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Annual Survey of Virginia Law: Criminal Law and Procedure

William J. Dinkin

Cullen D. Seltzer

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CRIMINAL LAW AND PROCEDURE

*William J. Dinkin**

*Cullen D. Seltzer***

I. INTRODUCTION

Because a large amount of the docket for the Court of Appeals of Virginia is comprised of criminal cases, and since the General Assembly regularly turns its attention to the questions of crime and punishment, in almost any year there are a great number of substantial developments in the criminal law. This past year was no exception. This article surveys developments in criminal law and procedure in Virginia from July 2000 to July 2001. Although this article is intended to survey significant developments over the past year, the reader is cautioned to bear in mind several important caveats.

First, the constraints of publication schedules prohibit a completely comprehensive survey of cases and legislative developments. This article treats those developments that, in the judgment of these authors, represent significant departures from previously established legal principles. Second, this article does not purport to survey the development of criminal law in the federal courts even though those courts do have occasion to interpret state law along with important federal constitutional issues. Although those decisions are often highly persuasive in the Virginia courts, they fall outside the scope of this article. Third, there is no

* Deputy Commonwealth's Attorney, City of Richmond Commonwealth Attorney's Office, Richmond, Virginia. B.A., 1986, University of Virginia; J.D., 1990, University of Richmond School of Law.

** Associate, Bowman and Brooke, L.L.P., Richmond, Virginia. B.A., 1990, Mary Washington College, *cum laude*; J.D., 1993, University of Richmond School of Law.

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real substitute for reading the law as the lawmakers have written it.

II. FOURTH AMENDMENT¹

A. *No-Knock Entries for Search Warrants*

In *Henry v. Commonwealth*,² the Court of Appeals of Virginia affirmed the general principle that police may not serve a warrant at a home without first knocking, announcing their presence, and giving the occupants a reasonable opportunity to answer the door.³ In *Henry*, however, the court created two exceptions to this rule, holding that if the officers executing a warrant have a reasonable suspicion (1) that knocking and announcing their presence would increase their peril, or (2) that such an entry is necessary to prevent persons within the dwelling from escaping or destroying evidence, they may make a “no-knock entry.”⁴ The court relied on the decision of the United States Supreme Court in *Richards v. Wisconsin*,⁵ which held that police need only have a reasonable suspicion that either of the two exceptions are met, rather than meeting the higher standard of probable cause.⁶

The Court of Appeals of Virginia had previously ruled in *Woody*

1. The section headings that refer to one of the first ten amendments to the Federal Constitution are a shorthand means of describing which component of the Due Process Clause of the Fourteenth Amendment is at issue. This is necessarily so because the first ten amendments to the Federal Constitution do not apply to the states; rather, many of the protections afforded by those amendments have been incorporated into the Due Process Clause of the Fourteenth Amendment, which expressly applies to the states. *See, e.g.,* *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”) (emphasis added). The modern trend in incorporation theory is that of “selective incorporation,” whereby rights deemed to be “fundamental” are “incorporated into the Fourteenth Amendment and applied to the states to the same extent that [they] appl[y] to the federal government.” JEROLD H. ISRAEL, *CRIMINAL PROCEDURE AND THE CONSTITUTION* 43 (1997) (emphasis added).

2. 32 Va. App. 547, 529 S.E.2d 796 (Ct. App. 2000).

3. *Id.* at 552, 529 S.E.2d at 798–99.

4. *Id.* at 552–53, 529 S.E.2d at 799.

5. 520 U.S. 385 (1997).

6. *Henry*, 32 Va. App. at 552–53, 529 S.E.2d at 799 (citing *Richards*, 520 U.S. at 394).

*v. Commonwealth*⁷ that officers seeking to effect a no-knock entry into a dwelling must have probable cause that an exception to the prohibition against such entries exists.⁸ The *Henry* court reasoned, however, that because Virginia's constitutional protections are "coextensive" with those in the United States Constitution, the United States Supreme Court's ruling in *Richards* is a binding floor and ceiling for Virginia's constitutional protections.⁹

As a practical matter, the court's ruling leaves open the possibility that a large majority of search warrants may lead to permissible no-knock entries. In state prosecutions, most search warrants are for drugs, weapons, or related contraband.¹⁰ The officers who execute these warrants will often readily adduce sufficient evidence, based on their experience and training, that they would have increased the risk of lost evidence or their own peril if they had announced their entry. In *Henry*, the court held that a disturbance outside the dwelling to be searched, caused by two men who had been on the porch of the dwelling, was sufficient to create a reasonable suspicion that a police announcement of their entry would have been either dangerous or futile.¹¹

In practice, the effect of *Henry* could be that the exceptions to the prohibition against no-knock entries will eventually swallow the rule.¹² Prosecutors would be wise to exploit this opening. By the same token, defense counsel should be on guard against it and be prepared to adduce evidence that announced entries are frequently successful in discovering contraband. Defendants may also wish to argue that private citizens who experience unannounced entries in their home are more likely to resist the entering officers, perhaps with force.¹³

7. 13 Va. App. 168, 409 S.E.2d 170 (Ct. App. 1991).

8. *Id.* at 170, 409 S.E.2d at 171.

9. *Henry*, 32 Va. App. at 552-53, 529 S.E.2d at 799.

10. For example, during August 2001, more than fifty percent of all search warrants issued in the City of Richmond were for drugs and/or weapons. More than eighty percent of search warrants for residences involved drugs and/or weapons.

11. *Henry*, 32 Va. App. at 553, 529 S.E.2d at 799.

12. See *Williams v. Commonwealth*, 4 Va. App. 53, 67, 354 S.E.2d 79, 87 (Ct. App. 1987) (noting that the presence of drugs gives rise to the inference of danger).

13. The Supreme Court of Virginia explained the purpose of the knock and announce rule as follows:

The reasons for the requirement of notice of purpose and authority have been said to be that the law abhors unnecessary breaking or destruction of any house, because the dweller in the house would not know the purpose of the

B. *Fourth Amendment Standing*

For Fourth Amendment purposes, the relevant inquiry in determining standing is whether a person has an expectation of privacy.¹⁴ Significantly, the privacy expectation, and consequent constitutional protection, attaches to people, not to places or things.¹⁵ Therefore, a person may have a reasonable expectation of privacy in a package he mails to himself using a fictitious name.¹⁶ Sending to oneself a package addressed to a fictitious person actually “indicate[s] an expectation that the contents would remain free from public examination” rather than an abandonment of a privacy interest in the package.¹⁷

C. *What May Be Seized Pursuant to a Search Warrant*

Pursuant to a validly issued search warrant, police may seize a citizen's private journals and writings. In *Moyer v. Commonwealth*,¹⁸ the Court of Appeals of Virginia ruled that a search warrant for “written materials (letters, diaries) . . . related to sexual conduct between juveniles and adults” did not run afoul of the protections afforded by the Fourth and Fifth Amendments to the United States Constitution,¹⁹ reasoning that the United States Supreme Court's decision in *Boyd v. United States*²⁰ did not require a contrary result.²¹ In *Boyd*, the Court held that an order to an accused to produce certain documents was unconstitutional.²² Under such circumstances, compelled production was es-

person breaking in, unless he were notified, and would have a right to resist seeming aggression on his private property.

Johnson v. Commonwealth, 213 Va. 102, 104, 189 S.E.2d 678, 679 (1972). “Thus, implementation of the rule ‘discourages violence and volatile confrontations and encourages orderly executions of search warrants.’” *Park v. Commonwealth*, 32 Va. App. 407, 412, 528 S.E.2d 172, 175 (Ct. App. 2000) (quoting *Hargrave v. Commonwealth*, 21 Va. App. 320, 323, 464 S.E.2d 176, 177 (Ct. App. 1995)).

14. See ISRAEL, *supra* note 1, at 73–74.

15. See *Katz v. United States*, 389 U.S. 347, 351 (1967).

16. See *Williams v. Commonwealth*, 32 Va. App. 554, 558, 529 S.E.2d 799, 802 (Ct. App. 2000).

17. *Id.* at 559, 529 S.E.2d at 802 (quoting *United States v. Richards*, 638 F.2d 765, 770 (5th Cir. Mar. 1981) (internal quotations omitted)).

18. 33 Va. App. 8, 531 S.E.2d 580 (Ct. App. 2000).

19. *Id.* at 14, 16, 531 S.E.2d at 583–84.

20. 116 U.S. 616 (1886).

21. *Moyer*, 33 Va. App. at 17–18, 531 S.E.2d at 584–85.

22. See *Boyd*, 116 U.S. at 638.

entially testimony compelled by the government.²³ In contrast, the search warrant executed by police in *Moyer* did not contemplate any testimony by the accused in the production of the documents.²⁴

D. Probable Cause

In *Colaw v. Commonwealth*,²⁵ the Court of Appeals of Virginia took the unusual step of invalidating the results of a search incident to the execution of a search warrant.²⁶ In doing so, the court agreed with the trial court's ruling that the affidavit in support of the subject warrant did not establish probable cause.²⁷ The deputy sheriff who applied to a magistrate for the warrant stated in his supporting affidavit that "on September 12th 1997 a reliable informant called [him] by phone and noticed [him] of a party at Steven Wimer's residence that the people there will be using and selling narcotics."²⁸ The affidavit further asserted that the confidential informant was someone who had "displayed knowledge of drug use and distribution on numerous occasions," and whose previous information had led to two arrests.²⁹

The court of appeals not only concluded that the affidavit failed to establish probable cause, but the court also held that the warrant was an invalid anticipatory search warrant.³⁰ The court noted that the affidavit failed to show either the date that criminal activity would occur or a reason why the informant believed the activity would occur on any particular date.³¹

Most notably, the court concluded that the good-faith exception set forth in *United States v. Leon*³² did not apply in this situa-

23. *See id.* at 634.

24. *Moyer*, 33 Va. App. at 6, 531 S.E.2d at 584. "As a result, appellant's diaries, which were prepared voluntarily, are not protected by the Fifth Amendment privilege against self-incrimination unless appellant was compelled to produce them, and then, only the act of production and not the contents of the diaries would be protected." *Moyer*, 33 Va. App. at 21, 531 S.E.2d at 586.

25. 32 Va. App. 806, 531 S.E.2d 31 (Ct. App. 2000).

