convictions and remanded for a new trial.<sup>74</sup> Relying principally upon *Miranda* and *Davis v. United States*,<sup>75</sup> the court engaged in a "plain meaning" analysis of the defendant's statement and had little difficulty determining that the statement was not a question, but, rather, was sufficiently clear that the detec-

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63. *Id.* at 477-79, 525 S.E.2d at 925.

64. 30 Va. App. 602, 518 S.E.2d 851 (Ct. App. 2000).

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

66. *McDaniel*, 30 Va. App. at 607, 518 S.E.2d at 854.

67. *Id.* at 603-04, 518 S.E.2d at 852.

68. *Id.* at 604, 518 S.E.2d at 852.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 605-06, 518 S.E.2d at 852.

73. *McDaniel v. Commonwealth*, 28 Va. App. 432, 506 S.E.2d 21 (Ct. App. 1998).

74. *McDaniel*, 30 Va. App. at 603, 518 S.E.2d at 852.

75. 512 U.S. 452 (1994).

tive should have terminated his interrogation.<sup>76</sup>

### 3. The Sixth Amendment

#### a. Ineffective Assistance of Counsel

Although traditionally fact-bound and of little continuing importance, the following ineffective assistance cases are interesting in that they demonstrate the difficulty of establishing a successful claim, even in the face of a potential conflict. In *Moore v. Hinkle*,<sup>77</sup> the defendant was convicted of abduction with the intent to defile and subsequently filed a habeas corpus petition alleging that his counsel was ineffective.<sup>78</sup> Here, counsel was largely unavailable for consultation between the defendant's first trial (which resulted in a mistrial) and subsequent trial in which he was convicted.<sup>79</sup> At the commencement of the second trial, the defendant's attorney informed the trial court that he was not ready to proceed and wished to be removed from the case.<sup>80</sup> After several unfortunate incidents between the court and defense counsel, including a contempt citation for Moore's attorney, the trial proceeded.<sup>81</sup> The defendant's attorney cross-examined each of the Commonwealth's witnesses and gave a closing argument, but chose (as he did in the first trial) not to put on any evidence in Moore's defense.<sup>82</sup>

Contrary to the defendant's claims, the court held that none of the other activities of the defendant's attorney were in actual conflict with his representation of the defendant.<sup>83</sup> The activities, instead, simply competed with his time to devote to the defendant's case.<sup>84</sup> The court noted that just because a lawyer fails to manage his time properly, resulting in the interests of some clients being addressed to the detriment of others, an actual conflict of interest does not arise.<sup>85</sup>

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76. *McDaniel*, 30 Va. App. at 606-07, 518 S.E.2d at 853.

77. 259 Va. 479, 527 S.E.2d 419 (2000).

78. *Id.* at 486, 527 S.E.2d at 423.

79. *Id.* at 483, 527 S.E.2d at 420-21.

80. *Id.* at 483, 527 S.E.2d at 421.

81. *Id.* at 484-85, 527 S.E.2d at 421-22.

82. *Id.* at 482, 485, 527 S.E.2d at 420, 422.

83. *Id.* at 489-90, 527 S.E.2d at 424-25.

84. *Id.* at 489, 527 S.E.2d at 425.

85. *Id.* at 489-90, 527 S.E.2d at 425.

After dismissing the conflict of interest argument, the court found that the defendant could not show that "but for" the actions of his attorney, the outcome of the trial would have been different.<sup>86</sup> The court held that the Commonwealth's evidence at trial fully supported the jury's verdict and the defendant did not show that the deficient representation prejudiced his case, and thus affirmed the dismissal of the petition.<sup>87</sup>

Similarly, in *Turner v. Commonwealth*,<sup>88</sup> the Supreme Court of Virginia dismissed the defendant's ineffective assistance of counsel claim.<sup>89</sup> That claim was based on the fact that during his trial, Turner's defense counsel was attempting to secure employment with the Commonwealth Attorney's Office.<sup>90</sup> The court held that the mere filing of the employment application was not enough to create a conflict of interest for the defendant's attorney without a showing that he had done more to create the conflict.<sup>91</sup> The court noted that both the defendant's attorney and the Commonwealth had filed affidavits stating, in effect, that they had never discussed Turner's case.<sup>92</sup> The court found that without some showing that the defendant's attorney's performance was deficient, the allegations of a conflict of interest were baseless.<sup>93</sup>

#### b. Waiver of the Right to Counsel Pursuant to a Plea Agreement

In an important case bearing upon the waiver of constitutional rights pursuant to a plea agreement, the Court of Appeals of Virginia, sitting en banc, held that, upon the defendant's unconditional guilty plea, he impliedly waived objection to any non-jurisdictional defects occurring before his plea was accepted.<sup>94</sup> In *Terry v. Commonwealth*, the defendant pleaded guilty to one count of felony carnal knowledge of a child.<sup>95</sup> The trial judge im-

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86. *Id.* at 490-92, 527 S.E.2d at 425-26.

87. *Id.* at 492, 527 S.E.2d at 426.

88. 259 Va. 816, 528 S.E.2d 112 (2000).

89. *Id.* at 821, 528 S.E.2d at 115.

90. *Id.* at 818, 528 S.E.2d at 113.

91. *Id.* at 820, 528 S.E.2d at 115.

92. *Id.* at 819, 528 S.E.2d at 114.

93. *See id.* at 820, 528 S.E.2d at 114-15.

94. *See Terry v. Commonwealth*, 30 Va. App. 192, 200-01, 516 S.E.2d 233, 237 (Ct. App. 1999).

95. *Id.* at 194, 516 S.E.2d at 234. Carnal knowledge of a child is a violation of Virginia Code section 18.2-63. VA. CODE ANN. § 18.2-63 (Repl. Vol. 1996).

posed a ten-year sentence, suspending all but two of those years.<sup>96</sup> Terry appealed that sentence, arguing that the admission of certain evidence at his sentencing hearing violated his Sixth Amendment right to counsel.<sup>97</sup>

The police arrested Terry and questioned him until he asked to speak with an attorney.<sup>98</sup> Because Terry's charge involved sexual contact with a minor, a social services investigator and two police investigators came to the jail and initiated contact with Terry, who was being represented by a public defender.<sup>99</sup> Terry's counsel was neither present at the interview, nor did counsel authorize the interrogation in his absence.<sup>100</sup> During the interview, Terry volunteered information about his prior sexual contact with the victim.<sup>101</sup> Terry subsequently moved to suppress the statements he made to the social services investigator and the police detectives.<sup>102</sup> He argued that because his counsel had not been present, and he had not consented to the questioning, any statements he made were in violation of his Sixth Amendment right to counsel.<sup>103</sup> Terry's suppression motion was never argued before the trial court, however, nor did the court issue a ruling on the motion because the defendant agreed to plead to a lesser charge.<sup>104</sup>

At the defendant's sentencing hearing, the Commonwealth called the social worker to testify about Terry's statements regarding his sexual contact with the victim.<sup>105</sup> Terry's counsel objected, however, arguing that it was irrelevant to the charge to which Terry had pleaded and, moreover, that the statements were obtained in violation of Terry's Sixth Amendment counsel right.<sup>106</sup> The Commonwealth responded that because the trial court had not ruled on Terry's suppression motion, no evidence either had been, or should have been, suppressed.<sup>107</sup> The court overruled Terry's objection and permitted the social worker to testify.<sup>108</sup>

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96. *Terry*, 30 Va. App. at 196, 516 S.E.2d at 235.

97. *Id.*

98. *Id.* at 194, 516 S.E.2d at 234.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 195, 516 S.E.2d at 235.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

The en banc Court of Appeals of Virginia affirmed, concluding that because Terry had made a "voluntary, intelligent and unconditional guilty plea," the claim was waived.<sup>109</sup> The court was careful to point out that because Terry was plainly aware of his potential Sixth Amendment claim, that claim should have been preserved pursuant to the plea agreement.<sup>110</sup> His failure to preserve the issue for appeal resulted in a waiver.<sup>111</sup> The court went to considerable lengths to distinguish the facts of this case from those in which the alleged Sixth Amendment violation occurred *after* the plea,<sup>112</sup> or as in *Mitchell v. United States*,<sup>113</sup> where the United States Supreme Court rendered a narrow holding establishing that a guilty plea could not waive a Fifth Amendment privilege against compelled self-incrimination at a sentencing hearing.<sup>114</sup>

### c. Confrontation Rights

Turning to basic confrontation rights, in *Lilly v. Commonwealth*,<sup>115</sup> the Supreme Court of Virginia, on remand from the United States Supreme Court, held that the admission of a non-testifying accomplice's statements implicating the defendant as the triggerman in the killing was not harmless beyond a reasonable doubt.<sup>116</sup> Here, the defendant was convicted and sentenced to death for a premeditated murder during a robbery.<sup>117</sup> The Supreme Court of Virginia affirmed the conviction and the imposition of the death sentence on direct appeal.<sup>118</sup> Thereafter, Lilly successfully petitioned the United States Supreme Court for a writ of certiorari.<sup>119</sup> The Supreme Court reversed a portion of the

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109. *Id.* at 200-01, 516 S.E.2d at 237.

110. *Id.* at 196, 516 S.E.2d at 235.

111. *See id.* at 200-01, 516 S.E.2d at 237.

112. *See id.* at 198-200, 516 S.E.2d at 236-37 (discussing *Powell v. Texas*, 492 U.S. 680 (1989); *Satterwhite v. Texas*, 486 U.S. 249 (1987); *Maine v. Moulton*, 474 U.S. 159 (1985); *Estelle v. Smith*, 451 U.S. 454 (1980); *United States v. Henry*, 447 U.S. 264 (1980); *Bey v. Morton*, 124 F.3d 524 (3d Cir. 1997); *United States v. Attar*, 38 F.3d 727 (4th Cir. 1994)).

113. 526 U.S. 314 (1999).

114. *See Terry*, 30 Va. App. at 200, 516 S.E.2d at 237.

115. 258 Va. 548, 523 S.E.2d 208 (1999).

116. *Id.* at 553, 523 S.E.2d at 210.

117. *Id.* at 550, 523 S.E.2d at 208.

118. 255 Va. 558, 499 S.E.2d 522 (1998), *rev'd sub nom. Lilly v. Virginia*, 527 U.S. 116 (1999).

119. *Lilly v. Virginia*, 527 U.S. 116, 123 (1999).

Virginia court's judgment, ruling that the admission into evidence at Lilly's trial of two confessions made by Lilly's brother, who had refused to testify, violated Lilly's Sixth Amendment right to be confronted with the witnesses against him.<sup>120</sup> The Supreme Court remanded the case with directions to determine whether this error was "harmless beyond a reasonable doubt."<sup>121</sup>

Applying the familiar *Chapman*<sup>122</sup> standard, which requires a determination of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,"<sup>123</sup> the Supreme Court of Virginia revisited the impact of the erroneously admitted testimony on the defendant's case.<sup>124</sup> The court explained that in order to impose the death penalty, "the Commonwealth had the burden to prove beyond a reasonable doubt that Lilly was the actual perpetrator . . . or the 'triggerman' in the murder."<sup>125</sup> However, the court concluded that the evidence of Lilly's guilt as the triggerman "was not overwhelming."<sup>126</sup> As the court explained, only two pieces of evidence supported the conjecture that Lilly was the triggerman: testimony from eyewitness Gary Wayne Barker, who was present at the murder, and the statements of Mark Lilly, the defendant's brother.<sup>127</sup> "Barker's eyewitness testimony [, the court explained,] unquestionably was the centerpiece of, or . . . the 'key to' the Commonwealth's case."<sup>128</sup> Barker testified that Lilly fatally shot DeFilippis three times in the head.<sup>129</sup> Mark Lilly's statement served as the sole corroborating evidence for Barker's testimony.<sup>130</sup> In the absence of that statement, Barker's testimony, which might easily have been motivated by his own self-interest to avoid the death penalty, was the only thing identifying Lilly as the triggerman.<sup>131</sup> In weighing the credibility of Barker's statement, the court concluded it would have been "inconceivable that the jury

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120. *Id.* at 139-40.

