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## Criminal Law


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# CRIMINAL LAW

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## I. INTRODUCTION

This article summarizes selected published decisions of the Supreme Court of Virginia, Virginia cases reviewed by the Supreme Court of the United States, and decisions of the Court of Appeals of Virginia issued between July 1, 2002 and July 1, 2003. The article also includes a summary of a few of the most relevant changes to the criminal law enacted during that time by the General Assembly of Virginia. The sheer quantity of new cases and statutes presents a significant challenge to the authors. We have tried to select those most relevant to the practitioner; of necessity, the discussion can highlight only a few of the most salient topographical changes to a complex landscape.

## II. CONSTITUTIONAL ISSUES

### A. *Fourth Amendment*

#### 1. Standing and Reasonable Expectation of Privacy

Standing is frequently an overlooked component of a Fourth Amendment challenge. While the term “standing,” in the context

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of standing to raise a claim, is often used for simplicity, as the cases demonstrate, courts characterize the challenge in a more detailed manner, taking into account both whether there is a subjective reasonable expectation of privacy that society is willing to recognize and whether the defendant actually exhibits an expectation of privacy in the object.<sup>1</sup> In any event, Virginia appellate courts reviewed three cases that are worthy of discussion on this issue.

In *Bell v. Commonwealth*,<sup>2</sup> the Supreme Court of Virginia considered numerous challenges to the defendant's conviction for capital murder of a police officer and to his sentence of death.<sup>3</sup> One claim involved the search of a vehicle that had been used by the defendant, but owned by another.<sup>4</sup> On the morning prior to the murder, the defendant parked the vehicle in a lot outside an apartment building and abandoned it.<sup>5</sup> The manager of the building reported the abandoned vehicle, and the police arranged to have it towed to the police station.<sup>6</sup> During the process, the police learned that a finance company had a lien on the car and that it had been stolen from an "Impound Lot."<sup>7</sup>

The lien holder gave the police permission to search the vehicle.<sup>8</sup> The defendant had possession of the car because he had borrowed it from the owner's girlfriend and failed to return it, despite her requests.<sup>9</sup> The owner of the vehicle testified that he never gave the defendant permission to use the car.<sup>10</sup> The defendant moved to suppress three bullets found inside the car, claiming that the search was unlawful.<sup>11</sup> The trial court ruled that the defendant did not have standing to object to the search.<sup>12</sup> The Supreme Court of Virginia found that the defendant failed to meet his burden of proving that he had a legitimate expectation of privacy in the vehicle in order to confer standing to challenge

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1. *Anderson v. Commonwealth*, 25 Va. App. 565, 576, 490 S.E.2d 274, 279 (Ct. App. 1997), *aff'd* 256 Va. 580, 507 S.E.2d 339 (1998).

2. 264 Va. 172, 563 S.E.2d 695 (2002), *cert. denied* 123 S. Ct. 860 (2003).

3. *Id.* at 178, 183, 563 S.E.2d at 700-01, 703.

4. *Id.* at 189, 563 S.E.2d at 707-08.

5. *Id.* at 189, 563 S.E.2d at 707.

6. *Id.* at 189, 563 S.E.2d at 707-08.

7. *Id.* at 189, 563 S.E.2d at 708.

8. *Id.* at 189-90, 563 S.E.2d at 708.

9. *Id.* at 190, 563 S.E.2d at 708.

10. *Id.*

11. *Id.*

12. *Id.*

the search.<sup>13</sup> The court pointed out that, in addition to the defendant not being the owner of the car, he failed to establish that he was authorized to have it in his possession at the time of the search.<sup>14</sup> Indeed, he left it at an apartment where he was not a tenant.<sup>15</sup> Moreover, at the time of the search, a lien holder was in the process of repossessing the vehicle and gave police consent to search it.<sup>16</sup> Thus, for all of these reasons, the supreme court found that the trial court properly concluded that the defendant lacked standing to challenge the search.<sup>17</sup>

In *McCracken v. Commonwealth*,<sup>18</sup> the Court of Appeals of Virginia, sitting en banc,—applying the principle that a trespasser does not have a justifiable expectation of privacy in the home of another—found that the defendant did not have standing to contest the sheriff department's entry into the home of his estranged paramour.<sup>19</sup> The defendant lived with Theresa Fields ("Fields") in her home for about three years prior to the incident.<sup>20</sup> On the day the sheriff's deputies entered Fields's home, she called the 911 emergency dispatcher twice.<sup>21</sup> The first time, she reported that she wanted the defendant removed from her home.<sup>22</sup> Deputies arrived at the residence and found the defendant arguing with Fields.<sup>23</sup> The defendant agreed to move out of the house and the deputies remained to assist him in removing his belongings.<sup>24</sup> The defendant left to go to his mother's home.<sup>25</sup> Later, after an argument with the defendant over the telephone, Fields again telephoned the 911 emergency dispatcher and reported that she believed the defendant was returning to her home.<sup>26</sup> The same two deputies were dispatched back to Fields's residence.<sup>27</sup> When they arrived, neighbors alerted the deputies to the dispute inside.<sup>28</sup>

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 39 Va. App. 254, 572 S.E.2d 493 (Ct. App. 2002).

19. *Id.* at 260, 572 S.E.2d at 496.

20. *Id.* at 258, 572 S.E.2d at 495.

21. *Id.* at 258–59, 572 S.E.2d at 495.

22. *Id.* at 258, 572 S.E.2d at 495.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 259, 572 S.E.2d at 495.

27. *Id.*

28. *Id.*

The officers heard the defendant and Fields arguing inside the house.<sup>29</sup> The back door was locked.<sup>30</sup> The front door was partially open, but the screen door was closed.<sup>31</sup> One of the deputies “drew his weapon, pushed open the screen door, and entered” the residence.<sup>32</sup> The defendant challenged the police entry and the subsequent search of his person—which he resisted.<sup>33</sup>

The court of appeals found that the police had probable cause to believe that the defendant was trespassing before the officer opened the screen door.<sup>34</sup> However, the court also found that because the defendant was a trespasser, he had no reasonable expectation of privacy in the residence and, consequently, had no standing to challenge the entry.<sup>35</sup>

In the context of a very unique set of circumstances in *Sheler v. Commonwealth*,<sup>36</sup> the court of appeals considered whether the trial court erred when it refused to suppress glass fragments found on the defendant’s shoes and clothing.<sup>37</sup> The court of appeals held that while the seizure of the defendant’s person was lawful, the police unlawfully searched the defendant’s shoes and the evidence should have been suppressed.<sup>38</sup> The court was presented with an issue of first impression in Virginia—whether an individual has a reasonable expectation of privacy in the sole of his shoe.<sup>39</sup> The court of appeals, contrary to the ruling of the trial court, found that the defendant had both an objective and subjective expectation of privacy in his shoes.<sup>40</sup> First, the court found that “an individual’s expectation of privacy in his or her shoes is an interest that society is willing to accept as reasonable.”<sup>41</sup> The court opined that, much like with the garments one wears, an individual does not expect another to “manipulate” and “explore” areas of his or her shoes that are not readily exposed to public

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 258, 572 S.E.2d at 495.

34. *Id.* at 260, 572 S.E.2d at 496.

35. *Id.*

36. 38 Va. App. 465, 566 S.E.2d 203 (Ct. App. 2002).

37. *Id.* at 468, 566 S.E.2d at 204.

38. *Id.* at 471, 566 S.E.2d at 206.

39. *Id.* at 475, 566 S.E.2d at 207–08.

40. *Id.* at 477, 566 S.E.2d at 208–09.

41. *Id.* at 477, 566 S.E.2d at 208.

view.<sup>42</sup> Second, the court found that, in this case, the defendant had not exposed the soles of his shoes to the detective before the detective asked to see the shoes.<sup>43</sup> Consequently, the defendant also “exhibited a subjective expectation that the soles of his shoes remain[ed] free from close inspection.”<sup>44</sup>

## 2. Exceptions to the Warrant Requirement

### a. Consensual Encounters and Consent

A consensual encounter between a citizen and a police officer does not constitute a seizure for purposes of the Fourth Amendment to the United States Constitution.<sup>45</sup> The Supreme Court of Virginia reviewed two significant cases relating to the consensual nature of an encounter.

In *Dickerson v. Commonwealth*,<sup>46</sup> the court considered whether an encounter after completion of a traffic stop constituted a consensual encounter or a second seizure.<sup>47</sup> This is the same type of analysis the court was asked to conduct in *Reittinger v. Commonwealth*,<sup>48</sup> where under a very different set of circumstances, the court found that a second seizure had, in fact, occurred.<sup>49</sup> In *Dickerson*, a police officer received a radio dispatch that a particular vehicle with a particular license plate number had failed to yield the right of way to an ambulance.<sup>50</sup> The officer saw the vehicle traveling sixty-five miles-per-hour in a fifty-five miles-per-hour zone.<sup>51</sup> He activated his emergency lights and siren and stopped the speeding car.<sup>52</sup> The defendant was the driver of the

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42. *Id.* at 477, 566 S.E.2d at 208–09.

43. *Id.* at 477, 566 S.E.2d at 209.

44. *Id.*

45. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 200–01 (2002) (stating that the police do not contravene the Fourth Amendment “merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen . . . . If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.”).

46. 266 Va. 14, 581 S.E.2d 195 (2003).

47. *Id.* at 16, 581 S.E.2d at 196.

48. 260 Va. 232, 532 S.E.2d 25 (2000).

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

50. *Dickerson*, 266 Va. at 16, 581 S.E.2d at 196.