26. *Id.* at 814, 531 S.E.2d at 34-35.

27. *Id.* at 811, 531 S.E.2d at 33.

28. *Id.* at 809, 531 S.E.2d at 32.

29. *Id.*

30. *Id.* at 812, 531 S.E.2d at 33.

31. *Id.*

32. 468 U.S. 897 (1984).

tion.³³ Ordinarily, pursuant to *Leon*, the government may rely upon evidence obtained during the course of a search warrant even if the warrant should not have been issued because it was not supported by probable cause.³⁴ The *Leon* exception to the warrant requirement presupposes, however, that the officer acted in good faith.³⁵

Under the circumstances in *Colaw*, the court reasoned that the officer did not act in good faith because “the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence unreasonable.”³⁶ The affidavit’s defects included the failure to specify a date or time where criminal activity would take place and the fact that the informant did not report having been in the place to be searched or having seen anyone purchase, sell, use, or possess drugs there.³⁷ The court concluded that “[o]nly by blindly accepting the informant’s conclusory statement could one believe the drugs would be at the residence.”³⁸ That sort of bare-bones affidavit removed the warrant from the ambit of the *Leon* good-faith exception.³⁹

E. Reasonable Articulable Suspicion

The United States Supreme Court has affirmed that police may order a passenger of a vehicle to exit the vehicle when it is stopped because the driver is suspected of some offense.⁴⁰ In *Hamlin v. Commonwealth*,⁴¹ the Court of Appeals of Virginia held that police could permissibly conduct a very brief, seconds-long detention of a passenger in a stopped vehicle to “investigate the circumstances surrounding the presence of an open container of an alcoholic beverage in the car.”⁴² In concluding that the deten-

33. *Colaw*, 32 Va. App. at 812, 531 S.E.2d at 34.

34. *See Leon*, 468 U.S. at 926.

35. *Id.*

36. *Colaw*, 32 Va. App. at 812, 531 S.E.2d at 34 (quoting *Atkins v. Commonwealth*, 9 Va. App. 462, 464, 389 S.E.2d 179, 180 (Ct. App. 1990)).

37. *Id.* at 812, 531 S.E.2d at 33–34.

38. *Id.* at 814, 531 S.E.2d at 34.

39. *Id.*

40. *See Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

41. 33 Va. App. 494, 534 S.E.2d 363 (Ct. App. 2000).

42. *Id.* at 501, 534 S.E.2d at 366.

tion was reasonable, the court emphasized the very limited nature of the detention.⁴³

The dissent in *Hamlin* reasoned that the officer's explanation for detaining the defendant—the one apparently endorsed by the majority—effectively placed the defendant “under investigative detention for the open alcoholic beverage container in the vehicle,” and was itself impermissible.⁴⁴ The dissent noted that “[n]o city ordinance or state law bars a passenger in a vehicle from having an alcoholic beverage in an open container.”⁴⁵ Moreover, according to the dissent, the “Commonwealth concedes this point but argues that ‘[a]t most, the officer may have made a mistake of law and did not act in bad faith.’”⁴⁶ The dissent concluded:

“[i]f officers are allowed to stop [individuals] based upon their subjective belief that . . . laws have been violated even where no such violation has, in fact, occurred [nor could it have occurred since no law proscribed the activity], the potential for abuse of . . . infractions as pretext for effecting [detentions] seems boundless and the costs to privacy rights excessive.”⁴⁷

Nevertheless, the fact that government agents may be mistaken about the facts of an encounter, and still permissibly detain suspects, is apodictic. *Terry* stops predicated on reasonable suspicion of criminal activity, and routine arrests predicated on mere probable cause, contemplate, by definition, that the probative value of the evidence compiled by police may not be enough to prove the accused guilty beyond a reasonable doubt.⁴⁸ Indeed, an officer may ultimately be proven mistaken about the facts that led her to reasonably suspect criminal activity or have probable cause to believe a defendant was engaged in crime.⁴⁹

43. See *id.* at 502, 534 S.E.2d at 366.

44. *Id.* at 504–05, 534 S.E.2d at 368 (Benton, J., dissenting).

45. *Id.* at 505, 534 S.E.2d at 368 (Benton, J., dissenting).

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

47. *Id.* (Benton, J., dissenting) (quoting *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999)).

48. See *id.* (Benton, J., dissenting); see also *Terry v. Ohio*, 392 U.S. 1, 35–37 (1968) (Douglas, J., dissenting).

49. See *Hamlin*, 33 Va. App. at 505, 534 S.E.2d at 368 (Benton, J., dissenting); see also *Terry*, 392 U.S. at 36 n.3 (Douglas, J., dissenting).

F. Roadblocks

In *Trent v. Commonwealth*,⁵⁰ the Court of Appeals of Virginia applied the recent United States Supreme Court ruling in *City of Indianapolis v. Edmond*.⁵¹ In *Edmond*, the Court held that a checkpoint program, such as a roadblock, contravenes the Fourth Amendment when its primary purpose is the interdiction of illegal narcotics.⁵² The Supreme Court stated:

We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.

. . . While we do not limit these purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.⁵³

In *Trent*, the court noted that even though the officers were told in a pre-checkpoint briefing to ask each driver for his license, they were also instructed to target drug violations.⁵⁴ Furthermore, the officer in charge of the roadblock testified that asking for a driver's license was merely a tactic used to engage the driver in conversation concerning drug activity.⁵⁵ Relying on *Edmond*, the court held that the roadblock was per se unconstitutional and, therefore, reversed and dismissed the appellant's conviction.⁵⁶

G. Seizure

A person is seized by police within the meaning of the Fourth Amendment only when "by means of physical force or a show of authority, his freedom of movement is restrained."⁵⁷ Under this

50. 35 Va. App. 248, 544 S.E.2d 379 (Ct. App. 2001).

51. 531 U.S. 32 (2000).

52. *Id.* at 40-42.

53. *Id.* at 44.

54. 35 Va. App. at 251, 544 S.E.2d at 381.

55. *Id.*

56. *Id.*

57. *U.S. v. Mendenhall*, 446 U.S. 544, 553 (1980).

standard, the Court of Appeals of Virginia deemed unconstitutional the seizure in *Cartwright v. Commonwealth*.⁵⁸ In *Cartwright*, a uniformed police officer entered a convenience store that he frequently visited and “said put your hands up’ in a ‘friendly and joking manner.’”⁵⁹ In response, the appellant and other customers raised their hands in the air.⁶⁰ The officer testified that his hands were in his pockets when he made the statement and that none of the officers present displayed a weapon.⁶¹ The officer later approached the appellant and began a conversation, during the course of which he asked the appellant for his driver’s license.⁶² Two other uniformed officers stood approximately three feet behind the appellant.⁶³ The appellant consented to a search and pulled a baggie containing a large off-white rock-like substance from his pocket.⁶⁴ The appellant was subsequently handcuffed and arrested for possession of cocaine.⁶⁵ At trial, the appellant moved to suppress the cocaine, arguing that his consent to the search was not voluntary because he was subjected to an illegal seizure.⁶⁶

The Court of Appeals of Virginia held that the cocaine found on the appellant was the fruit of an illegal seizure.⁶⁷ The court reasoned that the fact that a uniformed police officer, in the presence of two other uniformed officers, retained possession of the appellant’s identification was sufficient to indicate that a seizure had occurred.⁶⁸ Furthermore, the court noted that when the appellant raised his hands in response to the officer’s apparent command to “put your hands up,” he was clearly attempting to comply with a police order, and this compliance signified his belief that he was not free to leave.⁶⁹

58. No. 1349-00-2, 2001 Va. App. LEXIS 254 (Ct. App. May 15, 2001) (unpublished decision).

59. *Id.* at *2.

60. *Id.* at *3.

61. *Id.* at *2–3.

62. *Id.* at *3–5.

63. *Id.* at *3.

64. *Id.*

65. *Id.* at *4.

66. *Id.*

67. *Id.* at *11.

68. *Id.* at *10.

69. *Id.*

III. FIFTH AMENDMENT

A. *Self-Incrimination*

In *Commonwealth v. Hill*,⁷⁰ the use of polygraph testing as a special condition of probation was held not to violate a probationer's Fifth Amendment right against self-incrimination.⁷¹ The appellant argued that such requisite testing violated his Fifth Amendment rights because it presented "a 'Hobson's choice' of either (1) making statements that could potentially be used against him at a revocation hearing or in a new criminal proceeding, or (2) having his probation revoked for failing to cooperate with the directives of his probation officer."⁷² The Commonwealth responded by arguing that the appellant "had no Fifth Amendment rights in the context of probationary supervision, as his privilege against self-incrimination [abated] . . . the moment his sentence was fixed by the court."⁷³

Although the court rejected the arguments from both sides, it upheld the use of polygraph testing as a condition of probation.⁷⁴ The court set forth several policy reasons for its holding, including: (1) probationers maintain conditional liberty, unlike the absolute liberty of ordinary citizens; (2) the supervision of probationers is a special need of the state, which permits a degree of impingement upon privacy that would otherwise be unconstitutional; and (3) probation officers would be rendered virtually powerless if the privilege of self-incrimination applied to the questioning of probationers concerning conditions of their probation.⁷⁵

B. *Double Jeopardy*

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice

70. No. 85436, 2001 Va. Cir. LEXIS 66 (Cir. Ct. Apr. 10, 2001) (Fairfax County).

71. *Id.* at *42.

72. *Id.* at *6.

73. *Id.* at *7.

74. *Id.* at *11.

75. *Id.* at *16-18.

put in jeopardy of life or limb.”⁷⁶ The guarantee affords an accused three distinct constitutional rights: it disallows (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.⁷⁷

In *Herbin v. Commonwealth*,⁷⁸ the appellant, who had been convicted of robbery and abduction, argued that the trial court erred in finding that there was an abduction of two individuals “separate and apart from the detention inherent in the robbery.”⁷⁹ During the course of a robbery, the appellant took two employees into a back room and ordered them not to come out until they were sure the appellant was gone.⁸⁰

In asserting his double jeopardy claim, the appellant relied upon the language of *Brown v. Commonwealth*,⁸¹ which stated that

“[o]ne accused of abduction by detention and another crime involving restraint of the victim, both growing out of a continuing course of conduct, is subject upon conviction to separate penalties for separate offenses only when the detention committed in the act of abduction is separate and apart from, and not merely incidental to, the restraint employed in the commission of the other crime.”⁸²

Based on this theory, the appellant argued that a defendant may be convicted of abduction in addition to robbery only if the victim’s detention is “separate and apart from, and not merely incidental to, the restraint employed in the commission of [robbery].”⁸³ The court rejected these arguments, instead holding that the trial court, as the trier of fact, could have reasonably concluded that the abductions were separate and apart from the restraint employed in the commission of the robbery.⁸⁴ Specifically,

76. U.S. CONST. amend. V.

77. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

78. No. 0223-00-3, 2001 Va. App. LEXIS 40 (Ct. App. Jan. 30, 2001) (unpublished decision).

79. *Id.* at *1.