121. *Id.* at 140 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

122. *Chapman v. California*, 386 U.S. 18 (1967).

123. *Id.* at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

124. *Lilly*, 258 Va. at 551-53, 523 S.E.2d at 209-10.

125. *Id.* at 551, 523 S.E.2d at 209.

126. *Id.* at 553, 523 S.E.2d at 210.

127. *Id.* at 552-53, 523 S.E.2d at 510.

128. *Id.* at 552, 523 S.E.2d at 210.

129. *Id.*

130. *Id.* at 552-53, 523 S.E.2d at 210.

131. *See id.*

would not have weighed Barker's credibility in light of the concurring evidence of Mark's statements."<sup>132</sup> Those statements, "coming as they did, from Lilly's brother undoubtedly carried weight with the jury."<sup>133</sup> Thus, the court ruled, "there is a reasonable possibility that those statements contributed to Lilly's conviction for capital murder."<sup>134</sup> As a consequence, the court could not say that the error in admitting Mark Lilly's statements was "harmless beyond a reasonable doubt."<sup>135</sup>

In a variation on this theme, the Supreme Court of Virginia held in *Dearing v. Commonwealth*<sup>136</sup> that sufficient cause existed for a joint trial to go forward and that the erroneous admission of a co-defendant's confession, in violation of Dearing's confrontation rights, was harmless beyond a reasonable doubt.<sup>137</sup> Here, a grand jury indicted Dearing for robbery and the use of a firearm during the commission of that offense.<sup>138</sup> The Commonwealth tried him jointly with Leroy Vernoise Dorsey, a co-defendant who had participated in the robbery.<sup>139</sup>

Dearing argued that the trial court erred by granting the Commonwealth's motion for a joint trial because the Commonwealth had failed to establish good cause as required by Virginia Code section 19.2-262.1.<sup>140</sup> He further argued that his rights were prejudiced because he could not compel his co-defendant to testify as a witness in a joint trial.<sup>141</sup> The court, however, easily dismissed the defendant's claim. The court noted that it was clear

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132. *Id.* at 553, 523 S.E.2d at 210.

133. *Id.*

134. *Id.*

135. *Id.* Although the court reversed Lilly's capital murder conviction and related firearms charge, it affirmed his conviction for the carjacking, robbery, abduction, and the four related firearms charges. *Id.*

136. 259 Va. 117, 524 S.E.2d 121 (2000).

137. *Id.* at 123-24, 524 S.E.2d at 125.

138. *Id.* at 119, 524 S.E.2d at 122.

139. *Id.*

140. *Id.* at 122, 524 S.E.2d at 123-24. Section 19.2-262.1 reads:

On motion of the Commonwealth, for good cause shown, the court shall order persons charged with participating in contemporaneous and related acts or occurrences or in a series of acts or occurrences constituting an offense or offenses, to be tried jointly unless such joint trial would constitute prejudice to a defendant. If the court finds that a joint trial would constitute prejudice to a defendant, the court shall order severance as to that defendant or provide such other relief as justice requires.

VA. CODE ANN. § 19.2-262.1 (Repl. Vol. 2000).

141. *Dearing*, 259 Va. at 122, 524 S.E.2d at 124.

beyond peradventure that Dearing had no right to compel his co-defendant to testify if that individual elected to assert his own Fifth Amendment privilege against compelled self-incrimination.<sup>142</sup>

The more difficult issue for the court was whether the co-defendant's statement was properly admitted into evidence. Relying chiefly upon *Lilly v. Virginia*,<sup>143</sup> the court determined that it could not "conclude that Dorsey's confession contained particularized guarantees of trustworthiness or that the statement was within a firmly rooted hearsay exception for the Confrontation Clause as discussed by the Supreme Court in *Lilly*."<sup>144</sup> As a consequence, the court found that the trial court erred in admitting Dorsey's statement.<sup>145</sup> Regardless, the court determined that, in light of the overwhelming evidence supporting Dearing's conviction, the trial court's erroneous admission of the confession and resulting Confrontation Clause error was harmless beyond any reasonable doubt.<sup>146</sup>

#### d. The Effect of a Nolle Prosequi on the Speedy Trial Protection

The Supreme Court of Virginia held in *Harris v. Commonwealth*<sup>147</sup> that good cause supported the Commonwealth's motion for nolle prosequi of the original indictment, and that, as a result, the subsequent indictment was not governed by the initial indictment's speedy trial limitation.<sup>148</sup> The court further ruled that the Commonwealth's decision to nolle prosequi the first indictment was neither in bad faith nor rose to the level of prosecutorial misconduct, and that the trial court's decision to grant the Commonwealth's motion to nolle the case did not deprive the defendant of procedural due process.<sup>149</sup>

Harris was indicted for creating an insurance fraud to obtain money by false pretenses.<sup>150</sup> After a trial date was set, the Com-

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142. *Id.*

143. 527 U.S. 116 (1999).

144. *Dearing*, 259 Va. at 123, 524 S.E.2d at 124.

145. *Id.*

146. *See id.* at 123-24, 524 S.E.2d at 125.

147. 258 Va. 576, 520 S.E.2d 825 (1999).

148. *See id.* at 583-84, 520 S.E.2d at 829.

149. *Id.* at 583-85, 520 S.E.2d at 829-30.

150. *Id.* at 579, 520 S.E.2d at 826.



monwealth filed a continuance motion on the grounds that it had been unable to obtain certain documents essential to the prosecution.<sup>151</sup> Harris opposed the continuance, arguing that his witnesses would be inconvenienced by the delay and that the Commonwealth had failed to act with due diligence to obtain the documents.<sup>152</sup> After the trial court denied the motion and admonished the Commonwealth for not timely subpoenaing the documents, the Commonwealth moved to nolle prosequi the indictment.<sup>153</sup> Over Harris's objection, the trial court granted the motion.<sup>154</sup> Harris was subsequently indicted again for the same offenses, and after unsuccessfully asserting his speedy trial rights, entered a conditional guilty plea, reserving his right to appeal the denial of his speedy trial claim.<sup>155</sup>

The supreme court had little trouble concluding that the trial court properly granted the Commonwealth's motion for nolle prosequi and that the decision to nolle the original indictment was not in bad faith.<sup>156</sup> As a consequence, in light of *Barker v. Wingo*,<sup>157</sup> the court could find no violation of Harris's speedy trial rights, nor could it find that Harris was prejudiced in presenting his defense.<sup>158</sup>

e. When a Trial Commences for Purposes of the Speedy Trial Act

In *Hutchins v. Commonwealth*,<sup>159</sup> the en banc Court of Appeals of Virginia held that for purposes of the Commonwealth's speedy trial statute,<sup>160</sup> a "trial" commences when—in a jury trial—the first juror "is sworn for *voir dire*."<sup>161</sup> A jury convicted Hutchins of unlawful wounding, and he was subsequently sentenced to three years in prison.<sup>162</sup> In an unpublished opinion, a divided panel of

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151. *Id.*

152. *Id.* at 579, 520 S.E.2d at 827.

153. *Id.*

154. *Id.*

155. *Id.* at 580-81, 520 S.E.2d at 827-28.

156. *See id.* at 583-85, 520 S.E.2d at 829-30.

157. 407 U.S. 514 (1972).

158. *See Harris*, 258 Va. at 585-87, 520 S.E.2d at 830-31.

159. 30 Va. App. 574, 518 S.E.2d 838 (Ct. App. 1999).

160. VA. CODE ANN. § 19.2-243 (Repl. Vol. 2000).

161. *Hutchins*, 30 Va. App. at 575, 518 S.E.2d at 838.

162. *Id.*

the court of appeals affirmed.<sup>163</sup> In a case of first impression, the en banc court sought to determine when a jury trial begins for the purpose of tolling the Virginia speedy trial statute.<sup>164</sup> After carefully considering the revised statute and the General Assembly's intent, the court adopted the federal rule and held that a jury trial commences—and thus tolls the statutory bar—when the first venire person is sworn.<sup>165</sup> Because Hutchins's trial failed to start by the date specified by the applicable statutory provisions, the court of appeals ruled that Hutchins was denied his statutory speedy trial right and thus barred the prosecution.<sup>166</sup>

f. Delay Attributable to the Defendant Cannot Be Used to Invoke A Speedy Trial Defense

In *Heath v. Commonwealth*,<sup>167</sup> the en banc Court of Appeals of Virginia affirmed the defendant's murder conviction and ruled that his speedy trial rights were not violated.<sup>168</sup> In this case, the defendant was charged with murder and the preliminary hearing was held in the Juvenile and Domestic Relations Court of the City of Petersburg on March 20, 1997.<sup>169</sup> A grand jury subsequently indicted Heath on September 18, 1997.<sup>170</sup> During the time in between the preliminary hearing and the grand jury indictment, the Commonwealth obtained a court order for Heath to provide a blood sample.<sup>171</sup> Shortly thereafter, the court granted the defendant's motion for a psychiatric evaluation to determine his competency.<sup>172</sup> The case was eventually scheduled for trial some fifty days past the Virginia speedy trial statute's five-month requirement.<sup>173</sup>

On Heath's initial appeal, his murder conviction was reversed, and the matter was ordered discharged for failure to comply with the five-month speedy trial limitation.<sup>174</sup> On rehearing, however, the court held that the prosecution had met its burden of showing

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163. *Id.*

164. *Id.*

165. *See id.* at 577-80, 518 S.E.2d at 839-40.

166. *Id.* at 580, 518 S.E.2d at 841.

167. 32 Va. App. 176, 526 S.E.2d 798 (Ct. App. 1999).

168. *Id.* at 183, 526 S.E.2d at 801.

169. *Id.* at 178, 526 S.E.2d at 799.

170. *Id.*

171. *Id.* at 179, 526 S.E.2d at 799.

172. *Id.*

173. *Id.* at 179, 526 S.E.2d at 799-800.

174. *Id.* at 178, 526 S.E.2d at 799 (citing VA. CODE ANN. § 19.2-243 (Repl. Vol. 2000)).

that the defendant's prosecution fell within the five-month time limit.<sup>175</sup> The Commonwealth showed that while some of the delay was due to the wait for laboratory test results, most of the delay was in connection with the continuance allowing completion of the defendant's requested psychiatric examinations.<sup>176</sup>

#### 4. The Eighth Amendment and Related Death Penalty Cases

While the Supreme Court of Virginia has denied most Eighth Amendment claims related to the death penalty, a new area of capital litigation has begun to surface—namely, questions involving the use of DNA evidence, both to exonerate the innocent and to establish guilt. DNA evidence has proven to be both a powerful weapon in the prosecutor's arsenal as well as an effective tool for defendants seeking to establish their innocence. Indeed, highly publicized cases during this past year have demonstrated the importance of DNA testing as a means to free the wrongfully convicted. Undoubtedly, issues involving DNA testing will continue to receive scrutiny by both the courts and the General Assembly in the coming years.

In *Commonwealth v. Vinson*,<sup>177</sup> for example, the Supreme Court of Virginia grappled with the question of (among other things) whether the trial court in a capital case is required to search independently for a DNA expert for a defendant.<sup>178</sup> With the advent of DNA testing, courts have been presented with thorny new legal issues. In *Vinson*, the defendant requested appointment by the court of an "independent" expert to conduct DNA analysis.<sup>179</sup> At a pre-trial hearing on his motion for such an appointment, Vinson acknowledged he was unable to locate anyone who suited his needs.<sup>180</sup> The court continued the matter until the following day

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175. *Id.* at 183, 526 S.E.2d at 801.

176. *See id.* at 182-83, 526 S.E.2d at 801.

177. 258 Va. 459, 522 S.E.2d 170 (1999), *cert. denied sub nom.* *Vinson v. Virginia*, 120 S. Ct. 2226 (2000).