51. *Id.*

52. *Id.*

vehicle.<sup>53</sup> The officer noticed an odor of alcohol about the defendant's person and asked him to get out of the car.<sup>54</sup> The officer then conducted field sobriety tests.<sup>55</sup> After the tests, the officer decided not to arrest the defendant for any alcohol related offenses.<sup>56</sup> The officer told the defendant that "he was free to go but that he might be subpoenaed later for the failure-to-yield traffic infraction."<sup>57</sup>

The defendant returned to his car, opened the driver's door, and started to get back into the car.<sup>58</sup> The officer asked him, "if there was anything in the car [he] should know about, dope, marijuana, roaches in the ashtray, something, anything like that."<sup>59</sup> Dickerson responded, "no."<sup>60</sup> The officer asked him if he smoked marijuana.<sup>61</sup> The defendant said that he did, "but not while he was driving."<sup>62</sup> Dickerson told the officer that there was some marijuana in the ashtray.<sup>63</sup> The officer asked the defendant if he could search the car.<sup>64</sup> Dickerson refused to permit the search, but removed the ashtray from the car's console and handed it to the officer.<sup>65</sup> The ashtray contained "numerous hand-rolled cigarette roaches" which the defendant spontaneously identified as marijuana cigarettes.<sup>66</sup> The officer asked a second time for permission to search the car.<sup>67</sup> Dickerson again refused, but the officer told him to step away from the vehicle and then began to search it.<sup>68</sup> A quantity of cocaine and two sets of scales were found in the car.<sup>69</sup> The officer arrested the defendant, who was later charged with possession of cocaine with intent to distribute.<sup>70</sup> The trial court denied Dickerson's motion to suppress the evidence and

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (alteration in original).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 17, 581 S.E.2d at 196.

68. *Id.*

69. *Id.*

70. *Id.*

Dickerson was convicted of the offense.<sup>71</sup> The court of appeals affirmed the conviction, finding no Fourth Amendment violation.<sup>72</sup>

The supreme court agreed and found that, based on the totality of the circumstances, a reasonable person would have believed that the traffic stop had ended and that he was free to leave at the time of the questions by the officer.<sup>73</sup> The court reasoned that not only had the officer told the defendant that he was free to go, but also that the defendant had returned to his car and had begun to get inside, demonstrating his knowledge that the traffic stop was over.<sup>74</sup> Further, the officer's "questions sought information and did not implicate restraint or the need to restrain" the defendant.<sup>75</sup> Dickerson responded to the questions by freely stating that he used marijuana and actually showing the officer what he admitted were remnants of marijuana cigarettes in the ashtray.<sup>76</sup> The court rejected the defendant's argument that the facts supported a seizure, recognizing that, despite the presence of two armed officers, the officers did not block the defendant's access to his car, nor did they prevent him from leaving after the traffic stop.<sup>77</sup> Citing the recent decision by the Supreme Court of the United States in *United States v. Drayton*,<sup>78</sup> the Supreme Court of Virginia noted that the mere presence of uniformed, armed officers does not transform an otherwise consensual encounter into a seizure.<sup>79</sup> The court concluded that the encounter following the traffic stop was consensual and the evidence was lawfully admitted at trial.<sup>80</sup>

In another case, decided the same day as *Dickerson*, the Supreme Court of Virginia reached a very different result. In *Harris v. Commonwealth*,<sup>81</sup> the court found that a seizure that continued after the basis for a legitimate traffic stop had expired was unlawful.<sup>82</sup> In this case, an officer initiated a traffic stop for a broken license plate light that he observed on a truck driven by the

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71. *Id.* at 17, 581 S.E.2d at 196–97.

72. *Id.* at 17, 581 S.E.2d at 197.

73. *Id.* at 17–18, 581 S.E.2d at 197.

74. *Id.* at 18, 581 S.E.2d at 197.

75. *Id.*

76. *Id.*

77. *Id.*

78. 536 U.S. 194 (2002).

79. *Dickerson*, 266 Va. at 18, 581 S.E.2d at 197.

80. *Id.* at 19, 581 S.E.2d at 198.

81. 266 Va. 28, 581 S.E.2d 206 (2003).

82. *Id.* at 33, 581 S.E.2d at 210.



defendant.<sup>83</sup> The officer stopped the truck occupied by the defendant and a passenger.<sup>84</sup> A second officer arrived and both marked police vehicles remained on the scene with their emergency lights activated.<sup>85</sup> The officer who initiated the stop asked Harris for his license and vehicle registration.<sup>86</sup> The defendant produced his social security card and told the officer that he knew he had been stopped because he had no license plate light.<sup>87</sup> The officer told the defendant to get out of the truck and asked the defendant questions to confirm his identity.<sup>88</sup> Using his hand-held radio, the officer then provided his dispatcher with the social security number.<sup>89</sup> The dispatcher advised the officer of Harris's identity and that he had a valid Virginia driver's license.<sup>90</sup> The police officer returned the defendant's social security card and did not issue a summons;<sup>91</sup> however, he asked Harris if he had anything illegal in the truck or on his person.<sup>92</sup> The defendant stated that he did not.<sup>93</sup> The officer then asked if he could search the truck.<sup>94</sup> The defendant consented to the search.<sup>95</sup> The officer ultimately found stolen property inside the vehicle.<sup>96</sup> At no time prior to the search did the police tell Harris or the passenger that they were free to leave, nor did the officer ever tell the defendant that he was not going to be issued a summons for the traffic offense.<sup>97</sup>

The supreme court found that the reasonable articulable suspicion to support the traffic stop ended when the officer returned the social security card to the defendant, and the traffic stop was over.<sup>98</sup> Thus, in order to have been lawful, the continuation of the encounter would have had to have been consensual.<sup>99</sup> The supreme court, disagreeing with the court of appeals and the trial

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83. *Id.* at 30, 581 S.E.2d at 208.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 31, 581 S.E.2d at 208.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 33, 581 S.E.2d at 210.

98. *Id.*

99. *Id.*

court, found that it was not.<sup>100</sup> Under the circumstances of the case, the supreme court found it significant that, when the officer returned the social security card to the defendant, he did not tell the defendant that he was not going to issue a summons, nor did he tell the defendant that he was free to leave.<sup>101</sup> Instead, the officer immediately began to ask questions and asked for permission to search the truck.<sup>102</sup> The court noted that the defendant knew he had committed a traffic offense and was aware that he did not provide the officer with a license and registration when asked to do so.<sup>103</sup> The officer did nothing to indicate that the defendant was no longer being detained for a traffic violation when he began asking questions.<sup>104</sup> Instead, the court noted, the defendant remained in the presence of two armed, uniformed officers and two police vehicles with emergency lights flashing.<sup>105</sup> Under these circumstances, the court found that no reasonable person would have felt free to leave or free to refuse to answer the officer's questions.<sup>106</sup> Consequently, the encounter was not consensual, but was a seizure that was not supported by independent reasonable suspicion or probable cause.<sup>107</sup> The court further held that the defendant's consent to the search was the product of an illegal seizure and was not the result of "an independent act of free will."<sup>108</sup> Thus, the consent was involuntary and the evidence should have been suppressed.<sup>109</sup>

The Court of Appeals of Virginia has also decided several consensual encounter cases this year. Inasmuch as Fourth Amendment analysis—including whether the protection applies at all—is extremely dependent on the facts of the case, this is a highly litigated issue resulting in many published and unpublished decisions.

One case that is worthy of discussion is *Barkley v. Commonwealth*.<sup>110</sup> This case involves what is commonly referred to as a

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100. *Id.*

101. *Id.*

102. *Id.* at 31, 581 S.E.2d at 208.

103. *Id.* at 33, 581 S.E.2d at 210.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 34, 581 S.E.2d at 210.

109. *Id.* at 34, 581 S.E.2d at 210–11.

110. 39 Va. App. 682, 576 S.E.2d 234 (Ct. App. 2003).

“knock and talk.”<sup>111</sup> It also involves a consensual encounter that begins on a porch and extends into a residence.<sup>112</sup> In *Barkley*, two police officers, one in uniform and the other in plain clothes, went to a residence to investigate a “Crime Stoppers’ tip.”<sup>113</sup> Specifically, the information provided in the tip was “that male and female juveniles . . . were using and selling marijuana and cocaine” at that apartment.<sup>114</sup> An officer knocked on the apartment door and the male defendant answered.<sup>115</sup> The male defendant went out onto the porch with the police and asked how he could help them.<sup>116</sup> One of the officers told the defendant that they were there to “investigate a complaint on the residence . . . the building itself or the home itself.”<sup>117</sup> The officer explained that the defendant was not under arrest but that the police had received a tip that there was possible illegal activity going on at the residence—particularly involving the sale and use of illegal narcotics.<sup>118</sup> In an abundance of caution, the officer then advised the defendant of his *Miranda*<sup>119</sup> rights.<sup>120</sup> *Barkley* acknowledged that he understood his rights and admitted that he smoked marijuana, but claimed that no one sold drugs from the residence.<sup>121</sup>

While the defendant spoke with the police on the porch, several individuals passed by the apartment.<sup>122</sup> The defendant told the police that the neighbors were “nosey.”<sup>123</sup> In response, one of the officers suggested that they all go inside the apartment.<sup>124</sup> *Barkley* led the officers inside to his bedroom, which was also used as a den.<sup>125</sup> The primary officer continued to explain the purpose of their presence and again asked the defendant if he

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111. See, e.g., *Rogers v. Pendleton*, 249 F.3d 279, 289 (4th Cir. 2001) (defining the right to “knock and talk” as the right “to knock on a residence’s door or otherwise approach the residence seeking to speak to the inhabitants”).

112. *Barkley*, 39 Va. App. at 688, 576 S.E.2d at 237.

113. *Id.* at 687–88, 576 S.E.2d at 236–237.

114. *Id.* at 687–88, 576 S.E.2d at 237.

115. *Id.* at 688, 576 S.E.2d at 237.

116. *Id.*

117. *Id.* (alteration in original).

118. *Id.*

119. The Supreme Court of the United States first identified a suspect’s rights during police questioning in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966).

120. *Barkley*, 39 Va. App. at 688, 576 S.E.2d at 237.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

was aware of any illegal activity in the residence.<sup>126</sup> During the conversation, both officers noticed the remains of a marijuana cigarette in an ashtray.<sup>127</sup> They brought the marijuana to Barkley's attention and again advised him of his *Miranda* rights.<sup>128</sup> The defendant reiterated that he occasionally smoked marijuana and removed a bag of marijuana from his dresser.<sup>129</sup> The officer asked if he could search the apartment.<sup>130</sup> In response, the defendant asked if he was required to permit a search.<sup>131</sup> The officer explained that the defendant could refuse to provide his permission, but that based upon observations by the officers, they could obtain a search warrant for the premises.<sup>132</sup> The defendant reluctantly gave his permission, suggesting that they would probably search the apartment regardless of what he said.<sup>133</sup> The officer explained a second time that Barkley could refuse to allow the search and no search would be conducted without his consent or a warrant.<sup>134</sup> The defendant provided his consent, yet the officer continued to ask questions to ensure that the consent was voluntary.<sup>135</sup> Ultimately, the police went forward with a search based on the defendant's consent and discovered over a pound of marijuana.<sup>136</sup>

The court of appeals found that the conduct of the officers did not convert the otherwise consensual encounter into a seizure.<sup>137</sup> Contrary to the defendant's claim, the court found that the officers did not identify the defendant as the target of a criminal investigation, but instead told him that they were investigating complaints about illegal activities at that residence.<sup>138</sup> The court noted that the explanation of the officers' presence, combined with the fact that they informed him that he was not under arrest, would lead a reasonable person to believe that he was not

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 688–89, 576 S.E.2d at 237.