80. *Id.* at *2-3.

81. 230 Va. 310, 337 S.E.2d 711 (1985).

82. *Herbin*, 2001 Va. App. LEXIS 40, at *4 (quoting *Brown*, 230 Va. at 314, 337 S.E.2d at 713-14).

83. *Id.* at *5 (quoting *Hoke v. Commonwealth*, 237 Va. 303, 311, 377 S.E.2d 595, 600 (1989)).

84. *Id.* at *8.

the court found the appellant's instructions to the employees to remain in the room were made with the intent to extort pecuniary benefit and to facilitate his escape.⁸⁵

In *Coleman v. Commonwealth*,⁸⁶ the Supreme Court of Virginia was asked to decide whether the appellant's convictions for the malicious wounding and attempted murder of the same victim subjected the defendant to double jeopardy.⁸⁷ Both the circuit court and the Court of Appeals of Virginia concluded that shooting the victim six times in the arms and legs was separate and distinct from the act, ten seconds later, of walking over to the victim's body and shooting the victim in the head.⁸⁸

The appellant asserted two arguments in his defense.⁸⁹ First, he argued that "the evidence established that his conduct constituted one continuous act."⁹⁰ Second, he contended that "the crime of attempted murder is a lesser included offense of malicious wounding, and therefore, he is entitled to the benefit of the double jeopardy provisions contained in the Fifth Amendment."⁹¹ The appellant relied on the test set forth in *Blockburger v. United States*⁹² to support these arguments.⁹³ The *Blockburger* test determines "whether each [offense charged] requires proof of an additional fact which the other does not."⁹⁴ When applying this test, courts are required to look at the "offenses charged in the abstract, without referring to the particular facts of the case under review."⁹⁵

Furthermore, the appellant relied on language in *Brown v. Commonwealth*,⁹⁶ asserting that "attempted murder and malicious wounding convictions cannot arise from one transaction."⁹⁷

85. *Id.*

86. 261 Va. 196, 539 S.E.2d 732 (2001).

87. *Id.* at 198, 539 S.E.2d at 733.

88. *Id.* at 199, 539 S.E.2d at 733.

89. *Id.*

90. *Id.*

91. *Id.*

92. 284 U.S. 299 (1932).

93. *Coleman*, 261 Va. at 200, 539 S.E.2d at 734.

94. *Id.* (quoting *Blockburger*, 284 U.S. at 304).

95. *Id.* (citing *Blythe v. Commonwealth*, 222 Va. 722, 726-27, 284 S.E.2d 796, 798-99 (1981)).

96. 222 Va. 111, 279 S.E.2d 142 (1981).

97. *Coleman*, 261 Va. at 201, 539 S.E.2d at 734 (quoting *Brown*, 222 Va. at 116, 279 S.E.2d at 146).

In *Brown*, the jury convicted the defendant of assault and battery under an indictment charging attempted murder, and additionally convicted the defendant of unlawful wounding under an indictment for malicious wounding.⁹⁸ Thus, in *Brown*, the defendant's conviction for unlawful wounding barred his further conviction "of all other offenses of a higher grade and of any lesser included offense encompassed by the malicious wounding indictment."⁹⁹ The court in *Coleman* declined to apply this rationale so broadly.¹⁰⁰

C. *Miranda*

In *Redmond v. Commonwealth*,¹⁰¹ the Court of Appeals of Virginia reversed a conviction due to the failure of the trial judge to suppress a statement obtained after the appellant expressed his desire to have counsel present.¹⁰² In this case, the appellant specifically requested, "Can I speak to my lawyer? I can't even talk to [a] lawyer before I make any kinds of comments or anything?"¹⁰³ The police officer responded that this was the appellant's only opportunity to give his side of the story.¹⁰⁴ This misstatement ultimately resulted in a confession.¹⁰⁵ Holding that the appellant's request was a textbook example of the invocation of one's *Miranda* rights, the court overturned the conviction.¹⁰⁶ The court stated, "Redmond's statement . . . [was] an unambiguous request to talk to his counsel and was directly responsive to the detective's earlier warning that 'You have the right to talk to a lawyer.'"¹⁰⁷

The *Redmond* holding can be contrasted with the ruling of the Court of Appeals of Virginia in *Hopkins v. Commonwealth*.¹⁰⁸ In

98. *Brown*, 222 Va. at 113, 279 S.E.2d at 143.

99. *Id.* at 116, 279 S.E.2d at 146.

100. *Coleman*, 261 Va. at 202, 539 S.E.2d at 735.

101. No. 0762-00-1, 2001 Va. App. LEXIS 276 (Ct. App. May 22, 2001) (unpublished decision).

102. *Id.* at *1.

103. *Id.* at *5.

104. *Id.*

105. *Id.*

106. *Id.* at *9.

107. *Id.* at *8.

108. No. 0502-00-1, 2001 Va. App. LEXIS 244 (Ct. App. May 8, 2001) (unpublished decision).

Hopkins, the court found that a custodial interrogation did not exist when police questioned a juvenile and ultimately obtained a confession to murder in the first degree and conspiracy to commit murder.¹⁰⁹ The appellant agreed to accompany the police to headquarters, and the police obtained the consent of the appellant's mother to take the appellant for questioning.¹¹⁰ The appellant was instructed several times that he did not have to talk to the police and that he was free to leave.¹¹¹ Throughout the interview, the appellant was allowed to use the restroom unescorted, was offered food and drink, and voluntarily took the police to the burial site of the victim.¹¹² Furthermore, it was uncontroverted that the appellant was not a suspect and that the appellant's confession was unexpected until the close of the interview.¹¹³ In its ruling, the court identified the following factors as pertinent to the resolution of a custody issue in the *Miranda* context: "(1) the familiarity or neutrality of the surroundings, (2) the number of police officers present, (3) the degree of physical restraint, (4) the duration and character of the interrogation, (5) the presence of probable cause to arrest, and (6) whether the suspect has become the focus of the investigation."¹¹⁴

IV. SIXTH AMENDMENT

The Sixth Amendment embodies a criminal defendant's right to counsel. In *Tasco v. Commonwealth*,¹¹⁵ the trial court declined to appoint new counsel for the appellant when his attorney testified on his behalf.¹¹⁶ The Virginia Code of Professional Responsibility¹¹⁷ provides that an attorney need not withdraw as counsel when testifying on behalf of a client if: (1) the testimony relates to a substantially uncontested matter; (2) the testimony pertains to

109. *Id.* at *1-2.

110. *Id.* at *3.

111. *Id.* at *4-5.

112. *Id.* at *6.

113. *Id.* at *7-8.

114. *Id.* at *8-9 (quoting *Bosworth v. Commonwealth*, 7 Va. App. 567, 572, 375 S.E.2d 756, 759 (Ct. App. 1989)).

115. No. 2946-99-2, 2001 Va. App. LEXIS 8 (Ct. App. Jan. 9, 2001) (unpublished decision).

116. *Id.* at *1.

117. The court used the Code of Professional Responsibility rather than the Rules of Professional Conduct because they were the Rules in effect at the time of the trial.

the value of legal services provided; or (3) withdrawal would constitute an undue hardship on the client.¹¹⁸ In ruling against the appellant, the Court of Appeals of Virginia concluded that he had failed to demonstrate that defense counsel's decision to testify on his behalf created an actual conflict of interest between the appellant and his attorneys.¹¹⁹

V. DUE PROCESS

Last year, the Supreme Court of Virginia decided for the first time that juveniles have neither a due process right nor a statutory right to assert an insanity defense in the adjudicatory phase of juvenile delinquency proceedings.¹²⁰ In *Commonwealth v. Chatman*, the court found that: (1) the United States Constitution does not require states to recognize an insanity defense for adult defendants; (2) even if the United States Constitution did recognize such a right, that right would not apply to juvenile defendants; and (3) an insanity defense is not fundamental to the fact-finding process because sanity, unlike mens rea, is not an element of this particular offense.¹²¹

In *Chatman*, the defendant, a thirteen-year-old juvenile, was charged with delinquency; the petition alleged that he had committed the crime of malicious wounding in violation of Virginia Code section 18.2-51.¹²² Upon appeal from the Juvenile and Domestic Relations District Court to the Greensville Circuit Court, the defendant moved for a psychiatric evaluation to determine whether he was insane at the time of the offense.¹²³ The defendant claimed that he had a long, documented history of mental illness, that on the day of the offense a medical doctor examined him and determined that he displayed "homicidal ideations," and that a licensed clinical psychologist diagnosed him with "Schizophreniform Disorder" two days after the offense.¹²⁴

118. *Tasco*, 2001 Va. App. LEXIS 8, at *5 (citing Virginia Code of Professional Responsibility DR:5-101(B)(1) through (3)).

119. *Id.* at *8.

120. *See Commonwealth v. Chatman*, 260 Va. 562, 574, 538 S.E.2d 304, 309 (2000).

121. *Id.* at 567, 538 S.E.2d at 306.

122. *Id.* at 565, 538 S.E.2d at 305.

