

1987

## Annual Survey of Virginia Law: Criminal Procedure

Ronald J. Bacigal  
*University of Richmond*

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### Recommended Citation

Ronald J. Bacigal, *Annual Survey of Virginia Law: Criminal Procedure*, 21 U. Rich. L. Rev. 727 (1987).  
Available at: <https://scholarship.richmond.edu/lawreview/vol21/iss4/7>

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## CRIMINAL PROCEDURE\*

Ronald J. Bacigal\*\*

### I. FOURTH AMENDMENT

#### A. Searches by Public Employees other than Police

In the landmark case of *New Jersey v. T.L.O.*,<sup>1</sup> the United States Supreme Court applied the fourth amendment to searches conducted by public school officials. This past term, in *O'Conner v. Ortega*,<sup>2</sup> the Court held that the fourth amendment is also applicable to work-related searches conducted by public employers. As in *New Jersey v. T.L.O.*,<sup>3</sup> the Court rejected the probable cause standard in favor of a "reasonableness under all the circumstances" test to determine the constitutionality of such searches.<sup>4</sup> This general "reasonableness" approach was also approved in *Maryland v. Garrison*,<sup>5</sup> where the Court held that an "objectively understandable and reasonable" mistake as to the sub-unit (apartment) described in the warrant does not render the search illegal.<sup>6</sup>

The United States Supreme Court refused to apply the lower standard of reasonable suspicion in *Arizona v. Hicks*.<sup>7</sup> The Court held that the "traditional standard of probable cause" was required for seizures under the plain view doctrine.<sup>8</sup>

In *Gray v. Commonwealth*,<sup>9</sup> the Virginia Supreme Court explained that the requirement for inadvertent plain view is not vio-

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\* This article summarizes significant legislative changes, decisions of the United States and Virginia Supreme Courts, and decisions of the Virginia Court of Appeals. A more extensive consideration of this material as well as recent decisions of the Court of Appeals for the Fourth Circuit and federal district courts is contained in R. BACIGAL, *VIRGINIA CRIMINAL PROCEDURE* (Supp. 1987).

\*\* Professor of Law, T.C. Williams School of Law, University of Richmond; B.S., 1964, Concord College; LL.B., 1967, Washington & Lee University.

1. 469 U.S. 325 (1985).

2. 107 S. Ct. 1492 (1987).

3. 469 U.S. 325.

4. 107 S. Ct. at 1497.

5. 107 S. Ct. 1013 (1987).

6. *Id.* at 1019.

7. 107 S. Ct. 1149 (1987).

8. *Id.* at 1153.

9. 233 Va. 313, 356 S.E.2d 157 (1987).

lated merely because the defendant was a possible suspect in a murder case and the police anticipated that during a drug search they might find evidence relating to the murder.<sup>10</sup> That line of reasoning was followed by the Virginia Court of Appeals in *Stokes v. Commonwealth*,<sup>11</sup> which held that "a generalized expectation that seizable evidence may be found is not sufficient to preclude application of the plain view doctrine."<sup>12</sup>

### B. *Consent Searches*

The Virginia Court of Appeals offered some helpful guidance on consent searches in the case of *Walls v. Commonwealth*.<sup>13</sup> Observing that the police are not required to advise a suspect of his rights before requesting permission to conduct a search, the court nonetheless held that the failure to warn the defendant of his rights was one factor to be considered in determining whether the consent was voluntary.<sup>14</sup> The court held further that the defendant's failure to order the police to leave did not constitute implied consent.<sup>15</sup> The *Walls* court also noted that while consent obviates the need for a warrant, the consent itself may be the fruit of an illegal arrest. Finally, the court recognized that the validity of a third party's consent to a search is not dependent upon the absence of the defendant.<sup>16</sup>

### C. *Open Fields or Curtilage*

Continuing a string of recent decisions distinguishing open fields from curtilage, the United States Supreme Court held in *United States v. Dunn*<sup>17</sup> that curtilage questions should be resolved by considering four factors: (1) the proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation.<sup>18</sup>

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10. *Id.* at 326, 356 S.E.2d at 164.

11. 4 Va. App. 207, 355 S.E.2d 611 (1987).

12. *Id.* at 211, 355 S.E.2d at 613.

13. 2 Va. App. 639, 347 S.E.2d 175 (1986).

14. *Id.* at 645, 347 S.E.2d at 178.

15. *Id.* at 646, 347 S.E.2d at 179.

16. *Id.* at 651, 347 S.E.2d at 182.

17. 107 S. Ct. 1134 (1987).

18. *Id.* at 1139.