178. *See id.* at 467, 522 S.E.2d at 175-76. The court also held that the defendant's warrantless arrest was lawful; that a minor error in the chain of custody regarding a blood sample did not render that evidence inadmissible; that the evidence was sufficient to support the defendant's convictions; that defendant's prior unadjudicated conduct was admissible at the penalty phase to establish future dangerousness; and that the death penalty was not itself disproportionate punishment. *Id.* at 468-72, 522 S.E.2d at 176-79.

179. *Id.* at 467, 522 S.E.2d at 175.

180. *Id.*

to allow the defendant additional time to search for an expert, explaining that his request was "somewhat vague" as to what sort of expert he was requesting.<sup>181</sup> In light of Vinson's inability either to state precisely what he sought from an expert or to find someone who suited his alleged needs, the trial court denied his motion.<sup>182</sup> The Supreme Court of Virginia agreed with the trial court's decision.<sup>183</sup> The court explained that Vinson had been granted ample time to locate a DNA expert, but had failed to do so, and, in any event, was unable to demonstrate why he would need the appointment of such an expert.<sup>184</sup> The court dismissed the defendant's additional contentions as meritless.<sup>185</sup>

In *Johnson v. Commonwealth*,<sup>186</sup> the Supreme Court of Virginia affirmed the defendant's convictions for capital murder and rape, and refused to commute his death sentence.<sup>187</sup> Here, the defendant stabbed a twenty-two-year-old woman to death.<sup>188</sup> The court rejected Johnson's claims that the death penalty was disproportionate to his crime<sup>189</sup> and that the trial court erred in admitting his inculpatory statements and certain items of testimonial and photographic evidence.<sup>190</sup> In an issue of first impression, the court also dismissed the defendant's claim that the statutes establishing the Commonwealth's DNA data bank<sup>191</sup> violate various constitutional provisions.<sup>192</sup> The court relied upon two Fourth Circuit cases that upheld the statutes against federal constitutional challenge.<sup>193</sup> The court explained that "the minor intrusion caused

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181. *Id.*

182. *Id.*

183. *Id.*

184. *See id.* at 467, 522 S.E.2d at 175-76.

185. *Id.* at 467-72, 522 S.E.2d at 176-79.

186. 259 Va. 654, 529 S.E.2d 769 (2000).

187. *Id.* at 684, 529 S.E.2d at 786.

188. *Id.* at 662-63, 529 S.E.2d at 773-74.

189. *Id.* at 683-84, 529 S.E.2d at 786.

190. *Id.* at 670-71, 675-81, 529 S.E.2d at 778-79, 781-85.

191. VA. CODE ANN. §§ 19.2-310.2 to -310.7 (Repl. Vol. 2000).

192. *Johnson*, 259 Va. at 671-72, 529 S.E.2d at 779-80.

193. *See id.* at 672, 529 S.E.2d at 779 (discussing *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), *cert. denied*, 511 U.S. 1111 (1994), and *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992)). In *Jones*, the Fourth Circuit concluded that the procurement of a blood sample for DNA analysis from a convicted felon under Virginia Code section 19.2-310.2 does not violate the Fourth Amendment guarantee against unreasonable searches and seizures. 962 F.2d at 307. In *Ewell*, the Fourth Circuit held that Virginia Code section 19.2-310.2 does not violate the Ex Post Facto Clause of the Fifth Amendment. 11 F.3d at 484.

by the taking of a blood sample is outweighed by Virginia's interest . . . in determining inmates' 'identification characteristics specific to the person' for improved law enforcement."<sup>194</sup> The court expressly held that this reasoning was "equally applicable to the guarantee against unreasonable searches and seizures set forth in Article I, Section 10 of the Constitution of Virginia."<sup>195</sup>

The court further rejected Johnson's claim that the Commonwealth's recently enacted DNA statutes violated Article I, Section 8 of the Constitution of Virginia, which forbids compelled self-incrimination.<sup>196</sup> The court declared that "[t]he taking of a blood sample does not implicate any rights against self-incrimination, because such an act is not testimonial or communicative in nature."<sup>197</sup> Nor, the court declared, did the DNA statutes in any way violate the Eighth Amendment guarantee against cruel and unusual punishment, or the parallel right secured by Article 1, Section 9 of the Constitution of Virginia, because "[t]he DNA statutes are not penal in nature."<sup>198</sup> Similarly, the court rejected Johnson's contention either that the DNA statutes violate the federal constitutional due process right or the roughly parallel provision found in Article I, Section 11 of the Constitution of Virginia, or "that the DNA statutes are arbitrary and unreliable, fail to establish meaningful restrictions on the seizure and dissemination of DNA material, and constitute an 'improper delegation of [legislative] powers.'"<sup>199</sup>

#### b. Lesser-Included Charges in a Capital Prosecution

In *Orbe v. Commonwealth*,<sup>200</sup> the defendant was convicted of four charges in connection with a murder during the commission of a robbery.<sup>201</sup> On appeal, the defendant challenged the trial

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194. *Johnson*, 259 Va. at 672, 529 S.E.2d at 779 (quoting *Jones*, 962 F.2d at 307) (internal quotations omitted) (alteration in original).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 673, 529 S.E.2d at 780 (alteration in original).

200. 258 Va. 390, 519 S.E.2d 808 (1999), *cert. denied*, 120 S. Ct. 1970 (2000).

201. *Id.* at 393, 519 S.E.2d at 809. Those convictions were: (1) capital murder, in violation of Virginia Code section 18.2-31(4); (2) use or display of a firearm while committing murder, in violation of Virginia Code section 18.2-53.1; (3) robbery, in violation of Virginia Code section 18.2-58; and (4) use or display of a firearm while committing robbery, in violation of Virginia Code section 18.2-53.1. *Id.*

court's refusal to instruct the jury on lesser-included offenses, the finding of future dangerousness based on consideration of unadjudicated criminal acts, the admission of certain photographic evidence, and the court's refusal to permit the defendant to mail a questionnaire to each prospective juror.<sup>202</sup>

The Supreme Court of Virginia rejected each of the defendant's contentions.<sup>203</sup> The court explained that "[i]t is well-established in Virginia that jury instructions 'are proper only if supported by the evidence, and that more than a scintilla of evidence is necessary to support a lesser-included offense instruction requested by the defendant.'"<sup>204</sup> The court could find no evidence supporting the defendant's requested instructions.<sup>205</sup> By contrast, in light of the defendant's numerous criminal acts following the murder, the court had little trouble determining that sufficient evidence existed to establish the defendant's potential dangerousness.<sup>206</sup> The court also found no error in the decision to admit the photographic evidence or the trial court's refusal to permit the defendant to mail a questionnaire to each prospective juror, noting that "[t]he manner in which voir dire is conducted lies within the trial court's discretion."<sup>207</sup> Finally, the court rejected as without merit the defendant's contention that the death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors, or was in any way disproportionate to the crime.<sup>208</sup>

### c. Unadjudicated Acts to Prove Future Dangerousness

In *Bailey v. Commonwealth*,<sup>209</sup> the Supreme Court of Virginia affirmed the defendant's capital sentence for murdering his wife and two-year-old son.<sup>210</sup> The court rejected, as moot, the defendant's contentions that the Commonwealth could not use unadjudicated criminal conduct to prove future dangerousness.<sup>211</sup> The

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202. *Id.* at 393-94, 519 S.E.2d at 810.

203. *Id.*

204. *Id.* at 398, 519 S.E.2d at 813 (quoting *Commonwealth v. Donkor*, 256 Va. 443, 445, 507 S.E.2d 75, 76 (1998)).

205. *See id.* at 399, 519 S.E.2d at 813.

206. *See id.* at 400-01, 519 S.E.2d at 813-14.

207. *Id.* at 403, 519 S.E.2d at 815.

208. *Id.* at 403-05, 519 S.E.2d at 816-17.

209. 259 Va. 723, 529 S.E.2d 570 (2000).

210. *Id.* at 751, 529 S.E.2d at 586-87.

211. *Id.* at 736, 529 S.E.2d at 577.

court further ruled that the trial court did not err in admitting photographs of the deceased and the crime scene, in declining to appoint an "expert investigator," or in refusing to suppress his inculpatory statements to police.<sup>212</sup> Finally, the court held that the death sentence was neither disproportionate to his crimes, nor imposed under the influence of passion, prejudice, or any other arbitrary factors.<sup>213</sup>

## B. *Substantive Criminal Law*

### 1. Legal Excuse is Personal to the Actor Invoking It

In *Taylor v. Commonwealth*,<sup>214</sup> the Court of Appeals of Virginia, sitting en banc, affirmed the defendant's conviction for being a principal in the second degree in the abduction of her boyfriend's child.<sup>215</sup> Taylor argued that because her boyfriend was the child's biological father, he was legally excused from criminal liability in the abduction.<sup>216</sup> In effect, Taylor averred that under the statute, a biological parent could not abduct his child.<sup>217</sup> If he were legally excused, she argued, it would be impossible to convict her as a principal in the second degree.<sup>218</sup>

The court held that the father did not have a legal excuse to take the child, and thus the evidence at trial was sufficient to find Taylor guilty of being a principle in the second degree.<sup>219</sup> Even if the child's father possessed a legal excuse for taking the child, the court explained that "[e]xcuses, in contrast [to justifications], are always personal to the actor."<sup>220</sup> Based on this principle, even if the father had a legal excuse to take the child, that defense would not extend to protect Taylor's actions as a principal in the second degree.<sup>221</sup>

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212. *Id.* at 737-39, 745-46, 529 S.E.2d at 578-79, 582-83.

213. *Id.* at 750-51, 529 S.E.2d at 586.

214. 31 Va. App. 54, 521 S.E.2d 293 (Ct. App. 1999).

215. *Id.* at 56-57, 521 S.E.2d at 294.

216. *Id.*

217. *Id.*

218. *Id.* at 59, 521 S.E.2d at 295.

219. *Id.* at 64-65, 521 S.E.2d at 298.

220. *Id.* at 63, 521 S.E.2d at 297 (quoting GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 762 (1978) (alteration in original)).

221. *Id.* at 63-64, 521 S.E.2d at 297.

## 2. Criminal Negligence

In *Conrad v. Commonwealth*,<sup>222</sup> the Court of Appeals of Virginia, sitting en banc, held that the evidence adduced at trial supported a finding of criminal negligence arising from the defendant's falling asleep at the wheel of an automobile and striking and killing a pedestrian.<sup>223</sup> Here, the fact that the defendant admitted that he had worked the day before the accident, had been awake the entire night, and knew he was falling asleep while driving, but continued on because he was close to home, was sufficient to show that he was operating the motor vehicle with a "reckless disregard for human life."<sup>224</sup> The en banc court thus held that the evidence was plainly sufficient to support the conviction.<sup>225</sup>

## 3. Brandishing a Firearm in Defense of Property

In *Commonwealth v. Alexander*,<sup>226</sup> the defendant was convicted of brandishing a firearm when he threatened the victim with an unloaded rifle while the victim was attempting to repossess the defendant's vehicle.<sup>227</sup> The trial judge refused to grant the defendant's requested instruction that would have directed the jury to acquit if it felt he had brandished the weapon because he thought it was reasonably necessary to protect his property.<sup>228</sup> The Court of Appeals of Virginia reversed the decision of the trial court, finding that it had erred by refusing to instruct the jury on the law of the defense of personal property.<sup>229</sup>

The Supreme Court of Virginia, however, reversed, explaining that it is unlawful to use deadly force unless it is done to save "life or limb, or prevent a great crime, or to accomplish a neces-

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222. 31 Va. App. 113, 521 S.E.2d 321 (Ct. App. 1999).