123. *Id.*

124. *Id.*

The Commonwealth did not contest either the alleged mental problems or the existence of an adult's right, under Virginia law, to a psychiatric evaluation for these conditions.¹²⁵ Based solely on the defendant's status as a juvenile, however, the court held that the defendant had neither a due process right under the Fourteenth Amendment of the United States Constitution nor a statutory right under Virginia law to assert such an insanity defense.¹²⁶

In *Salmon v. Commonwealth*,¹²⁷ another case of first impression, the Court of Appeals of Virginia held that the Due Process Clause is not violated by the Commonwealth's investigation into the criminal backgrounds of potential jurors.¹²⁸ The court upheld Virginia Code section 19.2-389(A)(1), which provides in pertinent part:

Criminal history record information shall be disseminated . . . only to: Authorized officers or employees of criminal justice agencies . . . for purposes of the administration of criminal justice and the screening of an employment application or review of employment by a criminal justice agency with respect to its own employees or applicants, and dissemination to the Virginia Parole Board.¹²⁹

This statute specifically refers to the definitions of key terms in Virginia Code section 9-169, such as "criminal justice agencies" and "administration of criminal justice."¹³⁰ The court held that "[b]ecause the administration of criminal justice, by definition, includes the 'prosecution . . . of accused persons or criminal offenders,' the Office of the Commonwealth's Attorney constitutes a 'criminal justice agency' within the meaning of Code § 9-169."¹³¹

In *Thomas v. Commonwealth*,¹³² the Supreme Court of Virginia held that a defendant's constitutional right to waive assistance of counsel takes precedence over a trial court's judgment that coun-

125. *Id.*

126. *Id.* at 572, 538 S.E.2d at 309.

127. 32 Va. App. 586, 529 S.E.2d 815 (Ct. App. 2000).

128. *Id.* at 594, 529 S.E.2d at 819.

129. VA. CODE ANN. § 19.2-389(A)(1) (Cum. Supp. 2001)).

130. *Id.* "Administration of criminal justice" is defined as the "performance of any activity directly involving the . . . prosecution . . . of accused persons or criminal offenders." *Id.* § 9.1-101 (Cum. Supp. 2001).

131. *Salmon*, 32 Va. App. at 593, 529 S.E.2d at 818.

132. 260 Va. 553, 539 S.E.2d 79 (2000).

sel is necessary due to the nature of the offense charged.¹³³ The court held that the right to counsel is properly waived when a defendant knowingly and intelligently makes such a decision.¹³⁴ Relying on the United States Supreme Court's ruling in *Faretta v. California*,¹³⁵ the court noted that the right to assistance of counsel guaranteed by the Sixth Amendment also provides an inverse right to self-representation.¹³⁶

In *Thomas*, the dispositive issue was whether the defendant made a motion to represent himself in a timely fashion.¹³⁷ The court stated that "[w]hen the motion is timely, the trial court has no discretion to deny a defendant his right to represent himself, if the trial court is satisfied that the requirements of *Faretta* have been met."¹³⁸ Finding that the defendant had made his motion in a timely manner, the court concluded that "[w]hatever legitimate misgivings the trial court may have had about the difficulty Thomas would face in representing himself, his constitutional right to waive the assistance of counsel takes precedence when the choice to exercise that right is knowingly and intelligently made."¹³⁹

In *Williams v. Commonwealth*,¹⁴⁰ the appellant requested a jury after having signed a jury waiver two months prior to trial.¹⁴¹ Counsel for the appellant articulated surprise at this request and communicated to the court that he was not prepared for a jury trial.¹⁴² The trial court found that the defendant had waived his right to trial by jury.¹⁴³

The Court of Appeals of Virginia began its analysis by noting that "[w]here there has been a knowing, intentional and voluntary waiver of the right to a jury trial, there is no absolute constitutional right to withdraw it."¹⁴⁴ However, the court concluded

133. *See id.* at 560–61, 539 S.E.2d at 83.

134. *Id.*

135. 422 U.S. 806 (1975).

136. *Thomas*, 260 Va. at 559, 539 S.E.2d at 82.

137. *Id.*

138. *Id.* (citing *United States v. Lawrence*, 605 F.2d 1321, 1324 (4th Cir. 1979)).

139. *Id.* at 561, 539 S.E.2d at 83.

140. 33 Va. App. 506, 534 S.E.2d 369 (Ct. App. 2000).

141. *Id.* at 512, 534 S.E.2d at 371.

142. *Id.*

143. *Id.*

144. *Id.* at 513, 534 S.E.2d at 372 (quoting *Carter v. Commonwealth*, 2 Va. App. 392, 398-99, 345 S.E.2d 5, 9 (Ct. App. 1986)).

that in the instant case, the record did not reflect that the appellant waived his right voluntarily and intelligently, but rather that the appellant signed the waiver, and the Commonwealth's Attorney and the trial court concurred.¹⁴⁵ In finding for the appellant, the court relied on the rationale in *Jones v. Commonwealth*,¹⁴⁶ where the Supreme Court of Virginia found that in the absence of proof that the waiver is made knowingly and voluntarily, such a waiver is void, and the appellant must be afforded the right to trial by jury under the Due Process Clause of the Fourteenth Amendment.¹⁴⁷

Finally, the Supreme Court of Virginia addressed a novel issue in the case of *Burns v. Commonwealth*,¹⁴⁸ where the appellant was convicted of capital murder and sentenced to death for killing his mother-in-law during the commission of a rape and forcible sodomy.¹⁴⁹ The appellant contended on appeal that the trial court should have allowed him to examine law enforcement officials under oath to determine whether all potential exculpatory evidence had been disclosed to the Commonwealth's Attorney.¹⁵⁰ The Supreme Court of Virginia rejected this contention, holding that there was no authority for such a proposition; rather, it was the duty of the individual prosecutor to discover and disclose all exculpatory information to the defendant.¹⁵¹

VI. CAPITAL MURDER

Virginia courts have recently considered two appeals involving the interpretation of Virginia Code section 18.2-31(8), which states that "[t]he willful, deliberate, and premeditated killing of more than one person within a three-year period" is capital murder.¹⁵²

In *Burlile v. Commonwealth*,¹⁵³ the appellant contended that,

145. *Id.* at 514, 534 S.E.2d at 372.

146. 24 Va. App. 636, 484 S.E.2d 618 (Ct. App. 1997).

147. *Id.* at 639-40, 484 S.E.2d at 619-20.

148. 261 Va. 307, 541 S.E.2d 872 (2001).

149. *Id.* at 313, 541 S.E.2d at 877.

150. *Id.* at 328, 541 S.E.2d at 886.

151. *Id.*

152. VA. CODE ANN. § 18.2-31(8) (Repl. Vol. 1997).

153. 261 Va. 501, 544 S.E.2d. 360 (2001).

pursuant to this provision, the Commonwealth must prove that the defendant was a principal in the first degree, or “triggerman,” in each homicide.¹⁵⁴ In rejecting this contention, the Supreme Court of Virginia held that this subsection of capital murder is a “gradation crime.”¹⁵⁵ As such, the Commonwealth need only prove that the defendant is the “triggerman” in the principal murder charged.¹⁵⁶ Thus, for the killing of more than one person in a three-year period, the defendant may be an accomplice or principal in the second degree in the underlying murder used to elevate the grade of the primary crime to capital murder.¹⁵⁷

In *Smith v. Commonwealth*,¹⁵⁸ the appellant was tried in a single proceeding for four individual murders.¹⁵⁹ The first two murders were alleged to be part of the same act, and the defendant was charged with capital murder under Virginia Code section 18.2-31(7).¹⁶⁰ The Commonwealth relied upon the third murder to support the charge of capital murder of the fourth alleged victim by charging Smith with the killing of more than one person within a three-year period pursuant to Virginia Code section 18.2-31(8).¹⁶¹ The trial court refused to sever the four murder counts pursuant to a motion under Rule 3A:10(c) of the Rules of the Supreme Court of Virginia.¹⁶² The Court of Appeals of Vir-

154. *Id.* at 505, 544 S.E.2d at 362.

155. *Id.* at 511, 544 S.E.2d at 365–66. The court noted that there are several types of murder that the legislature has elevated to capital murder: those that are concerned with the status of the victim (e.g., the murder of a law enforcement officer in violation of VA. CODE ANN. § 18.2-31(6) (Cum. Supp. 2001)); those that are concerned with the status of the defendant (e.g., murder by a prisoner confined in a state or local correctional facility in violation of VA. CODE ANN. § 18.2-31(3) (Cum. Supp. 2001)); and “gradation” offenses, which elevate a single act of premeditated murder to capital murder because it is qualitatively more egregious (e.g., murder during the commission of abduction with intent to defile in violation of VA. CODE ANN. § 18.2-31(1) (Cum. Supp. 2001)). *Id.* at 509–10, 544 S.E.2d at 364–65.

156. *Id.* at 511, 544 S.E.2d at 365.

157. *See id.* at 510–11, 544 S.E.2d at 365.

158. 35 Va. App. 68, 542 S.E.2d 803 (Ct. App. 2001).

159. *Id.* at 71, 542 S.E.2d at 804.

160. *Id.* at 71–72, 542 S.E.2d at 804.

161. *Id.*

162. *Id.* at 71, 542 S.E.2d at 804. In the absence of consent by both parties, Rule 3A:10(c) permits the court to join separate charges for trial if two criteria are met:

(1) justice does not require separate trials; and (2) either (a) the requirements of Rule 3A:6(b) are met; or (b) the defendant and the Commonwealth’s attorney consent. Under Rule 3A:6(b), the offenses must be either: (1) part of the same act or transaction; or (2) two or more acts or transactions which are connected; or (3) the offenses must be part of a common plan or scheme.

VA. SUP. CT. R. 3A:10(c).

ginia found no support in the record for the proposition that the murders were in any way connected as part of a common scheme or plan and concluded that the trial court abused its discretion in allowing them to be tried together.¹⁶³

While not directly addressed in *Smith*, this ruling appears to dispel the notion, often asserted by prosecutors,¹⁶⁴ that the underlying or “predicate” murder relied upon to upgrade a subsequent murder to capital murder under Virginia Code section 18.2-31(8) can be treated merely as one of the elements of the capital charge. Unless the offenses can otherwise be joined under the provisions of Rules 3A:6 and 3A:10(c), prosecutors must either have in hand a prior conviction for a murder committed within a three-year period, or they must try the murders separately, seeking the “gradation crime” of capital murder only after securing a prior conviction for murder.¹⁶⁵

The Supreme Court of Virginia has also considered a number of penalty phase issues arising in capital murder cases. In *Powell v. Commonwealth*,¹⁶⁶ the court examined Virginia Code section 19.2-264.4(D), the statutory verdict form for the sentencing phase of a capital murder case,¹⁶⁷ and Virginia Code section 18.2-10, the statute providing the punishment for capital murder.¹⁶⁸ The Court found that a conflict does exist between the two sections.¹⁶⁹ In harmonizing these provisions, however, the court held that “the jury must receive a verdict form that, in addition to addressing the imposition of a sentence of death and the imposition of a sentence of life imprisonment, also allows the jury to impose a sentence of life and a fine of up to \$100,000.”¹⁷⁰

163. *Smith*, 35 Va. App. at 75, 542 S.E.2d at 806. *Smith* was convicted by the jury of only one count of first-degree murder and the related firearm charge, and he was sentenced to a total of sixty years incarceration. *Id.* at 71–72, 542 S.E.2d at 804. The case was reversed and remanded to the trial court. *Id.* at 78, 542 S.E.2d at 807.