The Virginia Court of Appeals held in *Kearney v. Commonwealth*<sup>19</sup> that a warrant authorizing a search of the dwelling and curtilage justified a search of a "broken down," "inoperable" truck found in the backyard of the dwelling.<sup>20</sup> The court of appeals also held in *Allen v. Commonwealth*<sup>21</sup> that the police acted reasonably in searching the owner who was about to drive away from his house when the police arrived to execute a search warrant.<sup>22</sup>

#### D. *Automobile Searches*

In *Colorado v. Bertine*,<sup>23</sup> the United States Supreme Court held that the police may exercise discretion when taking inventory of the contents of an automobile, "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of criminal activity."<sup>24</sup> The case of *Kearney v. Commonwealth*<sup>25</sup> also involved a search of an automobile. In that case, the Virginia Court of Appeals held that "a search may be as extensive as reasonably required to locate the items described in the warrant"; thus, the search is not limited by the possibility that separate acts of entry or opening of containers may be necessary to complete the search.<sup>26</sup>

#### E. *Searches of Dwellings*

In *Verez v. Commonwealth*,<sup>27</sup> the Virginia Supreme Court recognized ten forms of exigent circumstances justifying a warrantless entry of a dwelling.<sup>28</sup> *Verez* was distinguished this past term in *Walls v. Commonwealth*.<sup>29</sup> In *Walls*, the court of appeals concluded that there was no justification for a warrantless entry because there was "nothing inherently dangerous" in the situation.<sup>30</sup> The court acknowledged, however, that a protective sweep of a

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19. 4 Va. App. 202, 355 S.E.2d 897 (1987).

20. *Id.* at 205, 355 S.E.2d at 899.

21. 3 Va. App. 657, 353 S.E.2d 162 (1987).

22. *Id.* at 662, 353 S.E.2d at 165.

23. 107 S. Ct. 738 (1987).

24. *Id.* at 743.

25. 4 Va. App. 202, 355 S.E.2d 897 (1987).

26. *Id.* at 205, 355 S.E.2d at 899 (quoting *United States v. Wuagneux*, 683 F.2d 1343, 1352 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983)).

27. 230 Va. 405, 337 S.E.2d 749 (1985).

28. *Id.* at 410-11, 335 S.E.2d at 753.

29. 2 Va. App. 639, 347 S.E.2d 175 (1986).

30. *Id.* at 648, 347 S.E.2d at 180.

building is permissible when the police can point to specific and articulable facts supporting their belief that other dangerous persons may be in the building or elsewhere on the premises.<sup>31</sup>

#### F. *Statutory Procedures for Arrests*

Addressing some of the statutory procedures for arrests, the Virginia Supreme Court held in *Frye v. Commonwealth*<sup>32</sup> that the failure to take a suspect before a magistrate without unnecessary delay may violate statutory requirements, but it does not render the arrest unconstitutional.<sup>33</sup> In a similar vein, the court of appeals in *Woreford v. Commonwealth*,<sup>34</sup> recognized that failure to comply with the statutory provisions governing the arrest of someone driving under the influence of alcohol does not render the arrest illegal.<sup>35</sup>

#### G. *Wiretapping*

In *Smith v. Commonwealth*,<sup>36</sup> the Virginia Court of Appeals offered its first interpretation of the Virginia Wiretap Statute.<sup>37</sup> The court held that the void-for-vagueness doctrine is not applicable to those sections of the statute that are not penal in nature. The court interpreted section 19.2-66,<sup>38</sup> which identifies which court has jurisdiction to authorize a wiretap. The court stated that jurisdiction depends upon the locale where the physical intercept occurs. The court defined the term intercept as "the physical act (such as splicing) by which the interceptor gains the ability to exercise dominion and control over the communication."<sup>39</sup>

#### H. *Exclusionary Rule*

The exclusionary rule was addressed by both the Virginia Court of Appeals and the Court of Appeals for the Fourth Circuit. In *Williams v. Commonwealth*,<sup>40</sup> the Virginia Court of Appeals dis-

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31. *Id.* at 649, 347 S.E.2d at 181.

32. 231 Va. 370, 345 S.E.2d 267 (1986).

33. *Id.* at 376, 345 S.E.2d at 273.

34. 3 Va. App. 467, 351 S.E.2d 47 (1986).

35. *Id.* at 472, 351 S.E.2d at 49.

36. 3 Va. App. 650, 353 S.E.2d 159 (1987).

37. See VA. CODE ANN. §§ 19.2-61 to -70 (Repl. Vol. 1983 & Cum. Supp. 1987).

38. *Id.* § 19.2-66.

39. *Smith*, 3 Va. App. at 654, 353 S.E.2d at 161.

40. 4 Va. App. 53, 354 S.E.2d 79 (1987).

cussed the principle of standing to exclude evidence. The court held that "by disclaiming ownership of [a] briefcase, [the defendant] abandoned it for fourth amendment purposes."<sup>41</sup>

In *Walls v. Commonwealth*,<sup>42</sup> the court of appeals set forth the requirements of the inevitable discovery doctrine. The court stated that the prosecution must establish: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the police possess the leads which made the discovery inevitable at the time of the misconduct; and (3) that the police, prior to the misconduct, were actively pursuing the alternative line of investigation.<sup>43</sup>

The Fourth Circuit recognized in *United States v. Whitehorn*<sup>44</sup> that evidence first observed during an illegal search, but subsequently seized during a second search pursuant to a valid warrant, is admissible under the inevitable discovery doctrine.<sup>45</sup>

In *Walls v. Commonwealth*,<sup>46</sup> the Virginia Court of Appeals refused to extend the good faith exception to warrantless searches. The United States Supreme Court held, however, in *Illinois v. Krull*<sup>47</sup> that the exclusionary rule does not apply to evidence seized as a result of warrantless searches by police in situations where the police reasonably relied upon a statute that is later held to violate the fourth amendment.<sup>48</sup>

## II. BAIL

In the well publicized decision of *United States v. Salerno*,<sup>49</sup> the United States Supreme Court upheld provisions of the 1984 Bail Reform Act which authorize pretrial detention of arrestees who are charged with certain felonies and who are found, after an adversary hearing, to pose a threat to the safety of individuals or to the community.