223. *Id.* at 124, 521 S.E.2d at 327. In a related case, *Hall v. Commonwealth*, 32 Va. App. 616, 529 S.E.2d 829 (Ct. App. 2000), the Court of Appeals of Virginia, sitting en banc, affirmed the defendant's conviction for aggravated involuntary manslaughter resulting from an automobile accident wherein the defendant was driving under the influence of alcohol, and found harmless any inadvertent errors committed at trial. *Id.* at 637, 529 S.E.2d at 839.

224. *Conrad*, 31 Va. App. at 124, 521 S.E.2d at 327.

225. *Id.*

226. 260 Va. 238, 531 S.E.2d 567 (2000).

227. *Id.* at 239-40, 531 S.E.2d at 567-68.

228. *Id.* at 240, 531 S.E.2d at 568.

229. *Id.* at 240-41, 531 S.E.2d at 568.



sary public duty.”<sup>230</sup> The court disagreed with the defendant’s contention that this rule does not apply when there is a mere *threat* to use deadly force.<sup>231</sup> Explaining that this would have the effect of undoing the basic principle that one is not justified in using deadly force to defend property, the supreme court ordered the case remanded for reinstatement of the original sentencing order.<sup>232</sup>

#### 4. Assault on an Off-Duty Police Officer

In *Oulds v. Commonwealth*,<sup>233</sup> the Supreme Court of Virginia affirmed a court of appeals decision that upheld the defendant’s conviction for assault and battery on a law enforcement officer.<sup>234</sup> In this case, a Lynchburg police officer was providing security for a local mall during his off-duty hours.<sup>235</sup> During a routine arrest on mall property, the defendant assaulted the officer, and was thus subsequently charged with assault and battery on a law enforcement officer.<sup>236</sup> The supreme court held that the trial court did not err in taking judicial notice of a city ordinance authorizing police officers to use their police powers during off-duty employment, and thus affirmed the defendant’s conviction for assault and battery on a law enforcement officer.<sup>237</sup>

#### 5. Mental Illness and Continued Involuntary Commitment

The Supreme Court of Virginia, in *Mercer v. Commonwealth*,<sup>238</sup> affirmed a trial court’s determination that the defendant was not entitled to conditional release after having been acquitted of criminal charges by reason of insanity.<sup>239</sup> The trial court ordered Mercer to remain confined because she was in need of inpatient hospitalization and was determined to present an undue risk to public safety.<sup>240</sup>

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230. *Id.* at 241, 531 S.E.2d at 568 (citing *State v. Morgan*, 25 N.C. 186, 193 (1842)).

231. *Id.*

232. *Id.* at 242, 531 S.E.2d at 569.

233. 260 Va. 210, 532 S.E.2d 33 (2000).

234. *Id.* at 211-12, 246, 532 S.E.2d at 34, 36.

235. *Id.* at 212, 532 S.E.2d at 34.

236. *Id.* at 211, 532 S.E.2d at 34. Virginia Code section 18.2-57 makes assault and battery on a law enforcement officer a crime. VA. CODE ANN. § 18.2-57 (Repl. Vol. 1996 & Cum. Supp. 2000).

237. *Oulds*, 260 Va. at 213-14, 532 S.E.2d at 35-36.

238. 259 Va. 235, 523 S.E.2d 213 (2000).

239. *Id.* at 243, 523 S.E.2d at 217.

240. *Id.* at 239, 523 S.E.2d at 215.

Here, the defendant was found not guilty by reason of insanity on charges stemming from a carjacking.<sup>241</sup> Shortly thereafter, the trial court remanded Mercer to the custody of the Commissioner of the Department of Mental Health, Mental Retardation and Substance Abuse Services.<sup>242</sup> The court initially released the defendant, but following a thirty-day inpatient evaluation, ordered her recommitted.<sup>243</sup> At a subsequent hearing to determine if Mercer needed inpatient hospitalization, the court heard expert testimony from two witnesses who, while concluding that the defendant suffered from antisocial personality disorder and polysubstance dependence,<sup>244</sup> disagreed as to whether those conditions fell within the definition of a "mental illness" as defined by Virginia law.<sup>245</sup> After hearing the testimony of both experts, the trial court found that the defendant suffered from mental illness because of her history of drug abuse.<sup>246</sup> Based upon this evidence of mental illness, the court determined the defendant did not meet the criteria for release because she posed a threat to others and was highly likely to violate her release conditions.<sup>247</sup> The court, therefore, ordered the defendant to remain involuntarily confined.<sup>248</sup>

On appeal, Mercer argued that her diagnosed conditions were not "mental illnesses," and thus the court erred by ordering her continued commitment.<sup>249</sup> The court, however, noted that, in *Kansas v. Hendricks*,<sup>250</sup> the United States Supreme Court held that it had never "required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes."<sup>251</sup> Thus, the court held that the determination of whether a person was mentally ill was a question of fact for the trial court to determine.<sup>252</sup> The court, consequently, ruled that the trial court had properly

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241. *Id.* at 238, 523 S.E.2d at 214.

242. *Id.*; see also VA. CODE ANN. § 19.2-182.2 (Repl. Vol. 2000) (providing in pertinent part, that a person acquitted by reason of insanity shall be placed in the temporary custody of the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services "for evaluation as to whether the acquittee may be released with or without conditions or requires commitment").

243. *Mercer*, 259 Va. at 238, 523 S.E.2d at 214.

244. *Id.*

245. *Id.*; see also VA. CODE ANN. § 37.1-1 (Repl. Vol. 1996 & Cum. Supp. 2000).

246. *Mercer*, 259 Va. at 239, 523 S.E.2d at 215.

247. *Id.*

248. *Id.*

249. *Id.* at 239-40, 523 S.E.2d at 215.

250. 521 U.S. 346 (1997).

251. *Mercer*, 259 Va. at 242, 523 S.E.2d at 216 (quoting *Hendricks*, 521 U.S. at 359).

252. *Id.* at 242, 523 S.E.2d at 216.

made its determination and thus affirmed the lower court's decision.<sup>253</sup>

### C. Evidence

#### 1. Prior Acts Evidence

In *Medici v. Commonwealth*,<sup>254</sup> the Supreme Court of Virginia reversed the Court of Appeals of Virginia decision upholding the defendant's convictions for various sex offenses.<sup>255</sup> Medici alleged that the trial court erred when it refused to strike a juror for cause who had admitted that her husband had been murdered and the defendant in that case was represented by the same attorney as Medici.<sup>256</sup> Pursuant to *Cantrell v. Crews*,<sup>257</sup> the supreme court found that the trial court committed reversible error by not striking the juror for cause.<sup>258</sup>

In addition, Medici argued that the trial court erred when it admitted evidence of his prior California rape convictions.<sup>259</sup> Admission of this evidence, he contended, violated the Fourteenth Amendment's due process guarantee.<sup>260</sup> The court, however, held that "due process does not require that an accused be given a bifurcated trial when he is charged under a statute authorizing enhanced punishment for repeating offenders."<sup>261</sup> The court explained that the trial court specifically instructed the jury that the defendant's prior convictions were for proof of prior conviction only, and not "proof that [Medici] committed the offenses to which he is charged."<sup>262</sup>

The defendant also argued that the trial court erred by admitting the California rape convictions because the California statute allowed a conviction for some acts that were not specified in the

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253. *Id.* at 243, 523 S.E.2d at 217.

254. 260 Va. 223, 532 S.E.2d 28 (2000).

255. *Id.* at 231, 532 S.E.2d at 33.

256. *Id.* at 226, 532 S.E.2d at 30.

257. 259 Va. 47, 50, 523 S.E.2d 502, 503 (2000) (holding that the trial court erred by not striking a juror who was a client of the plaintiff's firm).

258. *Medici*, 260 Va. at 227, 532 S.E.2d at 31.

259. *Id.* at 227-28, 532 S.E.2d at 31.

260. *Id.* at 228, 532 S.E.2d at 31.

261. *Id.* at 228-29, 532 S.E.2d at 31 (quoting *Brown v. Commonwealth*, 226 Va. 56, 59, 307 S.E.2d 239, 241 (1983)).

262. *Id.* at 229, 532 S.E.2d at 31-32 (alteration in original).

Virginia statute.<sup>263</sup> The court disagreed, and held that the Virginia statute allowed for the admission of other State convictions for crimes that were "substantially similar" and that the California offenses met that criterion.<sup>264</sup>

In *Turner v. Commonwealth*,<sup>265</sup> the Supreme Court of Virginia affirmed the denial of the defendant's petition for appeal by the Court of Appeals of Virginia.<sup>266</sup> Here, the defendant was convicted of abducting a seventeen-year-old female from a mall parking lot and raping and sodomizing her.<sup>267</sup> Turner was matched to the crime by DNA evidence on file because he had been convicted of two prior rapes.<sup>268</sup> Over the defendant's objections, the trial court permitted the Commonwealth to introduce evidence of these earlier rapes because of their similarity to the present crime.<sup>269</sup>

On appeal, Turner argued that the prior crimes should not have been admitted because these offenses were dissimilar to the present crimes and, moreover, that too much time had passed between the commission of the previous offenses and the present criminal acts.<sup>270</sup> The court nevertheless held that when seeking to introduce prior acts to establish a *modus operandi*, the evidence does not have to be so exact as to represent a "signature;" it just has to bear a "singular strong resemblance to the pattern of the offense charged."<sup>271</sup> Because the Commonwealth had shown a "strong resemblance" between the earlier offense and the present crime, the court found the prior acts admissible.<sup>272</sup>

The court also held that, although the length of time between a prior act and a present offense may have an effect on the admissibility of evidence, the case at bar was not one in which the evidence was stale.<sup>273</sup> The court noted that during the majority of

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263. *Id.* at 229, 532 S.E.2d at 32.

264. *Id.* at 230, 532 S.E.2d at 32 (quoting VA. CODE ANN. § 18.2-67.5:3(C) (Repl. Vol. 1996)).

265. 259 Va. 645, 529 S.E.2d 787 (2000).

266. *Id.* at 653, 529 S.E.2d at 792.

267. *Id.* at 648, 529 S.E.2d at 789.

268. *Id.* at 649, 529 S.E.2d at 789.

269. *Id.* at 650-52, 529 S.E.2d at 790-91.

270. *Id.* at 650, 529 S.E.2d at 790.

271. *Id.* at 651, 529 S.E.2d at 791 (quoting *Chichester v. Commonwealth*, 248 Va. 311, 326-27, 488 S.E.2d 638, 649 (1994)).

272. *Id.*

273. *Id.* at 652-53, 529 S.E.2d at 791-92.

time between the prior offenses and the present acts, Turner had been incarcerated for those earlier crimes.<sup>274</sup> This interposition of prison time prevented the prior acts from being too remote to have probative value.<sup>275</sup>

## 2. The Admission of Prior-Crimes Evidence Was Not Harmless Error

In *Cooper v. Commonwealth*,<sup>276</sup> the police arrested the defendant for possession of an imitation controlled substance with the intent to distribute.<sup>277</sup> The officer asked the defendant if the substance was "demo," street-slang for fake cocaine, and the defendant replied "you know it."<sup>278</sup> During the resulting trial for possession of an imitation controlled substance with the intent to distribute, the Commonwealth introduced evidence that two months earlier, the defendant had sold imitation cocaine to an undercover state trooper.<sup>279</sup> The Commonwealth argued that the introduction of the prior sale was proper because it helped to prove "motive, intent, or knowledge" of the defendant and was a proper exception to the normal rule that evidence of other crimes is generally inadmissible to prove guilt.<sup>280</sup> The Court of Appeals of Virginia, however, sitting en banc, reasoned that there needed to be a clear nexus between the two events for the evidence of prior crimes to be admitted into evidence,<sup>281</sup> and held that the required nexus between the defendant's arrest and the prior alleged sale to an undercover police officer did not exist.<sup>282</sup> As the admission of this prior act was not harmless error, the court reversed and remanded the case.<sup>283</sup>

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274. *Id.*

275. *Id.*

276. 31 Va. App. 643, 525 S.E.2d 72 (Ct. App. 2000).