131. *Id.* at 689, 576 S.E.2d at 237.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 693, 576 S.E.2d at 239.

138. *Id.*

being detained.<sup>139</sup> Further, the court found that under the totality of the circumstances, the officers' conduct did not suggest a "threatening presence" so as to create a seizure.<sup>140</sup> The officers did not display their weapons and the atmosphere remained casual throughout the encounter.<sup>141</sup> The tone of the interview was relaxed and non-accusatory.<sup>142</sup> The court of appeals rejected the defendant's argument that when the police advised him of his *Miranda* rights, the encounter turned into a seizure.<sup>143</sup> The court noted that the record shows that the officers advised the defendant of his rights merely as a matter of caution.<sup>144</sup> Thus, the court concluded that the defendant voluntarily consented to the police entering his residence.<sup>145</sup> Likewise, the court found that he consented to a search of his apartment during a continued consensual encounter with the police.<sup>146</sup>

Consent to search is another similar area of analysis that cannot be overlooked when dealing with the Fourth Amendment. Often times, consent to search goes hand-in-hand with a consensual encounter. However, an individual may also voluntarily consent to a search during a seizure.<sup>147</sup> In short, consent is frequently an issue raised in connection with a Fourth Amendment challenge to a conviction.

One recent decision by the Court of Appeals of Virginia relating to consent is significant. In *Edwards v. Commonwealth*,<sup>148</sup> the court of appeals analyzed the scope of a defendant's consent to a search of his "person."<sup>149</sup> The police knew through an informant that two individuals, one of whom was known as "E," were selling narcotics from a particular room in a specific Econo Lodge.<sup>150</sup> When the police arrived at the room, the defendant was not pre-

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139. *Id.*

140. *Id.*

141. *Id.* at 694, 576 S.E.2d at 240.

142. *Id.* at 695, 576 S.E.2d at 240.

143. *Id.* at 694, 576 S.E.2d at 240.

144. *Id.* at 695, 576 S.E.2d at 240.

145. *Id.*

146. *Id.*

147. *See, e.g.*, *Davis v. United States*, 328 U.S. 582, 593-94 (1946) (analyzing all of the circumstances and determining that a filling station operator acted consensually when he unlocked a door where agents found contraband).

148. 38 Va. App. 823, 568 S.E.2d 454 (Ct. App. 2002).

149. *Id.* at 828, 568 S.E.2d at 457.

150. *Id.* at 826, 568 S.E.2d at 456.

sent and an occupant gave the officer permission to search.<sup>151</sup> The defendant knocked on the door and entered the room where the police were conducting the search for illegal drugs.<sup>152</sup> He identified himself as “E.”<sup>153</sup> One of the officers told the defendant that he understood that the defendant was a supplier of cocaine to a variety of locations, including locations at that motel.<sup>154</sup> The officer then asked him for consent to search his person.<sup>155</sup> At the time, Edwards was holding a clear plastic bag of women’s white tube socks.<sup>156</sup> He agreed to the search, stating “[s]ure, no problem.”<sup>157</sup> He then put the bag of socks down on a nearby bed and cooperated with the search.<sup>158</sup> The officer searched the defendant but did not find narcotics.<sup>159</sup> The officer then picked up the bag of socks from the bed, asked the defendant what he was doing with a bag of women’s socks, and immediately noticed a lumpy object in the bag.<sup>160</sup> He looked inside the bag and found two plastic sandwich bags containing cocaine.<sup>161</sup>

The question before the court of appeals, a matter of first impression in Virginia, was whether the defendant’s consent to a search of his “person” extended to the bag he was holding when he provided his voluntary consent.<sup>162</sup> The court found “that the scope of consent to search one’s person encompasses such items.”<sup>163</sup> It noted that at the time Edwards agreed to the search, “the bag [of socks] was ‘appended to,’ or intimately connected with, his person.”<sup>164</sup> Also, the defendant knew that “the object of the search was evidence related to cocaine distribution, which could possibly be found within the bag.”<sup>165</sup> Finally, the court addressed Edwards’ placement of the bag on the bed after he consented to the search.<sup>166</sup> It stated that Edwards’ “passive acquies-

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151. *See id.*; *see also id.* at 839, 568 S.E.2d at 462 (Elder, J., dissenting).

152. *Id.* at 826, 568 S.E.2d at 456.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (alteration in original).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 828, 568 S.E.2d at 457.

163. *Id.* at 829, 568 S.E.2d at 457.

164. *Id.* at 830, 568 S.E.2d at 457.

165. *Id.* at 830, 568 S.E.2d at 458.

166. *Id.*

cence while the officer searched the bag affirmed that the bag was within the scope of his consent.<sup>167</sup> Based upon all of the circumstances, the court found that a reasonable officer would believe that the defendant's consent to search his person included consent to search the bag.<sup>168</sup>

## b. Inventory Search

In *King v. Commonwealth*,<sup>169</sup> the Court of Appeals of Virginia determined whether the police lawfully impounded the defendant's vehicle and, if so, whether the warrantless search of that vehicle was authorized as an inventory search.<sup>170</sup> Applying an objective standard, the court found that the facts did not support the conclusion that the impoundment of the defendant's vehicle was intended to prevent a public safety risk or to safeguard the vehicle—the two bases for impoundment.<sup>171</sup> The court noted that the car was properly parked and did not obstruct the flow of traffic.<sup>172</sup> Nor was it trespassing on private property or violating any parking ordinances.<sup>173</sup> The record demonstrated that the police failed to inquire as to the defendant's ability to make arrangements for the car to be moved.<sup>174</sup> Moreover, there was no evidence that the defendant had property inside the car that would have been subject to vandalism.<sup>175</sup> Finally, the defendant was not being arrested, unlike other situations where a vehicle is impounded.<sup>176</sup> Based on these facts, the court of appeals found that the impoundment was an unlawful seizure and did not fall within the "community caretaker" exception to the warrant requirement.<sup>177</sup>

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167. *Id.*

168. *Id.* at 831, 568 S.E.2d at 458.

169. 39 Va. App. 306, 572 S.E.2d 518 (Ct. App. 2002).

170. *Id.* at 311, 572 S.E.2d at 520.

171. *Id.* at 311–12, 572 S.E.2d at 521.

172. *Id.* at 312, 572 S.E.2d at 521.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 310–14, 572 S.E.2d at 520–22.

### 3. Reasonable Suspicion

A major consideration in Fourth Amendment analysis relating to stops and seizures is whether the police officer possessed a "reasonable, articulable suspicion" of criminal activity, so as to justify a stop or seizure.<sup>178</sup> A few cases decided this past year are worth noting in this area.

In *Whitfield v. Commonwealth*,<sup>179</sup> the Supreme Court of Virginia found that the police had reasonable suspicion to believe that the defendant might be engaged in criminal activity when they stopped him.<sup>180</sup> At 3:30 a.m., in a high crime area, the defendant appeared to be trespassing on private property near an abandoned building.<sup>181</sup> When the initial officer shined the police car's floodlight in the direction of the defendant, the defendant ran.<sup>182</sup> The defendant continued to run away as a second officer arrived and joined the pursuit.<sup>183</sup> The defendant was ultimately caught when he could not escape over a high fence.<sup>184</sup> Relying, in part, on the Supreme Court of the United States' decision in *Illinois v. Wardlow*,<sup>185</sup> the Supreme Court of Virginia concluded that the "characteristics of the area" in conjunction with the defendant's behavior when the police arrived, which "includ[ed] his unprovoked flight, justified the stop, and further [police] investigation."<sup>186</sup>

In *Alston v. Commonwealth*,<sup>187</sup> the police had reasonable articulable suspicion to believe that the passenger of a vehicle had committed a crime.<sup>188</sup> While following the car, police noticed that the driver negotiated the vehicle in an evasive manner, then stopped the vehicle, and abruptly exited the car.<sup>189</sup> The Court of Appeals of Virginia held that under these circumstances, the po-

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178. See, e.g., *United States v. Place*, 462 U.S. 696, 702 (1983) (applying the concept first addressed in *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968)).

179. 265 Va. 358, 576 S.E.2d 463 (2003).

180. *Id.* at 361-62, 576 S.E.2d at 465.

181. *Id.* at 362, 576 S.E.2d at 465.

182. *Id.*

183. *Id.*

184. *Id.*

185. 528 U.S. 119 (2000).

186. *Whitfield*, 265 Va. at 362, 576 S.E.2d at 465.

187. 40 Va. App. 728, 581 S.E.2d 245 (Ct. App. 2003).

188. *Id.* at 733-34, 581 S.E.2d at 248.

189. *Id.* at 740, 581 S.E.2d at 251.



lice can order the driver back into the vehicle for the duration of the investigatory stop.<sup>190</sup>

#### 4. Probable Cause and Searches Incident to Arrest

In *Slayton v. Commonwealth*,<sup>191</sup> the Court of Appeals of Virginia reiterated the well-established standard for probable cause.<sup>192</sup> It also made clear that “even though probable cause [requires] more than a ‘mere suspicion [of criminal activity],’ it is not necessary for the facts to be ‘sufficient to convict’ the accused of the offense.”<sup>193</sup> The court further noted that as long as the officer has objective probable cause to arrest the defendant for one offense at the time of the search, it is legally irrelevant that he ultimately arrests him for a different offense.<sup>194</sup>

#### 5. Scope of Search

In *Murphy v. Commonwealth*,<sup>195</sup> the Supreme Court of Virginia had an opportunity to determine the scope of the decision of the Supreme Court of the United States in *Minnesota v. Dickerson*.<sup>196</sup> In *Murphy*, the police executed a search warrant at a residence where the defendant was present.<sup>197</sup> The warrant authorized a search of the residence for guns, drugs, and related items.<sup>198</sup> It also authorized police to search a named person, who was not the defendant.<sup>199</sup> When the police entered the house, they ordered the defendant to lie down on the floor.<sup>200</sup> They handcuffed the defendant and frisked him for weapons.<sup>201</sup> During the frisk for weapons, the officer “felt a bulge in the left front pocket of [the defendant’s] pants, and sensed that the object was a ‘plastic baggy.’”<sup>202</sup>

190. *Id.* at 739–40, 581 S.E.2d at 251.

