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EMPOWERING THE DEFENSE TO CONFRONT THE  
GOVERNMENT'S POWERS: VIRGINIA CRIMINAL JUSTICE  
LEGAL REFORM

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## ABSTRACT

*During the 2021 Session and 2021 Special Session, Virginia took steps to restore the balance between individuals ensnared in the criminal legal system and the government. These new laws allow people who are involved in the criminal legal system to emphasize their humanity and to hold the government to its various burdens at all stages of the case, including pre-trial, trials, sentencing, and appeal. This article discusses four of the most important changes to Virginia law that ensure a more level playing field between the government and the accused.*

*First, eliminating the presumption against bail challenges the government's power of pre-trial detention, as no longer is a person automatically considered dangerous just because of the name of their charge. Second, by creating a rule of evidence allowing introduction of mental condition evidence to negate intent at trial, people with mental illnesses and developmental disabilities will not be placed into the all-or-nothing unrealistic category of insanity. Third, jury sentencing reform will actually provide a meaningful right to a jury trial as the government will not be able to force the accused into a jury sentence. Finally, Virginians will join the rest of the country with a right to a merits review by an appellate court after conviction of a crime. While time will tell how effective these changes will be, all ensure that the system is fairer and more just for those facing trial in Virginia.*

## INTRODUCTION

In 2020 and 2021, the General Assembly of Virginia successfully passed a watershed agenda of criminal justice reform legislation, signed into law by the Governor Ralph Northam. The groundbreaking reforms include the abolition of the death penalty and the legalization of marijuana.<sup>1</sup> Other significant reforms that may not have garnered the attention of the national media include probation reform, placing limits on incarceration for technical violations, ending pretextual traffic stops, and expanding the ability to resolve cases by deferring disposition with the goal of dismissal or reduction of the charge(s).<sup>2</sup>

<sup>1</sup> H.B. 2263, 2021 Gen. Assemb., Spec. Sess. (Va. 2021).

<sup>2</sup> H.B. 5058, 2020 Gen. Assemb., Spec. Sess. 1 (Va. 2020); S.B. 489, 2020 Gen. Assemb., Spec. Sess. 1 (Va. 2020); H.B. 2038, 2021 Gen. Assemb. Spec. Sess. (Va. 2021). *See generally* Ned Oliver, *Every Criminal Justice Reform That Passed in Virginia After George Floyd's Death*, VA. MERCURY (Nov. 11, 2020), <https://www.virginiamercury.com/2020/11/11/every-criminal-justice-reform-that-passed-in-virginia-after-george-floyds-death/>. There were yet more reforms, including raising the threshold amount for grand larceny; allowing ex parte requests for expert assistance to be made by indigent defendants; requiring the recording of custodial interrogations; increasing the minimum age for juveniles to be tried as an adult; and creating additional public defender offices.

This article will focus on four other major criminal justice reforms reflected in new legislation: (1) ending the presumption against bail; (2) creating a rule of evidence allowing the defense to introduce mental condition evidence to negate mens rea; (3) allowing a person convicted of a crime to choose between a jury sentencing recommendation or a judge sentencing without a jury sentencing recommendation; and (4) establishing an appeal of right to the Court of Appeals following a conviction in the trial court.<sup>3</sup> These important reforms all have one major element in common. They all reduce the power of the government and empower the accused to present their case more thoroughly in a courtroom. They all give a person accused of a criminal offense a better opportunity to confront the powers of the government in court. This article will discuss the impact of these reforms on the criminal legal system in Virginia.

There are also important themes weaved throughout. First, these new laws emphasize the humanity of people involved with the criminal justice system. Eliminating the presumption against bail will lead to less pretrial detention of non-dangerous individuals. For some, this will improve the ability to keep employment, housing, and custody of children as well as actually reducing their risk of recidivism and failing to appear in court. Additionally, there will be a more individualized system of bail determinations because there will no longer be a presumption about an individual based on their type of charge. During the criminal adjudication process, admitting the introduction of mental condition evidence to help the factfinder determine whether the accused actually formed the intent to commit the charged crime decriminalizes having a mental disability or illness. People with developmental disabilities and mental illness are disproportionately involved in the criminal justice system. Jury sentencing reform will allow those who want to have their stories heard the opportunity to present their case to the community at trial without fear of an unjustified longer prison sentence. Finally, post-trial, an appeal of right recognizes that sometimes courts get it wrong. It is important to have this additional procedural safeguard given that there is a person, not just a defendant, that has a liberty interest at stake.

Another theme is that the new laws enhance the legitimacy of the courts, including holding the government to its burdens throughout criminal procedures. Ending the presumptions against bail returns the burden to the Commonwealth to prove that a person is either an unreasonable danger to the community or a flight risk. It also reinvigorates the presumption of innocence. Creating a new rule of evidence that allows mental condition evidence to negate intent, rather than simply serve as a defense, holds the

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<sup>3</sup> S.B. 1261, 2021 Spec. Sess. I (Va. 2021) (right of appeal); S.B. 1266, 2021 Spec. Sess. I (Va. 2021) (presumption against bail); S.B. 1315, 2021 Sess. (Va. 2021) (mental condition); S.B. 5007, 2021 Spec. Sess. I (Va. 2021) (jury sentencing).

Commonwealth to its burden to prove required intent elements. Allowing an accused to choose whether to have a jury recommend a sentence indirectly provides an accused a greater ability to exercise the constitutional right to a jury trial in order to hold the Commonwealth to its burden. Establishing an appeal of right ensures Virginia is no longer the sole state denying this right. In part, this ensures that the Commonwealth has indeed met its burden in proving the sufficiency of the evidence to support a conviction.

The sections will move chronologically through the criminal process. Section I will discuss ending the presumptions against bail. Section I begins with explaining why pretrial release matters, then discusses the history of both bail under the Constitution and the presumption against bail in Virginia and ends with addressing Virginia's bail reform and its expected impact. Section II will examine mental condition evidence to negate intent. Specifically, Section II will discuss the history of Virginia case law on this topic and argue that the new legislation has overridden that case law. Section II will conclude that this reform is an important step in decriminalizing developmental and intellectual disabilities and mental illness. Section III will analyze jury sentencing reform in Virginia. Section III will offer a historical and modern perspective on sentencing and the 2021 legislative changes. Section III then considers unresolved issues regarding Virginia's new jury sentencing scheme. Section IV will address the criminal appeal of right to the Court of Appeals, including history in Virginia regarding discussion around creating this right and the new legislation that has established the right. Section IV will assert that moving from a writ appeal process to an appeal of right is meaningful change and protecting oral argument under the new system is important. This article concludes that criminal justice reform is returning some of the power in the system to the accused, reversing decades of movement in the opposite direction of giving greater power to the government.

## I. ENDING THE PRESUMPTIONS AGAINST BAIL

In 2021, the Virginia General Assembly made a modest but important change to its bail statute.<sup>4</sup> Prior to 2021, there were over forty circumstances under which the law created a presumption against bail.<sup>5</sup> This meant that many people arrested in Virginia were presumed to be a danger to the

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<sup>4</sup> The words "bond" and "bail" are often used interchangeably; however, in Virginia they have very precise legal meanings. The Virginia Code defines "bond" as "the posting by a person or his surety of a written promise to pay a specific sum, secured or unsecured, ordered by an appropriate judicial officer as a condition of bail to assure performance of the terms and conditions contained in the recognizance." VA. CODE ANN. §19.2-119. "Bail" is defined as "the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer." *Id.*

<sup>5</sup> See VA. CODE ANN. § 19.2-120 (B) (2020) (subsection now essentially limits bond considerations to matters of public safety and/or flight risk).

community based on the name of the charge at arrest alone. The statutory change enacted by SB1266 removed all of the presumptions against bail from Virginia law and returned the burden to the government to prove that a person was either a flight risk or an unreasonable danger to themselves, a household or family member, or the public.<sup>6</sup>

#### A. Why Pretrial Release Matters

*Admission to bail always involves a risk . . . a calculated risk which the law takes as the price of our system of justice.*<sup>7</sup>

Getting pretrial detention right has clear constitutional and practical implications. The government should not be permitted put people into jail before trial without sufficient constitutional procedural protection. Additionally, pretrial detention can also affect the actual outcome of the case. A report from the Virginia Department of Criminal Justice Services noted that people who are detained pretrial are four times more likely to be sentenced to jail, three times more likely to receive longer jail sentences, three times more likely to be sentenced to prison, and twice as likely to receive longer prison sentences.<sup>8</sup> Pretrial detention is also expensive. One Department of Justice study estimated that holding people in jail who had not yet been convicted of anything costs American taxpayers about nine billion dollars per year.<sup>9</sup>

Most importantly, pretrial release has real implications for actual human beings. According to the Prison Policy Initiative, in 2018, there were, on average, 23,000 people held in local jails in Virginia each day.<sup>10</sup> Just under 9,000 of those people were being held pretrial.<sup>11</sup> Being held in jail, often unexpectedly, for even a few days can be unbelievably detrimental to a person's life. It can cause the person to lose their job, lose housing, and cause havoc with childcare arrangements.<sup>12</sup>

Beyond the common-sense issues caused by pretrial detention, studies have shown that pretrial detention can, in many cases, undercut the very goals of the criminal legal system. Pretrial release determinations are founded on

<sup>6</sup> S.B. 1266, 2021 Spec. Sess. I (Va. 2021).

<sup>7</sup> *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

<sup>8</sup> VA. DEPT. OF CRIM. JUST., A "NEW NORM" FOR PRETRIAL JUSTICE IN THE COMMONWEALTH OF VIRGINIA: PRETRIAL RISK-BASED DECISION MAKING VIRGINIA DEPARTMENT OF CRIMINAL JUSTICE SERVICES 14 (2013).

<sup>9</sup> TIMOTHY R. SCHNACKE, NAT'L INSTIT. CORR., U.S. DEP'T JUST., FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 7 (2014).

<sup>10</sup> *Virginia Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/VA.html>.

<sup>11</sup> *Id.*

<sup>12</sup> One study found that pretrial detention decreases formal sector employment and the ability to obtain some government benefits. It also increases the likelihood that the person will plead guilty. Will Dobbie, et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 224 (2018).

the idea that the court wants to ensure the person comes back to face the charges against them and does not commit any crimes pending trial.<sup>13</sup> When someone deemed “low-risk” is detained and then released, their risk of failing to appear at trial actually increases.<sup>14</sup> Longer periods of pretrial detention also increase the risk of a person committing a new crime while pending trial. People accused of a crime who are held for just two to three days are 1.39 times more likely to commit a new crime while on release, compared to those released after a day.<sup>15</sup> Those who are detained for a month or more are 1.74 times more likely to commit a new crime pending trial, compared to those released after a day.<sup>16</sup> Most remarkably, pretrial detention of two days or more increases the likelihood of recidivism both twelve and twenty-four months in the future.<sup>17</sup> People deemed “low-risk” who were held eight to fourteen days prior to trial were 51% more likely to commit another crime within two years after the completion of their cases than a “low-risk” person held no more than twenty-four hours.<sup>18</sup>

Accordingly, in addition to the importance of process, there are real consequences for both the community and the individual charged with a crime when the system gets pretrial release decisions “wrong.”

### *B. The Constitutional Status of Bail*

Many people, both lawyers and non-lawyers alike, misunderstand how the United States Constitution intersects with bail. This is likely caused, in no small part, by the seemingly contradictory statements in this area by the Supreme Court. For many years, these constitutional questions regularly arose in courts throughout the Commonwealth as people grappled with the meaning of the presumptions against bail. Because the Constitution offers little clear guidance in this area, the presumptions were able to control the outcome in many bail decisions based solely on the name of the charge at arrest.

#### *i. The Eighth Amendment*

The Eighth Amendment to the federal Constitution states, in part, that “[e]xcessive bail shall not be required.”<sup>19</sup> This does not mean that the United States Constitution guarantees a right to bail, simply that it guarantees that

<sup>13</sup> See VA. CODE ANN. § 19.2-120 (2021).

<sup>14</sup> CHRISTOPHER LOWENKAMP ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION, LAURA AND JOHN ARNOLD FOUND. 4 (Nov. 2013), [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 4, 24.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> U.S. CONST. amend. VIII; *United States v. Salerno*, 481 U.S. 739, 754 (1987) (“The only arguable substantive limitation of the Bail Clause is that the government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil”).

excessive bail cannot be required.<sup>20</sup> Similarly, the original Virginia Declaration of Rights did not contain a right to bail but only a right against excessive bail.<sup>21</sup> The current Virginia Constitution does not contain a right to bail.<sup>22</sup> Therefore, the presumptions against bail did not run directly afoul of the federal or state Constitutional provisions on bail.

*ii. The Right to Pretrial Liberty*

The Supreme Court of the United States has decided very few cases about bail, especially in the modern context.<sup>23</sup> The first major case was *Stack v. Boyle*, which held that a bail determination must be individualized to the person before the court.<sup>24</sup> The Court stated that “[s]ince the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”<sup>25</sup> In a concurring opinion, Justice Jackson stated that:

The practice of admission to bail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.<sup>26</sup>

This case brought constitutional bail jurisprudence into the modern era. Unfortunately, by the time of the Rehnquist Court, bail decisions would start to permit a greater expansion of pretrial detention.

For example, in *United States v. Salerno*, the Court clarified that the prohibition on “excessive bail” was not a prohibition on holding the person before trial.<sup>27</sup> The Court also made clear that pretrial detention is regulatory, not punishment, even though the people subject to pretrial detention can be detained in the same conditions as a person serving a criminal sentence.<sup>28</sup> The case also permitted the consideration of the risk of danger to the community as part of a bail analysis, in addition to the traditional concern about non-

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<sup>20</sup> *Carlson v. Landon*, 342 U.S. 524, 545 (1952).

<sup>21</sup> GEORGE MASON, THE VIRGINIA DECLARATION OF RIGHTS, FIRST DRAFT § 9 (*Encyclopedia Virginia*, VA. HUMANITIES (2020)). This mirrored the English Bill of Rights as well. *Id.* at 545.

<sup>22</sup> VA. CONST. art. I, §8.

<sup>23</sup> In addition to the cases discussed below, the U.S. Supreme Court decided cases involving pretrial release in *Schall v. Martin*, 467 U.S. 253 (1984) (discussing the pretrial detention of juveniles) and *Gerstein v. Pugh*, 420 U.S. 103 (1975) (discussing procedures for detention after arrest); however, those cases are not applicable to this discussing.

<sup>24</sup> *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.* at 7 (Jackson, J., concurring).

<sup>27</sup> *United States v. Salerno*, 481 U.S. 739, 750–51, 753 (1987) (“On the other side of the scale, of course, is the individual’s strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government’s interest is sufficiently weighty, be subordinated to the greater needs of society”).