277. *Id.* at 646, 525 S.E.2d at 73.

278. *Id.*

279. *Id.* at 647, 525 S.E.2d at 74.

280. *Id.* at 648, 525 S.E.2d at 74 (quoting *Guill v. Commonwealth*, 255 Va. 134, 138, 495 S.E.2d 489, 491 (1998)).

281. *Id.* (citing *Hill v. Commonwealth*, 17 Va. App. 480, 486, 438 S.E.2d 296, 300 (1993)).

282. *Id.* at 648-49, 525 S.E.2d at 74-75.

283. *Id.* at 650-51, 525 S.E.2d at 75-76.

### 3. The Availability of Non-Testifying Witnesses

In *Paden v. Commonwealth*,<sup>284</sup> the Supreme Court of Virginia overturned the defendant's robbery conviction.<sup>285</sup> Paden was one of three men tried together for the robbery of a movie theater.<sup>286</sup> During the trial, the judge permitted a police investigator to testify about statements made to him by one of Paden's co-defendants.<sup>287</sup> Paden objected to that testimony as hearsay.<sup>288</sup> The Commonwealth argued that the statements were admissible under a hearsay exception that permits the introduction of such a statement at trial if (among other things) the declarant was unable to testify.<sup>289</sup> The defendant argued that because a co-defendant, who was present at a trial, made the statement, the declarant was available; hence, the statement was inadmissible.<sup>290</sup> The supreme court agreed, holding that unless and until the co-defendant invoked his privilege against self-incrimination, he was still available to testify.<sup>291</sup> The statement thus should not have been admitted, the court reasoned, until the declarant actually exercised his privilege.<sup>292</sup>

### 4. Unavailable Declarant and the Admission of Prior Testimony

In *Longshore v. Commonwealth*,<sup>293</sup> the trial court allowed the Commonwealth to introduce the preliminary hearing testimony of a witness who was unavailable at trial.<sup>294</sup> During the preliminary hearing, the defendant questioned the witness.<sup>295</sup> Before the defendant's trial, the Commonwealth issued a summons for the witness to appear, but he was never served with the witness subpoena and, thus, did not appear at trial.<sup>296</sup> Over the defendant's

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284. 259 Va. 595, 529 S.E.2d 792 (2000).

285. *Id.* at 596, 529 S.E.2d at 792.

286. *Id.* at 596, 529 S.E.2d at 793.

287. *Id.*

288. *Id.*

289. *Id.* (citing *Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978)).

290. *Id.*

291. *Id.* at 597, 529 S.E.2d at 793.

292. *Id.*

293. 260 Va. 3, 530 S.E.2d 146 (2000).

294. *Id.* at 3, 530 S.E.2d at 146.

295. *Id.*

296. *Id.*

objection, the trial court admitted the witness's preliminary hearing testimony into evidence.<sup>297</sup> The defendant was subsequently convicted of robbery.<sup>298</sup> The Supreme Court of Virginia affirmed, explaining that the defendant had full opportunity to examine the witness at the preliminary hearing and that, as it was made during a judicial proceeding, the challenged testimony was sufficiently reliable to admit at trial.<sup>299</sup>

## 5. Evidentiary Sufficiency

### a. Narcotics Possession

The Court of Appeals of Virginia, sitting en banc, held in *McNair v. Commonwealth*,<sup>300</sup> that although the defendant had consented to the police officers' search of his apartment, the evidence was insufficient to support a conviction for cocaine possession.<sup>301</sup> In that case, defendant McNair was convicted of cocaine possession after the trial court denied his suppression motion.<sup>302</sup> A divided panel of the court of appeals affirmed the trial judge's rulings,<sup>303</sup> and the court subsequently granted the defendant's motion for en banc rehearing.<sup>304</sup>

The facts adduced at trial showed that police officers responded to a report that a robbery was in progress in McNair's apartment.<sup>305</sup> McNair informed the officers he believed the robbers remained inside his apartment.<sup>306</sup> Acting at McNair's request, two officers searched the apartment.<sup>307</sup> During their search, the officers discovered a glass test tube lying in plain view on the defendant's bedroom floor.<sup>308</sup> The tube contained a white substance, subsequently determined to be crack.<sup>309</sup> When asked about the

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297. *Id.*

298. *Longshore v. Commonwealth*, 1999 Va. App. LEXIS 431, at \*1 (Ct. App. July 13, 1999).

299. *Longshore*, 260 Va. at 4, 530 S.E.2d at 147.

300. 31 Va. App. 76, 521 S.E.2d 303 (Ct. App. 1999).

301. *Id.* at 80, 521 S.E.2d at 305.

302. *Id.*

303. *McNair v. Commonwealth*, 29 Va. App. 559, 513 S.E.2d 866 (Ct. App. 1999).

304. *See McNair v. Commonwealth*, 30 Va. App. 84, 515 S.E.2d 348 (Ct. App. 1999).

305. *McNair*, 31 Va. App. at 80, 521 S.E.2d at 305.

306. *Id.*

307. *Id.* at 80, 521 S.E.2d at 305-06.

308. *Id.* at 81, 521 S.E.2d at 306.

309. *Id.*

test tube, McNair explained that the intruders must have dropped it during the robbery.<sup>310</sup>

The court of appeals concluded that the apartment search was lawful, as McNair had asked the officers to search his apartment.<sup>311</sup> Although the court upheld the search's legality, it ruled that merely finding the test tube containing the crack on the defendant's bedroom floor—given the unusual circumstances of the robbery—was insufficient evidence from which to conclude that McNair, and not the alleged robbers, possessed the cocaine.<sup>312</sup> Indeed, McNair's bedroom was in considerable disarray, evidencing that someone, presumably the would-be robbers, had searched for something.<sup>313</sup> Given that the police discovered no other evidence of illegal narcotics activity, and McNair denied ownership of the drugs, the mere presence of the test tube was insufficient evidence to support a conviction.<sup>314</sup>

#### b. Arson Prosecutions

In *Hickson v. Commonwealth*,<sup>315</sup> the Supreme Court of Virginia found the evidence, largely circumstantial in nature, insufficient to convict the defendant of arson.<sup>316</sup> Although the supreme court noted that “[a]rson is a crime of stealth” and “[t]he proof is often necessarily circumstantial,”<sup>317</sup> it concluded that the Commonwealth did not provide an unbroken evidentiary chain that linked the defendant to the crime.<sup>318</sup>

#### c. Malicious Wounding

In *Commonwealth v. Smith*,<sup>319</sup> the Supreme Court of Virginia affirmed the Court of Appeals of Virginia decision to overturn the

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310. *Id.*

311. *Id.* at 82-85, 521 S.E.2d at 306-08.

312. *Id.* at 85-88, 521 S.E.2d at 308-09.

313. *Id.* at 87, 521 S.E.2d at 309.

314. *Id.* at 87-88, 521 S.E.2d at 309.

315. 258 Va. 383, 520 S.E.2d 643 (1999).

316. *Id.* at 385, 520 S.E.2d at 644.

317. *Id.* at 387, 520 S.E.2d at 645 (citing *Cook v. Commonwealth*, 226 Va. 427, 432, 309 S.E.2d 325, 329 (1983)).

318. *Id.* at 388, 520 S.E.2d at 645 (citing *Bishop v. Commonwealth*, 227 Va. 164, 169, 313 S.E.2d 390, 393 (1984)).

319. 259 Va. 780, 529 S.E.2d 78 (2000).



defendant's conviction for malicious wounding.<sup>320</sup> In *Smith*, the victim and the defendant became involved in an altercation.<sup>321</sup> Although the victim was stabbed, not merely beaten, he admitted that he did not see the defendant in possession of any weapons and that he could not testify as to whether the defendant had done anything other than punch or hit him.<sup>322</sup> The court noted that the victim never saw a weapon and could only indicate that some of the stab wounds were in the area where Smith struck him.<sup>323</sup> Because the evidence presented by the Commonwealth could not rule out other rational hypotheses for the victim's wounds, the court affirmed the court of appeals decision to reverse the conviction, explaining that "the evidence raises no more than a suspicion of Smith's guilt."<sup>324</sup>

## 2. Evidentiary Sufficiency and Witness Credibility

In *Phan v. Commonwealth*,<sup>325</sup> the Supreme Court of Virginia upheld the defendant's convictions for first-degree murder, malicious wounding, and two counts of use of a firearm in commission of a felony.<sup>326</sup> Although the defendant challenged the sufficiency of the testimony against him and offered his own alibi witnesses, the court held that the jury properly weighed the witnesses' credibility and, while no single witness could positively identify the defendant as the murderer, "the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion of guilt."<sup>327</sup>

## 3. Admissibility of Expert Testimony in Support of a Self-Defense Claim

In *Peebles v. Commonwealth*,<sup>328</sup> the Court of Appeals of Vir-

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320. *Id.* at 784, 529 S.E.2d at 79.

321. *Id.* at 782, 529 S.E.2d at 78.

322. *Id.* at 782, 529 S.E.2d at 78-79.

323. *Id.* at 783, 529 S.E.2d at 79.

324. *Id.* at 784, 529 S.E.2d at 79 (quoting *Smith v. Commonwealth*, 1999 Va. App. LEXIS 148, at \*4 (Ct. App. Mar. 2, 1999) (unpublished decision)).

325. 258 Va. 506, 521 S.E.2d 282 (1999).

326. *Id.* at 510, 521 S.E.2d at 284.

327. *Id.* at 514, 521 S.E.2d at 286 (quoting *Stamper v. Commonwealth*, 220 Va. 260, 273, 257 S.E.2d 808, 818 (1979) (internal quotations omitted)).

328. 30 Va. App. 626, 519 S.E.2d 382 (Ct. App. 1999).

ginia, sitting en banc, affirmed the defendant's convictions for aggravated malicious wounding and use of a firearm in commission of a felony.<sup>329</sup> Here, the defendant shot the victim several times, but claimed the shooting was in self-defense and in the heat of passion.<sup>330</sup> At trial, defendant Peeples offered that a psychologist would testify that he was mildly mentally retarded and had difficulty correctly interpreting social situations, and thus tended to react inappropriately.<sup>331</sup> Such expert testimony, Peeples contended, would demonstrate that his actions were in fact a result of his mental disabilities.<sup>332</sup> The trial court nonetheless granted the prosecution's motion to exclude the expert testimony from the trial's guilt phase.<sup>333</sup>

The court of appeals held that because there was insufficient evidence to establish the self-defense or heat-of-passion defenses, the expert's opinion in aid of those defenses was properly excluded.<sup>334</sup> The court further held that in the absence of an insanity defense, the criminal defendant's mental state at the time of the offense was irrelevant to the issue of guilt.<sup>335</sup>

#### D. *Juvenile Crime Issues*

##### 1. Parental Notice of Court Proceedings

In *Moore v. Commonwealth*,<sup>336</sup> the Supreme Court of Virginia reversed the defendant's convictions on two counts of murder and the use of a firearm in commission of those crimes.<sup>337</sup> The defendant, a juvenile, was tried as an adult for murder.<sup>338</sup> The original charges were filed in the Loudoun County Juvenile and Domestic Relations District Court but, after a transfer hearing, were transferred to circuit court.<sup>339</sup> Virginia Code sections 16.1-263 and

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329. *Id.* at 628, 519 S.E.2d at 383.

330. *Id.* at 629-30, 519 S.E.2d at 383-84.

331. *Id.* at 629-30, 519 S.E.2d at 383.

332. *Id.* at 630, 519 S.E.2d at 383-84.

333. *Id.* at 629-30, 519 S.E.2d at 383.

334. *Id.* at 634-35, 519 S.E.2d at 385-86.

335. *Id.* at 634, 519 S.E.2d at 385.

336. 259 Va. 431, 527 S.E.2d 406 (2000).

337. *Id.* at 434, 527 S.E.2d at 407.