The 1987 General Assembly amended the Virginia Code to pro-

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41. *Id.* at 70, 354 S.E.2d at 88-89.

42. 2 Va. App. 639, 347 S.E.2d 175 (1986).

43. *Id.* at 656, 347 S.E.2d at 185.

44. 813 F.2d 646 (4th Cir. 1987).

45. *Id.* at 650.

46. 2 Va. App. at 657, 347 S.E.2d at 185-86.

47. 107 S. Ct. 1160 (1987).

48. *Id.* at 1167.

49. 107 S. Ct. 2095 (1987).

vide that bail is not to be used to satisfy fines and costs imposed where the conditions of the bail were met, unless the person who posted the bail consents.<sup>50</sup> However, if the defendant fails to appear and is tried in absentia, the defendant's bond is first applied to fines and costs and the remainder is then forfeited.<sup>51</sup> The Code was also amended to require the trial court to specify in the record the reason for its denial of bail, and to authorize the appellate court to set bail where it overrules the decision of the trial court.<sup>52</sup>

### III. FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

#### A. Confessions

In *Colorado v. Connelly*,<sup>53</sup> a case that may have far ranging implications, the United States Supreme Court held that a confession cannot be deemed involuntary under the due process clause unless the confession is linked to coercion by government agents.<sup>54</sup> The Court suggested, however, that a confession rendered unreliable by factors beyond the control of the government might still be excluded under the local jurisdiction's rules of evidence.<sup>55</sup>

In *Richardson v. Marsh*,<sup>56</sup> the Supreme Court approved the admission of a nontestifying co-defendant's confession at a joint trial with the defendant. The Court required, however, that the confession be redacted to eliminate all references to the defendant, and that the jury be instructed not to consider the confession when determining the defendant's guilt or innocence.<sup>57</sup>

#### B. Miranda Warnings

In *May v. Commonwealth*,<sup>58</sup> the Virginia Court of Appeals followed *Berkemer v. McCarty*<sup>59</sup> in holding that traffic stops do not normally trigger *Miranda* requirements unless the stop exerts pressures upon a detained person that impair his privilege against self-incrimination.

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50. VA. CODE ANN. § 19.2-120 (Cum. Supp. 1987).

51. *Id.* § 19.2-143.

52. *Id.* § 19.2-319.

53. 107 S. Ct. 515 (1986).

54. *Id.* at 521.

55. *Id.* at 522.

56. 107 S. Ct. 1702 (1987).

57. *Id.* at 1708-09; *see also* *Cruz v. New York*, 107 S. Ct. 1714 (1987).

58. 3 Va. App. 348, 349 S.E.2d 428 (1986).

59. 468 U.S. 420 (1984).

In *Wright v. Commonwealth*,<sup>60</sup> the court of appeals held that “[t]he term ‘interrogation’ under *Miranda* does not include words or actions by the police which are normally attendant to arrest and custody.”<sup>61</sup> The Court of Appeals for the Fourth Circuit stated in *United States v. Taylor*<sup>62</sup> that “[o]rdinarily, the request for identifying information, however phrased, is inherently ministerial and does not violate *Miranda*.”<sup>63</sup>

In *Colorado v. Spring*,<sup>64</sup> the United States Supreme Court held that *Miranda* does not require that the suspect be informed of the nature of the crimes about which he will be questioned. The Court stated that failure to inform the suspect of all the possible subjects of interrogation does not constitute official trickery sufficient to invalidate the suspect’s waiver of his *Miranda* rights.<sup>65</sup>

In *Connecticut v. Barrett*,<sup>66</sup> the Supreme Court ruled that a suspect’s voluntary waiver of his *Miranda* rights is not negated by the suspect’s refusal to sign a written statement. The suspect in that case agreed to make an oral statement but refused to sign a written statement without advice from his counsel.

Finally, in *Arizona v. Mauro*,<sup>67</sup> the Supreme Court held that there was no interrogation within the meaning of *Miranda* when the suspect spoke with his wife knowing that a police officer was taping the conversation.

#### IV. SIXTH AMENDMENT RIGHT TO COUNSEL

In criminal cases, an indigent has a statutory right to court-appointed counsel before the Virginia Court of Appeals and the Virginia Supreme Court.<sup>68</sup> In *Gray v. Commonwealth*,<sup>69</sup> however, the Virginia Supreme Court rejected the defendant’s contention that the right to counsel included the right to spend public funds to secure statistical reports regarding the imposition of the death penalty on blacks accused of murdering whites. *Gray* held also that

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60. 2 Va. App. 743, 348 S.E.2d 9 (1986).

61. *Id.* at 746, 348 S.E.2d at 12.

62. 799 F.2d 126 (4th Cir. 1986).

63. *Id.* at 128.

64. 107 S. Ct. 851 (1987).

65. *Id.* at 858.

66. 107 S. Ct. 828 (1987).

67. 107 S. Ct. 1931 (1987).