<sup>28</sup> *See Bell v. Wolfish*, 441 U.S. 520 (1979).



appearance in court.<sup>29</sup> Despite this expansion of the ability of the government to detain a person before trial, the Court did note that in “our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>30</sup> Despite this directive from the U.S. Supreme Court, presumptions against bail made detention the norm for over forty charges in the Virginia Code.<sup>31</sup> Detention was, in fact, the norm because the General Assembly required trial courts to start from a presumption of detention instead of release.<sup>32</sup>

*iii. A note on the presumption of innocence*

*The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.*<sup>33</sup>

For many, the idea that there was a presumption against bail flew in the face of the presumption of innocence, and there is case law to back up this view. In *Stack v. Boyle*, the U.S. Supreme Court took a strong stance when addressing the link between pretrial liberty and the presumption of innocence, stating that the “traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>34</sup>

By the late 1970’s the U.S. Supreme Court had taken a different view of the presumption of innocence, at least when it came to pretrial confinement. In *Bell v. Wolfish*, the Court held that due process did not require the separation of pretrial detainees and those that were serving sentences in the local jail.<sup>35</sup> The Court stated that:

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused’s guilt or innocence solely on the evidence adduced at trial . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.<sup>36</sup>

Interestingly, *Bell* was entirely unrelated to bail in substance. Unfortunately, its dicta were extended far past the context of conditions of confinement. Most importantly, the Supreme Court of Virginia extended the holding

<sup>29</sup> 481 U.S. at 754.

<sup>30</sup> *Id.* at 755.

<sup>31</sup> VA. CODE ANN. § 19.2-120(B) (2020).

<sup>32</sup> VA. DEPT. OF CRIM. JUST., *supra* note 11 at 16.

<sup>33</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>34</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285 (1895)).

<sup>35</sup> *Bell v. Wolfish*, 441 U.S. 520, 543 (1979).

<sup>36</sup> *Id.* at 533.

in *Bell* to the very idea of pretrial liberty itself. In *Commonwealth v. Duse*, the court found that a trial court abused its discretion by applying the presumption of innocence as part of its bail analysis because the presumption was only applied at trial.<sup>37</sup> At least in Virginia, the presumption of innocence has no meaning in a bail proceeding and did not rebut the presumption against bail.

### *C. The Presumption Against Bail in Virginia*

#### *i. The statutory presumptions*

Before 1996, the burden was on the Commonwealth's Attorney to convince a judge that a person should be held prior to trial.<sup>38</sup> To meet their burden, the prosecutor was required to show that there was probable cause to believe that (1) the person will not appear for trial or a hearing or (2) that the person's liberty constituted an unreasonable danger to the public.<sup>39</sup> In the 1996 session, the General Assembly made what seemed like a small and reasonable change to the bail statute at the time.<sup>40</sup> The statute was amended to insert a rebuttable presumption, which stated that "no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public" if in the preceding sixteen years, the person was convicted of (i) certain felony drug distribution offenses, (ii) has been convicted as a "drug kingpin" or (iii) was convicted of a crime of violence under Virginia Code §19.2-297.1.<sup>41</sup>

The addition of these presumptions created a "Christmas tree"<sup>42</sup> that was expanded in 1997, 1999, 2004, 2005, 2006, 2007, 2008, 2011, 2015, and

<sup>37</sup> *Commonwealth v. Duse*, 295 Va. 1, 8 (2018); *see also* *Dorsey v. Commonwealth*, 32 Va. App. 154, 164 fn. 1 (2000).

<sup>38</sup> *See* *Fisher v. Commonwealth*, 374 S.E.2d 46, 50–51 (Va. 1988); *see also* *Heacock v. Commonwealth*, 321 S.E.2d 645, 647–48 (Va. 1984).

<sup>39</sup> *See* 374 S.E.2d at 51; 321 S.E.2d at 647.

<sup>40</sup> VA. CODE ANN. § 19.2-120 (1996) (amended 2021).

<sup>41</sup> VA. CODE § 19.2-120 (1996) (amended 2021). Crimes of violence under VA. CODE § 19.2-297 (1996) included first and second degree murder and voluntary manslaughter under Article 1 (§ 18.2-30 et seq.); mob-related felonies under Article 2 (§ 18.2-38 et seq.); any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.); any malicious felonious assault or malicious bodily wounding under Article 4 (§ 18.2-51 et seq.); robbery under § 18.2-58 and carjacking under § 18.2-58.1; except as otherwise provided in § 18.2-67.5:2 or § 18.2-67.5:3, criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.); arson in violation of § 18.2-77 when the structure burned was occupied or a Class 3 felony violation of § 18.2-79; or any conspiracy to commit these offenses or acting as a principal in the second degree or accessory before the fact to these charges.

<sup>42</sup> A "Christmas Tree" is a statutory provision that starts out as a small exception to a general rule, to which legislators then add more provisions over the years. This process expands small exceptions to be either a large class of exceptions which can swallow the original rule. Legislators "hang" more exceptions on the original statutory provision, leading to the analogy of a "Christmas tree." *See Christmas Tree Bill*, BALLOTPEdia, [https://ballotpedia.org/Christmas\\_tree\\_bill](https://ballotpedia.org/Christmas_tree_bill) (last visited Feb. 26, 2022).

2018.<sup>43</sup> In 2004, the General Assembly also enacted Virginia Code §19.2-120.1, which created a presumption against bail for certain non-citizens who were accused of crimes.<sup>44</sup> Generally, presumptions against bail identify a class of persons who were likely to always present an unreasonable risk of danger to themselves or others if they were released pretrial.<sup>45</sup> The presumption against bail meant that the judge did not start with an assessment of the individual before the court for sentencing. Rather, the trial judge started with the idea that the person was a danger to the community. In that way, bail determinations were not based only on the facts relating to the individual and the case and were instead linked primarily to the charge instead of the individual.<sup>46</sup>

The effect of the statute was to switch the burden of proof at a bail hearing. In theory, the presumption could be rebutted.<sup>47</sup> However, if a presumption against bail applied, the burden of proof was on the accused to show why the person should be released pending trial.<sup>48</sup> In a non-presumption case, the government holds the burden of proving why the person should be held.<sup>49</sup>

One study into the effect of presumptions against bail in the federal system found that these presumptions did not live up to their intended purpose. When looking at re-arrest rates, the author found that the “presumption does a poor job of assessing risk, especially compared to the results produced by actuarial risk assessment instruments.”<sup>50</sup> Overall, the study found that “the presumption was a poorly defined attempt to identify high-risk defendants based

<sup>43</sup> S.B. 486 (1997) (adding additional sexual assault offenses); H.B. 1691 (1999) (adding offenses with a maximum penalty of life imprisonment); H.B. 1012 (2004) (adding gang participation); H.B. 1542 (2005) (adding additional sexual assaults); H.B. 578 (2006) (adding aggravated sexual battery); H.B. 2980 and H.B. 1982 (Va. 2007) (adding child pornography and computer solicitation offenses and certain protective order violation offenses); H.B. 1179 (2008) (adding felony domestic assault charges); H.B. 1713 (2011) (adding use of threats of bodily harm to intimidate a witness); H.B. 2120 (2015) (adding strangulation against a family or household member); H.B. 1260 (2018) (adding certain trafficking and prostitution offenses).

<sup>44</sup> H.B. 570 (Va. 2004).

<sup>45</sup> See VA. CODE § 19.2-120 (1996).

<sup>46</sup> For a comparison with the federal government, see Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81 FED. PROB., 52, 53–54 (2017).

<sup>47</sup> See VA. CODE § 19.2-120(E) (2020) (requiring that the court consider “(1) the nature and circumstances of the offense charged, (2) the history and characteristics of the person . . . , and (3) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.” To most observers, there was little difference in most cases between the first and third factor).

<sup>48</sup> See *Commonwealth v. Thomas*, 855 S.E.2d 879, 882 (Va. Ct. App. 2021) (“Put simply, if this presumption against bail applies, the burden of persuasion shifts to the defendant to rebut the presumption that there is no condition or combination of conditions that will reasonably assure the defendant’s appearance at future court proceedings or prevent future criminal activity while awaiting trial”).

<sup>49</sup> See *id.*

<sup>50</sup> Austin, *supra* note 49 at 58. This is not to state that actuarial pretrial risk assessment should be used, or are a solution to pretrial risk determination. Much has been written on the use of these instruments that shows they should be created and used judiciously. See, e.g., Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (2018).

primarily on their charge, relying on the belief that a defendant's charge was a good proxy for that defendant's risk."<sup>51</sup> This study is an empirical representation of the thoughts of many Virginia attorneys and judges.

*ii. Case law interpreting the presumption*

The way in which Virginia appellate courts interpreted the presumption against bail demonstrated just how hard it was to overcome that presumption despite the facts of a particular case. The Supreme Court of Virginia even added additional requirements for trial judges through case law that were not written in the statute. This change resulted in it becoming even more difficult to succeed on a bail motion in a presumption case. *Shannon v. Commonwealth* was the result of an appeal by the Commonwealth after the trial court admitted the accused to bail.<sup>52</sup> The trial court heard proffers and argument by both counsel.<sup>53</sup> For its ruling, the trial court only stated, "Under the circumstances of this case[,] bond will be set at \$60,000 cash or corporate surety."<sup>54</sup>

The Supreme Court found that this explanation was insufficient. The Court decided that the "public policy" underlying the appeal process for a bail decision would be meaningless if the trial court did not state its reasons for admitting the person to bail on the record.<sup>55</sup> The Court then found that it would constitute error for a trial court to admit a person to bail without explaining its full decision under each factor in the presumption statute, thereby requiring trial courts to expressly state their findings in each case.<sup>56</sup>

As noted by the dissent, this was an extraordinary holding because of the "general rule that a trial court is not required to recite for the record the reasons underlying its rulings."<sup>57</sup> Moreover, if the trial court failed to explain its reasoning, *Shannon* requires the Court of Appeals to "look to the record made in the circuit court to ascertain whether the conclusion the circuit court reached had factual support."<sup>58</sup> This dicta in *Shannon* implicitly changed the standard of review in appeals of pretrial bail determinations. Typically, when reviewing a trial court's decision about whether to grant bail pretrial, the standard is abuse of discretion.<sup>59</sup> Abuse of discretion is a demanding standard

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<sup>51</sup> Austin, *supra* note 49 at 60.

<sup>52</sup> *Shannon v. Commonwealth*, 768 S.E.2d 433, 434 (Va. 2015); *see also* *Commonwealth v. Jawad*, No. 1828-02-1, 2002 WL 31655285, at \*2 (Va. Ct. App. 2002) (noting that prior to *Shannon*, the Virginia Court of Appeals was able to find that a trial court "implicitly" found that the presumption had been overcome and apply a true abuse of discretion standard).

<sup>53</sup> 768 S.E.2d at 434.

<sup>54</sup> *Id.* at 436.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (McClanahan, J., concurring) (citing *Fitzgerald v. Commonwealth*, 292 S.E.2d 798, 805 (Va. 1982)).

<sup>58</sup> *Id.*

<sup>59</sup> Va. Sup. Ct. R. 5A:2; *see also* *Fisher v. Commonwealth*, 374 S.E.2d 46, 51 (Va. 1988).

that is difficult for the appellant to overcome.<sup>60</sup> *Shannon* permitted the appellate courts to make a finding that the trial court's ruling was "insufficient" and then review the record themselves, essentially resulting in a much more forgiving *de novo* standard of review.<sup>61</sup> Therefore, even when a person awaiting trial prevailed in the trial court while laboring under the presumption against bail, they were very likely to lose in the appellate court if the Commonwealth's Attorney decided to appeal and the trial court did not perfectly state the rationale for its decision.<sup>62</sup>

After *Shannon* and its progeny, trial judges were even more wary of finding that a presumption had been overcome and admitting a person to bail given the exacting standard of review their decision would face in the appellate courts. These appellate changes made it even more difficult to secure the pretrial release of any person subject to a presumption against bail. This resulted in worse outcomes for those charged under these statutes and for community safety.

#### *D. Ending the Presumption Against Bail in 2021*

In 2021, the presumptions against bail were repealed in a very simple statute. SB1266, brought by Senator Creigh Deeds, simply returned Virginia to the law as it was before the presumptions were added in 1996.<sup>63</sup> As the bill moved from the Senate to the House of Delegates, it was amended to include what is now subsection (B).<sup>64</sup> This addition to the statute states that a judge must consider all relevant information when making a bail determination and then lists examples of the type of information a judge ought to consider.<sup>65</sup> Subsection (B) is modeled off of a list of factors contained in Virginia Code §19.2-121, which addresses how a judge sets conditions of release, although

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<sup>60</sup> *Beck v. Commonwealth*, 484 S.E.2d 898, 906 (Va. 1997) (noting the Virginia Supreme Court has held that "[i]n reviewing an exercise of discretion, we do not substitute our judgment for that of the trial court. Rather, we consider only whether the record fairly supports the trial court's action.").

<sup>61</sup> *See, e.g., Commonwealth v. Watson*, No. 1284-20-4, 2021 WL 2324262, at \*2 (Va. Ct. App. June 8, 2021).

<sup>62</sup> *See, e.g., Commonwealth v. Duse*, 809 S.E.2d 513, 514 (Va. 2019); *Commonwealth v. Thomas*, 855 S.E.2d 879, 883 (Va. Ct. App. 2021).

<sup>63</sup> S. 1266, 2021 Gen. Assemb., Spec. Sess. I (Va. 2021).

<sup>64</sup> VA. CODE ANN. § 19.2-120(B) (2021).

<sup>65</sup> VA. CODE ANN. § 19.2-120(B) (2021). ("In making a determination under subsection A, the judicial officer shall consider all relevant information, including (i) the nature and circumstances of the offense; (ii) whether a firearm is alleged to have been used in the commission of the offense; (iii) the weight of the evidence; (iv) the history of the accused or juvenile, including his family ties or involvement in employment, education, or medical, mental health, or substance abuse treatment; (v) his length of residence in, or other ties to, the community; (vi) his record of convictions; (vii) his appearance at court proceedings or flight to avoid prosecution or convictions for failure to appear at court proceedings; and (viii) whether the person is likely to obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness, juror, victim, or family or (household member as defined in § 16.1-228").

there are some minor differences.<sup>66</sup> The purpose of both of these sections is to give magistrates and judges guidance on what they should consider when making bail determinations.

As ultimately signed by the governor, the bill removed all of the presumptions formally found in Virginia Code §19.2-120 and the presumptions against bail for certain non-citizens in Virginia Code §19.2-120.01.<sup>67</sup> While it is clear that the burden is now on the Commonwealth to prove that a person is a risk of non-appearance or an unreasonable risk of danger, it is unclear how appellate courts will interpret bail appeals under this new statute. In theory, Shannon and its progeny were all cases that included a presumption against bail.<sup>68</sup> It would follow that the requirement that a trial court explain, in detail, the reasons it admitted a person to bail would be limited to presumption cases, but that may or may not be true given that the dicta in Shannon discusses bail determinations generally.<sup>69</sup> Virginia appellate courts may or may not extend the requirements in Shannon to cases under the amended code. Furthermore, while Virginia Code §19.2-120(B) states that a judge shall consider all relevant information, some courts may see the list of information to consider as factors that must each be considered and weighed instead of being part of a broader test.