164. Indeed, one of the authors herein has made this assertion.

165. See *Smith*, 35 Va. App. at 75, 542 S.E.2d at 806.

166. 261 Va. 512, 544 S.E.2d 679 (2001).

167. The statutory verdict form under this provision does not contain a reference to an alternative sentence of life imprisonment or a reference to the maximum fine to be imposed. See VA. CODE ANN. § 19-2.264.4(D) (Cum. Supp. 2001).

168. *Powell*, 261 Va. at 542–44, 544 S.E.2d at 697–98. This section includes an alternative sentence of life and a fine of not more than \$100,000. VA. CODE ANN. § 18.2-10(a) (Cum. Supp. 2001).

169. *Powell*, 261 Va. at 543–44, 544 S.E.2d at 697–98.

170. *Id.* at 544, 544 S.E.2d at 698.

More importantly, however, the *Powell* court considered the issue of whether the current statutory verdict form set forth in Virginia Code section 19.2-264.4(D) is likely to confuse a jury since the provision appears to allow the death sentence only if one or both aggravating factors are proven beyond a reasonable doubt.¹⁷¹ The court found that the potential for confusion did exist, holding that:

in a capital murder trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than \$100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.¹⁷²

In *Lenz v. Commonwealth*,¹⁷³ the court addressed a capital murder conviction for the killing of an inmate by another inmate.¹⁷⁴ In his appeal, Lenz contended that the trial court erred in precluding introduction of the victim's criminal history during the sentencing phase of the trial,¹⁷⁵ asserting that such information should be received by the jury to consider in mitigation of the offense.¹⁷⁶ The Supreme Court of Virginia disagreed, ruling that Lenz had no constitutional right to present the victim's criminal history and that such evidence was irrelevant to the consideration of whether the defendant's acts were vile or inhuman, showed depravity of mind, or whether the defendant would constitute a continuing threat to society.¹⁷⁷

In *Lovitt v. Commonwealth*,¹⁷⁸ the appellant argued that the trial court erred in refusing to allow him to argue to the jury that "he would die in prison" if given a sentence of life in prison without the possibility of parole.¹⁷⁹ The Supreme Court of Virginia disagreed, holding that such an argument is speculative in nature and incorrect as a matter of law.¹⁸⁰ The court reasoned that "prisoners who have received a sentence of life imprisonment without

171. *Id.* at 545, 544 S.E.2d at 698.

172. *Id.* at 545, 544 S.E.2d at 698-99.

173. 261 Va. 451, 544 S.E.2d 299 (2001).

174. *Id.* at 455, 544 S.E.2d at 301.

175. *Id.* at 458, 544 S.E.2d at 303.

176. *Id.* at 464, 544 S.E.2d at 307.

177. *Id.*

178. 260 Va. at 497, 537 S.E.2d at 866 (2000).

179. *Id.* at 515, 537 S.E.2d at 878.

180. *Id.*

possibility of parole are not precluded from receiving executive clemency for crimes they have committed.”¹⁸¹ The court also rejected the appellant’s argument that the jury should consider his future dangerousness solely in the context of prison “society.”¹⁸² The court noted that Virginia Code section 19.2-264.2¹⁸³ contains no such restrictions on the jury’s consideration and, accordingly, refused to rewrite the statute to restrict its scope.¹⁸⁴

VII. TRIAL

A. Jurors

In *Barrett v. Commonwealth*,¹⁸⁵ the Court of Appeals of Virginia held that a venireman need not be excluded from a jury simply because he was the brother of a police officer, despite the fact that the prospective juror’s brother was a witness in the pending case, and that the defendant was charged with assaulting a police officer.¹⁸⁶ Sitting en banc, the majority of the court of appeals reasoned that per se rules of juror disqualification are few in number and viewed with disfavor in Virginia.¹⁸⁷ The majority further concluded that the prospective juror’s repeated assertion that he could be impartial in the matter outweighed his lone statement that “truthfully” he would view his brother’s testimony as more credible than that of the defendant’s.¹⁸⁸ Finally, the majority relied on the fact that the testimony of the prospective juror’s brother was not material, the brother was not cross-examined, and the juror’s brother was not the victim in the case.¹⁸⁹

181. *Id.* (citations omitted).

182. *Id.* at 517, 537 S.E.2d at 879.

183. The statute allows a jury to sentence a defendant found guilty of capital murder to death if it finds beyond a reasonable doubt that he “would constitute a continuing serious threat to society.” VA. CODE ANN. § 19.2-264.2 (Repl. Vol. 2000 & Cum. Supp. 2001).

184. *Lovitt*, 260 Va. at 517, 537 S.E.2d at 879.

185. 34 Va. App. 374, 542 S.E.2d 23 (Ct. App. 2001) (en banc).

186. *Id.* at 376, 542 S.E.2d at 24.

187. *Id.* at 378, 542 S.E.2d at 25.

188. *Id.* at 380–81, 542 S.E.2d at 26.

189. *Id.* at 381, 542 S.E.2d at 26. In contrast, last year the Supreme Court of Virginia held in *Medici v. Commonwealth*, 260 Va. 223, 532 S.E.2d 23 (2000), that “[p]ublic confidence in the integrity of the” judicial system, and the integrity of criminal trials in particular, was reason enough to strike a venireman for cause and was reversible error not to

B. *Proof Beyond a Reasonable Doubt*

In *Tarpley v. Commonwealth*,¹⁹⁰ the Supreme Court of Virginia decided the question of what inferences a fact-finder may draw from circumstantial evidence to prove guilt beyond a reasonable doubt.¹⁹¹ In *Tarpley*, the evidence proved that the accused (1) was involved in a fight with the victim; (2) drove the victim's car away from the scene of the fight after the victim was beaten unconscious; (3) possessed the victim's car for a short while before abandoning it after a wreck; and (4) was lying when he testified that he took the car to get help for the victim.¹⁹² The court held that those facts, collectively and individually, provided an insufficient basis to prove beyond a reasonable doubt that the accused had the intent to permanently deprive the victim of his car.¹⁹³ The court instead concluded that such an inference was purely speculative.¹⁹⁴ In so holding, the court explicitly stated that disbelief of the accused's account "does not provide a factual basis for establishing "the accused's guilt beyond a reasonable doubt."¹⁹⁵ The court's reversal of this conviction makes clear that although a fact-finder has broad discretion to find facts as it sees fit, the appellate courts may and should closely scrutinize the inferences that are drawn from those facts.

C. *Speedy Trial*

In *Heath v. Commonwealth*,¹⁹⁶ the Supreme Court of Virginia held that the appellant's request for a psychiatric evaluation tolled the statutory speedy trial period for the time he remained in custody awaiting trial after his preliminary hearing.¹⁹⁷ Although the appellant requested the psychiatric evaluation, he argued that "his request for a psychiatric examination did not con-

do so. *Id.* at 227, 532 S.E.2d at 30-31. In *Medici*, the defense attorney worked for the same Public Defender's office as the attorney representing the man accused of murdering a juror's husband. *Id.* at 227, 532 S.E.2d at 31.

190. 261 Va. 251, 542 S.E.2d 761 (2001).

191. *Id.* at 252, 542 S.E.2d at 761.

192. *Id.* at 254-55, 542 S.E.2d at 762-63.

193. *Id.* at 257, 542 S.E.2d at 764.

194. *Id.*

195. *Id.*

196. 261 Va. 389, 541 S.E.2d 906 (2001).

197. *Id.* at 393, 541 S.E.2d at 908.

tain a request for a continuance” and, therefore, the statutory speedy trial period was not tolled.¹⁹⁸ The court rejected his argument, initially noting that the speedy trial protections granted in Virginia Code section 19.2-243 may be waived.¹⁹⁹ The court reasoned that because the appellant’s motion for a psychiatric examination included a request to determine his competency to stand trial, the motion implicitly requested that the court continue the case so that the examination could be performed.²⁰⁰ Thus, the court found that the appellant’s motion triggered the statutory tolling provisions of Virginia Code section 19.2-243(4).²⁰¹

The Isle of Wight Circuit Court issued a related ruling in *Commonwealth v. Norton*,²⁰² holding that there is no exception to the statutory five-month period for the commencement of a trial in cases where one prosecutor cannot produce an accused for trial because another prosecutor in a neighboring jurisdiction has the defendant before a different court on the same day.²⁰³ In so holding, the court determined that the enumerated exception for witnesses who are being “enticed or kept away, or prevented from attending by sickness or accident” does not encompass this type of situation.²⁰⁴

In *Norton*, the Commonwealth argued that the appellant’s unavailability on his trial date should not be attributable to the Commonwealth, even though the defendant was in a neighboring jurisdiction on that date facing different charges that were also issued by the Commonwealth.²⁰⁵ Based on the principles enunciated in *Knott v. Commonwealth*,²⁰⁶ the court rejected this argument.²⁰⁷ The *Norton* court pointed out that, in *Knott*, “[t]he Virginia Supreme Court observed that the judicial power to retrieve an inmate from a penal institution for trial, at the request of the Commonwealth, reaches ““into every penal institution within the

198. *Id.* at 392, 541 S.E.2d at 908.

199. *Id.* (citing *Stephens v. Commonwealth*, 225 Va. 224, 233–34, 301 S.E.2d 22, 27–28 (1983); *Brooks v. Peyton*, 210 Va. 318, 321, 171 S.E.2d 243, 246 (1969)).

200. *Id.*

201. *Id.* at 392, 541 S.E.2d at 908-09.

202. No. CR00-338, 2001 Va. Cir. LEXIS 23 (Cir. Ct. Mar 13, 2001) (Isle of Wight County).

203. *Id.* at *17.