191. 41 Va. App. 101, 582 S.E.2d 448 (Ct. App. 2003).

192. *Id.* at 106, 582 S.E.2d at 450.

193. *Id.* at 107, 582 S.E.2d at 451 (quoting *Gomez v. Atkins*, 296 F.3d 253, 262 (4th Cir. 2002)).

194. *Id.* at 109, 582 S.E.2d at 452.

195. 264 Va. 568, 570 S.E.2d 836 (2002).

196. 508 U.S. 366 (1993).

197. *Murphy*, 264 Va. at 571, 570 S.E.2d at 837.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

Based upon his training and experience, the officer concluded that the bag contained marijuana.<sup>203</sup> The Supreme Court of Virginia reversed the defendant's conviction, finding that the officer exceeded the scope of a protective frisk for weapons.<sup>204</sup> It opined that the officer did not testify that his sense of touch prompted him to conclude that the object was a weapon, nor did he state that it was "immediately apparent" to him once he touched the object that it was marijuana.<sup>205</sup> The court pointed out that all the officer could say based upon his sense of touch was that the object was a plastic bag.<sup>206</sup> The belief that it contained marijuana was based on his training and experience after feeling the bag.<sup>207</sup> Thus, the court concluded that the information provided by the officer's sense of touch was insufficient under *Dickerson* to establish probable cause to go beyond the frisk and conduct a search.<sup>208</sup>

In *Craddock v. Commonwealth*,<sup>209</sup> the Court of Appeals of Virginia combined an analysis of Virginia law relating to strip searches and the Supreme Court of the United States' standard for searching detainees<sup>210</sup> to determine whether the defendant's Fourth Amendment rights were violated.<sup>211</sup> The court looked at the "scope of the particular intrusion" and the "manner" in which the search was conducted" and determined that the defendant's rights were not violated.<sup>212</sup> The court of appeals agreed with the trial court that the facts supported the conclusion that the search was a strip search rather than a body cavity search.<sup>213</sup> The officer saw the bag between the defendant's buttocks before the police found it necessary to physically pry his legs apart to remove it.<sup>214</sup> Further, the court determined that the "manner" in which the search was accomplished was reasonable.<sup>215</sup> The officers removed the defendant's clothing in an isolated holding cell and did not in-

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203. *Id.*

204. *Id.* at 574, 570 S.E.2d at 839.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. 40 Va. App. 539, 580 S.E.2d 454 (Ct. App. 2003).

210. See *Bell v. Wolfish*, 441 U.S. 520, 558-59 (1979) (discussing the test of reasonableness under the Fourth Amendment for detainee searches).

211. *Craddock*, 40 Va. App. at 547, 580 S.E.2d at 458.

212. *Id.* at 550-51, 580 S.E.2d at 460 (quoting *Bell*, 441 U.S. at 559).

213. *Id.* at 550, 580 S.E.2d at 460.

214. *Id.*

215. *Id.* at 551, 580 S.E.2d at 460.

trude into any body cavity.<sup>216</sup> Thus, the search of the detainee was lawful.<sup>217</sup>

In *Kidd v. Commonwealth*,<sup>218</sup> the Court of Appeals of Virginia considered the constitutionality of a strip search that followed a protective frisk for weapons and the defendant's consent.<sup>219</sup> The initial frisk focused on the defendant's crotch, where the officer had seen an unnatural bulge.<sup>220</sup> When he felt an object with a hard edge, the officer pulled the defendant's sweatpants away from his body to look down in that area.<sup>221</sup> The officer saw a change purse, which he removed.<sup>222</sup> The defendant told the officer "that's all I've got, you can check me."<sup>223</sup> In response, the officer pulled back the sweatpants as well as the defendant's boxer shorts, exposing a plastic baggie of cocaine.<sup>224</sup> The court of appeals opined that the defendant knowingly and voluntarily authorized the search.<sup>225</sup>

## 6. Use of Force To Resist an Illegal Seizure

Virginia courts have held that a defendant is permitted to use reasonable force to resist an illegal arrest.<sup>226</sup> In *Commonwealth v. Hill*,<sup>227</sup> the Supreme Court of Virginia concluded that this right did not extend to the use of force to resist an illegal detention.<sup>228</sup> In *Hill*, the officer illegally detained the suspect based upon an insufficient tip and then tried to conduct a frisk.<sup>229</sup> In response, the suspect punched the officer in the face and proceeded to fight with three officers.<sup>230</sup> The police subdued Hill and, following a

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216. *Id.*

217. *Id.* at 552, 580 S.E.2d at 461.

218. 38 Va. App. 433, 565 S.E.2d 337 (Ct. App. 2002).

219. *Id.* at 441, 565 S.E.2d at 341.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 447, 565 S.E.2d at 344.

226. *See, e.g.,* *Banner v. Commonwealth*, 204 Va. 640, 646-47, 133 S.E.2d 305, 309-10 (1963).

227. 264 Va. 541, 570 S.E.2d 805 (2002).

228. *Id.* at 546, 570 S.E.2d at 808.

229. *Id.* at 544-46, 570 S.E.2d at 806-08.

230. *Id.* at 544, 570 S.E.2d at 806.

search, discovered cocaine on his person.<sup>231</sup> He claimed that because his detention was illegal, he was permitted to use force.<sup>232</sup> The supreme court disagreed, holding that in contrast to an arrest, “a detention is, by its nature, a brief intrusion on an individual’s liberty.”<sup>233</sup> Permitting the use of force in such situations, the court concluded, “would only serve to increase the danger of violence inherent in such detentions.”<sup>234</sup>

## B. *Fifth and Sixth Amendment*

### 1. Double Jeopardy

In *Neff v. Commonwealth*,<sup>235</sup> the defendant was convicted in the general district court of driving under the influence (“D.U.I.”) and he appealed to the circuit court.<sup>236</sup> While that appeal was pending, Neff was charged with a second offense D.U.I.<sup>237</sup> Prior to trial in the general district court on the second D.U.I. charge, the Commonwealth moved for a continuance.<sup>238</sup> The court refused to grant the continuance and further denied a motion for a *nolle prosequi*.<sup>239</sup> The prosecution declined to present any evidence and the charge was dismissed.<sup>240</sup> The Commonwealth later directly indicted Neff in the circuit court for the D.U.I., second offense, and he was convicted in that court.<sup>241</sup> The Court of Appeals of Virginia rejected Neff’s arguments that either double jeopardy or res judicata barred the conviction in circuit court.<sup>242</sup> Jeopardy had not attached because no witnesses were sworn and no evidence was presented.<sup>243</sup> Res judicata did not apply since the dismissal in general district court was not based on the merits of the case; instead, “[i]t was the equivalent of a *nolle prosequi* [that did] not’

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231. *Id.*

232. *Id.* at 546, 570 S.E.2d at 807.

233. *Id.* at 548, 570 S.E.2d at 808.

234. *Id.* at 548, 570 S.E.2d at 809.

235. 39 Va. App. 13, 569 S.E.2d 72 (Ct. App. 2002).

236. *Id.* at 15, 569 S.E.2d at 73.

237. *Id.*

238. *See id.*

239. *Id.* at 15–16, 569 S.E.2d at 73–74.

240. *Id.* at 16, 569 S.E.2d at 74.

241. *Id.*

242. *Id.* at 17, 569 S.E.2d at 74.

243. *Id.*

actually or constructively establish the guilt or innocence of the accused.”<sup>244</sup>

In *Ragsdale v. Commonwealth*,<sup>245</sup> the Court of Appeals of Virginia considered whether carnal knowledge of a child was a lesser-included offense of rape.<sup>246</sup> The defendant had originally been charged with rape.<sup>247</sup> However, he was not brought to trial in a timely manner under the speedy trial statute and this charge was dismissed.<sup>248</sup> The Commonwealth proceeded to indict Ragsdale for carnal knowledge.<sup>249</sup> In response, Ragsdale claimed that this second prosecution was barred by the Double Jeopardy Clause.<sup>250</sup> The court analyzed the elements of the two offenses under the *Blockburger*<sup>251</sup> test to determine “whether each [statutory] provision requires proof of a fact which the other does not.”<sup>252</sup> The court of appeals concluded that rape requires proof of sexual intercourse and the use of force, which are not required in a prosecution for carnal knowledge.<sup>253</sup> A prosecution for carnal knowledge requires proof that the victim is between thirteen and fifteen years old, an element not found in a prosecution for rape.<sup>254</sup> Therefore, while the Commonwealth could not proceed with a prosecution for rape, the Double Jeopardy Clause did not preclude Ragsdale’s conviction for carnal knowledge of a minor.<sup>255</sup>

## 2. Statutory Double Jeopardy

With the ever-growing federalization of criminal law as a backdrop, the court of appeals in *Londono v. Commonwealth*<sup>256</sup> examined the scope of the statutory double jeopardy provision in Vir-

244. *Id.* at 20, 569 S.E.2d at 76 (quoting *Ward v. Reasor*, 98 Va. 399, 403, 36 S.E. 470, 471 (1900)).

245. 38 Va. App. 421, 565 S.E.2d 331 (Ct. App. 2002).

246. *Id.* at 424–25, 565 S.E.2d at 333. Compare VA. CODE ANN. § 18.2-63 (Repl. Vol. 1996), with VA. CODE ANN. § 18.2-61 (Cum. Supp. 2003).

247. *Ragsdale*, 38 Va. App. at 424, 565 S.E.2d at 333.

248. *Id.*

249. *Id.*

250. *Id.* at 425, 565 S.E.2d at 333.

251. *Blockburger v. United States*, 284 U.S. 299, 303 (1932).