For lawyers with cases under the new statute, it would be prudent to address each of the factors in the statute and include a section of argument that talks about all of the other relevant information that the court should consider in its bail decision. Lawyers should also request that judges address each of the items listed in Virginia Code §19.2-120(B) and state for the record all other information that the court considered in making its decision. Judges should affirmatively make a record of their rationale under each of the factors listed in the revised statute, especially when they decide that a person is a good candidate for release. It is also critical that lawyers, especially defense lawyers, remind trial courts that the burden is on the Commonwealth to show why a person should be held. Any failure to provide critical information to the trial court should be held against the party with the burden of proof. Defense lawyers should provide the court with as much information and documentation to support their client's release.<sup>70</sup>

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<sup>66</sup> VA. CODE ANN. § 19.2-121 (2021).

<sup>67</sup> Max Marcilla, *Virginia State Senate Passes Bill to End Presumptions Against Bail*, NBC 29 (Feb. 2, 2021), <https://www.nbc29.com/2021/02/03/virginia-state-senate-passes-bill-end-presumptions-against-bail/>.

<sup>68</sup> Shannon v. Commonwealth, 768 S.E.2d 433, 434 (Va. 2015).

<sup>69</sup> *Id.* at 434–35.

<sup>70</sup> VA. INDIGENT DEF. COMM'N, STANDARDS OF PRACTICE FOR INDIGENT DEFENSE COUNSEL (2018).

*E. The impact of the 2021 amendments*

The statute, as now written, creates a presumption of release in most cases.<sup>71</sup> This means that Virginia will join the vast majority of states that have either a constitutional or statutory presumption of pretrial release.<sup>72</sup> Forty-seven other states have a presumption of release, which meant prior to 2021, Virginia was an extreme outlier.<sup>73</sup> At least thirty-four other states go even further and have a presumption of release on an unsecured bond or a presumption that the person be released on the least restrictive conditions possible.<sup>74</sup>

This statutory change likely will not result in the release of people who are charged with serious, violent offenses with substantial evidence against them. The new bail statute will assist in ensuring that people who are good candidates for bail are released without having to overcome unnecessary procedural hurdles. More importantly, this bill was a win for due process and fairness in the Virginia pretrial system. If the government wants to hold a person in detention prior to trial, the burden should be on the government to convince a judge that this is absolutely necessary. Better process should result in better outcomes, or, at the very least, outcomes that are better accepted by all parties as the procedure used is more just. Hopefully, this change is the first step towards a world where pretrial detention truly is the carefully limited exception in Virginia.

## II. MENTAL CONDITION EVIDENCE TO NEGATE INTENT

When there are criminal charges, people naturally want to know the defendant's "side of the story." Of course, in our criminal justice system, at trial, it is axiomatic that the accused does not have to put forth any evidence because the prosecution has the burden to prove the charge beyond a

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<sup>71</sup> VA. CODE ANN. § 19.2-120 (2021) ("A person who is held in custody pending trial or hearing for an offense, civil or criminal contempt, or otherwise *shall be admitted to bail* by a judicial officer, unless...").

<sup>72</sup> *Pretrial Release: Guidance for Courts*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx> (last visited Oct. 12, 2020).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

reasonable doubt.<sup>75</sup> However, if the accused desires, they also have the right to tell their story through the defense case-in-chief.<sup>76</sup>

An accused's story of what happened that led up to criminal charges can involve their mental condition.<sup>77</sup> Until recently, in Virginia, the accused's ability to share this important part of the story during trial was constrained under the law. An accused's only option was to assert an insanity defense, if eligible.<sup>78</sup> The standard is Herculean to meet, especially given that Virginia uses the *M'Naghten* and irresistible impulse tests.<sup>79</sup> Now, with the passage and signing into law of Code §19.2-271.6 in 2021, if certain requirements are met, notwithstanding the insanity defense, evidence of a person's mental

<sup>75</sup> See *In re Winship*, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

<sup>76</sup> See *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."). See also VA. CONST. art. I, § 8 (provides an accused a fair trial, including that the accused has "a right . . . to call for evidence in his favor").

<sup>77</sup> Language matters. This article uses "mental condition" as well as its included terms "mental illness," "developmental disability," "intellectual disability," and "autism spectrum disorder" because that is the language used in the new Code. VA. CODE ANN. § 19.2-271.6 (2021). Legal and clinical definitions do not necessarily overlap. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, ("DSM-5") is used primarily in a clinical setting. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 19 (5th ed. 2013) (hereinafter DSM-5). The DSM-5 categorizes "mental disorders." DSM-5's chapter on "Neurodevelopmental Disorders," includes intellectual disability and autism spectrum disorders. Other DSM-5 mental disorder categories include "schizophrenia spectrum and other psychotic disorders," "bipolar and related disorders," "depressive disorders," "anxiety disorders," "obsessive-compulsive and related disorders," and "trauma-and stressor-related disorders." Society generally views these disorders as "mental illness." Other mental disorders under the DSM-5, particularly related to forensic contexts, include "disruptive, impulse-control, and conduct disorders," "substance-related and addictive disorders," "neurocognitive disorders," "personality disorders," and "paraphilic disorders" may or may not be viewed considered "mental illness" by various societal groups. DSM-5 25.

<sup>78</sup> See VA. CODE ANN. § 19.2-167. The only "exception" was that Virginia recognizes the doctrine of "settled insanity," which applies only to capital murder and murder in the first degree where the accused suffers from a mental defect or disease of mind that is traceable to long-term, chronic, habitual alcohol or drug use. *Morgan v. Commonwealth*, 646 S.E.2d 899, 905 (Va. Ct. App. 2007).

<sup>79</sup> See ALISA ROTH, *INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS* 176–78 (2018) (stating that "[p]opular opinion holds that pleading [not guilty by reason of insanity] is extremely common . . . [i]n reality, though . . . it's clear that both requests for a finding of [not guilty by reason of insanity] and the success of those requests are quite rare." Estimates are that the insanity defense is advanced in between 0.1 and 0.5 percent of felony cases and between 10% to 60% are successful; most successful not guilty by reason of insanity defenses are through plea bargains, not trials. The *M'Naghten* rule allows a finding of insanity if "at the time of the commission of the act, [the accused] was suffering from a mental disease or defect such that he did not know the nature and quality of the act he was doing" or "if he did know it, he did not know what he was doing was wrong." The irresistible impulse rule allows a finding of insanity if "[w]here the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act." *Orndorff v. Commonwealth*, 691 S.E.2d 177, 179 (Va. 2010).



condition may be admissible at trial to negate intent.<sup>80</sup> This new law expands an accused's opportunity to tell their story prior to a determination of innocence or guilt where a developmental or intellectual disability, autism spectrum disorder, or mental illness is a central theme.

*A. Stamper v. Commonwealth:*

*No Evidence of Mental Condition Outside an Insanity Defense*

"[In] the absence of an insanity defense," the Supreme Court of Virginia, in 1985, held in *Stamper v. Commonwealth* that "evidence of a criminal defendant's mental state at the time of the offense is . . . irrelevant to the issue of guilt."<sup>81</sup> Virginia drew a black and white line when it came to allowing mental condition evidence at trial to explain an accused's intent and behavior. The *Stamper* Court stated: "For the purposes of determining criminal responsibility a perpetrator is either legally insane or sane; there is no sliding scale of insanity."<sup>82</sup>

The *Stamper* Court had three reasons for its holding. First, the Supreme Court declined to depart from "the common law theory of [criminal] responsibility," which "fixed a stable and constant standard of mental competence as the criterion for the determination of criminal responsibility."<sup>83</sup> Second, the Court viewed that any attempt to show by evidence "that the requisite specific intent did not in fact exist" invaded "by expert opinion on the ultimate fact in issue, of the province of the fact-finder."<sup>84</sup> Finally, the Court determined that as knowledge in medicine and psychiatry advances and changes, "[t]he classifications and gradations applied to mental illnesses, disorders, and defects are frequently revised" and the "courts cannot, and should not, become dependent upon these subtle and shifting gradations for the resolution of each specific case."<sup>85</sup> Based on its reasoning and legal conclusion, the *Stamper* Court barred the accused from introducing "psychiatric testimony to prove that he was manic-depressive, in a manic state on the date of the offense, and consequently incapable of forming the intent to distribute" marijuana.<sup>86</sup>

In short, an accused could not share with the factfinder prior to adjudication of guilt how any mental condition affected their thoughts or behavior

<sup>80</sup> VA. CODE ANN. § 19.2-271.6 (2021).

<sup>81</sup> *Stamper v. Commonwealth*, 324 S.E.2d 682, 688 (Va. 1985).

<sup>82</sup> *Id.* The *Stamper* Court similarly stated: "A person whose mental state falls outside the borderline drawn by that standard is deemed legally insane. All persons inside that borderline are 'presumed to be sane, and to possess a sufficient degree of reason to be responsible for [their] crimes.'"

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 687.

while committing acts that led to a charged offense unless the accused advanced an insanity defense. *Stamper* acted to censor certain stories.

*B. Stamper's Progeny: Strict Application and No Exceptions*

Since then, appellate courts regularly applied and re-affirmed *Stamper's* holding. In *Smith v. Commonwealth*, the Supreme Court barred a defendant from introducing expert testimony that he suffered from "alcohol dependence and from a borderline personality disorder" to show that "he lacked the capacity to form the necessary premeditation" for capital murder.<sup>87</sup> In *Schmuhl v. Commonwealth*, the trial court ruled that the accused could not present "psychiatric testimony," and his expert could not use words like "delirium," "psychosis," "dissociation," and "delusions" during his trial for serious violent charges.<sup>88</sup> The Court reiterated that *Stamper* "made clear that the only way to negate *mens rea* with evidence of a defendant's mental state is to plead an insanity defense," and that there was "no exception for a defense premised on a defendant's involuntary intoxication."<sup>89</sup> The Court stated:

By offering expert evidence of his mental state, but refusing to plead insanity, appellant attempted to avoid the rules that dictate how such evidence must be disclosed. Appellant essentially wants all the benefits afforded an insanity argument without the associated responsibility for notice to the court required by statute and case law.<sup>90</sup>

In *Johnson v. Commonwealth*, the Court of Appeals refused to find any exceptions to *Stamper's* holding and reiterated that "expert testimony about a criminal defendant's mental state at the time of the offense is – absent an insanity defense – inadmissible at trial."<sup>91</sup> Ms. Johnson, the defendant, sought to introduce expert testimony about her post-traumatic stress disorder to support her statutory affirmative defense for the crime of eluding law enforcement, specifically that she reasonably believed she was being pursued by a person other than a law-enforcement officer.<sup>92</sup> Ms. Johnson testified at trial that one day prior to eluding the police, her boyfriend had choked her.<sup>93</sup> After obtaining a protective order, she was driving to her godmother's house out-of-state when she saw "flashing lights."<sup>94</sup> As her "'memories came flooding back' of her childhood rape and involvement in child pornography," she

<sup>87</sup> *Smith v. Commonwealth*, 389 S.E.2d 871, 879 (Va. 1990).

<sup>88</sup> *Schmuhl v. Commonwealth*, 818 S.E.2d 71, 74, 79 (Va. Ct. App. 2018). Mr. Schmuhl was charged and convicted of two counts of abduction with intent to gain pecuniary benefit, two counts of aggravated malicious wounding, two counts of using or displaying a firearm during the commission of an aggravated malicious wounding, and burglary while armed with a deadly weapon.

<sup>89</sup> *Id.* at 81.

<sup>90</sup> *Id.* at 82.

<sup>91</sup> *Stamper v. Commonwealth*, 324 S.E.2d 682, 687 (Va. 1985); *Johnson v. Commonwealth*, 824 S.E.2d 14, 18 (Va. Ct. App. 2019).

<sup>92</sup> 824 S.E.2d at 15.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

“thought the lights were ‘camera flashes’ . . . ‘I had to get away or they’re going to kill me.’”<sup>95</sup> Ms. Johnson did not realize it was the police pursuing her until after she wrecked her car.<sup>96</sup>

Ms. Johnson was not allowed to support her story with the testimony of a recognized expert in the diagnosis and treatment of post-traumatic stress disorder.<sup>97</sup> The expert would have testified that Ms. Johnson’s “strangulation by her boyfriend was a triggering event” of her memories of abuse.<sup>98</sup> The expert explained that her “‘primitive brain’ took over, to the suppression of her ‘logical brain,’ causing her to flee and making her ‘not able to think straight.’”<sup>99</sup> The trial court convicted Ms. Johnson of felony eluding police.<sup>100</sup> Citing *Stamper* and *Stamper’s* precedent, the Court of Appeals specifically found that the codified affirmative defense to elude “does not in any way contradict the Supreme Court’s decision in *Stamper* – and does not make expert testimony concerning a defendant’s mental state at the time of the offense somehow admissible at trial, without an insanity defense.”<sup>101</sup>

The appellate courts also applied *Stamper* to cases involving situations in which the accused had an intellectual disability. In *Bowling v. Commonwealth*, the Court of Appeals found that the trial court did not err in denying the defense motion “to introduce psychiatric evidence as to his mental state at the time of the offense.”<sup>102</sup> Specifically, the accused wanted to introduce evidence that he “functioned at the lower limits of the borderline range of the Adult Intelligence Scale and that Bowling did not have developed problem-solving skills or elaborate abstract thinking capability,” and therefore could not premeditate a murder.<sup>103</sup> In *Peoples v. Commonwealth*, the Court of Appeals upheld the denial of a psychologist’s testimony that the accused was “mildly mentally retarded,” causing him to interpret social situations differently than most people and resulting in problems with impulse control.<sup>104</sup> The defense sought to introduce this evidence to support his argument that he acted in the heat of passion, thereby rebutting the presumption of malice for his aggravated malicious wounding charges or that he acted in self-defense.<sup>105</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 16.

<sup>98</sup> *Id.* at 15.

<sup>99</sup> *Id.* at 15–16.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 18; *Stamper v. Commonwealth*, 324 S.E.2d 682, 687–88 (Va. 1985).

<sup>102</sup> *Bowling v. Commonwealth*, 403 S.E.2d 375, 379 (Va. Ct. App. 1991).

<sup>103</sup> *Id.* at 377–78.

<sup>104</sup> *Peoples v. Commonwealth*, 519 S.E.2d 382, 383–85 (Va. Ct. App. 1999).

<sup>105</sup> *Id.* at 383. .