204. *Id.* at *14 n.5 (quoting VA. CODE ANN. § 19.2-243 (Repl. Vol. 2000)).

205. *Id.* at *16.

206. 215 Va. 531, 211 S.E.2d 86 (1975).

207. *Norton*, 2001 Va. Cir. LEXIS 23, at *17.

jurisdiction of the sovereign.”²⁰⁸ Accordingly, the court concluded that “[w]hen the Commonwealth fails to accomplish this task, it has no one to blame but itself.”²⁰⁹

VIII. CRIMES AND NEW LEGISLATION

A. *Post-Conviction Treatment of Biological Evidence*

In the wake of recent high-profile cases where DNA evidence was relied upon to exonerate convicted felons, including death row inmates, the General Assembly recently established broad new procedures for the storage, preservation, and retention of human biological evidence in felony cases.²¹⁰ The new legislation allows a convicted felon or his attorney to petition the trial court to preserve human biological evidence for fifteen years or longer.²¹¹ Upon the granting of such a petition, the evidence is transferred to the custody of the Division of Forensic Science for preservation.²¹²

Another newly enacted provision allows a convicted felon to petition the circuit court that entered his conviction to apply for a new scientific investigation of human biological evidence.²¹³ The court must find the following elements before ordering the testing:

(i) the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the Division of Forensic Science at the time the conviction became final in the circuit court; (ii) the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way; (iii) the testing is materially relevant, noncumulative, and necessary and may prove the convicted person’s actual innocence; (iv) the testing requested involves a scientific method employed by the Division of Forensic Science; and

208. *Id.* (quoting *Knott*, 215 Va. at 533, 211 S.E.2d at 87) (citations omitted).

209. *Id.*

210. VA. CODE ANN. § 19.2-270.4:1 (Cum. Supp. 2001).

211. *Id.*

212. *Id.*

213. *Id.* § 19.2-327.1 (Cum. Supp. 2001).

(v) the convicted person has not unreasonably delayed the filing of the petition after the evidence or the test for the evidence became available at the Division of Forensic Science.²¹⁴

The petition must also set forth the reasons that the evidence was not known or tested by the time the conviction became final and also indicate why the newly discovered or untested evidence may prove the actual innocence of the person convicted.²¹⁵

The court, after hearing the motion, must

set forth its findings specifically as to each of the items enumerated [above] and either (i) dismiss the motion for failure to comply with the requirements of [the] section or (ii) dismiss the motion for failure to state a claim upon which relief can be granted or (iii) order that the testing be done by the Division of Forensic Science based upon a finding of clear and convincing evidence that the requirements of [section 19.2-327.1(A)] are met.²¹⁶

B. Writs of Actual Innocence

In the face of considerable criticism over Virginia's restrictive "21-day rule," which limits motions for a new trial—even where there is newly discovered evidence—to a period not later than twenty-one days after trial,²¹⁷ the General Assembly has created

214. *Id.* § 19.2-327.1(A) (Cum. Supp. 2001).

215. *Id.* § 19.2-327.1(B) (Cum. Supp. 2001).

216. *Id.* § 19.2-327.1(D) (Cum. Supp. 2001).

217. *See* VA. SUP. CT. R. 3A:15(c). The Supreme Court of Virginia has previously set out the following standard:

Motions for new trials based on after-discovered evidence are addressed to the sound discretion of the trial judge, are not looked upon with favor, are considered with special care and caution, and are awarded with great reluctance. The applicant bears the burden to establish that the evidence (a) appears to have been discovered subsequent to the trial; (b) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (c) is not merely cumulative, corroborative or collateral; and (d) is material, and such as should produce opposite results on the merits at another trial.

Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983) (citations omitted); *see also* *Stockton v. Commonwealth*, 227 Va. 124, 149, 314 S.E.2d 371, 387 (1984). In the federal courts, habeas corpus claims of actual innocence, based solely on newly discovered evidence and not constitutional error, are not recognized, even for those sentenced to death. *Herrera v. Collins*, 506 U.S. 390, 404 (1993). The United States Supreme Court has stated that:

Petitioner in this case is simply not entitled to habeas relief . . . [f]or he does not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence, but rather argues

the writ of actual innocence.²¹⁸ The new law, which becomes effective on November 15, 2002, allows for the petition and issuance of a writ of actual innocence for persons convicted of a felony upon a plea of not guilty, or for any person sentenced to death or convicted of a Class 1 or Class 2 felony, or convicted of a felony for which the maximum penalty is life imprisonment.²¹⁹

Convicted criminals must file the petition with the Supreme Court of Virginia and must allege:

(i) the crime for which the petitioner was convicted and that such conviction was upon a plea of not guilty or that the person is under a sentence of death or convicted of (1) a Class 1 felony, (2) a Class 2 felony or (3) any felony for which the maximum penalty is imprisonment for life; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the human biological evidence and the scientific testing supporting the allegation of innocence; (iv) that the evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court, or if known, the reason that the evidence was not subject to the scientific testing set forth in the petition; (v) the date the test results under § 19.2-327.1 became known to the petitioner or any attorney of record; (vi) that the petitioner or his attorney of record has filed the petition within sixty days of obtaining the test results under § 19.2-327.1; (vii) that the petitioner is currently incarcerated; (viii) the reason or reasons the evidence will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (ix) for any conviction that became final in the circuit court after June 30, 1996, that the evidence was not available for testing under § 9-196.11.²²⁰

If the supreme court determines that a resolution of the case requires further development of the facts, it may order the circuit court to conduct a hearing to certify findings of fact on certain issues.²²¹ After considering the petition and the Commonwealth's

that he is entitled to habeas relief because newly discovered evidence shows that his conviction is factually incorrect. The fundamental miscarriage of justice exception is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence." We have never held that it extends to freestanding claims of actual innocence. Therefore, the exception is inapplicable here.

Id. at 404–405 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion)) (citation omitted).

218. S.B. 1366, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of May 2, 2001, ch. 873, 2001 Va. Acts 1621) (codified as amended at § 19.2-327.2 (Cum. Supp. 2001)).

219. VA. CODE ANN. § 19.2-327.2 (Cum. Supp. 2001).

220. *Id.* § 19.2-327.3(A) (Cum. Supp. 2001).

221. *Id.* § 19.2-327.4 (Cum. Supp. 2001).

response, the previous records of the case, the record of any hearing on newly tested evidence, and any findings certified from the circuit court, the supreme court may dismiss the petition or vacate or modify the conviction.²²²

C. *Driving Under the Influence*

Under prior law, at a trial that involved a charge of driving under the influence, the Commonwealth was prohibited from introducing evidence in its case-in-chief that the defendant refused to take a blood or breath test under the implied consent law.²²³ Prosecutors were often faced with the problem of seeking a conviction without a chemical test, which was frequently aggravated by the presence of a jury that held the Commonwealth responsible for the absence of such much-expected evidence. In response, the General Assembly amended Virginia Code sections 18.2-268.3 and 18.2-268.10 to allow the Commonwealth to introduce evidence that the defendant unreasonably refused to allow a blood or breath sample to be taken.²²⁴ The sole purpose of admitting this evidence under the new law, however, is to explain the absence of a chemical test at trial.²²⁵ The statute also provides that an arresting officer must advise an arrestee that a finding of an unreasonable refusal to consent may be admitted as evidence at a criminal trial.²²⁶

D. *Oral or Written Threats*

In response to the growing awareness of threats made over the Internet as well as those made to schoolchildren and teachers, the General Assembly has rewritten Virginia Code section 18.2-60 to provide that it is now a Class 6 felony to knowingly communicate in writing a threat to kill or to do bodily injury to a person if the threat creates a reasonable apprehension of death or bodily injury

222. *Id.* § 19.2-327.5 (Cum. Supp. 2001).

223. *Id.* § 18.2-268.10 (Repl. Vol. 1996).

224. H.B. 924, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Mar. 25, 2001, ch. 654, 2001 Va. Acts 802) (codified as amended at VA. CODE ANN. §§ 18.2-268.3, -268.10 (Cum. Supp. 2001)).

225. VA. CODE ANN. § 18.2-268.10(C) (Cum. Supp. 2001).

226. *Id.* § 18.2-268.3(A) (Cum. Supp. 2001).

to the recipient or his family.²²⁷ The statute includes communications that are “electronically transmitted [to] produce a visual or electronic message.”²²⁸ If such communication threatens to carry out the bodily harm on school property, including school buses, then the crime is complete, regardless of whether the person who is the object of the threat actually receives the threat.²²⁹

E. *Stalking*

The General Assembly provided prosecutors with a third type of mental state that can be proved to convict a person for stalking under Virginia Code section 18.2-60.3. Under the prior law, the Commonwealth was required to prove that the stalker either intended or knew that his actions placed the victim in reasonable fear of death, criminal sexual assault, or bodily injury on more than one occasion.²³⁰ The new standard allows for a conviction if the Commonwealth demonstrates that the stalker “reasonably should know” that his actions place the victim in reasonable fear.²³¹

F. *Victim Rights in Plea Negotiations*

The General Assembly amended Virginia Code section 19.2-11.01 to require the Commonwealth’s Attorney, upon written request of the victim in a felony case, to inform the victim, either verbally or in writing, of the contents of any proposed plea agreement, and to obtain the victim’s views concerning plea negotiations.²³² While this new section does not obligate the Commonwealth’s Attorney to follow the directions of the victim and does not abrogate the Commonwealth Attorney’s discretion in criminal cases, it certainly will create a new dynamic for some prosecutors.²³³ If the prosecutor does not consult the victim concerning a

227. *Id.* § 18.2-60(A) (Cum. Supp. 2001).

228. *Id.* § 18.2-60(A)(2) (Cum. Supp. 2001).

229. *Id.* § 18.2-60(B) (Cum. Supp. 2001).

230. *Id.* § 18.2-60.3(A) (Repl. Vol. 1996).

231. *Id.* § 18.2-60.3(A) (Cum. Supp. 2001).

232. *Id.* § 19.2-11.01(A)(4)(d) (Cum. Supp. 2001).