338. *Id.* at 435, 527 S.E.2d at 407-08.

339. *Id.*

16.1-264, in effect at the time the defendant was tried, required the notification of *both* parents whenever proceedings were initiated against a juvenile.<sup>340</sup> Although the defendant's mother was summoned to appear in juvenile court, his biological father was not notified.<sup>341</sup> The juvenile court made no certification in the record that the identity of the defendant's father was not reasonably ascertainable.<sup>342</sup> In fact, the defendant's biological father's name and city of residence were available in a social history report filed by a juvenile probation counselor.<sup>343</sup> The defendant's counsel, however, raised no objection to the defect in the juvenile court proceedings and did not raise the issue of the failure to give notice to the defendant's father in the Court of Appeals of Virginia.<sup>344</sup>

The supreme court reversed and remanded, holding that the requirement of parental notice was mandatory, the defect was not waivable, and, therefore, the juvenile court never acquired subject matter jurisdiction over the offense charged.<sup>345</sup> The court explained that if the Commonwealth sought to try the defendant again, he would have to be tried as an adult, because he had reached the age of majority.<sup>346</sup>

## 2. Establishment of Custodial Relationships

In *DeAmicis v. Commonwealth*,<sup>347</sup> the Court of Appeals of Virginia, sitting en banc, affirmed the defendant's convictions for taking indecent liberties with a minor and for contributing to the delinquency of a minor.<sup>348</sup> On the initial appeal, a panel of the court of appeals affirmed the defendant's conviction for taking indecent liberties with a minor, but reversed his other conviction.<sup>349</sup>

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340. VA. CODE ANN. §§ 16.1-263, -264 (Repl. Vol. 1999).

341. *Moore*, 259 Va. at 435, 527 S.E.2d at 407.

342. *Id.* at 436, 527 S.E.2d at 408.

343. *Id.* at 434-35, 527 S.E.2d at 407.

344. *Id.* at 435, 527 S.E.2d at 407.

345. *Id.* at 436-40, 527 S.E.2d at 408-11.

346. *Id.* at 440-41, 527 S.E.2d at 411.

347. 31 Va. App. 437, 524 S.E.2d 151 (Ct. App. 2000).

348. *Id.* at 439-40, 524 S.E.2d at 152. Virginia Code sections 18.2-370.1 and 18.2-371 define the crimes of taking indecent liberties with a minor and contributing to the delinquency of a minor. VA. CODE ANN. §§ 18.2-370.1, -371 (Repl. Vol. 1996 & Cum. Supp. 2000).

349. *DeAmicis v. Commonwealth*, 29 Va. App. 751, 514 S.E.2d 788 (Ct. App. 1999).

The Commonwealth petitioned for a rehearing en banc, and the en banc court affirmed both convictions.<sup>350</sup>

The victim's mother took her child to the defendant, who was allegedly a licensed counselor, because the child was having serious difficulties in school.<sup>351</sup> In a seemingly bizarre twist, the defendant informed the victim's mother that he was going to have the victim model for him and he would photograph her.<sup>352</sup> The defendant, over the course of several months, photographed the juvenile victim in various states of undress.<sup>353</sup> The victim's mother discovered the photos and turned them over to the authorities.<sup>354</sup>

The defendant challenged the sufficiency of the evidence that established a custodial or supervisory relationship between himself and the victim that was legally necessary to support the felony conviction.<sup>355</sup> The court held that the mother of the victim entrusted control and custody of the child to the defendant, thus fulfilling the statutory requirement.<sup>356</sup> The defendant further argued that his conduct never put the child in danger—a prerequisite for a child in need of services.<sup>357</sup> The court found, however, that Virginia Code section 18.2-371 declares that a child who is abused or neglected is in need of services.<sup>358</sup> The court held that the defendant's felonious conduct with respect to the child fulfilled the abuse or neglect requirement, and thus affirmed both of the defendant's convictions.<sup>359</sup>

### E. *Jury Instructions*

#### 1. Abolition of Parole and the Possibility of Geriatric Release

In *Fishback v. Commonwealth*,<sup>360</sup> the Supreme Court of Virginia reversed and remanded a Court of Appeals of Virginia deci-

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350. *DeAmicis*, 31 Va. App. at 440, 514 S.E.2d at 152.

351. *Id.* at 440-41, 514 S.E.2d at 152.

352. *Id.* at 441, 514 S.E.2d at 152-53.

353. *Id.* at 442, 514 S.E.2d at 153.

354. *Id.*

355. *Id.* at 442-43, 514 S.E.2d at 153.

356. *Id.* at 443-44, 514 S.E.2d at 154.

357. *Id.* at 444, 514 S.E.2d at 154.

358. *Id.* at 444-45, 514 S.E.2d at 154-55.

359. *Id.* at 445, 514 S.E.2d at 155.

360. 260 Va. 104, 532 S.E.2d 629 (2000).

sion<sup>361</sup> that denied the defendant a jury instruction that would have explained the abolition of parole under Virginia Code section 53.1-165.1 for non-capital felonies committed after January 1, 1995.<sup>362</sup> The supreme court held that the trial court should have granted the defendant both this jury instruction and also an instruction that would have informed jurors of the possibility of the defendant's geriatric release pursuant to Virginia Code section 53.1-40.01.<sup>363</sup> Similarly, the court ruled that the jury was entitled to be instructed about the possibility of good-time credits that can allow a defendant to reduce her sentence by as much as fifteen percent.<sup>364</sup>

This decision is significant in that it overruled, in part, the supreme court's earlier decision in *Yarbrough v. Commonwealth*,<sup>365</sup> which held that, although a defendant in a capital murder trial was entitled to a jury instruction that the defendant was parole-ineligible, a defendant charged with a non-capital felony was not.<sup>366</sup> Similarly, the court modified its decision in *Coward v. Commonwealth*<sup>367</sup> to the extent that it held that the jury should be instructed about the possibility of geriatric release.<sup>368</sup>

Interestingly, issues surrounding jury instructions regarding parole eligibility were considered only months before in *Yarbrough*, which was partially modified by *Fishback*.<sup>369</sup> In *Yarbrough*, the Supreme Court of Virginia affirmed the defendant's capital murder and robbery convictions, but vacated and remanded for re-sentencing.<sup>370</sup> The court held that the defendant was entitled to an instruction that would have advised the jury that he was ineligible for parole.<sup>371</sup> The trial court refused such a jury instruction during the trial's sentencing phase, explaining

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361. *Fishback v. Commonwealth*, No. 1377-98-4, 1999 Va. App. LEXIS 345 (Ct. App. June 15, 1999) (unpublished decision).

362. *Fishback*, 260 Va. at 117, 532 S.E.2d at 635. Virginia Code section 53.1-165.1 abolishes parole for non-capital felonies committed after January 1, 1995. VA. CODE ANN. § 53.1-165.1 (Repl. Vol. 1998 & Cum. Supp. 2000).

363. *Fishback*, 260 Va. at 117, 532 S.E.2d at 635.

364. *Id.* (citing VA. CODE ANN. § 53.1-202.3 (Repl. Vol. 1998)).

365. 258 Va. 347, 519 S.E.2d 602 (1999).

366. *See Fishback*, 260 Va. at 116, 532 S.E.2d at 634 n.4.

367. 164 Va. 639, 178 S.E. 797 (1935).

368. *See Fishback*, 260 Va. at 116, 532 S.E.2d at 634.

369. *Id.* at 115-16, 532 S.E.2d at 634.

370. *Yarbrough*, 258 Va. at 375, 519 S.E.2d at 617.

371. *Id.* at 374, 519 S.E.2d at 616.

that precedent precluded instructions regarding a defendant's parole eligibility.<sup>372</sup>

Following his convictions for capital murder and robbery, the defendant requested that a parole-ineligibility instruction be given to the jury.<sup>373</sup> The Commonwealth opposed the request, arguing that such an instruction was proper only if the prosecution argued for the death penalty based upon the defendant's future dangerousness; here, by contrast, the Commonwealth argued for the death penalty given the crime's vileness.<sup>374</sup> The court refused to give the instruction.<sup>375</sup> During its deliberations, the jury requested an explanation about the length of a life sentence.<sup>376</sup> The trial judge refused to explain to the jury the "life means life" concept as the defendant requested.<sup>377</sup> The jury subsequently recommended the death penalty.<sup>378</sup>

On an automatic appeal, the court noted that this was a matter of first impression.<sup>379</sup> Following Virginia's decision to abolish parole, this was the first case that the court reviewed where the Commonwealth had relied on the crime's "vile nature," rather than the defendant's "future dangerousness," as the reason for seeking the death penalty.<sup>380</sup> Both the defendant and the Commonwealth relied on *Simmons v. South Carolina*<sup>381</sup> in their briefs.<sup>382</sup> The defendant argued that *Simmons* created a broad due process right "that a jury be fully informed as to what the realities of sentences are,"<sup>383</sup> while the Commonwealth argued the case limited the right to a "life is life" instruction only if the question of future dangerousness was involved.<sup>384</sup> The court, however, reasoned that no constitutional right exists—either in the Federal

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372. *Id.* at 358, 519 S.E.2d at 607.

373. *Id.* at 357-58, 519 S.E.2d at 606.

374. *Id.*

375. *Id.* at 358, 519 S.E.2d at 606.

376. *Id.* at 358, 519 S.E.2d at 607.

377. *Id.* at 358-59, 519 S.E.2d at 607.

378. *Id.* at 359, 519 S.E.2d at 607.

379. *Id.* at 366, 519 S.E.2d at 612.

380. *Id.* at 366, 519 S.E.2d at 611.

381. 512 U.S. 154 (1994) (holding that when a defendant was charged with a capital offense and the underlying reason the state sought the death penalty was the future dangerousness of the offender, the defendant was entitled to a jury instruction that he was ineligible for parole).

382. *Yarbrough*, 258 Va. at 366, 519 S.E.2d at 611.

383. *Id.* at 367, 519 S.E.2d at 612.

384. *Id.*

Constitution or in the Virginia Constitution—for a defendant to be sentenced by a jury.<sup>385</sup> When a jury is given the responsibility of recommending a sentence, “the defendant’s right to trial by an informed jury requires that the jury be adequately apprised of the nature of the range of sentences it may impose so that it may assess an appropriate punishment.”<sup>386</sup> Rather, the court ultimately found that a defendant in a capital case who is parole-ineligible cannot be treated any more harshly by a jury that fully understands both of the possible sentences available to them.<sup>387</sup> Because the proffered instruction would not hinder a defendant’s rights, and indeed could only benefit a defendant, the trial judge should—if so requested by the defendant—instruct the jury that life imprisonment means life imprisonment without possibility of parole.<sup>388</sup> The court, therefore, affirmed the defendant’s convictions for both capital murder and robbery, but vacated the death sentence and remanded the case back to the trial court with instructions to resentence the defendant in accordance with the court’s ruling.<sup>389</sup>

## 2. Offense Elements

In *Dobson v. Commonwealth*,<sup>390</sup> the Supreme Court of Virginia affirmed a conviction in which the defendant challenged a jury instruction telling the jurors they could infer that the defendant was the thief from proof that he was in recent exclusive possession of the stolen property.<sup>391</sup> In this case, a Virginia State Trooper stopped Dobson, who was driving a stolen rental car.<sup>392</sup> At trial, the jury was instructed that it could infer, from the proof that Dobson was currently in possession of the stolen vehicle, that he was the thief.<sup>393</sup>

Dobson argued that the instruction was a violation of his due

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385. *Id.* at 369, 519 S.E.2d at 613.

386. *Id.*

387. *See id.* at 373, 519 S.E.2d at 615-16.

388. *Id.* at 374, 519 S.E.2d at 615-16.

389. *Id.*

390. 260 Va. 71, 531 S.E.2d 569 (2000).

391. *Id.* at 73, 531 S.E.2d at 570.

392. *Id.* at 73-74, 531 S.E.2d at 570-71.