252. *Ragsdale*, 38 Va. App. at 427, 565 S.E.2d at 334 (quoting *Dalo v. Commonwealth*, 37 Va. App. 156, 162, 554 S.E.2d 705, 708 (Ct. App. 2001) (citation omitted)).

253. *Id.* at 428, 565 S.E.2d at 335.

254. *Id.*

255. *Id.* at 428–29, 565 S.E.2d at 335.

256. 40 Va. App. 377, 579 S.E.2d 641 (Ct. App. 2003).

ginia Code section 19.2-294.<sup>257</sup> The defendant was originally charged in federal court with conspiracy to distribute heroin and possession with the intent to distribute.<sup>258</sup> However, the United States District Court granted a motion to suppress.<sup>259</sup> Londono was then charged and eventually convicted in state court for transporting heroin into the Commonwealth and for conspiracy.<sup>260</sup> The court, in affirming the convictions, first noted that Virginia Code section 19.2-294 bars prosecutions based on a prior prosecution for the "same act."<sup>261</sup> To determine whether the two prosecutions involved the same act, the Court must examine "whether the same evidence is required to sustain them."<sup>262</sup> The Court held that proof of the state charges required different evidence from that required to prove the federal charges.<sup>263</sup> Finally, the court rejected the application of collateral estoppel based on the suppression motion in federal court.<sup>264</sup> The court held that there was no evidence that the Commonwealth was a party to the federal proceeding or that it exercised any control over that prosecution.<sup>265</sup> Conversely, no evidence showed that the federal prosecutors induced or controlled the state prosecution.<sup>266</sup>

### 3. Right to Counsel

In *Commonwealth v. Redmond*,<sup>267</sup> the Commonwealth asked the Supreme Court of Virginia to find that the court of appeals had not sufficiently deferred to the trial court's factual findings concerning the defendant's invocation of his right to counsel dur-

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257. *Id.* at 392-93, 579 S.E.2d at 698. Virginia Code section 19.2-294, which was subsequently amended, provided that "if the same act be a violation of both a state and a federal statute a prosecution under the federal statute shall be a bar to a prosecution under the state statute." VA. CODE ANN. § 19.2-294 (Repl. Vol. 2000).

258. *Londono*, 40 Va. App. at 389, 579 S.E.2d at 647.

259. *Id.*

260. *Id.* at 391, 579 S.E.2d at 648.

261. *Id.* at 392-93, 579 S.E.2d at 648.

262. *Id.* at 393, 579 S.E.2d at 649 (quoting *Treu v. Commonwealth*, 12 Va. App. 996, 997, 406 S.E.2d 676, 677 (Ct. App. 1991)); *see also* *Estes v. Commonwealth*, 212 Va. 23, 24, 181 S.E.2d 622, 624 (1971); *Hundley v. Commonwealth*, 193 Va. 449, 451, 69 S.E.2d 336, 337 (1952).

263. *Londono*, 40 Va. App. at 395, 579 S.E.2d at 650.

264. *Id.* at 406, 579 S.E.2d at 655.

265. *Id.* at 405, 579 S.E.2d at 654.

266. *Id.*

267. 264 Va. 321, 568 S.E.2d 695 (2002).

ing a custodial interrogation.<sup>268</sup> The supreme court disagreed, holding that invocations of the right to counsel are legal issues, to be resolved *de novo* on appeal.<sup>269</sup> However, the appellate court will review a trial court's "findings of historical fact only for clear error, . . . giv[ing] due weight to inferences drawn from those factual findings."<sup>270</sup> The supreme court did not agree with the government's argument that the police interrogation must be viewed in its entirety, including statements made after a purported request for counsel, in determining whether the defendant made a clear assertion of his right to counsel.<sup>271</sup> The court said that statements made after the purported invocation of the right to counsel are not relevant.<sup>272</sup> The court ultimately concluded that the defendant did not make a clear and unambiguous assertion of his right to counsel when he stated "[c]an I speak to my lawyer? I can't even talk to [a] lawyer before I make any kinds of comments or anything?"<sup>273</sup>

The Supreme Court of Virginia reaffirmed the "offense specific" feature of the right to counsel in *Alston v. Commonwealth*.<sup>274</sup> Alston was arrested in connection with a burglary of the One Stop Pet Shop.<sup>275</sup> Counsel was appointed by the court and the defendant was remanded to the jail.<sup>276</sup> While Alston was incarcerated, a detective spoke with him concerning several burglaries, including one at the Tidewater Feed and Seed store.<sup>277</sup> At the time, Alston had not been charged with burglarizing that store.<sup>278</sup> During this interview, the defendant confessed to the burglary at the Feed and Seed store.<sup>279</sup> He sought to suppress this statement, arguing that the invocation of his right to counsel for one burglary applied to the other burglary which was "so closely related in place, time, and modus operandi as to make the interrogation in the Feed and Seed case 'a part and parcel of a single prosecu-

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268. *Id.* at 326, 568 S.E.2d at 697.

269. *Id.* at 326, 568 S.E.2d at 697-98.

270. *Id.* at 327, 568 S.E.2d at 698.

271. *Id.*

272. *Id.*

273. *Id.* at 330, 568 S.E.2d at 700 (second alteration in original).

274. 264 Va. 433, 437, 570 S.E.2d 801, 803 (2002).

275. *Id.* at 435, 570 S.E.2d at 804.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 435-36, 570 S.E.2d at 802.

tion.<sup>280</sup> The court held that the defendant suffered no violation of his Sixth Amendment right to counsel.<sup>281</sup> The court reasoned that the burglaries were separate offenses, committed at different times and against different victims, and the connection between the two was, in fact, minimal.<sup>282</sup> The court also noted that the statement was only used against him in the prosecution for burglarizing the Feed and Seed store.<sup>283</sup>

### III. SPECIFIC CRIMES

#### A. *Assault and Battery*

Over the years, the General Assembly has steadily increased the categories of persons protected by an enhanced penalty under the assault and battery statute, Virginia Code section 18.2-57(B).<sup>284</sup> Racially motivated attacks, for example, are now punished more harshly under other provisions of the Virginia Code.<sup>285</sup> In *Carfagno v. Commonwealth*,<sup>286</sup> the Court of Appeals of Virginia held that the trial court properly concluded that the use of racial slurs before and during a battery constituted sufficient circumstantial evidence that the attack was racially motivated.<sup>287</sup>

#### B. *Forging Public Documents*

The defendant in *Hines v. Commonwealth*<sup>288</sup> was convicted of five separate counts of forging a public document.<sup>289</sup> Hines had signed his brother's name and provided his brother's birth date and social security number for five summonses that were issued following one traffic stop.<sup>290</sup> He argued that the single larceny

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280. *Id.* at 437, 570 S.E.2d at 804.

281. *Id.* at 438, 570 S.E.2d at 804.

282. *Id.*

283. *Id.*

284. VA. CODE ANN. § 18.2-57(B) (Cum. Supp. 2003). This section of the Virginia Code raises the penalty from a Class 1 misdemeanor to a Class 6 felony for certain assaults or batteries. *Id.*

285. *See id.*

286. 39 Va. App. 718, 576 S.E.2d 765 (Ct. App. 2003).

287. *Id.* at 725, 576 S.E.2d at 768.

288. 39 Va. App. 752, 576 S.E.2d 781 (Ct. App. 2003).

289. *Id.* at 753, 576 S.E.2d at 782.

290. *Id.* at 754, 576 S.E.2d at 782.



doctrine, which permits only a single conviction for larceny where several items are taken at the same time,<sup>291</sup> should be expanded to cover the five forged summonses.<sup>292</sup> Hines noted that the forgeries stemmed from a single intent to avoid the outstanding warrants.<sup>293</sup> The court disagreed.<sup>294</sup> Relying on the plain language of the public documents forgery statute, the difference between larceny and forgery, and the narrow interpretation given to the single larceny doctrine, the court affirmed Hines's five separate convictions.<sup>295</sup>

### C. *Concealing Merchandise*

In *Hulcher v. Commonwealth*,<sup>296</sup> the defendant challenged his conviction for concealing or taking possession of merchandise.<sup>297</sup> He argued that the stolen items—display boxes that were not for sale—did not constitute “goods or merchandise” under Virginia Code section 18.2-103.<sup>298</sup> The court of appeals affirmed his conviction, holding that the statute does not require that the merchandise be for sale.<sup>299</sup>

### D. *Construction Fraud*

The Court of Appeals of Virginia, in *Holsapple v. Commonwealth*,<sup>300</sup> clarified a number of issues relating to prosecutions for fraudulently obtaining an advance of payment for construction work.<sup>301</sup> First, the court held that the Commonwealth must prove that the victim sent notice by certified mail and requested a return receipt.<sup>302</sup> However, the statute does not require the defendant to receive actual notice from the victim.<sup>303</sup> Second, the court

291. See *Richardson v. Commonwealth*, 25 Va. App. 491, 496, 489 S.E.2d 697, 700 (Ct. App. 1997).

292. *Hines*, 39 Va. App. at 755, 576 S.E.2d at 782.

293. *Id.*

294. *Id.* at 755–57, 576 S.E.2d at 783–84.

295. *Id.*

296. 39 Va. App. 601, 575 S.E.2d 579 (Ct. App. 2003).

297. *Id.* at 605, 575 S.E.2d at 581.

298. *Id.* at 605, 575 S.E.2d at 580–81 (emphasis removed).

299. *Id.* at 609–10, 575 S.E.2d at 583.

300. 39 Va. App. 522, 574 S.E.2d 756 (Ct. App. 2003).

301. See VA. CODE ANN. § 18.2-200.1 (Repl. Vol. 1996 & Cum. Supp. 2003).

302. *Holsapple*, 39 Va. App. at 534–35, 574 S.E.2d at 761–62.