### C. *New Virginia Code § 19.2-271.6 Abrogates Stamper*

As appellate courts strictly construed *Stamper*, families, advocacy groups, and members of the public became increasingly frustrated when learning that individuals with a developmental or intellectual disability, autism spectrum disorder, or mental illness connected to a charged offense could not explain to the judge or jury deciding guilt how their mental condition played a role in their thoughts or behavior.<sup>106</sup> During the 2021 Virginia General Assembly Session, Senator Jennifer McClellan, and Delegate Jeffrey Bourne introduced bills regarding mental condition evidence during trial, specifically Senate Bill ("SB") 1315 and House Bill ("HD") 2047.<sup>107</sup> Following the 2021 Virginia General Assembly Special Session I, after various amendments, their bills were signed into law by Governor Northam on April 7, 2021.<sup>108</sup>

Senate Bill 1315 and House Bill 2047 created new Virginia Code § 19.2-271.6. Virginia Code § 19.2-271.6 now states:

“In any criminal case, evidence offered by the defendant concerning the defendant’s mental condition at the time of the alleged offense, including expert testimony, is relevant, is not evidence concerning an ultimate issue of fact, and shall be admitted if such evidence (i) tends to show the defendant did not have the intent required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence.”<sup>109</sup>

Although not explicitly saying so, this section supersedes *Stamper*. First, it is clear that mental condition evidence is now admissible outside of an insanity defense. The “is relevant” language specifically attacks and abrogates *Stamper’s* holding that “evidence of a criminal defendant’s mental state at the time of the offense is . . . *irrelevant* to the issue of guilt.”<sup>110</sup> By abrogating *Stamper’s* holding, this law also abrogates the common law, which the court

<sup>106</sup> See, e.g., The Arc of Virginia, *About Us*, THE ARC OF VA., [https://www.thearcofva.org/about\\_us](https://www.thearcofva.org/about_us); Legal Reform for the Intellectually and Developmentally Disabled, *About LRIDD*, LEGAL REFORM FOR THE INTELLECTUALLY AND DEVELOPMENTALLY DISABLED, <https://lridd.org/about-lridd-legal-reform/>; Partner for Mental Health and Mental Health America of Virginia, *MHA Affiliate Network About*, PARTNER FOR MENTAL HEALTH AND MENTAL HEALTH AM. OF VA., <https://arc.mhanational.org/mha-affiliate-network>; Justice Forward Virginia, *Who We Are*, JUSTICE FORWARD VA., <https://justiceforwardva.com/who-we-are>; and the Virginia Indigent Defense Commission, *About Us*, VA. DEF. INDIGENT DEF. COMM’N, <http://www.vadefenders.org/about-us/>, representatives advocated for change.

<sup>107</sup> S.B. 1315, Gen. Assemb., Spec. Sess. (Va. 2021); H. 2047, Gen. Assemb., Spec. Sess. (Va. 2021).

<sup>108</sup> Their bills addressed more than admissibility of a defendant’s mental condition. A judicial officer considering bail must consider any diagnosis of an intellectual or developmental disability. VA. CODE ANN. § 19.2-120(B). The bill, now law, also requires that court-appointed attorneys receive training, at the time of initial certification and recertification, on “the representation of individuals with behavioral or mental health issues and individuals with intellectual or developmental disabilities.” VA. CODE ANN. § 19.2-163.03 (2021). Further, probation officers when creating pre-sentence reports must include any diagnoses of an intellectual or developmental disability. VA. CODE ANN. § 19.2-299 (2021).

<sup>109</sup> Compare with MODEL PENAL CODE § 4.02(1) (AM. L. INST. Proposed Official Draft 1955): “Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.”

<sup>110</sup> See *Stamper v. Commonwealth*, 324 S.E.2d 682, 688 (Va. 1985).

relied on in *Stamper*.<sup>111</sup> Second, by specifically including “expert testimony” and clarifying that expert testimony “is not evidence concerning an ultimate issue of fact,” the General Assembly successfully takes aim at the *Stamper* Court’s view that an expert’s testimony on mental condition invades the province of the judge or jury deciding guilt as an opinion on the ultimate issue in the case.<sup>112</sup> Finally, by stating in section (D) that “[n]othing in this section shall be construed to affect the requirements for a defense of insanity,” the General Assembly provides that this new law is *in addition to* Virginia’s insanity defense. Therefore, there is a rejection of *Stamper’s* boundary that a person is “either legally insane or sane.”<sup>113</sup>

Virginia Code § 19.2-271.6 is not an affirmative defense but rather a rule governing admissibility of evidence.<sup>114</sup> The accused is not admitting to commission of the crime and is not seeking to be excused from responsibility. By introducing such evidence as allowed under Virginia Code § 19.2-271.6, the accused is pleading “not guilty” because the Commonwealth cannot prove the required intent of the crime. In other words, the presence of the mental condition precludes formation of the intent. “Intent” may be a specific intent to perform an act (i.e., intent to kill or rob), premeditation, knowledge, or willfulness. However, an accused may be found guilty of a lesser crime that does not require the same intent element. It is unclear whether, in practice, this statute can be used in general intent crimes, although criminal practitioners would be wise to try until the appellate courts say otherwise.

This new rule also limits those who can use it. Section (B) requires a defendant to “show that his condition existed at the time of the offense,” and the condition must satisfy specific diagnostic criteria.<sup>115</sup> The “mental condition” must be “(i) a mental illness, (ii) a developmental disability or intellectual disability, or (iii) autism spectrum disorder as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the

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<sup>111</sup> See *id.* at 687.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 688.

<sup>114</sup> Therefore, it is not accurate to say that this new law provides a diminished capacity defense or any other type of “defense.” In all criminal cases, the Commonwealth has the burden of persuasion to prove every element of a crime beyond a reasonable doubt, and this burden never shifts to the defendant. KENT SINCLAIR, *THE LAW OF EVIDENCE IN VIRGINIA* § 5-9, (8th ed. 2018). As an affirmative defense is not an element, the defense assumes the burden of persuasion to prove the affirmative defense. SINCLAIR § 5-10. Although specific to the affirmative defense, generally, the accused, to carry his burden, needs to produce enough evidence to create a reasonable doubt on that issue and as to guilt. *Id.* As VA. CODE ANN. § 19.2-271.6 is not an affirmative defense, the accused continues to have no burden of persuasion at all in the case. KENT SINCLAIR, *LAW OF EVIDENCE IN VIRGINIA* § 5-10, (8th ed. 2018).

<sup>115</sup> VA. CODE ANN. § 19.2-271.6(B) (2021).

American Psychiatric Association” (“DSM-5”).<sup>116</sup> Section (A) further limits a “developmental disability” or “intellectual disorder” as defined in § 37.2-100.<sup>117</sup> “Mental illness” is directly defined in section (A) as “a disorder of thought, mood, perception, or orientation that significantly impairs judgment or capacity to recognize reality.”<sup>118</sup>

By defining the mental conditions that are prerequisites to the use of this rule of evidence, the General Assembly indirectly rejects the *Stamper* Court’s final rationale that courts should not be tasked with frequently changed understandings of “mental illnesses, disorders, and defects.”<sup>119</sup> The General Assembly relies on the factfinder to apply definitions of mental illness, developmental disability, intellectual disability, and autism spectrum disorder to the facts of the case.

The new law has several provisions to protect the Commonwealth’s interests. The new law has notice provisions, requiring the defense to inform the Commonwealth of its intention to rely on mental condition evidence.<sup>120</sup> A breach of this notice provision allows the court discretion to provide the Commonwealth a continuance or even bar the defense from presenting its evidence.<sup>121</sup> Virginia Code § 19.2-271.6, therefore, addresses the concern of the *Schmuhl* Court, which criticized the defense as wanting to avoid

<sup>116</sup> A person with autism spectrum disorder will have persistent deficits in social communication and social interaction across multiple contexts and restricted, repetitive patterns of behavior, interests or activities. Symptoms must be present in the early developmental period and cause clinically significant impairment in social, occupational, or other important areas of current functioning. DSM-5, *supra* note 80 at 31.

<sup>117</sup> VA. CODE ANN. § 37.2-100 defines a developmental disability as: “[A] severe, chronic disability of an individual that (i) is attributable to a mental or physical impairment, or a combination of mental and physical impairments, other than a sole diagnosis of mental illness; (ii) is manifested before the individual reaches 22 years of age; (iii) is likely to continue indefinitely; (iv) results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency; and (v) reflects the individual’s need for a combination and sequence of special interdisciplinary or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated. An individual from birth to age nine, inclusive, who has a substantial developmental delay or specific congenital or acquired condition may be considered to have a developmental disability without meeting three or more of the criteria described in clauses (i) through (v) if the individual, without services and supports, has a high probability of meeting those criteria later in life. Per Virginia Code § 37.2-100, “Intellectual disability” means a disability, originating before the age of 18 years, characterized concurrently by (i) significant subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning, administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. See VA. CODE ANN. § 37.2-100 (2021).

<sup>118</sup> VA. CODE ANN. § 19.2-271.6(A) (2021).

<sup>119</sup> See *Stamper v. Commonwealth*, 324 S.E.2d 682, 688 (Va. 1985).

<sup>120</sup> The defendant must notify the Commonwealth, in writing, of its intent “at least 60 days prior to his trial in circuit court, or at least 21 days prior to trial in general district court or juvenile and domestic relations district court, or at least 14 days if the trial date is set within 21 days of last court appearance.” VA. CODE ANN. § 19.2-271.6 (2021).

<sup>121</sup> *Id.*

disclosure and “the associated responsibility for notice to the court” when presenting evidence of mental condition.<sup>122</sup> The defense is further required to share any expert reports or summary of expected expert testimony and the witness’s qualifications and contact information.<sup>123</sup> Similarly, the defense must share with the Commonwealth before introduction “any written reports of any physical or mental examination of the accused made in connection with the case.”<sup>124</sup> The Commonwealth may also introduce “relevant, admissible evidence, including expert testimony, in rebuttal to evidence introduced by the defendant.”<sup>125</sup> Finally, the General Assembly kept the bar against “introduction of evidence of voluntary intoxication.”<sup>126</sup>

#### D. Decriminalization

This bill is an important step in the decriminalization of developmental or intellectual disabilities, autism spectrum disorder, and mental illness. In any discussion about criminal justice reform, it must be understood how certain mental conditions are a “salient feature of mass incarceration” and that jails and prisons are the largest providers of psychiatric care.<sup>127</sup> About 50% of Americans with serious mental illness will be arrested at some point in their lives.<sup>128</sup> More than a third of those incarcerated with mental illness “show signs or have symptoms of their disease when they’re arrested but haven’t been diagnosed or treated within the past year.”<sup>129</sup> People with mental illness are also more likely to face longer sentences.<sup>130</sup> Similarly, people with developmental and intellectual disabilities are more likely to “be arrested, be charged with a crime, and serve longer prison sentences once convicted, than those without disabilities.”<sup>131</sup>

Allowing judges and juries to find the accused not guilty of charges when criminal intent was not formed due to a mental condition ensures that the accused is not criminalized because of their mental disability, illness, or disorder. If the intent could not be formed because of a mental condition, then there is not a crime, or a person may be guilty of a lesser crime.

<sup>122</sup> See *Schmuhl v. Commonwealth*, 818 S.E.2d 71, 82 (Va. Ct. App. 2018).

<sup>123</sup> VA. CODE ANN. § 19.2-271.6(B) (2021).

<sup>124</sup> VA. CODE ANN. § 19.2-271.6(C) (2021). The Commonwealth cannot use during its case in chief any statements “made by the accused in the course of such an examination.”

<sup>125</sup> VA. CODE ANN. § 19.2-271.6(D) (2021).

<sup>126</sup> VA. CODE ANN. § 19.2-271.6(G) (2021).

<sup>127</sup> ROTH, *supra* note 82 at 2–3.

<sup>128</sup> *Id.* at 16, 93 (defining “serious mental illness” to generally include disorders such as schizophrenia and bipolar disorder”).

<sup>129</sup> *Id.* at 111.

<sup>130</sup> *Id.* at 4.

<sup>131</sup> *Our Initiatives: Criminal Justice*, THE ARC, <https://thearc.org/our-initiatives/criminal-%20justice/> (last visited Sept. 26, 2021).

What the General Assembly got right is that this new rule of evidence includes individuals with both conditions deemed “mental illness” and those that are “developmental disabilities.”<sup>132</sup> This almost did not happen. One substitute to HB 2047 limited the rule of evidence to those with autism spectrum disorder or a developmental or intellectual disability.<sup>133</sup> However, as discussed above, *Stamper* was applied to both mental illness and developmental disabilities. Therefore, in terms of replacing *Stamper*'s holding, it would not be fair to exclude one of those groups. Additionally, if the goal is to determine if the mens rea was actually formed by the accused, which is a necessary element of a crime, then it is crucial to be inclusive of the different types of mental conditions that affect the forming of intent.

There are some unanswered questions regarding this new law. Does it apply to both general and specific intent crimes? Will it be difficult for the poor accused of crimes to obtain experts (or specifically, funding for experts)? Will defense attorneys, who are not mental health experts, recognize clients who qualify for this rule of evidence?<sup>134</sup> Despite any possible problems, this bill is a much-needed reform to enable an accused to tell their full story and prevent ensnaring individuals with mental conditions, who, while not insane, cannot form the intent required for a crime, deeper into the criminal justice system.

### III. JURY SENTENCING REFORM

In its 2020 Special Session, the Virginia General assembly made its most significant change to its criminal sentencing process since at least 1994, and possibly since 1796. SB5007 ended the requirement that a jury recommend a sentence if it convicted the accused after a jury trial.<sup>135</sup> Instead, a person convicted of a crime can now elect to have a jury recommend a sentence or proceed to a judge sentencing without a jury recommendation.<sup>136</sup> To help understand the importance of this change, this section will discuss the origins of jury sentencing in Virginia, how the system functioned before these changes in 2020, and the statutory changes themselves.

#### *A. The Origins of Jury Sentencing in Virginia*

At the time of the founding of the United States, English trial judges “had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each

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<sup>132</sup> VA. CODE ANN. § 19.2-271.6(B) (2021).

<sup>133</sup> H.D. 2047, Gen. Assemb. 1st Sess. (Jan. 2021) (amended Spec. Sess. 2021).

<sup>134</sup> VA. CODE ANN. § 19.2-271.6(B) (2021).

<sup>135</sup> VA. CODE ANN. § 19.2-295 (2021); S. 5007 1st Spec. Sess. 2020 (Va. 2020).