68. *Dodson v. Department of Corrections*, 233 Va. 303, 355 S.E.2d 573 (1987).

69. 233 Va. 313, 356 S.E.2d 157 (1987).



the right to counsel is not abridged merely because an attorney experiences inconvenience in gaining access to his client.<sup>70</sup>

While recognizing in *Dowell v. Commonwealth*<sup>71</sup> that simultaneous representation of two or more defendants is not a per se violation of the accused's right to effective assistance of counsel, the Virginia Court of Appeals cited counsel's ethical obligation<sup>72</sup> to avoid conflicting representation and to advise the court promptly when a conflict of interest arises.

## V. INDICTMENT

Both the Virginia Supreme Court<sup>73</sup> and the court of appeals<sup>74</sup> affirmed that the initiation of criminal charges, as well as their order and timing, are matters of prosecutorial discretion. The court of appeals also held in *Reed v. Commonwealth*<sup>75</sup> that when a statute is cited in the indictment, the essential elements of the statute are incorporated by reference.

In two other decisions, the court of appeals noted that although the indictment must recite that the accused committed the offense on or about a certain date,<sup>76</sup> a charge is not invalid for omitting, or stating imperfectly, the time at which the offense was committed when time is not an essential component of the offense.<sup>77</sup>

The Virginia Court of Appeals reaffirmed in *Cantwell v. Commonwealth*<sup>78</sup> that the Virginia Code provision governing amendment of indictments is to be construed liberally.<sup>79</sup> In *Clinebell v. Commonwealth*,<sup>80</sup> the Virginia Court of Appeals held that if the indictment is inadequate, the decision to order a bill of particulars rests within the sound discretion of the trial court. The Virginia Supreme Court held in *Tasker v. Commonwealth*<sup>81</sup> that the decision turns upon whether the matter left out of the indictment

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70. *Id.* at 332, 356 S.E.2d at 167.

71. 3 Va. App. 555, 559, 351 S.E.2d 915, 917 (1986).

72. *Id.* at 559, 351 S.E.2d at 917 (citing VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) (1986)).

73. *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157 (1987).

74. *Davis v. Commonwealth*, 4 Va. App. 27, 353 S.E.2d 905 (1987).

75. 3 Va. App. 665, 353 S.E.2d 166 (1987).

76. *Marlowe v. Commonwealth*, 2 Va. App. 619, 347 S.E.2d 167 (1986).

77. *Clinebell v. Commonwealth*, 3 Va. App. 362, 349 S.E.2d 676 (1986).

78. 2 Va. App. 606, 347 S.E.2d 523 (1986).

79. VA. CODE ANN. § 19.2-231 (Repl. Vol. 1983).

80. 3 Va. App. 362, 365, 349 S.E.2d 676, 678 (1986).

81. 206 Va. 1019, 121 S.E.2d 459 (1961).

would subject the accused to the danger of being tried upon a charge for which he has not been indicted.

The 1987 General Assembly amended the Virginia Code to require a circuit court to impanel a special grand jury if a regular grand jury so recommends, but only upon a court finding that the grand jury had probable cause to believe that a crime was committed.<sup>82</sup> The 1987 General Assembly also authorized the use of conditional pleas in felony cases. With the approval of the court and the Commonwealth, a defendant may enter a conditional guilty plea and reserve the right, on appeal, to a review of any adverse determination on a pretrial motion.<sup>83</sup> If a defendant prevails on appeal, he will be allowed to withdraw his guilty plea.

## VI. PRETRIAL MOTIONS

### A. *Discovery Motions*

In *Farish v. Commonwealth*,<sup>84</sup> the Virginia Court of Appeals examined the scope of the subpoena duces tecum. The court construed Rule 3A:12(b) to allow a party access to relevant documents in the possession of a person not a party to the case. The requesting party must show substantial basis for claiming that the document is material because the subpoena cannot be used as a "fishing expedition."<sup>85</sup>

A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the prosecution's files. The United States Supreme Court, in *Pennsylvania v. Ritchie*,<sup>86</sup> held that the defendant's discovery rights could be fully protected when child abuse files are submitted only to the trial court for in camera review. The trial court must release only that information deemed likely to change the outcome of the trial. In *Walker v. Commonwealth*,<sup>87</sup> however, the Virginia Court of Appeals held that "[t]he suppression or withholding by the prosecution of evidence favorable to the accused upon request violates due process when the evidence is material either to guilt or to punish-

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82. VA. CODE ANN. § 19.2-206 (Cum. Supp. 1987).

83. *Id.* § 19.2-254.

84. 2 Va. App. 627, 630, 346 S.E.2d 736, 738 (1986).

85. *Id.* at 630, 346 S.E.2d at 738 (construing VA. SUP. CT. R. 3A:12(b)).

86. 107 S. Ct. 989 (1987).