303. *Id.*

concluded that work that is so poor as to render a dwelling unsafe or uninhabitable could constitute a failure to perform.<sup>304</sup> Finally, the court of appeals held that the trial court properly considered building code violations in determining that the workmanship was faulty.<sup>305</sup>

### E. *Driving Related Offenses*

In *Oliver v. Commonwealth*,<sup>306</sup> the Court of Appeals of Virginia held that the Commonwealth was not required to obtain a blood test from a defendant who had rendered himself unconscious by his consumption of alcohol.<sup>307</sup> The court noted that the defendant did not contest the finding that he was intoxicated when he was arrested and he demonstrated no prejudice from the failure to take the blood test.<sup>308</sup> In a noteworthy concurrence, Judge Humphreys wrote separately to stress his conclusion that the plain language of the implied consent statute “does not obligate an arresting officer to elect to conduct any chemical testing . . . [but] merely provides that a suspect is deemed to have consented to such tests and establishes certain guidelines for testing in the event the testing option is utilized.”<sup>309</sup>

In another D.U.I. case, *Williams v. Commonwealth*,<sup>310</sup> the defendant was arrested and charged with D.U.I., second offense.<sup>311</sup> Before his trial on that charge, he was again arrested and charged with a D.U.I., third offense.<sup>312</sup> He argued that he could not be punished with a D.U.I., third offense, because he had not yet been *convicted* of the second offense.<sup>313</sup> The Supreme Court of Virginia affirmed his conviction for the D.U.I., third offense, reasoning that the unambiguous statutory language of Virginia Code section 18.2-270 authorized such punishment.<sup>314</sup> In addition, the

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304. *Id.* at 537, 574 S.E.2d at 763. In *Holsapple*, the building inspector informed the victim that her house was uninhabitable due to faulty workmanship. *Id.* at 531, 574 S.E.2d at 760.

305. *Id.* at 537, 574 S.E.2d at 763.

306. 40 Va. App. 20, 577 S.E.2d 514 (Ct. App. 2003).

307. *Id.* at 24, 577 S.E.2d at 516.

308. *Id.*

309. *Id.* at 28, 577 S.E.2d at 518 (Humphreys, J., concurring).

310. 265 Va. 268, 576 S.E.2d 468 (2003).

311. *Id.* at 270, 576 S.E.2d at 469.

312. *Id.*

313. *Id.*

314. *Id.* at 271–72, 576 S.E.2d at 470.

court said that to hold otherwise would permit a defendant to violate the statute repeatedly without facing a felony conviction.<sup>315</sup> Such a conclusion would undermine the deterrence rationale of the statute.<sup>316</sup>

A case with implications for any convictions that require proof of a predicate offense is *Wilson v. Commonwealth*.<sup>317</sup> In *Wilson*, the defendant was charged with driving after having been declared a habitual offender, second or subsequent offense.<sup>318</sup> At trial, the Commonwealth introduced a certified copy of a warrant to prove a prior conviction.<sup>319</sup> On the warrant, the general district court made a notation that the defendant pled guilty to a charge of driving after having been found to be a habitual offender.<sup>320</sup> However, the warrant failed to memorialize a finding of guilt.<sup>321</sup> Wilson argued that the Commonwealth failed to establish a prior conviction.<sup>322</sup> The court held that the notation on the warrant that the defendant had pled guilty—"a self-supplied conviction"—combined with the sentence imposed, sufficed to prove the prior conviction.<sup>323</sup>

Many jurisdictions in Virginia contain federal facilities within their boundaries. In *Campbell v. Commonwealth*,<sup>324</sup> the defendant was convicted of driving as a habitual offender, second offense.<sup>325</sup> He claimed that the trial court lacked jurisdiction to hear his case, because the road on which he traveled was exclusively within the boundaries of a federal military base.<sup>326</sup> The Court of Appeals of Virginia held that Virginia retains concurrent jurisdiction to prosecute crimes on land ceded to the federal government.<sup>327</sup> In reaching this conclusion, the court drew from the cessation deed itself and from established sovereignty law.<sup>328</sup> Campbell also argued that his arrest occurred on a road that did

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315. *Id.*

316. *Id.*

317. 40 Va. App. 250, 578 S.E.2d 831 (Ct. App. 2003).

318. *Id.* at 252, 578 S.E.2d at 832.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 254, 578 S.E.2d at 833.

324. 39 Va. App. 180, 571 S.E.2d 906 (Ct. App. 2002).

325. *Id.* at 184, 571 S.E.2d at 908.

326. *Id.*

327. *Id.* at 191, 571 S.E.2d at 912.

328. *Id.* at 187-88, 571 S.E.2d at 909-11.

not constitute a “highway” because it contained gated checkpoints.<sup>329</sup> The court concluded that even if certain portions of the road were gated, the defendant was apprehended on the unrestricted, public portion of the road.<sup>330</sup> Therefore, he was traveling on a “highway” for purposes of Virginia law.<sup>331</sup>

In *Wright v. Commonwealth*,<sup>332</sup> the defendant was convicted of maiming as a result of driving while intoxicated under Virginia Code section 18.2-51.4.<sup>333</sup> Wright argued that the prosecution could not rely on proof of his intoxication “to establish that he drove in a manner so gross, wanton and culpable as to show a reckless disregard for human life.”<sup>334</sup> The Court of Appeals of Virginia relied on well-established definitions of criminal negligence to resolve the issue.<sup>335</sup> The court held that while intoxication does not establish reckless driving, it is a factor that might bear upon proof of dangerous or reckless driving.<sup>336</sup> Moreover, the intoxication is relevant in establishing the degree of the defendant’s negligence, which “increas[es] with the level of intoxication.”<sup>337</sup> Ultimately, the court held that the evidence of intoxication combined with the defendant’s admission that he was driving his car “too fast” were sufficient to show that his actions constituted gross, culpable, and wanton misconduct.<sup>338</sup>

#### F. *Obstruction of Justice / Witness Tampering*

In a case of first impression, *Law v. Commonwealth*,<sup>339</sup> the Court of Appeals of Virginia was called upon to interpret Virginia Code section 18.2-441.1, which prohibits offering money or something of value to prevent that person from testifying and also prohibits offering money or something of value to influence someone into testifying falsely.<sup>340</sup> In *Law*, the defendant’s friend had

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329. *Id.* at 186, 571 S.E.2d at 909.

330. *Id.* at 190–91, 571 S.E.2d at 911–12.

331. *Id.* at 190, 571 S.E.2d at 912.

332. 39 Va. App. 698, 576 S.E.2d 242 (Ct. App. 2003).

333. *Id.* at 700, 576 S.E.2d at 243.

334. *Id.* at 702, 576 S.E.2d at 244.

335. *Id.* at 702–03, 576 S.E.2d at 244.

336. *Id.* at 704, 576 S.E.2d at 244.

337. *Id.*

338. *Id.* at 704–05, 576 S.E.2d at 245.

339. 39 Va. App. 154, 571 S.E.2d 893 (Ct. App. 2002).

340. *Id.* at 158, 571 S.E.2d at 895.

been charged with sexual assault.<sup>341</sup> Prior to the preliminary hearing, Law approached the mother of the complaining witness and offered her “\$500 to squash [the case], to keep the white man out of it.”<sup>342</sup> The court first concluded that the targeted person under the statute need not be a witness.<sup>343</sup> However, the court held that the defendant’s statement to the complaining witness’s mother did not demonstrate an intent to induce her not to testify or to testify falsely.<sup>344</sup> The court said that even if the statement constituted a request to dismiss the charge, such behavior would not qualify under twin prohibitions of Virginia Code section 18.2-441.1.<sup>345</sup>

### G. *Threatening Letters*

In *Keyes v. Commonwealth*,<sup>346</sup> the Court of Appeals of Virginia addressed several issues relating to the prohibition against threatening letters.<sup>347</sup> First, the court noted that an inmate who used the institutional mail had, in fact, “sent the letter or procured its sending.”<sup>348</sup> The intended recipient of the letter, identified in the letter as a “Target,” was a woman whom Keyes had attempted to rape.<sup>349</sup> Keyes made crass statements in the letter that implied that the target would be raped in the future, and he signed the letter “The Nightmare Child.”<sup>350</sup> The court held that this evidence sufficed to demonstrate that the letter was threatening.<sup>351</sup>

### H. *Trespass*

In *Virginia v. Hicks*,<sup>352</sup> the Supreme Court of the United States reversed and remanded the Supreme Court of Virginia’s decision

341. *Id.* at 156, 571 S.E.2d at 894.

342. *Id.* (alteration in original).

343. *Id.* at 159, 571 S.E.2d at 895.

344. *Id.* at 159–60, 571 S.E.2d at 895–96.

345. *Id.* at 160, 571 S.E.2d at 896.

346. 39 Va. App. 294, 572 S.E.2d 512 (Ct. App. 2002).

347. VA. CODE ANN. § 18.2-60 (Cum. Supp. 2003).

348. *Keyes*, 39 Va. App. at 301, 572 S.E.2d at 516.

349. *Id.* at 301–02, 572 S.E.2d at 516.

350. *Id.* at 302, 572 S.E.2d at 516.

351. *Id.*

352. 123 S. Ct. 2191 (2003).

in *Commonwealth v. Hicks*.<sup>353</sup> The Supreme Court of Virginia had concluded that a barment policy developed by a public housing development was overbroad and violated the defendant's First Amendment rights.<sup>354</sup> The Supreme Court of the United States held that the defendant had failed to show that the barment policy was "substantially overbroad judged in relation to its plainly legitimate sweep."<sup>355</sup> *Hicks*, the Court observed, was not punished for any expressive conduct, such as leafleting or demonstrating.<sup>356</sup> The Court also found that the housing authority had applied the rules to all those who sought entry on the property, "not just to those who seek to engage in expression."<sup>357</sup> The Court left open any challenges to the conviction "on other grounds."<sup>358</sup>

#### IV. EVIDENCE

There have been a number of published and unpublished decisions relating to evidence in some fashion. A few cases are particularly noteworthy and will be briefly discussed here.

##### A. *Admissibility of a Child's Testimony by Television*

In *Parrish v. Commonwealth*,<sup>359</sup> the Court of Appeals of Virginia considered a challenge to the application of Virginia Code section 18.2-67.9 (permitting a court to order that testimony of a child be taken by closed-circuit television under certain conditions).<sup>360</sup> The court, applying the standard set forth in *Maryland v. Craig*,<sup>361</sup> in which a similar Maryland statute was upheld,<sup>362</sup> found that the Commonwealth met its burden under the statute and made an adequate showing of necessity for the procedure.<sup>363</sup> The court of appeals noted that, based on the record, it could not

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353. 264 Va. 48, 563 S.E.2d 674 (2002).

354. *Id.* at 60, 563 S.E.2d at 681.

355. *Hicks*, 123 S. Ct. at 2198.

356. *Id.* at 2199.