<sup>136</sup> VA. CODE ANN. § 19.2-295(A) (2021).



offense. The judge was meant simply to impose that sentence.”<sup>137</sup> In post-revolutionary America, however, the movement “. . . away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process.”<sup>138</sup> In Virginia, the 1796 General Assembly passed legislation abolishing the death sentence, which, at the time, was the mandatory sentence for all felonies, for all crimes other than first-degree murder.<sup>139</sup> However, this change only applied to white people in the Commonwealth.<sup>140</sup> Sentencing decisions were entrusted to the jury instead of a judge.<sup>141</sup> Virginia was the first state to adopt jury sentencing in criminal cases, but it was not the last. At least ten other states had done the same by the middle of the nineteenth century.<sup>142</sup> As many as half of the states used juries to impose non-capital criminal sentences at some point between 1800 and 1900.<sup>143</sup> This was a push for larger democratic reform.<sup>144</sup> Post-revolution state legislatures favored sentencing decisions by juries instead of judges because of a general fear of unelected judges who were not responsive to popular will.<sup>145</sup> In fact, during the debate on the 1796 Virginia bill, the patron of the bill “charged his colleagues with passively submitting to a system ‘calculated to awe and crush the humble vassals of monarchy,’ and urged them to revise the criminal law ‘to comport with the principles of our government.’”<sup>146</sup>

Jury sentencing continued without interruption in Virginia for all offenses from 1796 to July of 2021. Virginia persisted in maintaining jury sentencing

<sup>137</sup> *Apprendi v. N.J.*, 530 U.S. 466, 479 (2000) (citing John Langbein, *The Trial Jury in England, France, Germany 1700-1900* in *The English Criminal Trial Jury on the Eve of the French Revolution*, 4 COMPAR. STUD. IN CONT’L AND ANGLO-AM. LEGAL HIST. 13, 36–37 (Antonio Schioppa ed. 1987)).

<sup>138</sup> *Furman v. Georgia*, 408 U.S. 238, 375 (Burger, C. J., dissenting).

<sup>139</sup> Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 LAW & HIST. REV. 53, 76 (1983).

<sup>140</sup> See generally *id.* at 53.

<sup>141</sup> See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 317–18 (2003).

<sup>142</sup> *Id.* at 317.

<sup>143</sup> Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1373 (1999).

<sup>144</sup> Iontcheva, *supra* note 144 at 319–20. Despite this desire for a more democratic criminal legal system, the members of Congress in the early days of the Republic chose to not include jury sentencing as part of the new federal court system or the Federal Constitution. Cf. *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986) (noting the Sixth Amendment does not provide a right to be sentenced by a jury even when the sentencing turns on a finding of fact). Some scholars have noted that the dominance of judicial sentencing in state and federal courts was a “historical accident” more than a thoughtful policy. Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 967 (2003).

<sup>145</sup> Iontcheva, *supra* note 144 at 317–18 (2003); see also EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES 96–97* (The Nat’l Conf. of Jud. Councils, 1944).

<sup>146</sup> Preyer, *supra* note 142 at 78. George Keith Taylor is a fascinating and little-known historical figure in his own regard. In addition to being the patron of the bill that made all of this radical change for crime and punishment for white Virginians, he was also a prime defender of the Alien and Sedition Act and one of the “midnight” judges appointed by President Adams that would end up before the United States Supreme Court in *Marbury v. Madison*, 5 U.S. 137 (1803). Preyer, *supra* at 78; Edward A. Wyatt, IV, *George Keith Taylor, 1769-1815, Virginia Federalist and Humanitarian*, 16 WM. & MARY COLL. Q. HIST. MAG., no. 1, Jan. 1936, at 1.

even after most other states switched back to a judge-only sentencing regime. Most states subsequently reverted to judge sentencing.

[P]rogressive beliefs in the possibility of rehabilitation began to prioritize utilitarianism and legal expertise over retributivism and community wisdom. Legal institutions viewed criminal law not as a system to punish criminals for their immoral acts but rather as a system to cure them of their antisocial behavior. The idea that lay jurors could administer these quasi-medical procedures appeared nonsensical.<sup>147</sup>

Virginia, perhaps unsurprisingly, did not adopt this view.

There were criticisms of jury sentencing from various parties in the criminal legal system. For example, all parties to a criminal case worried that “a juror with misconceptions about the operation of the parole laws could easily infect the other jurors with these misconceptions and thereby cause the assessment of a sentence [to be] based on erroneous beliefs as to when the defendant will really 'get out.’”<sup>148</sup> Commonwealth’s Attorneys were also troubled because the jury did not know the prior criminal convictions of the accused prior to making the sentencing decision, which they felt meant people were not being punished harshly enough.<sup>149</sup>

Before 1994, there was only one phase of a criminal trial in Virginia.<sup>150</sup> The jury decided whether the accused was guilty, and, if they found him guilty, would decide what punishment he should receive.<sup>151</sup> Therefore, the jury only knew the information about the offense at the time it determined the sentence. The jury did not know any additional information about the accused, whether aggravating or mitigating.<sup>152</sup> After a guilty verdict and a

<sup>147</sup> Kurt A. Holtzman, *Criminal Advisory Juries: A Sensible Compromise for Jury Sentencing Advocates*, 16 NW. J. OF L. & SOC. POL’Y 164, 169 (2021).

<sup>148</sup> Edward A. Linden, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 983-84 (1967).

<sup>149</sup> *Id.* at 968 (citing Editorial, RICHMOND TIMES-DISPATCH September 1, 1966, “The Association of Commonwealth’s Attorneys of Virginia wants state law changed so that a jury in a criminal case, after finding a defendant guilty, would be given the defendant’s criminal record to aid in fixing punishment.... The sentiment among the commonwealth’s attorneys (the men who prosecute criminal cases) was that habitual lawbreakers often receive light sentences because the juries do not know that they have committed previous crimes. In their proposal to correct the situation, the commonwealth’s attorneys are on the right track, but they don’t go far enough. A better solution would be to change the law so as to provide that juries determine whether defendants are guilty or innocent, and the judges fix the punishments of those defendants found guilty”).

<sup>150</sup> See Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1791-92 (1999).

<sup>151</sup> *Smith v. Commonwealth*, 223 Va. 721, 725 (1982) (Russell, J., dissenting) (“A Virginia jury bears an awesome responsibility in a criminal case. After discharging a jury’s usual duty of determining guilt or innocence, it must, if it has found the defendant guilty, fix the punishment to be imposed by the court in the same deliberation, without further evidence or instructions”).

<sup>152</sup> Thomas D. Horne, *Some Thoughts on Bifurcated Sentencing in Non-Capital Felony Cases in Virginia*, 30 U. RICH. L. REV. 465, 466-67 (1996) (“In a non-bifurcated jury trial, a defendant could use the jury trial as a means of sheltering himself from the adverse effects of a prior criminal history. Contrariwise, the Commonwealth could use punishment decision making with blinders to powerfully argue a substantial prison term for serious offenses”).

sentencing recommendation, a judge was required to hold a separate hearing at which the parties could introduce additional evidence that related to the actual person being sentenced, and not simply the facts of the offense.<sup>153</sup> In theory, the judge was required to make an independent judgment about all of the facts in the case and determine a fair sentence.<sup>154</sup>

In 1994, Virginia Code §19.2-295.1 bifurcated felony trials and gave the Commonwealth the ability to present the defendant's prior conviction to the jury prior to the jury fixing a sentence and gave the defendant the ability to present mitigating evidence.<sup>155</sup> In 2007, the General Assembly amended Virginia Code §19.2-295.1 to permit the jury to know not only the history of prior convictions of the person they were sentencing, but also what sentence he received in each of those cases.<sup>156</sup> The 2007 amendment also permitted victim impact testimony in the sentencing phase of a bifurcated trial.<sup>157</sup> As of 2021, only six states permit juries to make a sentencing decision in a non-capital case.<sup>158</sup>

### *B. How Jury Sentencing Functioned in 2020*

A review of the history seems to show that jury sentencing was developed to make the system more democratic, and possibly to act as a check on judges and prosecutors who would otherwise treat a person accused of a crime too harshly. At least on paper, jury sentencing seems like it would be a good option for criminal defendants. Based on how the statutes are designed, it would appear that jury sentencing in Virginia is nothing more than a recommendation that sets the upper limits of a possible sentence.<sup>159</sup> Virginia's pre-

<sup>153</sup> *See id.* at 471; *see also* 223 Va. at 725–26 (Russell, J., dissenting) (The theory of our unitary jury trial is that the jury is to sentence the offense rather than the offender. The factors mentioned above, relating to the defendant's personal life, are taken into account by the trial judge and the executive branch of government in the defendant's later treatment, but are not the jury's concern").

<sup>154</sup> *Duncan v. Commonwealth*, 343 S.E.2d 392, 394 (Va. Ct. App. 1986) (citing *Vines v. Muncy*, 553 F.2d 342, 349 (4th Cir., 1977)) ("Under such practice, the convicted criminal defendant is entitled to "two decisions" on the sentence, one by the jury and the other by the trial judge in the exercise of his statutory right to suspend; his "ultimate sentence . . . does not [therefore] rest with the jury" alone but is always subject to the control of the trial judge. This procedure makes the jury's finding little more than an advisory opinion or first-step decision").

<sup>155</sup> Misdemeanor trials were bifurcated into a guilt and sentencing phase in 2001 by SB 252 of the 2001 General Assembly Session. VA. CODE ANN. § 19.2-295.1 (1994).

<sup>156</sup> VA. CODE ANN. § 19.2-295.1 (2007); *see also* *Pcelinski v. Commonwealth*, Rec. No. 2366-06-4, 2008 Va. App. LEXIS 81, at \*10 (Va. Ct. App. Feb. 19, 2008).

<sup>157</sup> VA. CODE ANN. § 19.2-295.1 (2007).

<sup>158</sup> ARK. CODE ANN. § 5-4-103 (Westlaw current through 2021 Reg. Sess. 93d Ark. Gen. Assemb.); KY. REV. STAT. ANN. § 532.055 (Westlaw current through 2021 Reg. Sess.); MO. ANN. STAT. § 557.036 (Westlaw current through 2021 Reg. Sess. 101st Mo. Gen. Assemb.); OKLA. STAT. ANN. tit. 22, § 926.1 (Westlaw current through 2021 Reg. Sess. 58th Okla. Legis.); TEX. CODE CRIM. PROC. ANN. art. 37.07 (Westlaw current through 2021 Reg. Sess. 87th Tex. Legis.); VA. CODE ANN. § 19.2-295.1 (Westlaw current through 2021 Reg. Sess.).

<sup>159</sup> *Batts v. Commonwealth*, 515 S.E.2d 307, 315 (Va. Ct. App. 1999) ("the trial judge may reduce a sentence but may not exceed the maximum punishment fixed by the jury").

2021 jury sentencing statute appears to be more like Kentucky's jury sentencing scheme, where jury sentences are only nonbinding recommendations for a judge to consider.<sup>160</sup> The law played out in practice much differently than the way it appeared in the code book and in the reporters.

According to the Virginia Criminal Sentencing Commission, judges throughout the Commonwealth rarely suspend a jury sentence, despite having the authority to do so. In FY2020, for example, judges in Virginia only modified 13% of jury sentences.<sup>161</sup> In FY2019, it was just 9%.<sup>162</sup> These numbers reflect the general trend over the past five years of judges' actions after jury recommendations.<sup>163</sup> In comparison to Kentucky, this made Virginia more akin to the Texas jury sentencing scheme, where judges are bound by the sentence handed down by the jury.<sup>164</sup> Virginia judges were binding themselves to the jury's recommendation instead of exercising their own independent discretion, despite no legal requirement that they do so.

Jury sentences were often much harsher than sentences by judges. In 2016, 81.1% of non-jury cases complied with the Virginia Sentencing Guidelines.<sup>165</sup> Judges only imposed a sentence greater than the guidelines recommendation in 9.1% of cases.<sup>166</sup> In jury cases, on the other hand, sentences complied with the guidelines only 42.9% of the time.<sup>167</sup> A shocking 48% of jury sentences were greater than the guidelines recommendation.<sup>168</sup> By 2020, not much had changed. Non-jury cases complied with the guidelines in 83.5% of cases.<sup>169</sup> Only 7.2% of those sentences were above the guidelines.<sup>170</sup> In cases with a jury recommendation, there was a compliance rate of 46%.<sup>171</sup> 40% of the sentences were above the guidelines range.<sup>172</sup> There is a similar pattern in the other years in this range.<sup>173</sup> "This pattern of jury sentencing vis-

<sup>160</sup> See *Murphy v. Commonwealth*, 50 S.W.3d 173, 178 (Ky. 2001) (stating that a jury's sentencing recommendation has no mandatory effect).

<sup>161</sup> VA. CRIM. SENT'G COMM'N, ANNUAL REPORT 27 (2020) (hereinafter 2020 REPORT).

<sup>162</sup> *Id.* at 29.

<sup>163</sup> *Id.* at 27–28.

<sup>164</sup> *Beasley v. State*, 718 S.W.2d 304, 305 (Tex. App. 1985).

<sup>165</sup> 2020 REPORT at 28.

<sup>166</sup> VA. CRIM. SENT'G COMM'N, ANNUAL REPORT 28 (2016).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> VA. CRIM. SENT'G COMM'N, *supra* note 166 at 27.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See generally VA. CRIM. SENT'G COMM'N, ANNUAL REPORT 27 (2018) (Non-Jury: Compliance- 82.3%, Above guidelines- 8.7%. Jury: Compliance- 39.4%, Above guidelines 49.8%); VA. CRIM. SENT'G COMM'N, ANNUAL REPORT 29 (2019) (Non-Jury: Compliance- 83.9%, Above guidelines- 7.4%. Jury: Compliance- 49.7%, Above guidelines 36.7%).

à-vis the guidelines has been consistent since the truth-in-sentencing<sup>174</sup> guidelines became effective in 1995.<sup>175</sup>

Virginia prosecutors have long been aware of the advantage they receive from jury sentencing. According to one study:

The most ringing endorsement prosecutors gave jury sentencing, however, was as a tool to encourage defendants to waive jury trial. Jury sentences following jury trial often exceeded sentences after plea, they explained, giving prosecutors leverage in bargaining. “Let me be candid,” remarked a Commonwealth’s Attorney from Virginia, “there is another reason I prefer jury over judge sentencing—it forces pleas. Those higher sentences from a jury tend to concentrate a defendant’s attention.”<sup>176</sup>

This rationale was common among the Virginia prosecutors interviewed in the study.<sup>177</sup> In addition to impacting the length of a sentence a defendant receives, jury sentencing also impacts the ability of a person accused of a crime to have a trial. Under the Virginia Constitution, “[i]n criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the Commonwealth’s Attorney and of the court entered of record . . .”<sup>178</sup> Therefore, as a matter of state constitutional law, either the accused, the prosecutor, or the trial judge can request a jury trial. Regardless of who requested a jury trial, the jury was required to fix punishment under Va. Code §19.2-295.1.<sup>179</sup> This meant that if a person accused of a crime pleaded not guilty, a prosecutor (or judge) could force that person into a jury sentence that would statistically be above the sentencing guidelines, against their will.