87. 4 Va. App. 286, 356 S.E.2d 853 (1987).

ment, irrespective of the good faith of the prosecution."<sup>88</sup> Additionally, the court of appeals noted that "knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared."<sup>89</sup>

### B. *Speedy Trial Issues*

In *Clark v. Commonwealth*,<sup>90</sup> the Virginia Court of Appeals held that the prosecution of conspiracy charges is barred when the charges for the underlying substantive offense have been dismissed for lack of a speedy trial. In *Walker v. Commonwealth*,<sup>91</sup> the court held that speedy trial considerations do not apply to the time of sentencing.<sup>92</sup> Rather, the defendant must prove he was so prejudiced by the delay in sentencing that he was effectively denied due process of law. In *Cantwell v. Commonwealth*,<sup>93</sup> the court advised trial judges that although the "complete record" may be sufficient to establish the reasons for delay, "[i]deally, the court's order should specify the reasons for continuances or failure to try within the statutory time limit and state the positions of the parties with regard to that order."<sup>94</sup>

### C. *Double Jeopardy*

In *Hill v. Commonwealth*,<sup>95</sup> the Virginia Court of Appeals held that for purposes of double jeopardy, common law robbery was not the same offense as entry of a bank with a deadly weapon with intent to commit larceny. In *Jordan v. Commonwealth*,<sup>96</sup> the court explained further that the gravamen of robbery is violence to *the person*. Thus, for double jeopardy purposes, "the appropriate 'unit of prosecution' is determined by the number of persons from whose possession property is taken separately by force or intimidation."<sup>97</sup> In yet a third case, the court distinguished double jeopardy

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88. *Id.* at 300, 356 S.E.2d at 861 (citing *Lowe v. Commonwealth*, 218 Va. 670, 679, 239 S.E.2d 112, 118, cert. denied, 435 U.S. 950 (1977)).

89. *Id.*

90. 4 Va. App. 3, 353 S.E.2d 790 (1987).

91. 4 Va. App. 286, 356 S.E.2d 853 (1987).

92. *Id.* at 297, 356 S.E.2d at 859.

93. 2 Va. App. 606, 347 S.E.2d 523 (1986).

94. *Id.* at 611, 347 S.E.2d at 526.

95. 2 Va. App. 683, 347 S.E.2d 913 (1986).

96. 2 Va. App. 590, 347 S.E.2d 152 (1986).

97. *Id.* at 596, 347 S.E.2d at 156.

considerations from the doctrine of collateral estoppel and held that the latter "does not prevent a party from relying upon or using the same evidence in a subsequent proceeding to prove a fact other than that for which it was offered in a prior proceeding."<sup>98</sup>

The 1987 General Assembly repealed a unique double jeopardy provision of a state statute. Before repeal, the statute barred prosecution under a state statute if the defendant had already been charged and prosecuted for the same crime under a federal statute. Effective July 1, 1987, this proscription no longer exists.<sup>99</sup>

## VII. TRIALS

The constitutional right to a fair trial requires that a judge not express or indicate an opinion as to the credibility of a witness.<sup>100</sup> In *Henshaw v. Commonwealth*,<sup>101</sup> the Virginia Court of Appeals held that the prejudicial effect of a judge's comment on the credibility of a witness could not be cured by a jury instruction that only the jury can determine a witness' credibility. When an error such as this occurs, a motion for a mistrial should be granted.<sup>102</sup>

In *Cumbee v. Commonwealth*,<sup>103</sup> the court stated that the right to a "public trial" means that attendance "is not limited or restricted to any particular class of the community, but is open to the free observation of all."<sup>104</sup> In *Vescuso v. Commonwealth*,<sup>105</sup> the court of appeals held that the record did not establish that the security concerns justified trying the accused in a penal facility rather than in a public courtroom.<sup>106</sup> In another case, the Fourth Circuit held that plea and sentencing proceedings must normally be open to the public and the press.<sup>107</sup>

Finally, in the area of public trials, the 1987 General Assembly authorized a two-year experimental program to broadcast judicial

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98. *Dorn v. Commonwealth*, 3 Va. App. 110, 115, 348 S.E.2d 412, 415 (1986) (citing *Simon v. Commonwealth*, 220 Va. 412, 419, 258 S.E.2d 567, 572 (1979)).

99. VA. CODE ANN. § 19.2-294 (Cum. Supp. 1987).

100. *Brown v. Commonwealth*, 3 Va. App. 101, 348 S.E.2d 408 (1986).

101. 3 Va. App. 213, 348 S.E.2d 853 (1986).

102. *Id.* at 219, 348 S.E.2d at 857.

103. 219 Va. 1132, 254 S.E.2d 112 (1979).

104. *Id.* at 1135, 254 S.E.2d at 115 (quoting *Jones v. Peyton*, 208 Va. 378, 158 S.E.2d 181 (1967)).

105. 4 Va. App. 32, 354 S.E.2d 68, *opinion vacated*, 355 S.E.2d 892 (Va. App. Apr. 20, 1987).

106. *Id.* at 39, 354 S.E.2d at 71-72.