357. *Id.*

358. *Id.*

359. 38 Va. App. 607, 567 S.E.2d 576 (Ct. App. 2002).

360. *Id.* at 609, 567 S.E.2d at 577.

361. 497 U.S. 836 (1990).

362. *Id.* at 860.

363. *Parrish*, 38 Va. App. at 613, 567 S.E.2d at 579.

find that the trial court erred.<sup>364</sup> The trial court determined that the evidence showed that there was a “substantial likelihood” that the child victim “would suffer severe emotional trauma” if forced to testify in the presence of the defendant.<sup>365</sup>

### B. *Public’s Right to Access and Re-test DNA*

In *Globe Newspaper Company v. Commonwealth*,<sup>366</sup> the Supreme Court of Virginia rejected the newspapers’ claims that they had a right to have access to biological samples from a concluded criminal case.<sup>367</sup> The newspapers alleged, among other things, that under the First Amendment to the Constitution of the United States and under Article I, Section 12 of the Constitution of Virginia, the public had a right to access and re-test DNA evidence from a completed capital murder case where the defendant had already been executed.<sup>368</sup> The court found that the newspapers sought the biological material in order to have it re-tested and generate a new report so as to create new evidence.<sup>369</sup> Thus, the court reasoned that the “access” sought was access to evidence that did not exist.<sup>370</sup> The Supreme Court of Virginia concluded that there was no constitutional error and that the trial court properly denied access to the biological material.<sup>371</sup>

### C. *Admissibility of Expert’s “Blood Spatter Analysis”*

In *Smith v. Commonwealth*,<sup>372</sup> the Supreme Court of Virginia ruled that an expert witness’s rebuttal testimony about “blood spatter analysis” was properly admitted in the defendant’s first-degree murder trial.<sup>373</sup> The court found that such testimony was “a well-recognized discipline, based upon the laws of physics.”<sup>374</sup>

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364. *Id.* at 614–15, 567 S.E.2d at 579.

365. *Id.* at 614, 567 S.E.2d at 579.

366. 264 Va. 622, 570 S.E.2d 809 (2002).

367. *Id.* at 631, 570 S.E.2d at 813.

368. *Id.* at 628, 570 S.E.2d at 811.

369. *Id.* at 628–29, 570 S.E.2d at 812.

370. *Id.*

371. *Id.* at 630, 570 S.E.2d at 813.

372. 265 Va. 250, 576 S.E.2d 465 (2003).

373. *Id.* at 255, 576 S.E.2d at 468.

374. *Id.* at 252–53, 576 S.E.2d at 467 (quoting *State v. Rodgers*, 812 P.2d 1208, 1212 (Idaho 1991)).

#### D. *Admissibility of Sexual-Assault Victim's Diary*

In *Cairns v. Commonwealth*,<sup>375</sup> the defendant attempted to introduce one of the victim's journals to attack her credibility during his trial for three counts of forcible sodomy, rape, and producing sexually explicit material.<sup>376</sup> The Court of Appeals of Virginia, reviewing the trial court's decision to exclude the journals, found that the documents should have been admitted to impeach the victim.<sup>377</sup> The diaries discussed sexual encounters, but made no mention of sexual acts perpetrated by the defendant.<sup>378</sup> Nevertheless, the court held that any error in failing to admit the diaries was harmless.<sup>379</sup>

#### E. *Standard of Review in Appeal of Conviction*

In *Commonwealth v. Hudson*,<sup>380</sup> the Supreme Court of Virginia reversed a court of appeals' decision and found that the evidence was sufficient to convict the defendant of second-degree murder of his wife and a related firearms offense.<sup>381</sup> The supreme court discussed, at length, the burden of proof at trial in a criminal case and the appellate standard of review once a defendant is convicted.<sup>382</sup> The supreme court noted that the court of appeals erroneously viewed the evidence in the "light most favorable" to the defendant rather than to the Commonwealth, which is the required standard on appeal.<sup>383</sup> Finally, the Supreme Court of Virginia examined the Commonwealth's burden relating to "exclusion of reasonable theories of innocence," noting that it only needs to exclude those "advanced by the accused at trial."<sup>384</sup>

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375. 40 Va. App. 271, 579 S.E.2d 340 (Ct. App. 2003).

376. *Id.* at 286, 579 S.E.2d at 347.

377. *Id.*

378. *Id.*

379. *Id.*

380. 265 Va. 505, 578 S.E.2d 781 (2003).

381. *Id.* at 517, 578 S.E.2d at 787-88.

382. *Id.* at 512-16, 578 S.E.2d at 785-87.

383. *Id.* at 514, 578 S.E.2d at 786.

384. *Id.*



## V. OTHER INCIDENTS OF TRIAL

A. *Prosecutorial Conduct*

Appellate courts addressed prosecutorial conduct in a number of cases. In *Morrisette v. Commonwealth*,<sup>385</sup> the defendant faced trial following a DNA “cold hit” nineteen years after the alleged rape and murder occurred.<sup>386</sup> He argued that this delay precluded him from obtaining corroborating witnesses in support of his alibi.<sup>387</sup> The Supreme Court of Virginia explained that the Sixth Amendment speedy trial clause was not at issue because the delay occurred pre-indictment.<sup>388</sup> Instead, the defendant could gain relief under the Due Process Clause if he could show: (1) that the prosecution intentionally delayed charging him to gain a tactical advantage; and (2) actual prejudice.<sup>389</sup> The court affirmed the convictions, holding that the defendant could not establish the first part of this test.<sup>390</sup>

In *Leonard v. Commonwealth*,<sup>391</sup> the Court of Appeals of Virginia addressed the issue of prosecutorial vindictiveness.<sup>392</sup> The defendant was originally charged with rape and abduction with intent to defile.<sup>393</sup> The prosecution threatened to bring an additional attempted murder charge if Leonard did not plead guilty.<sup>394</sup> The court, in accord with Supreme Court of the United States precedent, held that a prosecutor may generally threaten to file more severe charges to induce a guilty plea.<sup>395</sup> Such threats do not amount to vindictiveness if the prosecution treats the defendant no “worse than he would have been if no plea bargain had been offered.”<sup>396</sup> The court concluded that the defendant failed to show actual vindictiveness.<sup>397</sup> The court noted that the fact that an ad-

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385. 264 Va. 386, 569 S.E.2d 47 (2002).

386. *Id.* at 391, 569 S.E.2d at 51.

387. *Id.* at 392, 569 S.E.2d at 51–52.

388. *Id.* at 393, 569 S.E.2d at 52.

389. *Id.*

390. *Id.*

391. 39 Va. App. 134, 571 S.E.2d 306 (Ct. App. 2002).

392. *Id.* at 138, 571 S.E.2d at 308.

393. *Id.*

394. *Id.* at 139, 571 S.E.2d at 309.

395. *Id.* at 142–43, 571 S.E.2d at 310–11.

396. *Id.* at 145, 571 S.E.2d at 312 (quoting *United States v. Williams*, 47 F.3d 658, 662 (4th Cir. 1995)).

397. *Id.*

ditional attempted murder indictment was brought only a week before the previously scheduled trial reflected the schedule of the grand jury and the timing of the plea negotiations rather than any vindictiveness.<sup>398</sup>

## B. *Judicial Recusal*

In *Jackson v. Commonwealth*,<sup>399</sup> the defendant asked a judge to recuse himself.<sup>400</sup> The judge had been the Commonwealth's Attorney when the defendant was previously prosecuted in that jurisdiction.<sup>401</sup> The judge declined to recuse himself.<sup>402</sup> The court of appeals, sitting en banc, reversed.<sup>403</sup> The court held that while it was possible that the judge had no knowledge of the case and played no part in filing charges or framing trial strategy as the Commonwealth's Attorney, the case must be reversed because the record did not establish these facts.<sup>404</sup> Echoing a consistent theme of recent appellate jurisprudence, the court avoided the adverse public perception that would be created by the possibility of judicial impropriety.<sup>405</sup> The Supreme Court of Virginia recently granted the Commonwealth's appeal of this decision.<sup>406</sup>

## C. *Jury Issues*

### 1. *Jury List*

In *Butler v. Commonwealth*,<sup>407</sup> one of the jurors fell ill after opening statements.<sup>408</sup> However, a trial in an adjacent courtroom was canceled and the Commonwealth proposed using that jury panel for the defendant's trial.<sup>409</sup> Butler claimed, among other

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398. *Id.* at 145–46, 571 S.E.2d at 312.

399. 40 Va. App. 343, 579 S.E.2d 375 (Ct. App. 2003).

400. *Id.* at 345, 579 S.E.2d at 376.

401. *Id.*

402. *Id.*

403. *Id.* at 349, 579 S.E.2d at 377.

404. *Id.* at 348, 579 S.E.2d at 377.

405. *Id.*

406. *Jackson v. Commonwealth*, 40 Va. App. 343, 579 S.E.2d 375, *appeal docketed*, No. 030749 (Va. Sept. 8, 2003).

407. 264 Va. 614, 570 S.E.2d 813 (2002).

408. *Id.* at 616, 570 S.E.2d at 814.

409. *Id.*

things, that he was entitled to a continuance because he had not received a copy of the jury panel list forty-eight hours before trial.<sup>410</sup> The trial court refused to grant the continuance and the court of appeals affirmed.<sup>411</sup> The court of appeals acknowledged that Virginia Code section 8.01-353 provides that counsel "shall" be provided with a copy of the jury panel forty-eight hours before trial.<sup>412</sup> However, the court found that this language is directory rather than mandatory.<sup>413</sup> In addition, the defendant could show no prejudice.<sup>414</sup>

## 2. Juror Inattention to a Voir Dire Question

Jurors occasionally fail to answer a question posed during voir dire. In *Blevins v. Commonwealth*,<sup>415</sup> the defendant discovered after he was convicted of malicious wounding, abduction, and object sexual penetration<sup>416</sup> that one of the jurors failed to disclose that she had been the victim of a robbery approximately fifteen years earlier.<sup>417</sup> The court conducted a hearing and examined the juror.<sup>418</sup> The juror explained that her failure to answer the question was inadvertent.<sup>419</sup> She also said that this prior experience did not affect her impartiality.<sup>420</sup> The trial court credited her testimony and denied a motion for a mistrial.<sup>421</sup> The court of appeals gave deference to this finding and concluded that such honest mistakes will not provide grounds for a mistrial if the juror's impartiality was not implicated.<sup>422</sup>

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410. *Id.* at 617, 570 S.E.2d at 814.