393. *Id.* at 73-74, 531 S.E.2d at 570-71.

process rights because it shifted the burden to him to prove that he was not the thief and thereby relieved the Commonwealth of the burden to prove beyond a reasonable doubt every element of the charged offense.<sup>394</sup> The court held, however, that “the Due Process Clause does not prohibit the use of a permissive inference as a procedural device that shifts to a defendant the burden of producing some evidence contesting a fact that may otherwise be inferred, provided that the prosecution retains the ultimate burden of proof beyond a reasonable doubt.”<sup>395</sup> The court noted that the test to determine if a jury instruction violates a defendant’s due process rights is if the instruction creates a mandatory presumption, or merely a permissive inference.<sup>396</sup> In the present case, the court held that the instruction did not *require* the jury to draw any conclusions from the facts proved by the Commonwealth in the absence of such contrary evidence from the defendant.<sup>397</sup> In addition, the court observed that the trial court instructed the jury that the Commonwealth had to prove every element beyond a reasonable doubt and that the defendant was presumed innocent.<sup>398</sup>

### 3. Lesser-Included Offenses

In *Commonwealth v. Dalton*,<sup>399</sup> the defendant was charged with first-degree murder.<sup>400</sup> He alleged, however, that while he had assisted in the murder’s concealment, he had not actually been a party to the killing.<sup>401</sup> He thus requested the trial court to instruct the jury that it could find him guilty of being an accessory after the fact even though he had not been charged with that offense.<sup>402</sup> The Supreme Court of Virginia rejected that contention, however, explaining that, as the defendant was not charged with being an accessory after the fact, and that such a crime is not a lesser-included offense to murder, the trial court was correct in

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394. *Id.* at 74, 531 S.E.2d at 571.

395. *Id.* at 74-75, 531 S.E.2d at 571.

396. *Id.* at 75, 531 S.E.2d at 571.

397. *Id.* at 76, 531 S.E.2d at 572.

398. *Id.*

399. 259 Va. 249, 524 S.E.2d 860 (2000).

400. *Id.* at 251, 524 S.E.2d at 861.

401. *Id.* at 252-53, 524 S.E.2d at 862.

402. *Id.* at 251, 524 S.E.2d at 861.



refusing the requested jury instruction.<sup>403</sup>

#### 4. Concert of Action

In *McLean v. Commonwealth*,<sup>404</sup> the Court of Appeals of Virginia, sitting en banc, affirmed a trial court judge's instruction that answered a jury's question regarding intent by using a theory of a concert of action among the parties.<sup>405</sup> In this case, the defendant was charged with a robbery and murder that arose from the beating and stabbing of the victim.<sup>406</sup> McLean was one of three men who attacked and robbed the victim.<sup>407</sup> During jury deliberations, although the court declined to answer a jury question regarding "intent," it did respond to the following question the jury posed: "Once the intent is spoken by one member of a group and the act is performed, does the intent to commit the act apply to all?"<sup>408</sup> McLean objected to having the judge answer this question and instead requested that the judge instruct the jury that the defendant's "mere presence" at the scene was insufficient to establish his guilt.<sup>409</sup> The court denied McLean's request and instead instructed the jury that, if there was a "concert of action" to commit a crime, all those who participated in the crime were equally responsible.<sup>410</sup> After receiving this instruction, the jury convicted the defendant of capital murder and robbery.<sup>411</sup>

On appeal, the defendant argued (among other assignments of error) that the trial judge erred by instructing the jury as to "concert of action."<sup>412</sup> The court of appeals, however, held that it was "proper for a trial court to fully and completely respond to the jury's inquiry concerning its duties."<sup>413</sup> The court further held that McLean was not entitled to a "mere presence" instruction.<sup>414</sup>

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403. *Id.* at 255, 524 S.E.2d at 863.

404. 30 Va. App. 322, 516 S.E.2d 717 (Ct. App. 1999).

405. *Id.* at 325-26, 516 S.E.2d at 718.

406. *Id.* at 325-26, 516 S.E.2d at 718-19.

407. *Id.* at 326-27, 516 S.E.2d at 719.

408. *Id.* at 329, 516 S.E.2d at 720.

409. *Id.*

410. *See id.* at 328, 516 S.E.2d at 719.

411. *Id.* at 328, 516 S.E.2d at 720.

412. *Id.* at 329-30, 516 S.E.2d at 720-21.

413. *Id.* at 330, 516 S.E.2d at 721 (quoting *Marlowe v. Commonwealth*, 2 Va. App. 619, 625, 347 S.E.2d 167, 171 (Ct. App. 1986)).

414. *Id.* at 332, 516 S.E.2d at 722.

The court noted that the Commonwealth had argued that McLean was an active participant in the murder and that his defense to the charge was that he was not present at the murder scene; thus, neither of those theories fit with a mere presence instruction.<sup>415</sup> The court, therefore, affirmed the defendant's convictions.<sup>416</sup>

### III. LEGISLATIVE ENACTMENTS

The most recent Virginia General Assembly session was notable only in that it did not work any particularly significant changes to existing law.<sup>417</sup> Indeed, many of the legislative enactments from this session were quite minor.<sup>418</sup> The General Assembly's restraint in the criminal justice area could be attributable,

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415. *Id.*

416. *Id.* at 336, 516 S.E.2d at 724.

417. Many of the changes can be found by visiting the Commonwealth's legislative Web site. This information is available at <http://leg1.state.va.us>.

418. For example, Virginia Code section 18.2-67.5:2 was amended to expand the list of sexual offenses for which a second or subsequent offense is punishable by the maximum amount allowable for the latest offense, none of which is subject to suspension. S.B. 176, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 333, 2000 Va. Acts 475) (codified as amended at VA. CODE ANN. § 18.2-67.5:2 (Cum. Supp. 2000)). The change also allows a second offense, taken from section 18.2-67.5:3, for those sexual offenses that carry up to life imprisonment upon a second offense, aggravate the punishment of a less serious first offense. *Id.* Virginia Code section 18.2-370 was also amended to make a second or subsequent offense of taking indecent liberties with children a Class 5 felony; before, all offenses were punished as Class 6 felony offenses. *Id.* (codified as amended at VA. CODE ANN. §§ 18.2-67.2, -370 (Cum. Supp. 2000)). Virginia Code section 18.2-67.4 was amended to provide that the definition of sexual abuse, as defined in section 18.2-67.10, applies to criminal sexual battery. H.B. 169, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 832, 2000 Va. Acts 1782) (codified as amended at VA. CODE ANN. § 18.2-67.4 (Cum. Supp. 2000)). Virginia Code section 18.2-473.1, making it unlawful to communicate with a prisoner without authorization, was amended so that the definition of "prisoner" would be consistent with other sections of the Code. H.B. 78, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 286, 2000 Va. Acts 415) (codified as amended at VA. CODE ANN. § 18.2-473.1 (Cum. Supp. 2000)). The General Assembly added a new code section, 18.2-57.01, which makes it a Class 2 misdemeanor to project a laser light onto someone they know, or should have reason to know, is a law enforcement officer. H.B. 437, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 350, 2000 Va. Acts 498) (codified as amended at VA. CODE ANN. § 18.2-57.01 (Cum. Supp. 2000)). Virginia Code section 19.2-245.1 was amended to include the venue where a forged document is found in the possession of the defendant as a proper one for trial. H.B. 1156, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 327, 2000 Va. Acts 472) (codified as amended at VA. CODE ANN. § 19.2-245.1 (Cum. Supp. 2000)). Virginia Code section 18.2-248.1 was amended to enhance the penalty for supplying marijuana to an inmate from a Class 5 felony to a Class 4 felony. S.B. 199, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 819, 2000 Va. Acts 1730) (codified as amended at VA. CODE ANN. § 18.2-248.1 (Cum. Supp. 2000)).

in part, to the fairly extensive statutory changes wrought in 1994 and 1996—particularly in the area of juvenile justice—and the general decline in crime rates. With the decline in crime, the General Assembly has been able to focus its attention elsewhere.<sup>419</sup>

### A. *Felonious Sexual Contact*

Following the lead of other jurisdictions that have enacted similar prohibitions, the General Assembly added a new section to the Virginia Code, section 18.2-67.4:1, which makes it a Class 6 felony for anyone who knows they are infected with HIV, Syphilis, or Hepatitis B to engage in sexual intercourse, cunnilingus, fellatio, anallungus, or anal intercourse with the intent to transmit the infection to another person.<sup>420</sup> As with other statutes of this sort, enacted in the wake of the AIDS crisis and highly publicized stories involving such intentional infections, proof of intent will likely be a difficult prosecutorial hurdle to overcome.

### B. *Community Corrections*

The General Assembly amended multiple code sections<sup>421</sup> and added two entirely new sections under the heading of the “Comprehensive Community Corrections Act for Local Responsible Offenders.”<sup>422</sup> The Act defines local services as community-based probation and requires localities to adopt local community criminal justice boards and make mandatory the service of those officials already appointed to these boards.<sup>423</sup> The Act also expands the options for removal of an offender for intractable behavior

419. See, e.g., Cullen D. Seltzer, *Annual Survey of Virginia Law: Criminal Law and Procedure*, 30 U. RICH. L. REV. 1281 (1996); Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 30 U. RICH. L. REV. 1467 (1996); Robert E. Shepard, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 28 U. RICH. L. REV. 1075 (1994).

420. H.B. 141, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 831, 2000 Va. Acts 1781) (codified at VA. CODE ANN. § 18.2-67.4:1 (Cum. Supp. 2000)).

421. H.B. 202, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 1040, 2000 Va. Acts 2487) (codified as amended at VA. CODE ANN. §§ 18.2-57.3, -64.2, -67.4, 19.2-299.2, -303.3, 53.1-82.1, -82.3, -150, -180, -181, -182, -182.1, -183, -184, -185, -185.1, -185.2, and -185.3 (Cum. Supp. 2000)).

422. *Id.* (codified at VA. CODE ANN. §§ 19.2-152.4:1, 53.1-182.1:1 (Cum. Supp. 2000)).

423. *Id.* (codified as amended at VA. CODE ANN. § 53.1-183 (Cum. Supp. 2000)).

and, significantly, limits participation in the program to persons who receive a sentence of fewer than twelve months.<sup>424</sup>

### C. *"Date Rape" Drugs*

In light of the concern over so-called "date rape" drugs, the General Assembly amended Virginia Code sections 54.1-3446 and 54.1-3450 and added Virginia Code section 18.2-251.3 to make it a Class 3 felony to possess with the intent to distribute gamma hydroxybutyric acid ("GHB").<sup>425</sup> GHB, one of the drug's common street names, has been identified as a "date rape" drug and had not previously been listed in the Virginia Drug Control Act.<sup>426</sup>

### D. *Expanded Definition of "Law Enforcement Officers" for Purposes of Enhancing Punishments*

Virginia Code section 18.2-57 was amended to add jail officers, deputy sheriffs, and game wardens to law enforcement officers listed in this section.<sup>427</sup> Those committing assault and battery against these officers will now receive the enhanced punishment already in effect for other law enforcement personnel under this section.<sup>428</sup>

### E. *Exempting Necessary School Discipline Statutory Assault and Battery*

In a popular, albeit controversial, move, the General Assembly modified Virginia Code section 18.2-57 to exempt a teacher acting in her official capacity from the assault and battery statute for certain actions deemed essential for disciplinary purposes or for the need to maintain classroom order.<sup>429</sup>

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424. See *id.* (codified as amended at VA. CODE ANN. § 19.2-303.3 (Cum. Supp. 2000)).

425. H.B. 280, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 348, 2000 Va. Acts 492) (codified as amended at VA. CODE ANN. §§ 54.1-3466, -3450 (Cum. Supp. 2000)) (codified at VA. CODE ANN. § 18.2-251.3 (Cum. Supp. 2000)).