107. *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).

proceedings in the supreme court, the court of appeals, and in designated circuit and general district courts.<sup>108</sup>

### VIII. JURY SELECTION

Several recent cases provide further guidance on challenging a juror for cause. In *Gray v. Commonwealth*,<sup>109</sup> the Virginia Supreme Court held that jurors are not automatically excluded because they are associated with law enforcement personnel.<sup>110</sup> In *Mullis v. Commonwealth*<sup>111</sup> the Virginia Court of Appeals stated that the trial court should remove a juror who would "give unqualified credence to the testimony of a law enforcement officer. . . ."<sup>112</sup> The court of appeals also held that although doubts as to the impartiality of a juror must be resolved in favor of the accused,<sup>113</sup> a tendency to give *some* weight to the fact that a witness is a police officer does not disqualify a juror.<sup>114</sup>

In *Witherspoon v. Illinois*,<sup>115</sup> the defendant's constitutional right to an impartial jury was abridged when the trial judge removed a juror for cause who was not irrevocably opposed to the death penalty.<sup>116</sup> Reaffirming the *Witherspoon* decision, the Court recently held that a judge's decision to similarly remove a juror must be reversed, and would not be sustained under the harmless error doctrine on the basis that the prosecution retains a preemptory challenge that might have been used.<sup>117</sup>

### IX. TRIALS AND SENTENCING OF DEFENDANTS IN ABSENTIA

In an important case of first impression, *Head v. Commonwealth*,<sup>118</sup> the Virginia Court of Appeals addressed the question of trial in absentia for felony defendants.<sup>119</sup> The court held that before proceeding with a trial in absentia, the trial judge should

108. VA. CODE ANN. § 19.2-266 (Cum. Supp. 1987).

109. 233 Va. 313, 356 S.E.2d 157 (1987).

110. *Id.* at 338, 356 S.E.2d at 171.

111. 3 Va. App. 564, 351 S.E.2d 919 (1987).

112. *Id.* at 571-72, 351 S.E.2d at 923.

113. *See* Educational Books, Inc. v. Commonwealth, 3 Va. App. 384, 349 S.E.2d 903 (1986).

114. *Mullis*, 3 Va. App. at 572, 351 S.E.2d at 924.

115. 391 U.S. 510 (1968).

116. *Id.* at 522-23.

117. *Gray v. Mississippi*, 55 U.S.L.W. 4638 (U.S. May 18, 1987).

118. 3 Va. App. 163, 348 S.E.2d 423 (1986).

119. The Fourth Circuit had previously held that a defendant waived his constitutional right to be present at trial when he knew of the trial date and voluntarily failed to appear. *United States v. Schocket*, 753 F.2d 336 (4th Cir. 1985).

consider: (1) "the likelihood that the trial could soon take place with the defendant present"; (2) "the difficulty of rescheduling"; (3) "the burden on the Commonwealth in securing the attendance of witnesses on another date"; and (4) "any other factors given to explain the defendant's absence."<sup>120</sup> The court noted, however, that none of the factors justified proceeding with the sentencing stage in the defendant's absence. Thus, sentencing must be delayed until the defendant is present.<sup>121</sup>

## X. VIDEOTAPED DEPOSITIONS

After considering numerous proposals over past years, the 1987 General Assembly authorized the use of videotaped depositions in certain child abuse cases. If a child under the age of eleven is the alleged victim of kidnapping, criminal sexual assault or designated family offenses, the child's deposition may be videotaped if the Commonwealth and the accused consent, and the trial judge determines that the child will probably suffer severe emotional or mental trauma if required to testify in open court.<sup>122</sup>

## XI. COMPETENCY AND IMPEACHMENT OF WITNESSES

A number of recent cases have dealt with the competency and impeachment of witnesses. In *Mullis v. Commonwealth*,<sup>123</sup> the court of appeals upheld the lower court's ruling that a lay witness is permitted to describe a person in "lay parlance" without using medical terms.<sup>124</sup>

Expert witnesses did not fare as well in the courts. In *Patterson v. Commonwealth*,<sup>125</sup> the court of appeals held that expert opinion may not be based upon an out-of-court summation of testimony.<sup>126</sup> In *Clinebell v. Commonwealth*,<sup>127</sup> the court held that the trial

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120. *Head*, 3 Va. App. at 169-70, 348 S.E.2d at 427-28.

121. *Id.* at 172, 348 S.E.2d at 430; see also VA. CODE ANN. § 19.2-237 (Repl. Vol. 1983) (prohibiting imposition of a jail sentence in a misdemeanor prosecution where the defendant is absent).

122. VA. CODE ANN. §§ 18.2-67, 18.2-67.01 (Cum. Supp. 1987).

123. 3 Va. App. 564, 351 S.E.2d 919 (1987).

124. *Id.* at 573, 351 S.E.2d at 925.

125. 3 Va. App. 1, 348 S.E.2d 285 (1986).

126. *Id.* at 14, 348 S.E.2d at 292.

127. 3 Va. App. 362, 349 S.E.2d 676 (1986).

court did not abuse its discretion in refusing to allow an optometrist treating the witness for hysterical amblyopia to offer an opinion on the witness' tendency to fabricate testimony.<sup>128</sup>

In *Barrett v. Commonwealth*,<sup>129</sup> the Virginia Supreme Court acknowledged that it was within the trial court's discretion "to see that the right of cross-examination is not abused once the right to cross-examination has been fairly and substantially exercised."<sup>130</sup> In *Williams v. Commonwealth*,<sup>131</sup> the Virginia Court of Appeals upheld the trial court's discretion to prohibit counsel from recalling witnesses for further cross-examination.<sup>132</sup> Finally, in *Delaware v. Van Arsdall*,<sup>133</sup> the United States Supreme Court applied the harmless-error doctrine to an improper denial of a defendant's opportunity to impeach a witness.<sup>134</sup>

In another major decision, *Chrisman v. Commonwealth*,<sup>135</sup> the Virginia Court of Appeals held that since the crime of indecent exposure does not involve deception, trickery, forgery, lying, cheating or stealing, it was not a crime of moral turpitude to be used for impeachment purposes.<sup>136</sup>

In *Hall v. Commonwealth*,<sup>137</sup> the Virginia Supreme Court stated that, upon request, the trial judge must instruct the jury that inconsistent statements are not evidence of the substantive issues, but may be considered only on the collateral issue of the witness' credibility.<sup>138</sup>

In a case of first impression, *Arnold v. Commonwealth*,<sup>139</sup> the court of appeals held that the trial judge has discretion to permit the jury to use a typed transcript as a visual aid while listening to a recording.