This issue was even more acute in cases where there was a statutory minimum.<sup>180</sup> Judges, aided by the sentencing guidelines, can give the minimum sentence and suspend the actual time served below the minimum.<sup>181</sup> Juries in

<sup>174</sup> “Truth-in-sentencing” refers to a group of reforms passed at the national and state level in the early 1990s that sought to “reduce drastically the gap between the sentenced pronounced in the courtroom and the incarceration time actually served.” Virginia State Crime Commission “A Decade of Truth-In-Sentencing In Virginia,” March 2005 [http://www.vcsc.virginia.gov/Mar\\_05/TIS\\_Brochure.pdf](http://www.vcsc.virginia.gov/Mar_05/TIS_Brochure.pdf)

<sup>175</sup> VA. CRIM. SENT’G COMM’N, ANNUAL REPORT 26 (2017).

<sup>176</sup> Nancy J. King & Rosevelt L. Noble, *Felony Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 895–96 (2004).

<sup>177</sup> See also *id.* at 910 (“One prosecutor summed it up: ‘Defense counsel will plead guilty rather than run the risk of being sentenced by the jury, it tends to force a plea’”).

<sup>178</sup> VA. CONST. art. I, § 8 (1971).

<sup>179</sup> VA. CODE ANN. § 19.2-295.1 (2021).

<sup>180</sup> Many Virginia offenses, including non-violent offenses, carry statutory minimums. See VA. CODE ANN. § 18.2-10(b)–(f) (2021). Distribution of a controlled substance on schedule I or II, regardless of the amount, carried a punishment range of five to forty years in prison. This resulted in essentially no low-level distributions going to trial in the whole state, because if a person lost, they would face five years, versus guidelines as low as seven months on the low end for a person with a limited criminal record. See Virginia Sentencing Guidelines Commission, *Sentencing Guidelines*, VIRGINIA SENTENCING GUIDELINES MANUAL (2021), [http://www.vcsc.virginia.gov/worksheets2021/Drg\\_SchI\\_II.pdf](http://www.vcsc.virginia.gov/worksheets2021/Drg_SchI_II.pdf).

<sup>181</sup> VA. CODE ANN. § 19.2–303 (2021).

Virginia are not permitted to recommend that a period of incarceration be suspended or that the person be placed on probation.<sup>182</sup> Because only judges, not juries, can suspend a sentence, the legislature has encouraged higher sentences for those who decide to exercise their right to a trial by jury instead of a plea.<sup>183</sup>

It is no wonder that the number of convictions resulting from jury trials has fallen sharply over the past thirty years.<sup>184</sup> The mere decision to plead not guilty in Virginia resulted in an automatically higher sentence than if one simply had pleaded guilty to all of the charges or accepted a plea offer to a reduced number of charges or a lesser offense. Prosecutors were placed in control of not only the plea process, but also the trial process.

Therefore, in large part due to the effect of jury sentencing, Virginia's criminal legal system has become a "system of pleas, not a system of trials."<sup>185</sup> In Virginia, the prosecutor was able to skew the calculus for both parties by ensuring that a jury trial would result in a jury sentencing. The prosecutor could therefore make the option of having a jury trial at all so unpalatable that even those who had legitimate issues for trial were effectively forced into taking the best plea they could negotiate.

### *C. The 2021 Legislative Changes to Jury Sentencing*

During the 2020 Special Session of the General Assembly, Senator Joe Morrissey introduced SB 2007, which drastically improved the prior jury sentencing system.<sup>186</sup> A similar bill had passed the Virginia Senate in the 2020 Regular Session, but failed to make it out of the House of Delegates Courts of Justice Criminal Subcommittee.<sup>187</sup> Between the Regular and Special Sessions in 2020, Virginia, and the nation, saw the movement for criminal legal system reform grow in the wake of the murder of George Floyd.<sup>188</sup> Therefore, when the same bill was introduced a few months later, it had

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<sup>182</sup> *Hinton v. Commonwealth*, 219 Va. 492, 495 (1978) (Russell, J., dissenting) ("The jury is given no information as to the effect or availability of probation, parole, time allowances for good behavior, suspended sentences, rehabilitative programs, or pardons"); *see also* King & Noble, *supra* note 179 at 911.

<sup>183</sup> *Id.*

<sup>184</sup> 2020 REPORT at 26.

<sup>185</sup> *See Missouri v. Frye*, 566 U.S. 134, 144 (2012) (citing *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)).

<sup>186</sup> Rachel Weiner & Laura Vozella, 'Revolutionary' Criminal Sentencing Change Passes in Virginia, WASH. POST (Oct. 23, 2020), [https://www.washingtonpost.com/local/legal-issues/sentencing-reform-virginia/2020/10/23/59ad16dc-149b-11eb-ba42-ec6a580836ed\\_story.html](https://www.washingtonpost.com/local/legal-issues/sentencing-reform-virginia/2020/10/23/59ad16dc-149b-11eb-ba42-ec6a580836ed_story.html).

<sup>187</sup> *See* S.B. 811, 2020 Sess. (Va. 2020).

<sup>188</sup> Alan Suderman & Denise Lavoie, *Virginia Democrats Vow Sweeping Changes in Criminal Justice*, ASSOCIATED PRESS (July 22, 2020), <https://apnews.com/article/health-death-of-george-floyd-coronavirus-pandemic-virginia-police-reform-9ac4d3ca0cbea8ac02a8fa4500d188c1>.

greater support among members of the House of Delegates and ultimately became law.<sup>189</sup>

The bill made substantive changes to Virginia Code §19.2-295 and several technical amendments to other statutes.<sup>190</sup> In essence, it removed the link between requesting a jury for a determination of guilt and requesting a jury to recommend a sentence.<sup>191</sup> After a jury trial, the default is now that the judge will determine the punishment if the person is convicted.<sup>192</sup> If a person accused of a crime wants a jury to recommend a sentence in addition to the judge deciding the final sentence, they must file a written notice with the court requesting a jury sentencing at least thirty days before trial.<sup>193</sup> Therefore, the defendant in a criminal case now has the ability to have a jury determine guilt, but can avoid the trial penalty that comes from a jury sentencing, if he chooses.

This bill will reduce the power of prosecutors to leverage jury sentencing against a person accused of a crime who does not want to plead guilty, but is worried about the jury sentencing penalty. It is a modest step, but one that will let the right to a jury trial serve as a check on police action and overzealous prosecutors.

#### *D. Remaining Questions with the New Jury Sentencing Scheme*

There are several questions that are left open by this statute that trial courts and appellate courts will need to resolve. For example, it is not clear what happens if a person who requests a jury sentence decides they no longer wish to have a jury sentencing. Is this decision irrevocable, or can a person change their mind? The question is particularly salient when it comes to a person who wants to change from a jury sentencing to a judge sentencing after the jury comes back with a guilty finding, but before the sentencing phase begins.

There are several reasons why a person on trial would want to change their mind after the guilty verdict. The most important one is that until the jury renders its verdict, the person does not know what charges they will be sentenced on. For example, a person charged with distribution of a controlled

<sup>189</sup> Weiner & Vozella, *supra* note 186.

<sup>190</sup> S.B. 5007, 2020 Spec. Sess. I (Va. 2020); *see* VA. CODE ANN. § 19.2-264.2 (2021); VA. CODE ANN. § 19.2-288 (2021); VA. CODE ANN. § 19.2-295.1 (2021); VA. CODE ANN. 19.2-295.3 (2021).

<sup>191</sup> *See* VA. CODE ANN. § 19.2-295 (2021).

<sup>192</sup> VA. CODE ANN. § 19.2-295 (2021) (“Within the limits prescribed by law, the court shall ascertain the term of confinement in the state correctional facility or in jail and the amount of fine, if any, of when a person is convicted of a criminal offense...”).

<sup>193</sup> VA. CODE ANN. § 19.2-295 (2021) (“...unless the accused is tried by a jury and has requested that the jury ascertain punishment. Such request for a jury to ascertain punishment shall be filed as a written pleading with the court at least 30 days prior to trial”).

substance may only be convicted with possession of a controlled substance.<sup>194</sup> Likewise, a person on trial for aggravated malicious wounding may ultimately be convicted of malicious wounding, unlawful wounding, assault and battery, or nothing at all.<sup>195</sup> Additionally, a person charged with multiple counts may be convicted of some, but not all counts.<sup>196</sup> Therefore, many people facing trial do not actually know the range of punishment or total possible punishment the jury will consider until the verdict is rendered after the guilt phase. The accused similarly does not know what the statutory minimum sentence will be, if any.

Different types of crimes may also be viewed completely differently by the community from which the jury is drawn. For example, many people have strong negative feelings about people who sell drugs, but, increasingly, the public understands drug possession as a symptom of substance use disorder.<sup>197</sup> How a jury punishes a distribution, compared to something seen as more akin to a public health issue, may be completely different.

Anecdotally, several prosecutors and judges throughout the state seem to be taking the position that once a person requests a jury sentencing, they cannot change their mind. The main worry seems to be that criminal defendants will say they want jury sentencing in order to be able to tell the venire the range of punishment for the offenses in an attempt to influence how the jurors see the burden of proof in the case.<sup>198</sup> Some judges have said that since the statute does not expressly provide for revoking a request for jury sentencing, it cannot be done.

This argument does not make sense as a matter of logic or statutory construction. First, the thirty-day notice requirement exists so that the prosecutor will be able to prepare for a jury sentencing and, most importantly, give the

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<sup>194</sup> VA. CODE ANN. § 18.2-248 (2021) (the punishment for distribution of a Schedule I controlled substance is five to forty years in prison); see VA. CODE ANN. § 18.2-250 (2021) (the punishment for possession of a schedule I controlled substance is one to ten years in prison).

<sup>195</sup> See VA. CODE ANN. § 18.2-51.2 (the punishment for aggravated malicious wounding is twenty years to life in prison); VA. CODE ANN. § 18.2-51 (the punishment for malicious wounding is five to twenty years in prison and the punishment for unlawful wounding is up to five years in prison); VA. CODE ANN. § 18.2-57 (misdemeanor assault and battery is punishable by up to twelve months in jail).

<sup>196</sup> See VA. CODE ANN. § 18.2-51.2 (the punishment for aggravated malicious wounding is twenty years to life in prison); VA. CODE ANN. § 18.2-51 (the punishment for malicious wounding is five to twenty years in prison and the punishment for unlawful wounding is up to five years in prison); VA. CODE ANN. § 18.2-57 (misdemeanor assault and battery is punishable by up to twelve months in jail).

<sup>197</sup> See Thomas McLellan, *Substance Misuse and Substance Use Disorders: Why Do They Matter in Healthcare?*, 128 TRANSACTIONS OF THE AM. CLINICAL & CLIMATOLOGICAL ASS'N 112,113 (2017).

<sup>198</sup> See VA. CODE ANN. § 19.2-262.01 (overturning *Hill v. Commonwealth*, 570 S.E.2d 805 (2002)). Several commentators have argued that jurors should be informed of the range of punishment, even if they will not sentence the accused. See, e.g., Jeffrey Bellin, *Is Punishment Relevant After all? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U.L. REV. 2223; Kristen K. Sauer, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232 (1995)).



“notice of prior convictions” that will be used at a potential jury sentencing under Va. Code §19.2-295.1.<sup>199</sup> However, if the accused changes their mind, this will actually result in less work for the prosecutor, the jury, and the trial court. Even if there is a jury sentencing phase, the trial court still must hold a sentencing hearing, review the guidelines, and consider mitigation of the jury’s recommendation.<sup>200</sup> If, after the jury returns a guilty verdict, the accused changes their mind and wants only a judge sentencing, the only difference would be that the jury goes home earlier and the judge does not have a jury recommendation to constrain their decision-making.

Furthermore, the 2020 revisions to Virginia Code §19.2-295 confer upon the accused the right to have a jury recommend a sentence.<sup>201</sup> It stands to reason that the accused could waive that right just as an accused can waive a myriad of constitutional and statutory rights in a criminal proceeding. The prosecutor does not have a right to a jury sentencing recommendation under the statute.<sup>202</sup> The only right granted to the Commonwealth is the right to notice that a jury sentencing phase may occur.<sup>203</sup> A person accused of a crime in Virginia can waive his right to a jury trial by pleading guilty before the trial or during the trial, provided the jury has not yet rendered its verdict.<sup>204</sup> While there is a presumption against waiver, Virginia and federal courts have found that even the most basic rights, including the right to counsel and the right to a jury trial, can be waived in the criminal context.<sup>205</sup>

It would be absurd to think that a criminal defendant could waive any number of critical constitutional rights during the trial process but could not waive his statutory right to have a jury determine his sentence. That being said, this remains an open question of law, the answer to which may impact how people accused of crimes use this new statutory right to request a jury sentencing.

Next, it remains to be seen what impact this statutory change will have on the number of jury trials in the Commonwealth. This was the chief concern of the Virginia Association of Commonwealth’s Attorneys (“VACA”) when SB5007 was before the General Assembly.<sup>206</sup> VACA estimated that, as a result of this statutory change, the number of jury trials would increase by six or eight times.<sup>207</sup> They arrived at this number by comparing the average rate

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<sup>199</sup> VA. CODE ANN. § 19.2-295.1.

<sup>200</sup> VA. CODE ANN. § 19.2-303 (2021).

<sup>201</sup> VA. CODE ANN. § 19.2-295.

<sup>202</sup> See VA. CODE ANN. § 19.2-295 (“unless the accused is tried by a jury and has requested that the jury ascertain punishment.”).

<sup>203</sup> See VA. CODE ANN. § 19.2-295.

<sup>204</sup> See VA. CODE ANN. § 19.2-257.

<sup>205</sup> Muhammad v. Commonwealth, 619 S.E.2d 16, 48 (2005).

<sup>206</sup> Email from Jeffrey Haislip, President, Virginia Association of Commonwealth’s Attorneys, to members of the General Assembly (Sept. 1, 2020) (on file with co-author Bryan Kennedy).

<sup>207</sup> *Id.*

of jury trials in the states that do not use jury sentencing.<sup>208</sup> Other system actors, including defense attorneys, argued that this fear was either overblown or nothing to be afraid of at all. As recently as 1986, over six percent of Virginia felony convictions came from a jury trial.<sup>209</sup> By 2021 the number was around 1%.<sup>210</sup> Even a six-fold increase in jury trials would put Virginia back to where it was in the years before the push for “truth in sentencing.”

As our nation’s criminal legal system has become a “system of pleas,” prosecutors may simply make more favorable plea offers to criminal defendants who are still worried about the results they will receive from a judge or a jury after a trial.<sup>211</sup> The only cases that should automatically change from a plea to a trial under the new system are those where the prosecutor has historically leveraged a statutory minimum and the threat of a jury sentence against a person accused of a crime, forcing them to plead to avoid the statutory minimum from a jury if they lose. Other than that, it would seem that all other cases would be treated in the normal course—including an evaluation of the strength of the evidence and aggravating and mitigating factors, among other data points—when deciding to make a plea offer or not.