426. See *id.*

427. H.B. 297, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 288, 2000 Va. Acts 415) (codified as amended at VA. CODE ANN. § 18.2-57 (Cum. Supp. 2000)).

428. *Id.*

429. See H.B. 1229, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 8,

### F. *Unlawful Use of Official Identification Documents*

To combat the apparently increasing rise in document fraud and identity theft, the General Assembly added a new section to the Virginia Code, section 18.2-186.3, that makes it unlawful to obtain the identification documents of another and to use them with the intent to defraud.<sup>430</sup> The identity fraud statute punishes acts resulting in losses of less than \$200 as Class 1 misdemeanors for the first offense and subsequent convictions as Class 6 felonies.<sup>431</sup> Any offense that causes a loss of more than \$200 will automatically be a Class 6 felony.<sup>432</sup> If the identifying documents are used to avoid arrest or impede a criminal investigation, the offense will also be a Class 6 felony.<sup>433</sup>

### G. *Increased Punishments for Driving Under the Influence*

With an eye to the tragedies caused by those driving under the influence of alcohol and other drugs, the General Assembly amended Virginia Code section 18.2-270 to enhance the mandatory minimum period of confinement for a second driving-under-the-influence ("DUI") offense within five years from forty-eight hours to five days.<sup>434</sup> The Virginia Code now requires a mandatory minimum period of confinement of ten days for a third DUI offense within ten years and thirty-day confinement for a third

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2000, ch. 682, 2000 Va. Acts 1302) (codified as amended at VA. CODE ANN. § 18.2-57(F) (Cum. Supp. 2000)). The actions allowed include:

(i) incidental, minor or reasonably physical contact or other actions designed to maintain order and control; (ii) reasonable and necessary force to quell a disturbance or remove a student from the scene of a disturbance that threatens physical injury to persons or damage to property; (iii) reasonably and necessary force to prevent a student from inflicting physical harm to himself; (iv) reasonable and necessary force for self-defense or the defense of others; or (v) reasonable and necessary force to obtain possession of weapons or other dangerous objects or controlled substances or associated paraphernalia that are upon the person of the student or within his control.

*Id.*

430. H.B. 373, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 349, 2000 Va. Acts 497) (codified at VA. CODE ANN. § 18.2-186.3 (Cum. Supp. 2000)).

431. *Id.*

432. *Id.*

433. *Id.*

434. See H.B. 386, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 958, 2000 Va. Acts 2116) (codified as amended at VA. CODE ANN. §§ 18.2-270, -270.1, -271.1, 19.2-299.2, 46.2-341.28, -391 (Cum. Supp. 2000)).

offense in five years.<sup>435</sup> The changes also permit a court to impose an ignition interlock system requirement for up to six months on anyone convicted of her first DUI offense.<sup>436</sup> Anyone convicted of a second offense within five years is ineligible for a restricted license for one year following conviction and then must use an ignition interlock system for an additional six months.<sup>437</sup> The ignition interlock system locks a car's ignition if the driver's blood alcohol content ("BAC") is more than .025%.<sup>438</sup> The General Assembly also amended the section to require a mandatory minimum jail term for those with a BAC above .20%.<sup>439</sup> For the first offense, a BAC of at least .20%, but not more than .25%, requires a mandatory confinement of five days; if the BAC is above .25%, a mandatory confinement of ten days is required.<sup>440</sup> For any second or subsequent offense within ten years, a BAC of at least .20%, but not more than .25%, mandates a ten-day jail term, and above .25% a stay of at least twenty days.<sup>441</sup>

#### H. *Detention of Juvenile Offenders in Secure Facilities*

The General Assembly changed Virginia Code section 16.1-248.1 to require that a detention order expressly state the offense with which a juvenile is being charged and, to the extent practicable, other pending and previous charges against the juvenile before that juvenile can be placed in a secured detention facility.<sup>442</sup> For clarification purposes, the General Assembly changed the phrase "unreasonable danger to the person and property of others" to "a clear and substantial threat to the person or property of others," for inclusion as one of the factors to be considered when determining if a juvenile should be placed in a secured facility.<sup>443</sup>

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435. *Id.* (codified as amended at VA. CODE ANN. § 18.2-270 (Cum. Supp. 2000)).

436. *Id.* (codified as amended at VA. CODE ANN. § 18.2-270.1(B) (Cum. Supp. 2000)).

437. *Id.*

438. *Id.* (codified as amended at VA. CODE ANN. § 18.2-270.1(A) (Cum. Supp. 2000)).

439. S.B. 525, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 784, 2000 Va. Acts 1665) (codified as amended at VA. CODE ANN. § 18.2-270 (Cum. Supp. 2000)).

440. *Id.* (codified as amended at VA. CODE ANN. § 18.2-270(A) (Cum. Supp. 2000)).

441. *Id.* (codified as amended at VA. CODE ANN. § 18.2-270(B) (Cum. Supp. 2000)).

442. H.B. 567, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 836, 2000 Va. Acts 1786) (codified as amended at VA. CODE ANN. § 16.1-248.1) (Cum. Supp. 2000)).

443. *Id.* (codified as amended at VA. CODE ANN. § 16.1-248.1 (Cum. Supp. 2000)).

### I. *Apprising Juries of Parole Eligibility*

In an important nod to the defense bar, and in consideration of sentencing cases like those discussed in Part E of this article,<sup>444</sup> the General Assembly altered Virginia Code section 19.2-264.4 to permit, upon request from the defendant in a capital case, a jury instruction that explains to the jurors that, for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life.<sup>445</sup> The section also requests that the Supreme Court of Virginia, in conjunction with the Virginia State Bar, recommend such instructions in non-capital cases.<sup>446</sup>

### J. *Application of the Death Penalty to Juveniles*

The General Assembly amended Virginia Code section 18.2-10 to limit the application of the death penalty for a Class 1 felony conviction to those who are sixteen years of age or older at the time of the offense.<sup>447</sup>

### K. *Obscenity and Electronic Media*

With the advent of computer and other optical and magnetic storage devices, legislatures have had to come to grips with statutorily defining what may constitute an "item" for purposes of prosecution under obscene materials prohibitions. While it had generally been the case that obscene materials consisted of only a single magazine, photograph, or videotape, modern electronic storage devices create new challenges for legislatures that wish to make prosecutable obscene items that are stored in these new devices. To this end, the General Assembly amended Virginia Code section 18.2-373 to include for prosecution any item stored in an electronic medium that fits the Commonwealth's definition of "ob-

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444. See *supra* notes 360-89 and accompanying text.

445. H.B. 705, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 388, 2000 Va. Acts 1789) (codified as amended at VA. CODE ANN. § 19.2-264.4 (Cum. Supp. 2000)).

446. *Id.* (codified as amended at VA. CODE ANN. § 19.2-264.4(E)(Z) (Cum. Supp. 2000)).

447. H.B. 978, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 361, 2000 Va. Acts 508) (codified as amended at VA. CODE ANN. § 18.2-10 (Cum. Supp. 2000)).

scene.”<sup>448</sup> In addition, as a protection for industry, Virginia Code section 18.2-391 was amended so that an Internet service provider or a provider of electronic mail will not be liable when a person using its services commits a prohibited act involving sexually explicit materials being transmitted to juveniles.<sup>449</sup>

#### L. *Unlawful Street Gang Activities*

The General Assembly added Article 2.1 to Chapter 4 of Title 18.2 of the Virginia Code.<sup>450</sup> This new Article creates a series of separate felonies based on prohibited street gang activity.<sup>451</sup> Participation in a street gang that commits a criminal act now becomes a Class 5 felony, and if the street gang has any juvenile members, the offense becomes a Class 4 felony.<sup>452</sup> The Article further creates a separate offense penalizing anyone who recruits juveniles into prohibited street gang activities.<sup>453</sup>

#### M. *Prohibited Contact for Sex Offenders*

Public concern about pedophiles being released back into communities prompted the General Assembly to place additional restrictions on persons convicted of sex offenses against children. To this end, the General Assembly added Virginia Code section 18.2-370.2.<sup>454</sup> The section prohibits, as part of the sentence, a person convicted of any one of a number of criminal statutes involving sexual and other offenses perpetrated against juveniles from loitering within 100 feet of a primary, secondary, or high school for the remainder of their lives.<sup>455</sup> A violation of this section is a

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448. See H.B. 1492, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 1009, 2000 Va. Acts 2378) (codified as amended at VA. CODE ANN. §§ 18.2-373, -391 (Cum. Supp. 2000)).

449. See *id.* (codified as amended at § 18.2-391(A)(2) (Cum. Supp. 2000)).

450. S.B. 143, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 332, 2000 Va. Acts 474) (codified at VA. CODE ANN. §§ 18.2-46.1, -46.2, -46.3 (Cum. Supp. 2000)).

451. See *id.*

452. *Id.* (codified as amended at VA. CODE ANN. § 18.2-46.2(A) (Cum. Supp. 2000)).

453. *Id.* (codified as amended at VA. CODE ANN. § 18.2-46.3 (Cum. Supp. 2000)).

454. See S.B. 197, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 770, 2000 Va. Acts 1651) (codified at VA. CODE ANN. §§ 18.2-10, -11 (Cum. Supp. 2000)).

455. *Id.* (codified as amended at VA. CODE ANN. § 18.2-370.2 (Cum. Supp. 2000)). The



Class 6 felony.<sup>456</sup>

#### N. *The Rights of Crime Victims*

In an effort to strengthen certain protections for the victims of crime, the General Assembly amended Virginia Code section 19.2-11.01 to require a crime victim to receive notification of any appeal or habeas corpus proceeding involving her case in addition to the other victim and witness services provided by this section.<sup>457</sup>

#### O. *DNA Profiling*

Issues raised by DNA testing continue to present complicated questions to legislatures throughout the country. In the face of significant concerns about privacy, it is clear that state and federal law enforcement agencies will continue to cooperate in creating and maintaining DNA banks that contain profiles of known offenders. In keeping with these federal/state collaborative efforts, the General Assembly amended Virginia Code section 19.2-310.5 to require the Division of Forensic Science to confirm whether or not a DNA profile exists on file for a specific individual if requested to do so by a federal, state, or local law enforcement officer who requests the information in furtherance of an official investigation.<sup>458</sup>

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criminal acts that qualify are: abduction and kidnapping a minor; abduction of a minor with intent to defile or for immoral purpose; crimes against nature with a minor relative; adultery or fornication with a minor relative; rape of a child under age thirteen; carnal knowledge of a child between thirteen and fifteen; carnal knowledge of certain minors; forcible sodomy with a child under age thirteen, inanimate or animate object sexual penetration of a child under age thirteen; aggravated sexual battery of a child under age thirteen; taking indecent liberties with children; taking indecent liberties with child by person in custodial or supervisory relationship; causing or encouraging acts rendering children delinquent or abused; possession with intent to distribute of sexually-explicit items involving children; possession of child pornography, and employing a minor to assist in an obscenity offense. *Id.*

456. *Id.*

457. See S.B. 211, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 272, 2000 Va. Acts 400) (codified as amended at VA. CODE ANN. § 19.2-11.01 (Cum. Supp. 2000)).

458. See S.B. 619, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 3, 2000, ch. 284, 2000 Va. Acts 412) (codified as amended at VA. CODE ANN. § 19.2-310.5 (Cum. Supp. 2000)).

#### IV. A FINAL WORD

The Virginia General Assembly, the Supreme Court of Virginia, and the Court of Appeals of Virginia, by and large, took a fairly nuanced view with respect to modifications or advancements in criminal law and procedure. As violent crime rates continue to fall, courts—in particular—have become perhaps more sensitive to individuals' civil rights and liberties.

On a slightly different front, this past year reflected the ongoing struggle of governmental agencies to adapt to and to address the promise and the potential threat of new technologies (such as the advent of DNA testing) to the criminal law. Many of these issues, only now beginning to be considered in the Assembly and the courts, will continue to pose interesting challenges in the coming years.

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