In *Brown v. Commonwealth*,<sup>140</sup> the Virginia Supreme Court held that it is prejudicial error to introduce a co-conspirator's convic-

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128. *Id.* at 369, 349 S.E.2d at 680.

129. 231 Va. 102, 341 S.E.2d 190 (1986).

130. *Id.* at 108, 341 S.E.2d at 194.

131. 4 Va. App. 53, 354 S.E.2d 79 (1987).

132. *Id.* at 78, 354 S.E.2d at 92-93.

133. 106 S. Ct. 1431 (1986).

134. *Id.* at 1438.

135. 3 Va. App. 89, 348 S.E.2d 399 (1986).

136. *Id.* at 100, 348 S.E.2d at 405.

137. 233 Va. 369, 355 S.E.2d 591 (1987).

138. *Id.* at 374, 355 S.E.2d at 595.

139. No. 0948-85 (Va. Ct. App. June 2, 1987).

140. 3 Va. App. 101, 348 S.E.2d 408 (1986).

tion for the very offense for which the defendant is on trial.<sup>141</sup> The court recognized in another case that when the alleged victim denied the act of incest, the results of a Human Leucocyte Antigen (HLA) blood test were insufficient to prove incest beyond a reasonable doubt.<sup>142</sup>

In *Gardner v. Commonwealth*,<sup>143</sup> the Virginia Court of Appeals held that the trial court may reverse its granting of a mistrial and reassemble the jury, provided the jury has not left the presence of the court.<sup>144</sup> In *White v. Commonwealth*,<sup>145</sup> the Virginia Court of Appeals held that "a defendant is barred on appeal from challenging the sufficiency of the evidence when he fails to renew his motion to strike the evidence after presenting his case, unless the record demonstrates that good cause exists"<sup>146</sup> or that justice demands appellate consideration of the issue.

## XII. SENTENCING

The due process clause, not the sixth amendment right to a speedy trial, requires that a defendant be sentenced in a timely fashion.<sup>147</sup> In *Correll v. Commonwealth*,<sup>148</sup> the Virginia Supreme Court held that a post-sentence report is not required in a bench trial where the judge considers the evidence adduced in the sentencing hearing, as well as the pre-sentence report and, in a single step, imposes the death sentence.<sup>149</sup>

In *Pruett v. Commonwealth*,<sup>150</sup> the supreme court held that jurors may not be instructed that the court will impose a sentence if the jurors are not unanimous in recommending the death sentence.<sup>151</sup>

The United States Supreme Court held this year that the jury may not be precluded from considering any relevant mitigating ev-

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141. *Id.* at 104, 348 S.E.2d at 409.

142. *Bridgeman v. Commonwealth*, 3 Va. 523, 351 S.E.2d 598 (1986).

143. 3 Va. App. 418, 350 S.E.2d 229 (1987).

144. *Id.* at 424, 350 S.E.2d at 232-33.

145. 3 Va. App. 231, 348 S.E.2d 866 (1986).

146. *Id.* at 234, 348 S.E.2d at 868.

147. *Walker v. Commonwealth*, No. 1133-85 slip op. at \_\_\_ (Va. Ct. App. June 2, 1987).

148. 232 Va. 454, 352 S.E.2d 352, *cert. denied*, 107 S. Ct. 3219 (1987).

149. *Id.* at 466, 352 S.E.2d at 359.

150. 232 Va. 266, 351 S.E.2d 1 (1986), *cert. denied*, 107 S. Ct. 3220 (1987).

151. *Id.* at 279, 351 S.E.2d at 9.



idence,<sup>152</sup> but the jury may be instructed not to be swayed by mere sympathy or sentiment.<sup>153</sup>

Closing the door to another broad attack on capital punishment, the United States Supreme Court, in *McCleskey v. Kemp*,<sup>154</sup> rejected statistical studies indicating that black defendants convicted of killing white victims were more likely to receive the death penalty. The Court held that such studies do not establish racial discrimination in violation of the fourteenth amendment's equal protection clause.<sup>155</sup>

### XIII. HABEAS CORPUS PROCEEDINGS

In *Howard v. Warden*,<sup>156</sup> the Virginia Supreme Court held that a habeas corpus motion will not be granted merely because counsel allegedly committed errors in a prior habeas proceeding.<sup>157</sup> The Court of Appeals for the Fourth Circuit held in *Whitley v. Blair*<sup>158</sup> that the doctrine of procedural default applies to claims raised by a federal habeas corpus petitioner which he failed to raise in his state habeas appeal.<sup>159</sup>

### XIV. LEGISLATION: COMMONWEALTH'S RIGHT OF APPEAL

Effective January 1, 1988<sup>160</sup> the Commonwealth has a limited right of appeal to the Virginia Court of Appeals.<sup>161</sup> The Commonwealth may appeal from: (1) an order of a circuit court dismissing a warrant, information or indictment, or any count or charge thereof on the ground that a statute upon which it was based is unconstitutional; or (2) an order of the circuit court prohibiting the use of certain evidence at trial on the grounds that such evidence was obtained in violation of the Fourth, Fifth or Sixth Amendments to the United States Constitution or article I, sections 8, 10

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152. *Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987).