Even if the number of jury trials does increase, this will likely increase the fairness of the criminal legal system. Research has shown that a shocking number of innocent people plead guilty to crimes they did not commit.<sup>212</sup> In the plea-bargaining process, “the prosecutors hold all the cards; defendants only have the power to throw a monkey wrench into the system by demanding a jury trial.”<sup>213</sup> Prior to SB5007 passing in 2020, people accused of a crime in Virginia did not even have that monkey wrench to try to protect their own futures.<sup>214</sup> Ending mandatory jury sentencing in Virginia will start to ease this power imbalance between the prosecutor and the accused during the entire criminal trial process.<sup>215</sup>

There is more work to be done to bring the right to a jury trial back to the center of our criminal legal system, but with the 2020 amendments to our

<sup>208</sup> *Id.*

<sup>209</sup> 2020 REPORT at 26. .

<sup>210</sup> *Id.*

<sup>211</sup> See NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5–8 (2018) (discussing the vanishing jury trial because of the trial penalty even in those states with judge sentencings).

<sup>212</sup> Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://ny-books.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

<sup>213</sup> Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 599 (2014).

<sup>214</sup> *Reforming Jury Sentencing -- Reducing Virginia’s Trial Penalty*, JUSTICE FORWARD VA. (Jul. 17, 2020), <https://justiceforwardva.com/blog/jury-sentencing>.

<sup>215</sup> Virginia still has over 224 distinct offenses that require a mandatory minimum sentence. Virginia State Crime Commission, *Mandatory Minimum Sentences* (Jan. 5, 2021), <http://vscc.virginia.gov/2021/VSCC%20Mandatory%20Minimums%20Presentation.pdf>.

jury trial system in Virginia, we may be starting to restore the palladium of liberty back to its proper place in our law.

#### IV. ESTABLISHING AN APPEAL OF RIGHT

On January 1, 2022, Virginia will no longer be the only state in the nation denying criminal defendants at least one level of appellate review as a matter of right.<sup>216</sup> All persons convicted of a crime will gain a right to appeal their convictions to the Court of Appeals.<sup>217</sup> Prior to this change in the law, a person who was convicted of a crime had to petition the Court of Appeals to consider the merits of their arguments as to how the trial court erred.<sup>218</sup> Only about 12% of petitioners appealing their criminal convictions ultimately had their issues considered on the merits.<sup>219</sup> With Virginia's new laws, 100% of criminal appellants will have their issues considered on the merits by the Court of Appeals. Furthermore, following judgment by the Court of Appeals, appellants convicted of crimes may still continue to petition the Supreme Court of Virginia for a discretionary appeal.<sup>220</sup>

##### *A. History of Virginia's Consideration of an Appeal of Right*

###### *i. Prior to the establishment of the Court of Appeals of Virginia*

For centuries, criminal appeals, with the exception of death penalty cases, were sought through a writ process to Virginia's one appellate court.<sup>221</sup> Upon the petition for writ of error filed by the defendant and upon the trial court's record, the Court determined "whether there exists a substantial possibility that error has been committed in the conviction of the defendant."<sup>222</sup> If the answer is yes, a writ is granted; if it does not exist, a writ is refused.<sup>223</sup> The Court conceptualized that it provided "a merits review of each [criminal] petition for writ of error."<sup>224</sup> Discretionary appeals in Virginia were primarily

<sup>216</sup> Monica T. Monday, *Appeals of Right Are Coming to Virginia*, XLVIII VBA JOURNAL 2, 19 (2021) (noting that, since 2000, Virginia has been the only state "not providing one level of appellate review as a matter of right in both civil and criminal cases").

<sup>217</sup> VA. CODE ANN. § 17.1-406(A) (2022); VA. CODE ANN. § 17.1-407(B) (2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) 19–20.

<sup>218</sup> See S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) (providing for an appeal of right in criminal cases by a defendant).

<sup>219</sup> ALICE ARMSTRONG ET AL., REPORT TO THE JUDICIAL COUNCIL OF VIRGINIA: COURT OF APPEALS JURISDICTION STUDY - SJ 47 18 (Sept. 24, 2020).

<sup>220</sup> VA. CODE ANN. § 8.01-670 (2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

<sup>221</sup> *A Short History of the Court of Appeals of Virginia*, JUDICIAL LEARNING CTR., <https://scvahistory.org/a-short-history-of-the-court-of-appeals-of-virginia/> (last visited Feb. 26, 2022).

<sup>222</sup> *Saunders v. Reynolds*, 214 Va. 697, 703 (1974).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 702.

justified as being necessary for the Supreme Court to manage its huge case-load.<sup>225</sup>

In 1970, Virginia's revised constitution empowered the General Assembly with the ability to establish an intermediate appellate court.<sup>226</sup> Discussion over creation of an intermediate appellate court included whether there should be an appeal of right following a criminal conviction. In 1971, the Court System Study Commission, created by the General Assembly, issued a report recommending the creation of an intermediate appellate court to help with an "overburdened" Supreme Court and "to preserve the quality of justice in Virginia."<sup>227</sup> This Commission, however, did not envision any "new appeals of right."<sup>228</sup>

In 1979, the National Center for State Courts similarly recommended the creation of an intermediate appellate court for Virginia.<sup>229</sup> This report recommended that "appeals from the circuit court should be appeals of right to the intermediate court, and the Supreme Court should have discretionary jurisdiction over all intermediate court decisions."<sup>230</sup> The National Center for State Courts reasoned that "[u]nder present standards of fairness in this country, 'it is almost axiomatic that every losing litigant in a one-judge court ought to have a right of appeal to a multijudge court . . . [as] a protection against error, prejudice, and human failings in general.'"<sup>231</sup> The study noted that an "[a]ppel of right implies that the appellate court makes a single decision in each case" and "also implies more thorough consideration of the case than most courts give when exercising discretionary review."<sup>232</sup>

By contrast, the Judicial Council of Virginia, in 1981, proposed an intermediate appellate court where appeals would be discretionary.<sup>233</sup> One legal scholar applauded the Judicial Council's proposal of an intermediate appellate court but argued that there should be an appeal of right to the intermediate court.<sup>234</sup> In addition to Virginia conforming "to current, national standards of fairness," an appeal of right "would enhance the litigant's perception of the appellate process as responsive to his needs" and "would allow the litigant to

<sup>225</sup> Martha B. Brissette, Comment, *The Virginia Judicial Council's Intermediate Appellate Court Proposal*, 16 U. RICH. L. REV. 209, 219 (1981).

<sup>226</sup> VA. CONST. art. VI, § 1.

<sup>227</sup> Stephen R. McCullough & Marla Graff Decker, *The Court of Appeals of Virginia Celebrates Thirty Years of Service to the Commonwealth*, 50 U. RICH. L. REV. 217, 218–19 (2015).

<sup>228</sup> *Id.* at 219.

<sup>229</sup> *Id.* at 220.

<sup>230</sup> ARMSTRONG ET AL., *supra* note 219 at 9.

<sup>231</sup> *Id.* at 71 (quoting Robert Leflar, Internal Operating Procedures of Appellate Courts 4, 9-10 (1976)).

<sup>232</sup> *Id.* at 171.

<sup>233</sup> Brissette, *supra* note 225 at 219.

<sup>234</sup> *Id.* at 232.

determine whether the trial court's decision would receive full scale judicial review."<sup>235</sup> Some bar groups also opposed the Judicial Council's view that appeals to an intermediate appellate court would be discretionary. The Virginia Trial Lawyers Association sought to form a committee with members from Virginia's other bar groups to develop a proposal that would "secure appeal as a matter of right to the intermediate court."<sup>236</sup>

Ultimately, legislation to create the Court of Appeals was based on this Judicial Council report.<sup>237</sup> The General Assembly adopted legislation in 1983 to create an intermediate appellate court—the Court of Appeals of Virginia—beginning January 1, 1985.<sup>238</sup> Criminal appeals to the Court of Appeals were to be discretionary.<sup>239</sup>

*ii. After the establishment of the Court of Appeals of Virginia*

Discussion over appeals of right continued after the creation of the Court of Appeals. In 1994, the Virginia Bar Association published a report recommending an appeal of right in all civil and criminal cases.<sup>240</sup> Over twenty years later, in 2017, a Boyd-Graves Conference committee studied the issue and a majority (4-3) recommended an expansion of the Court of Appeals' jurisdiction to include an appeal of right in criminal and civil cases.<sup>241</sup> Amongst other reasons, supporters viewed it as "a fundamental issue of fairness," especially for criminal defendants with liberty interests, and important for public perception and confidence in the judiciary.<sup>242</sup>

A 2018 Working Group constituted by Chief Justice Donald W. Lemons of the Supreme Court of Virginia recommended an appeal of right in civil and criminal cases from the circuit court to the Court of Appeals.<sup>243</sup> It envisioned that an appeal of right "does not necessarily require oral argument in all or even most cases."<sup>244</sup>

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<sup>235</sup> *Id.* at 221.

<sup>236</sup> *Id.* at n.67.

<sup>237</sup> McCullough & Decker, *supra* note 227 at 220.

<sup>238</sup> *Id.* at 220–21.

<sup>239</sup> However, in a "compromise," there were "limited-topic civil appeal of right jurisdictional categories." WORKING GRP. TO STUDY JURISDICTION OF THE CT. OF APPEALS OF VA., REPORT TO THE JUDICIAL COUNCIL OF VIRGINIA: COURT OF APPEALS JURISDICTION STUDY – SJ 47 8 (2020), [https://www.va-courts.gov/news/items/covid/jc/2020\\_1022\\_materials.pdf](https://www.va-courts.gov/news/items/covid/jc/2020_1022_materials.pdf) (hereinafter WORKING GRP.). This included domestic relations and workers' compensation matters.

<sup>240</sup> *Id.* at 10.

<sup>241</sup> Email from Monica T. Monday, Gentry Locke Attorneys, to Stuart A. Raphael, Esq. (Sept. 6, 2017), in BOYD-GRAVES CONFERENCE COMMITTEE REPORT ON APPEALS OF RIGHT IN THE COURT OF APPEALS OF VIRGINIA 72 (2017).

<sup>242</sup> *Id.*

<sup>243</sup> WORKING GRP. at 4.

<sup>244</sup> *See id.* at 2, 53.

Despite a writ process in criminal appeals, it was the Working Group's opinion that "the *reality* of an appeal of right" was already being provided by the Court of Appeals.<sup>245</sup> The 2018 Working Group unanimously concluded that the present criminal appeal process be "re-cast . . . to better set forth the assurance of appellate review that the criminal appeal review system actually provides."<sup>246</sup> It does not appear that there was a public defense perspective within the 2018 Working Group.<sup>247</sup> The 2018 Working Group reasoned that "the operation of the criminal appellate process provides *essentially* an appeal of right at present, since no appeal is denied without a statement of reasons."<sup>248</sup> The Group also pointed to "[t]he automatic availability of review by a three judge panel" of the one judge decision as to whether to grant the petition for appeal.<sup>249</sup> The Group further explained that the fact that petitioners did not request a three-judge panel review in about half of the cases demonstrates that the petitioners "recognize that their claims have been substantively reviewed."<sup>250</sup> Despite the belief that the discretionary system of review was a *de facto* appeal of right in criminal cases, the Working Group recognized that "[a]ppel of right review is simpler, improves access to justice, and better reflects the rights of criminal defendants."<sup>251</sup>

In 2020, the General Assembly adopted a resolution requesting the Judicial Council to study the jurisdiction and organization of the Court of Appeals, including an appeal of right.<sup>252</sup> The General Assembly specifically recognized that Virginia "has been the only state in the United States without a guaranteed right of appeal in criminal cases for over a decade" and that "a bona fide right to appeal has been recognized as part of fundamental procedural due process that has its ultimate roots in the Virginia Declaration of Rights."<sup>253</sup> The Resolution acknowledged the importance of appellate courts, noting that "a lack of appellate review increases the likelihood of judicial mistakes, wrongful convictions, and unjust outcomes."<sup>254</sup>

The 2018 Working Group was reconstituted in 2020 to provide a report to the Judicial Council of Virginia.<sup>255</sup> This 2020 Working Group recommended that the Court of Appeals be given appeal of right jurisdiction in all criminal

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<sup>245</sup> WORKING GRP. TO STUDY JURISDICTION OF THE CT. OF APPEALS OF VA., REPORT OF JUNE 11, 2018 2 (2018) (hereinafter 2018 REPORT)

<sup>246</sup> *Id.*

<sup>247</sup> WORKING GRP. AT 1.

<sup>248</sup> *Id.* at 7.

<sup>249</sup> WORKING GRP. AT 30.

<sup>250</sup> 2018 REPORT at 7.

<sup>251</sup> *Id.* at 13.

<sup>252</sup> S.J. Res. 47, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> WORKING GRP. at 1.

and civil appeals.<sup>256</sup> Specifically, for criminal cases, the Group recommended that “appeal of right be adopted immediately for criminal cases, with further appeal available on a petition for certiorari basis to the Supreme Court of Virginia.”<sup>257</sup> The Group suggested a process where all criminal appeals would be reviewed by a three-judge panel; the panels could “dispense with oral argument in any case where it is determined that there would be no material benefit from that process;” and that summary disposition be allowed in some cases as long as the Court of Appeals stated its reasons.<sup>258</sup> The 2020 Working Group also considered comments from bar, business groups, and individuals, noting that all bar and business groups and almost all individuals who responded to a state-wide invitation for comments supported an appeal of right for all criminal and civil cases.<sup>259</sup> The Virginia Indigent Defense Commission’s Executive Director and Chief Appellate Counsel and the President of the Virginia Association of Criminal Defense Lawyers both noted in public comments that an appellant should not lose any current rights in a move to an appeal of right system, including oral argument.<sup>260</sup> All criminal defendants have a right to oral argument in the petition stage of a criminal appeal in the Court of Appeals with no exception or limitation.<sup>261</sup>

### *B. Senate Bill 1261: An Appeal of Right*

The General Assembly passed Senate Bill 1261 during the 2021 Special Session, introduced by chief patron Senator John S. Edwards and patrons Senators Joseph D. Morrissey and Scott A. Surovell, expanding the jurisdiction of the Court of Appeals to make for an appeal of right in, generally, every criminal and civil case.<sup>262</sup> Governor Northam signed the bill into law on March 31, 2021.<sup>263</sup> Following any final conviction in a circuit court of a traffic infraction or a crime, the defendant may appeal, by right, to the Court of Appeals.<sup>264</sup> An appeal of right will be initiated by filing a notice of appeal, followed by preparation of transcripts at the expense of the

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<sup>256</sup> *Id.* at 2.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 2, 61.

<sup>260</sup> *Id.* at 81–82, 87–92.

<sup>261</sup> VA. SUP. CT. R. 5A:12(f).

<sup>262</sup> VA. CODE ANN. § 17.1-406(A) (for example, Commonwealth appeals to the Court of Appeals are still by a petition process); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 18, 20–21, 27 (in addition to expanding the jurisdiction of the Court of Appeals by providing an appeal of right in civil and criminal cases, the bill also increased from 11 to 17 the number of judges on the Court of Appeals. The bill also made other important, but less discussed changes, such eliminating the requirement for an appeal bond in criminal appeals and requiring all criminal cases in a court of record to be recorded and transcribed upon notice of appeal).