233. For many other prosecutors, this section simply states what has always been a routine practice.

proposed plea bargain, the court may deny a plea agreement unless the Commonwealth shows good cause for its failure to consult the victim.²³⁴

G. *Special Grand Juries*

The General Assembly has created a new mechanism for the impaneling of special grand juries.²³⁵ Under the new law, a special grand jury may be impaneled upon motion of the Commonwealth's Attorney.²³⁶ This provision provides a powerful new tool for prosecutors in the investigation and prosecution of criminal activity. The special grand jury has the authority to issue subpoenas for witnesses, papers, records and documents.²³⁷ Procedurally, the Commonwealth's Attorney may examine witnesses called to testify or produce evidence before the grand jury.²³⁸ The special grand jury may also consider indictments and return "true bills."²³⁹ Under prior law, a special grand jury could only be impaneled by a majority of the regular grand jurors or upon the court's own motion.²⁴⁰

While the new special grand juries have powers similar to the present multi-jurisdiction grand jury,²⁴¹ the subject matter jurisdiction of the special grand jury is not limited to certain enumerated crimes.²⁴² Moreover, the duration of a new special grand jury is not limited in the statute.²⁴³

234. VA. CODE ANN. § 19.2-11.01(A)(4)(d) (Cum. Supp. 2001). The section confers no procedural or substantive rights upon the defendant, and therefore cannot be used to invalidate any plea entered into by the defendant. *Id.*

235. S.B. 694, Va. Gen. Assembly (Reg. Sess. 2001) (enacted as Act of Feb. 13, 2001, ch. 4, 2001 Va. Acts 2) (codified as amended at VA. CODE ANN. § 19.2-206 (Cum. Supp. 2001)).

236. VA. CODE ANN. § 19.2-206(A)(iii) (Cum. Supp. 2001).

237. *Id.* § 19.2-208 (Cum. Supp. 2001).

238. *Id.* § 19.2-210 (Cum. Supp. 2001).

239. *Id.* § 19.2-206(A) (Cum. Supp. 2001).

240. *Id.* § 19.2-206 (Repl. Vol. 2000).

241. *Id.* § 19.2-215.1 to -215.11 (Repl. Vol. 2000).

242. *See id.* §§ 19.2-206 to -215 (Repl. Vol. 2000 & Cum. Supp. 2001).

243. *See id.*

IX. EVIDENCE

A. Admissions

In *Commonwealth v. Evans*,²⁴⁴ the Southampton Circuit Court held that a defendant's statements to a prosecutor during plea negotiations could be used to impeach the defendant's alibi at trial after plea negotiations were unsuccessful.²⁴⁵ While federal rules prohibit use at trial of statements made by a criminal defendant during plea negotiations,²⁴⁶ the Rules of the Supreme Court of Virginia bar the statements only "in the case-in-chief in any civil or criminal proceeding against the person" who made the statement.²⁴⁷

B. Unavailability of Witness

It is well-settled that a party who seeks to introduce the testimony of an unavailable witness may establish the witness's unavailability by demonstrating: (1) that the witness in question will invoke his Fifth Amendment privilege against self-incrimination; (2) that the proponent has conducted a good-faith and diligent effort to find the witness; or (3) that the witness is deceased.²⁴⁸ In *Sapp v. Commonwealth*,²⁴⁹ a case of first impression, the Court of Appeals of Virginia held that witnesses who were present at trial and testified to some degree, but who stated they were too afraid for their personal safety to fully testify at trial, are also unavailable.²⁵⁰ This unavailability rendered their preliminary hearing testimony admissible at trial.²⁵¹

The dissent in *Sapp* contended that the witnesses were manifestly not unavailable—they were, in fact, present at trial.²⁵²

244. No. CR-01-26, 2001 Va. Cir. LEXIS 38 (Cir. Ct. May 7, 2001) (Southampton County).

245. See *id.* at *8–12.

246. FED. R. EVID. 410(4).

247. *Evans*, 2000 Va. Cir. LEXIS 38, at *5 (quoting VA. SUP. CT. R. 3A:8(c)(5)).

248. See CHARLES E. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* §§ 18-9 to 18-11 (5th ed. 1999).

249. 35 Va. App. 519, 546 S.E.2d 245 (Ct. App. 2001).

250. *Id.* at 526, 546 S.E.2d at 249.

251. *Id.* at 529, 546 S.E.2d at 250.

252. *Id.* at 530, 546 S.E.2d at 250–51 (Benton, J., dissenting).

Though the majority held that it lay in the discretion of the trial judge to use the contempt power to compel the witnesses' testimony,²⁵³ the dissent reasoned that by admitting the preliminary hearing testimony, the accused's right to confront his accusers was unfairly curtailed.²⁵⁴ Moreover, the fearful witnesses in *Sapp* did not actually contend that the defendant had threatened them, or that anyone on his behalf had done so.²⁵⁵ They testified only to a "general fear because of hearing talk here and there in the streets."²⁵⁶

In response to the suggestion that the use of preliminary hearing testimony operated in derogation of the defendant's Confrontation Clause right, the majority noted that the defendant had the opportunity to cross-examine the witnesses at the preliminary hearing.²⁵⁷ This observation ignores the fact that a preliminary hearing may, in many cases, precede by many months the actual trial of a case; thus, at a preliminary hearing, a cross-examiner may not have completed investigation of the facts of the case or fully know in what way to cross-examine a witness. Counsel confronted with the attempted admission of a stale transcript should note that, for these reasons, old testimony should not be admitted.

In *Cairns v. Commonwealth*,²⁵⁸ the Court of Appeals of Virginia decided the question of whether a co-defendant's hearsay admissions may be admitted against an accused pursuant to Virginia's "statement-against-interest" hearsay exception.²⁵⁹ The court concluded that admission of such statements violates the Sixth Amendment's Confrontation Clause guarantee unless the statements contain "particularized guarantees of trustworthiness such that the adversarial testing of the statement would be expected to add little, if anything, to the statement's reliability."²⁶⁰ Those guarantees do not include the fact that the statement was voluntary or that other evidence in the case tends to corroborate

253. *Id.* at 528, 546 S.E.2d at 250.

254. *Id.* at 531, 546 S.E.2d at 251 (Benton, J., dissenting).

255. *Id.* at 532, 546 S.E.2d at 252 (Benton, J., dissenting).

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

257. *Id.* at 528-29, 546 S.E.2d at 250.

258. 35 Va. App. 1, 542 S.E.2d 771 (Ct. App. 2001).

259. *See id.* at 9-10, 542 S.E.2d at 776.

260. *Id.* at 13, 542 S.E.2d at 777 (quoting *Dearing v. Commonwealth*, 259 Va. 117, 123, 524 S.E.2d 121, 124 (2000)).

the statement.²⁶¹ Rather, the court must examine whether adversarial examination of the co-defendant's motive to lie, or any other attempt to mitigate the co-defendant's role in the offense, would be at the expense of the defendant.²⁶² If the content of the statement or the circumstances surrounding the statement give rise to an inference of such motive or impulse by the non-testifying co-defendant, then the defendant's Sixth Amendment Confrontation Clause right to confront his accuser is abrogated by introducing the hearsay testimony.²⁶³ This special concern for the admissibility of co-defendant hearsay is born of the fact that such testimony is "inherently unreliable."²⁶⁴

C. *Impeachment by Felony Conviction*

A recent decision of the Supreme Court of Virginia makes clear that although for some purposes a person has not been "convicted" of an offense until she has been both adjudicated guilty and sentenced, for purposes of using a felony conviction to impeach a witness's credibility, the accused is convicted upon her guilty plea, even if her sentence has not yet been imposed.²⁶⁵ A guilty plea is, after all, "a self-supplied conviction authorizing imposition of the punishment fixed by law."²⁶⁶ If, however, the witness pled not guilty to the offense, and is awaiting sentencing at the time of her testimony, the mere fact that guilt had been determined would be an insufficient basis for impeaching the witness's testimony.²⁶⁷

D. *Evidentiary Concerns in Sex Offense Cases*

The Court of Appeals of Virginia recently held that a sexual assault nurse examiner (SANE) may be qualified as an expert in "the diagnosis of sexual assault" and may testify that certain observed conditions or injuries are consistent or inconsistent with

261. *Id.* at 13–14, 542 S.E.2d at 777.

262. *See id.*

263. *See id.* at 14–15, 542 S.E.2d at 777–78.

264. *Id.* at 13, 542 S.E.2d at 777 (quoting *Lee v. Illinois*, 476 U.S. 530, 541, 545 (1986)).

265. *Jewel v. Commonwealth*, 260 Va. 430, 433, 536 S.E.2d 905, 906 (2000).

266. *Id.* at 422, 536 S.E.2d at 906 (quoting *Peyton v. King*, 210 Va. 194, 196, 169 S.E.2d 569, 571 (1969)).

267. *See id.*

consensual, first-time sexual intercourse.²⁶⁸ In rendering an expert opinion that certain injuries are inconsistent with consensual sex, the SANE nurse does not run afoul of the proscription against testifying as to the ultimate issue in a criminal case.²⁶⁹

In prosecutions for many sex offenses, Virginia's Rape Shield statute²⁷⁰ provides for pre-trial hearings on the admissibility of evidence related to the victim's sexual history and reputation.²⁷¹ These hearings are intended to allow the trial judge to pass on the admissibility of particular evidence.²⁷² However, the hearings are not intended as discovery devices during which a defendant may discover evidence of the complainant's sexual history that may later become the subject of an evidentiary dispute.²⁷³

X. SENTENCING

In *Brooks v. Commonwealth*,²⁷⁴ the Court of Appeals of Virginia interpreted the prior Supreme Court of Virginia decision in *Fishback v. Commonwealth*.²⁷⁵ The court of appeals held that, although the trial court erred in failing to instruct the jury in accordance with *Fishback*, the error was harmless, and the appellant was not entitled to a new sentencing hearing.²⁷⁶ The court began by noting that a non-constitutional error by the trial court is harmless if "it plainly appears from the record and the evidence given at the trial that the error did not affect the ver-

268. *Velazquez v. Commonwealth*, 35 Va. App. 189, 197-99, 543 S.E.2d 631, 635-36 (Ct. App. 2001).

269. *See id.* at 199-200, 543 S.E.2d 636-37. This case also illustrates the willingness of the court of appeals to broadly defer to the factual determinations made in the trial court. *See, e.g., id.* at 194, 543 S.E.2d at 633. The court affirmed the conviction for rape, which required proof of penetration of the female sex organ by the male sex organ, on the prosecutrix's testimony that she felt vaginal pain, that the defendant's waist was at her knees, that he was making an up and down motion, and that the defendant's hands were visible at her sides. *Id.* at 193-94, 543 S.E.2d at 633-34.