153. *California v. Brown*, 107 S. Ct. 837 (1987).

154. 107 S. Ct. 1756 (1987).

155. *Id.* at 1770.

156. 232 Va. 16, 348 S.E.2d 211 (1986).

157. *Id.* at 19, 348 S.E.2d at 213.

158. 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 1618 (1987).

159. *Id.* at 1491.

160. Prior to January 1, 1988 the appellate procedures are governed by VA. CODE ANN. § 19.2-398 (Cum. Supp. 1987).

161. *Id.* § 19.2-398.

or 11 of the Virginia Constitution.<sup>162</sup> The Commonwealth may take such an appeal only in felony cases and only before a jury is impaneled and sworn in a jury trial, or before the court begins to hear or receive evidence or the first witness is sworn, whichever comes first.<sup>163</sup> In the case of an appeal of a suppression order, the Commonwealth must certify that the evidence is essential to the prosecution.<sup>164</sup>

The Commonwealth must file a notice of appeal with the clerk of the trial court, such notice being filed within seven days after entry of the order from which the appeal is taken, and before a jury is impaneled and sworn or in bench trials before the court begins to hear evidence.<sup>165</sup> Upon the filing of a timely notice of appeal, the order from which the appeal is taken and further trial proceedings, except for bail hearings,<sup>166</sup> shall be suspended pending disposition of the appeal.<sup>167</sup>

The defendant has no independent right of appeal, but if the Commonwealth appeals the defendant may cross appeal from any pretrial orders from which the Commonwealth was entitled to appeal.<sup>168</sup> An indigent defendant is entitled to court appointed counsel to defend against the Commonwealth's appeal and to cross appeal.<sup>169</sup> The defendant must file a notice of cross appeal with the clerk of the circuit court within seven days following the notice of appeal filed by the Commonwealth.<sup>170</sup>

The Commonwealth must file a petition for appeal with the clerk of the court of appeals not more than fourteen days after the transcript or written statement of facts is filed.<sup>171</sup> Within fourteen days after the Commonwealth files a petition for appeal, the defendant may file a brief in opposition with the clerk of the court of appeals.<sup>172</sup> If the defendant has filed a notice of cross appeal, he shall file a petition for cross appeal to be consolidated with and

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* § 19.2-400.

166. *Id.* § 17.2-406.

167. *Id.*

168. *Id.* § 19.2-401.

169. *Id.*

170. *Id.*

171. *Id.* § 19.2-402. If there are objections to the transcript, the fourteen-day period runs from the date the judge signs the transcript. *See id.* § 19.2-405.

172. *Id.*

filed within the same time period as his brief in opposition.<sup>173</sup> The Commonwealth may file a brief in opposition to any petition for cross appeal within ten days after the petition for cross appeal is filed.<sup>174</sup> The court of appeals shall grant or deny petitions for appeal and cross appeal within thirty days after the brief in opposition is filed.<sup>175</sup> No petition for rehearing may be filed.<sup>176</sup>

If the petition for appeal is denied, the court of appeals shall immediately return the record to the trial court.<sup>177</sup> If the court of appeals grants the petition for appeal, the Attorney General shall represent the Commonwealth during the appeal.<sup>178</sup> The Commonwealth shall file its opening brief within twenty-five days after the date of the certificate awarding the appeal.<sup>179</sup> The defendant's brief must be filed within twenty-five days after the Commonwealth's brief. The Commonwealth may then file a reply brief, including its response to any cross appeal, within fifteen days after the filing of the defendant's brief. With the permission of a judge of the court of appeals, the time for filing any brief may be extended for good cause shown.<sup>180</sup> The Court of Appeals shall render a decision within sixty days.<sup>181</sup> No petition for rehearing may be filed. The decision of the court of appeals is final,<sup>182</sup> and no further appeal shall be allowed to the Virginia Supreme Court.<sup>183</sup>

The statutory speedy trial provisions do not apply to the period of time commencing when the Commonwealth's notice of appeal is filed and ending when the court of appeals disposes of the appeal.<sup>184</sup>

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173. *Id.*

174. *Id.*

175. *Id.* § 19.2-403. If no brief in opposition is filed, the thirty days runs from the time that the period for filing the brief has expired.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. In its discretion, the supreme court may certify an appeal for expedited review by the supreme court before it has been determined by the court of appeals. *Id.* § 19.2-407. The grounds for such certification are set out in *id.* § 17-116.06 B.

183. *Id.* § 19.2-408. However, the subject of the pretrial appeal may be reconsidered on direct appeal after the defendant's conviction.

184. *Id.* § 19.2-409.