<sup>263</sup> 2021 Legislative Agenda, VA. BAR ASS’N, <https://www.vba.org/page/2021-legislation> (last visited Sept. 28, 2021).

<sup>264</sup> VA. CODE ANN. § 17.1-406(A) (effective Jan. 1, 2022); VA. CODE ANN. § 17.1-407(B) (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 20.

Commonwealth.<sup>265</sup> After filing the record with the Court of Appeals, the appellant must file an opening brief within 40 days.<sup>266</sup> Other practice, procedure, and internal processes for the Court of Appeals governing the appeal of right process will be set out by the Rules of the Supreme Court.<sup>267</sup> The General Assembly specifically expressed that the Rules prescribe procedures authorizing the Court of Appeals “to prescribe truncated record or appendix preparation” and permit the Court of Appeals to dispense with oral argument in certain cases.<sup>268</sup> Including for criminal cases, the Court of Appeals may:

[D]ispense with oral argument if the panel has examined the briefs and record and unanimously agrees that oral argument is unnecessary because (a) the appeal is wholly without merit or (b) the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed.<sup>269</sup>

The appeal of right will be decided by a panel of the Court of Appeals.<sup>270</sup> The panel will consist of at least three judges.<sup>271</sup> The Court of Appeals will state in writing the reasons for its ruling in a case, which may be by order or memorandum opinion.<sup>272</sup> Opinions having precedential value, or other significance will be published.<sup>273</sup> Following the panel decision, any party may petition for rehearing by the Court of Appeals sitting en banc or the Court may do so upon its own motion.<sup>274</sup> The Court may sit en banc with at least 13 judges.<sup>275</sup> If the defendant loses in the Court of Appeals, there remains a discretionary appeal to the Supreme Court of Virginia via petition.<sup>276</sup> With the new amendments, the Court of Appeals no longer has final jurisdiction over traffic infractions and misdemeanor cases where no incarceration is

<sup>265</sup> VA. CODE ANN. § 17.1-407(A) (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 21; VA. CODE ANN. § 17.1-408 (effective Jan. 1, 2022).

<sup>266</sup> VA. CODE ANN. § 17.1-408 (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 21.

<sup>267</sup> VA. CODE ANN. § 17.1-403 (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 20.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> VA. CODE ANN. § 17.1-403 (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 19.

<sup>271</sup> VA. CODE ANN. § 17.1-403 (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 21.

<sup>272</sup> VA. CODE ANN. § 17.1-413(A) (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 21.

<sup>273</sup> VA. CODE ANN. § 17.1-413(A) (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 21.

<sup>274</sup> VA. CODE ANN. § 17.1-402 (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 19.

<sup>275</sup> VA. CODE ANN. § 17.1-402(E) (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 21.

<sup>276</sup> VA. CODE ANN. § 8.01-670(C) (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 3-4.



imposed.<sup>277</sup> Previously, these types of cases could only be appealed to the Supreme Court from the Court of Appeals if the appeal involved a “substantial constitutional question as a determinative issue or matters of significant precedential value.”<sup>278</sup>

*C. Meaningful, Not Minimal, Change in the Appellate Process*

Will the new appeal of right bring meaningful, positive, change to a criminal defendant who decides to appeal any criminal convictions? On the surface, the creation of a new “right,” by itself, suggests yes. Certainly, having an appeal of right improves the public perception of Virginia’s criminal justice system, as Virginia is no longer the outlier state. However, was the 2018 Working Group correct that criminal defendants already had a *de facto* appeal of right even though the appeal was by petition? If so, has anything really changed for a criminal appellant?

The 2018 Working Group’s conclusion, and the rationale in support, that the existing criminal writ process in the Court of Appeals was “the *reality* of an appeal of right” is in error.<sup>279</sup> While the 2018 Working Group is correct that “no appeal is denied without a statement of reasons,” this statement was issued by the one judge assigned to the case, not by any panel of judges.<sup>280</sup> The order was essentially anonymous, lacking transparency, as it also did not state which judge from the Court of Appeals made the decision and for what reasons.

The 2018 Working Group suggests that there could be a three-judge review of the petition if requested by the defendant: “[T]he automatic availability of review by a three-judge panel underscores the opportunity for consideration of the merits of the claimed errors in every case.”<sup>281</sup> The fundamental flaw in the 2018 Working Group’s reasoning is that the three-judge panel does not review the merits of an appellant’s assignments of error as to how the trial court erred. The three-judge review is a rehearing process that considers any error in the one-judge order denying the petition for appeal.<sup>282</sup> Supreme Court Rule 5A:15A explains that the request for a review by a three-judge panel must, in 350 words or less, include a “statement identifying how the one-judge order is in error.”<sup>283</sup> Also, this is in contrast with

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<sup>277</sup> VA. CODE ANN. § 17.1-410(A) (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 21.

<sup>278</sup> VA. CODE ANN. § 17.1-410(B) (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) at 21.

<sup>279</sup> See 2018 REPORT at 2, 13.

<sup>280</sup> *Id.* at 7.

<sup>281</sup> *Id.*

<sup>282</sup> VA. SUP. CT. R. 5A:15.

<sup>283</sup> *Id.*

the writ process in the Supreme Court, where three justices review the initial petition.<sup>284</sup>

The 2018 Working Group's additional reasoning that "[t]he fact that only half of the one-judge dispositions rendered under the present system lead to a request for three-judge reconsideration demonstrates in part that the petitioning parties recognize that their claims have been substantively reviewed" is pure speculation.<sup>285</sup> The report did not refer to any sources to support its claim. It is equally plausible this fact demonstrates that the petitioning parties were disillusioned with the rehearing process, assuming, whether erroneously or not, that the three-judge panel will just defer to and "rubber-stamp" the one-judge order. Indeed, the 2020 re-convened Working Group stated that "in a large majority of cases, three-judge reviews confirm the one-judge denial of an appeal."<sup>286</sup>

The 2020 Working Group distanced itself from the 2018 Working Group's position that the writ process in a criminal appeal is the effective equivalent to an appeal of right. The 2020 Working Group makes no similar claim in its report. The 2020 Working Group further noted: "No observer has suggested that anything resembling the current one-judge review system would be appropriate in implementing appeal of right in criminal cases."<sup>287</sup>

Accordingly, Virginia's writ process in criminal appeals is not an appeal of right. An appeal of right should include three-judge review on the merits of the issues raised by the appellant.<sup>288</sup> A one-judge review on the merits with the option for a request for a three-judge panel to review the one-judge decision—not the trial court's decision—is not equivalent to an appeal of right. Therefore, having a panel of at least three judges review the appellant's issues on the merits, which Senate Bill 1261 establishes, makes a meaningful difference to Virginia's appellants who appeal their criminal conviction. Indeed, "all panel members should participate equally in the consideration of the case and the determination of the appropriate outcome."<sup>289</sup>

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<sup>284</sup> See generally L. Steven Emmert, *Getting a Writ in Virginia's Appellate Courts*, VA LAWYER, Feb. 2006, at 22, 23–24, [https://www.vsb.org/docs/valawyer/feb06\\_Writ.pdf](https://www.vsb.org/docs/valawyer/feb06_Writ.pdf) (discussing the mechanics of the writ system in the Virginia Supreme Court).

<sup>285</sup> 2018 REPORT at 7.

<sup>286</sup> WORKING GRP. AT 18, 21–22.

<sup>287</sup> *Id.* at 23.

<sup>288</sup> See COUNCIL OF CHIEF JUSTICES OF THE STATE CTS. OF APPEAL, THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS 26 (2012) (explaining an appeal of right system where "the panel assigned to determine the merits of an appeal must ultimately make a collective and deliberative decision in each case" (emphasis added)); see also WORKING GRP. at 71.

<sup>289</sup> COUNCIL OF CHIEF JUSTICES OF THE STATE CTS. OF APPEAL, *supra* note 288 at 27.

*D. Protection of Oral Argument*

Although an appeal of right with merit review by a panel of three judges is a meaningful victory for a fair system, it does come with some cost. No longer is the right of a criminal appellant to oral argument absolute.

Virginia has a robust tradition of a right to oral argument in a criminal appeal. Under the discretionary system in both the Court of Appeals and Supreme Court, the appellant has a right to oral argument before a panel of judges or justices, respectively.<sup>290</sup> Although subject to waiver, there is no limitation of the type of appeal allowed oral argument—a defendant who appeals from a guilty plea, for instance, still has a right to oral argument.<sup>291</sup> There is a further right to oral argument before the merits panel for both the appellant and appellee in both courts if the petition is granted.<sup>292</sup>

Now, in an appeal of right system, a criminal defendant will not be allowed oral argument if the panel of judges “unanimously agrees” that “the appeal is wholly without merit” or “the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed.”<sup>293</sup> On one hand, it can be argued that criminal defendants should not lose any rights under a law designed to give greater access to meaningful review of an appellant’s case.

However, the General Assembly shows a clear value of the right to oral argument, given that the exception to oral argument is narrowly tailored. Indeed, the 2018 Working Group envisioned that oral argument could be eliminated in most cases.<sup>294</sup> Similarly, the 2020 Working Group recommended that oral argument should only be given where doing so would create a “material benefit.”<sup>295</sup> The General Assembly’s exception to oral argument is less harsh than suggested by others’ recommendations. The plain language of the statute demonstrates how limited the exception to a right to oral argument should be for criminal defendants. There must be “unanimous” agreement by a panel.<sup>296</sup> The General Assembly did not settle for a simple majority.

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<sup>290</sup> In the Court of Appeals, if the defendant requests review of a one-judge denial of a petition for appeal by a three-judge panel, the defendant is entitled to oral argument before the three-judge panel. VA. SUP. CT. R. 5A:15; VA. SUP. CT. R. 5A:12(f). In the Supreme Court, following filing of the petition for appeal, a defendant is entitled to oral argument before a three-justice panel of the Supreme Court. VA. SUP. CT. R. 5:17(j). In practice, the appellant has a choice whether to argue directly before a three-justice panel or before the Chief Staff Attorney.

<sup>291</sup> See VA. SUP. CT. R. 5:17(j).

<sup>292</sup> VA. SUP. CT. R. 5:33; VA. SUP. CT. R. 5A:28.

<sup>293</sup> VA. CODE ANN. § 17.1-403 (effective Jan. 1, 2022); S. 1261, 2021 Gen. Assemb., 1st Spec. Sess. (Va. 2021).

<sup>294</sup> 2018 REPORT at 9.

<sup>295</sup> WORKING GRP. at 2.

<sup>296</sup> VA. CODE ANN. § 17.1-403 (effective Jan. 1, 2022).

Additionally, there are only two types of cases where there may not be oral argument.

First, a case that is not entitled to oral argument is where the case is “wholly without merit.”<sup>297</sup> The Supreme Court of the United States has equated “without merit” with “frivolous.”<sup>298</sup> This statutory language is similar to the *Anders* context, where if counsel believes that the client’s case is “wholly frivolous, after a conscientious examination of it,” counsel may advise the appellate court and request permission to withdraw.<sup>299</sup> Even with an *Anders* brief, it is “the court – not counsel,” who “proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.”<sup>300</sup> Comparably, the Court of Appeals can only dispense with oral argument if the entire panel, after examining the entire record, including appellate briefs, finds that there is *no* legal point *arguable* on the merits.<sup>301</sup> The adjective “wholly” signifies that if there is any part of the argument with some merit, however slight, there still must be oral argument.

The second type of case where the Court of Appeals may eliminate oral argument is where “the *dispositive* issue or issues have been *authoritatively* decided.”<sup>302</sup> Therefore, if there is mandatory authority, with no distinguishing material facts, where the holding directly resolves the appellant’s assignment of error, then there is no right to oral argument. Additionally, even in such a situation, the defendant is still entitled to oral argument as long as the appellant has an assignment of error stating that the precedent needs to be overturned, extended, modified, or reversed. This precondition gives the appellant the opportunity to frame the argument in a way to use oral argument, if desired, in an attempt to change existing law.

The General Assembly is right in protecting the right to oral argument in criminal cases, subject to narrow exceptions. Oral argument is vital as to public perception of a fair appellate process. From its inception, the Court of Appeals was referred to as a “people’s court,” since “[t]he life, liberty, property, and well-being of the citizens are involved, and the stakes are high.”<sup>303</sup> Oral argument “provides extended access to the court and gives every party . . . full opportunity to be heard” and “also provides an open court setting for the public.”<sup>304</sup> Oral argument allows litigants on appeal to have

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<sup>297</sup> *Id.*

<sup>298</sup> *See Anders v. California*, 386 U.S. 738, 743 (1967).

<sup>299</sup> *Id.* at 744.

<sup>300</sup> *Id.*

<sup>301</sup> *See id.* (noting that if the Court “finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal”).

<sup>302</sup> VA. CODE ANN. § 17.1-403 (effective Jan. 1, 2022) (emphasis added).

<sup>303</sup> McCullough & Decker, *supra* note 227 at 225.

<sup>304</sup> *Id.* at 226.

their “day in court.” Criminal appellants who are out on bond or who have served their sentence, as well as family members of those incarcerated, are often present at oral argument. Virginia courts also live stream and record oral arguments, allowing incarcerated appellants the opportunity to feel involved and see how their arguments are considered by the appellate courts. As Senior Judge Walter S. Felton, Jr., a prior chief judge of the Court of Appeals, explained following merit oral argument: “We come down off the bench and shake hands with the attorneys or pro se litigants and . . . thank them for their argument, because this is justice.”<sup>305</sup>

Ultimately, it will be the appellate court who will interpret and apply the General Assembly’s exception to the right to oral argument in criminal cases. It is unclear whether an appellant who is denied oral argument under the statute can challenge the determination, such as by motion, and ask the panel to reconsider. The General Assembly’s language is consistent with Virginia’s traditional “institutional preference to afford counsel the opportunity to present oral argument” with “the goal of making the court accessible.”<sup>306</sup>

#### CONCLUSION

These changes to the criminal law in Virginia will allow people accused of crimes to be heard in a meaningful way in both the trial courts and the appellate courts. While these changes by no means make our criminal legal system perfect, they represent an important and critical change that will ultimately make the system fairer and help to ensure that the system gets to the right result. As discussed, many of these changes must still be worked out by lawyers, litigants, and courts to determine how much of an impact they will actually have.

For decades, the main purpose behind making changes in our criminal law was to make the system more punitive and to give greater power to the government, often at the expense of the individual. The changes discussed in this article will return some of the power in the system to the individuals charged with crimes and ensure that the government is held to its heavy burden in each and every criminal case in the Commonwealth.

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<sup>305</sup> *Id.* at 227.

<sup>306</sup> *Id.* at 230.