270. VA. CODE ANN. § 18.2-67.7 (Repl. Vol. 1996 & Cum. Supp. 2001).

271. *Id.*

272. *Blackmon v. Commonwealth*, 33 Va. App. 728, 734, 536 S.E.2d 918, 921 (Ct. App. 2000).

273. *See id.*

274. No. 0366-00-2, 2001 Va. App. LEXIS 268 (Va. Ct. App. 2001).

275. 260 Va. 104, 532 S.E.2d 629 (2000). In *Fishback*, the supreme court held that "juries shall be instructed, as a matter of law, on the abolition of parole for non-capital felony offenses committed on or after January 1, 1995." *Id.* at 115, 532 S.E.2d at 634.

276. *Brooks*, 2001 Va. App. LEXIS 268, at *2.

dict.”²⁷⁷ In *Brooks*, the jury returned verdicts of the minimum sentence provided by statute for each of the appellant’s charges.²⁷⁸ Thus, the court concluded that “without usurping the jury’s fact-finding function . . . had the jury been properly instructed on the abolition of parole in Virginia, the penalty verdict would have been the same. Accordingly, the error was harmless and . . . the appellant’s sentence” was affirmed.²⁷⁹

In *Pughsley v. Commonwealth*,²⁸⁰ the Court of Appeals of Virginia held that evidence of bad character as a juvenile is admissible in the sentencing phase to rebut the defendant’s evidence of good character.²⁸¹ In *Pughsley*, the appellant contended that the trial court erred by permitting the Commonwealth to introduce rebuttal evidence, consisting of unadjudicated criminal behavior, specific bad acts, and institutional infractions committed in juvenile detention, during the sentencing phase of the trial.²⁸² The appellant claimed that the Commonwealth’s rebuttal evidence should have been restricted to rebutting the specific character evidence to which his witnesses testified and further limited to the time period about which his witnesses testified.²⁸³

In its analysis, the court stated:

Code § 19.2-295.1, the provision governing the bifurcated sentencing proceeding, goes beyond the common law rule of evidence, which disallows proof of a defendant’s specific bad acts to rebut the defendant’s character evidence. The Supreme Court [of Virginia] has made clear that Code § 19.2-295.1, which allows a defendant to introduce relevant evidence of his “history and background” in a sentencing procedure, also allows the Commonwealth to introduce rebuttal evidence once the defendant has undertaken to put his history and background in issue.²⁸⁴

Utilizing this reasoning, the court held that when a defendant puts on evidence of his good character, specifically his history and

277. *Id.* at *3 (quoting *Lavinder v. Commonwealth*, 12 Va. App. 1003, 1005, 407 S.E.2d 910, 911 (Ct. App. 1991) (en banc) (quoting VA. CODE ANN. § 8.01-678 (Repl. Vol. 2000 & Cum. Supp. 2001)) (internal quotations omitted).

278. *Id.*

279. *Id.* at *5–6.

280. 33 Va. App. 640, 536 S.E.2d 447 (Ct. App. 2000).

281. *Id.* at 647, 536 S.E.2d at 450.

282. *See id.* at 644–45, 536 S.E.2d at 449.

283. *Id.* at 642, 536 S.E.2d at 448.

284. *Id.* at 646, 536 S.E.2d at 450 (citing *Commonwealth v. Shifflett*, 257 Va. 34, 43–44, 510 S.E.2d 232, 236 (1999)).

background of good behavior, the Commonwealth may introduce specific acts in the defendant's history and background that prove that the defendant has a history and background of criminal or bad acts, or that the defendant is not of good character.²⁸⁵

Despite the ruling in *Pughsley*, in *Duong v. Commonwealth*,²⁸⁶ the Court of Appeals of Virginia took steps toward preventing the use of juvenile records in certain situations.²⁸⁷ In *Duong*, the appellant was convicted of two counts of grand larceny pursuant to a plea agreement.²⁸⁸ Upon the appellant's request, the trial court ordered a presentence report.²⁸⁹ Prior to sentencing, the appellant moved to preclude consideration of his juvenile adjudications, claiming that the required notice was not given to his father and, therefore, under the rule enunciated in *Baker v. Commonwealth*,²⁹⁰ the proceedings were void.²⁹¹ After the court of appeals found that the juvenile court did not give notice of the proceedings to the appellant's father, making the prior juvenile adjudications void, the Commonwealth noted that the appellant did not seek, in this proceeding, to have his juvenile court adjudications voided and thus extinguished.²⁹² The Commonwealth, therefore, argued that the appellant could not "refrain from having those adjudications ruled void while at the same time arguing that they are void for the purposes of subsequent sentencing."²⁹³ The court did not accept this argument and, finding in favor of the appellant, stated that "the failure to have those adjudications officially voided does not alter the fact that they are void and cannot be used."²⁹⁴

In *Ruffin v. Commonwealth*,²⁹⁵ the appellant prevailed when the Court of Appeals of Virginia held that a court does not have

285. *Id.* at 647, 536 S.E.2d at 450.

286. 34 Va. App. 424, 542 S.E.2d 47 (Ct. App. 2001).

287. *See id.* at 428, 542 S.E.2d at 49.

288. *Id.* at 427, 542 S.E.2d at 48.

289. *Id.*

290. 28 Va. App. 306, 315, 504 S.E.2d 394, 399 (Ct. App. 1998) (holding that where a juvenile court conducts a delinquency proceeding without notifying the parents or certifying that notice cannot reasonably be obtained, the resulting conviction order is void), *aff'd per curiam*, 258 Va. 1, 516 S.E.2d 219 (1999).

291. *Duong*, 34 Va. App. at 427, 542 S.E.2d at 49.

292. *Id.* at 428, 542 S.E.2d at 49.

293. *Id.*

294. *Id.* at 429, 542 S.E.2d at 49.

295. 35 Va. App. 79, 542 S.E.2d 808 (Ct. App. 2001).

the power to enforce a jail sentence in a defendant's absence.²⁹⁶ The appellant, Daymon Ruffin, was convicted, in his absence, of driving on a suspended driver's license and subsequently sentenced to twelve months in jail.²⁹⁷ On appeal, the appellant contended that Virginia Code section 19.2-258 does not provide trial courts with the authority to enforce a jail sentence upon defendants who have been released on recognizance bonds, or admitted to bail, but have failed to appear for trial.²⁹⁸ The court agreed, holding that if a defendant charged with a misdemeanor fails to appear for trial,

the trial court may elect to (1) issue a *capias* for failure to appear and continue further proceedings or (2) proceed to trial in the defendant's absence and if convicted, sentence the defendant, but in that event and pursuant to Code section 19.2-237, such sentence may not include an unsuspended jail sentence.²⁹⁹

In *Johnson v. Commonwealth*,³⁰⁰ the Court of Appeals of Virginia also addressed the question of whether a trial court lacks jurisdiction to revoke suspended sentences when predicate violations occur after a defendant's term of probation has ended.³⁰¹ The court held that trial courts do have jurisdiction in such cases under Virginia Code section 19.2-306.³⁰² The court of appeals reasoned that because the petitioner could have received a maximum sentence of ten years for her conviction, the trial court retained the authority to revoke her suspended sentence up to ten years from the date of her conviction, regardless of her probationary status.³⁰³

XI. APPEALS

In *Michaels v. Commonwealth*,³⁰⁴ the Virginia Court of Appeals re-affirmed that even in the absence of any objection in the trial court, the appellate court will consider appeals where there has

296. *See id.* at 85, 542 S.E.2d at 810.

297. *Id.* at 80, 542 S.E.2d at 808.

298. *See id.* at 82, 542 S.E.2d at 809.

299. *Id.* at 85, 542 S.E.2d at 810.

300. No. 0072-00-4, 2001 Va. App. LEXIS 5 (Va. Ct. App. 2001).

301. *Id.* at *1.

302. *See id.* at *4-5.

303. *Id.*

304. 32 Va. App. 601, 529 S.E.2d 822 (Ct. App. 2000).

been a miscarriage of justice.³⁰⁵ In these cases, appellants must demonstrate more than just that the Commonwealth failed to prove an element of an offense, and, consequently, that a miscarriage of justice may have occurred.³⁰⁶ Rather, appellants must also show that they were convicted for conduct that was not an offense or that an element of the charged offense did not occur, and that as a result of this error, a miscarriage of justice did actually occur.³⁰⁷

In *Smith v. Commonwealth*,³⁰⁸ the Court of Appeals of Virginia also affirmed its intention to strictly adhere to the jurisdictional requirements imposed by the Rules of the Supreme Court of Virginia.³⁰⁹ In this case, the court of appeals disallowed an appeal because the appellant failed to file indispensable transcripts within sixty days of final judgment.³¹⁰ Although the appellant failed to make the appropriate filing because he did not realize the trial court had entered final judgment in the case since the court entered an order that was not circulated to counsel,³¹¹ the court of appeals ruled that "counsel of record have the duty and responsibility to examine the public record and to determine the date of entry of such orders."³¹²

XII. CONCLUSION

Few areas of the law implicate citizens' liberty and property interests in as tangible and direct a way as the criminal law. It should come as no surprise, then, that the forces that push change in the criminal law come to do battle with closely held ideological views. It is reasonable to expect that extraordinary evolution in legal doctrine and theory might spring from that clash of ideas. Such was certainly the case this past year. It most certainly will be next year.

305. *See id.* at 608, 529 S.E.2d at 826.

306. *Id.* (citing *Redman v. Commonwealth*, 25 Va. App. 215, 221-22, 487 S.E.2d 269, 272-73 (Ct. App. 1987)).

307. *Id.* (citing *Redman*, 25 Va. App. at 221-22, 487 S.E.2d at 273-73).

308. 32 Va. App. 766, 531 S.E.2d 11 (Ct. App. 2000).

309. *See id.* at 771, 531 S.E.2d at 14.

310. *Id.* at 769, 531 S.E.2d at 13.

311. *Id.* at 773, 531 S.E.2d at 15.

312. *Id.* (quoting *Smith v. Stanaway*, 242 Va. 286, 289, 410 S.E.2d 610, 612 (1991)).