411. *Id.* at 616, 570 S.E.2d at 814.

412. *Id.* at 619, 570 S.E.2d at 816.

413. *Id.* at 619-20, 570 S.E.2d at 816.

414. *Id.* at 620, 570 S.E.2d at 817.

415. 40 Va. App. 412, 579 S.E.2d 658 (Ct. App. 2003).

416. *Id.* at 418, 579 S.E.2d at 661.

417. *Id.* at 419-20, 579 S.E.2d at 662.

418. *Id.* at 420, 579 S.E.2d at 662.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 429-30, 579 S.E.2d at 666-67.

### 3. Juror Misconduct

In *Evans v. Commonwealth*,<sup>423</sup> the trial judge questioned a juror after trial concerning a conversation the juror had with one of the defendant's relatives.<sup>424</sup> The juror denied that such a conversation had occurred.<sup>425</sup> Evans later filed a motion for a new trial on the basis of juror misconduct.<sup>426</sup> In support of the motion, he attached an affidavit from the same juror that related a conversation between the juror and the defendant's uncle.<sup>427</sup> The juror stated that he had learned damaging information about the defendant, such as the fact that the defendant was "always in trouble," was "slick" and that the defendant's uncle hoped the defendant would receive a "forty year[]" sentence.<sup>428</sup> The Commonwealth filed a conflicting affidavit from—yet again—the same juror in which the juror denied hearing any damaging details.<sup>429</sup> The trial court heard arguments on the defendant's motion for a mistrial, but denied the motion without an evidentiary hearing.<sup>430</sup> The court of appeals held that the allegations in the defense affidavit, if true, would constitute grounds for a mistrial.<sup>431</sup> The court explained that a mistrial would have been appropriate because the defendant might have been prejudiced.<sup>432</sup> The court noted "that only slight evidence of influence or prejudice as a result of such misconduct of a juror should be required to warrant the granting of a new trial."<sup>433</sup> Second, the court held that under such circumstances, a trial court must investigate further and conduct an evidentiary hearing to determine whether any misconduct occurred.<sup>434</sup> The failure to do so constituted reversible error.<sup>435</sup>

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423. 39 Va. App. 229, 572 S.E.2d 481 (Ct. App. 2002).

424. *Id.* at 233, 572 S.E.2d at 483.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* (quoting *Evans Aff.* ¶ 2).

429. *Id.* at 234, 572 S.E.2d at 483.

430. *Id.* at 235, 572 S.E.2d at 483–84.

431. *Id.* at 239, 572 S.E.2d at 485.

432. *Id.* at 239, 572 S.E.2d at 486.

433. *Id.* at 238, 572 S.E.2d at 485 (quoting *Hickerson v. Burner*, 186 Va. 66, 72, 41 S.E.2d 451, 454 (1947)).

434. *Id.* at 239–40, 572 S.E.2d at 486.

435. *Id.* at 240, 572 S.E.2d at 486.

#### 4. Public Perception

A number of appellate decisions addressed the requirement that jury selection must ensure public confidence in the integrity of the judicial process. In *Patterson v. Commonwealth*,<sup>436</sup> the court of appeals held that a defendant can raise, for the first time on appeal, the adverse public perception effect of permitting a particular person to sit on a jury.<sup>437</sup> The court further concluded that a juror who had been a police officer for forty-three years,<sup>438</sup> who had conversed with members of the sheriff's department concerning the specific case upon which he sat as a juror, and who initially expressed concern about his impartiality, should have been removed for cause.<sup>439</sup> This is so despite the trial court's finding that the juror would be impartial.<sup>440</sup> The court relied on the rationale that permitting a juror to hear the case given the circumstances would undermine the public confidence in the judicial process.<sup>441</sup>

In contrast, *Perez v. Commonwealth*<sup>442</sup> was a rape case in which a juror acknowledged that his daughter had been sexually assaulted four years before the instant case.<sup>443</sup> However, he did not initially realize that the detective who participated in the investigation of this case had also investigated his daughter's case.<sup>444</sup> When the trial court learned of that fact, it questioned the juror about his interaction with the detective and made the factual finding that this juror could be objective.<sup>445</sup> The defendant moved for a mistrial, but the trial court declined to grant the motion.<sup>446</sup> The court of appeals sustained this ruling.<sup>447</sup> The court credited the trial court's finding of objectivity and held there was no basis for a per se exclusion; therefore, the public perception did not compel the exclusion of this juror.<sup>448</sup> The court distinguished prior

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436. 39 Va. App. 658, 576 S.E.2d 222 (Ct. App. 2003).

437. *Id.* at 669, 576 S.E.2d at 228.

438. *Id.* at 660, 576 S.E.2d at 223.

439. *Id.* at 669, 576 S.E.2d at 228.

440. *Id.*

441. *Id.*

442. 40 Va. App. 648, 580 S.E.2d 507 (Ct. App. 2003).

443. *Id.* at 651, 580 S.E.2d at 509.

444. *Id.*

445. *Id.* at 651-54, 580 S.E.2d at 509-10.

446. *Id.* at 653-54, 580 S.E.2d at 510.

447. *Id.* at 659, 580 S.E.2d at 512.

448. *Id.* at 656-59, 580 S.E.2d at 510-12.

cases, noting that the jurors in those cases had a contemporaneous or continuing relationship with legal counsel or a witness, a factor not present in this case.<sup>449</sup>

## 5. Right to a Jury of Twelve

In *King v. Commonwealth*,<sup>450</sup> the court of appeals held that the Constitution of Virginia affords the Commonwealth, like the defendant, a right to have twelve jurors hear the case.<sup>451</sup> In *King*, a juror became ill during the trial.<sup>452</sup> The defendant proposed to go forward with eleven jurors, but the Commonwealth refused.<sup>453</sup> The trial court found that manifest necessity dictated a mistrial.<sup>454</sup> King argued that there was no manifest necessity for a mistrial and, therefore, any subsequent prosecution would be barred by double jeopardy principles.<sup>455</sup> The trial court's decision was affirmed on appeal.<sup>456</sup> The court concluded that, in the absence of the Commonwealth's consent to proceed with fewer than twelve jurors present, the absence of twelve jurors created a manifest necessity.<sup>457</sup> Given this manifest necessity, the Double Jeopardy Clause did not bar subsequent prosecution.<sup>458</sup>

## 6. Voir Dire

The Supreme Court of Virginia concluded in *Commonwealth v. Hill*<sup>459</sup> that, in a non-capital case, neither the defendant nor the Commonwealth has the right to question the venire concerning the range of punishments a defendant faces.<sup>460</sup> The court noted that such questions would only cause the jury to speculate in a factual vacuum.<sup>461</sup> Furthermore, such questions are not relevant

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449. *Id.* at 658–59, 580 S.E.2d at 512.

450. 40 Va. App. 364, 579 S.E.2d 634 (Ct. App. 2003).

451. *Id.* at 375, 579 S.E.2d at 640.

452. *Id.* at 368, 579 S.E.2d at 636.

453. *Id.*

454. *Id.* at 369–70, 579 S.E.2d at 637.

455. *Id.* at 370, 579 S.E.2d at 637.

456. *Id.* at 377, 579 S.E.2d at 641.

457. *Id.* at 375–76, 579 S.E.2d at 640.

458. *Id.* at 376, 579 S.E.2d at 640.

459. 264 Va. 315, 568 S.E.2d 673 (2002).

460. *Id.* at 319, 568 S.E.2d at 676.

461. *Id.*

to the voir dire factors outlined in Virginia Code section 8.01-358, which address opinions about the cause, or bias, or prejudice.<sup>462</sup>

#### D. Juvenile Issues

In *Rodriguez v. Commonwealth*,<sup>463</sup> a juvenile defendant was charged with second-degree murder.<sup>464</sup> In accord with Virginia Code section 16.1-269.1, the juvenile and domestic relations court, after making a determination of probable cause, certified the case to the circuit court without a transfer hearing.<sup>465</sup> Rodriguez objected, arguing that he was entitled as a matter of constitutional law to a transfer hearing to determine whether he should be treated as an adult.<sup>466</sup> The court of appeals rejected the defendant's argument that he had a constitutional right to such a transfer hearing.<sup>467</sup> The court relied on prior Supreme Court of Virginia holdings, stating that a juvenile is not entitled to a transfer hearing.<sup>468</sup> The court of appeals found no cases holding that such a proceeding is constitutionally mandated.<sup>469</sup>

The defendant in *Hughes v. Commonwealth*<sup>470</sup> was charged with malicious wounding and the case was certified to the circuit court pursuant to Virginia Code section 16.1-269.1(C).<sup>471</sup> That section lists certain violent offenses that, once certified to the circuit court, divest the juvenile court of jurisdiction.<sup>472</sup> Hughes was ultimately convicted of unlawful wounding, which is not one of the violent felonies enumerated in Virginia Code section 16.1-269.1(C).<sup>473</sup> Hughes argued that "when a juvenile is transferred pursuant to Code § 16.1-269.1(C) . . . the jurisdiction of the juvenile court is not divested if the violent juvenile felony is later dismissed or reduced to a lesser-included offense which is not one

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462. *Id.*

463. 40 Va. App. 144, 578 S.E.2d 78 (Ct. App. 2003).

464. *Id.* at 148, 578 S.E.2d at 79.

465. *Id.* at 149, 578 S.E.2d at 80.

466. *Id.* at 150, 578 S.E.2d at 80.

467. *Id.* at 149, 578 S.E.2d at 80.

468. *Id.*

469. *Id.* at 153-54, 578 S.E.2d at 82. For additional discussion of certification and other juvenile issues in Virginia, see Robert E. Shepherd, Jr., *Annual Survey of Virginia Law: Legal Issues Involving Children*, 38 U. RICH. L. REV. 161, 169-82 (2003).

470. 39 Va. App. 448, 573 S.E.2d 324 (Ct. App. 2002).

471. *Id.* at 452, 573 S.E.2d at 325.

472. VA. CODE ANN. § 16.1-269.1(C) (Repl. Vol. 2003).

473. *Hughes*, 39 Va. App. at 452, 573 S.E.2d at 325.

of the enumerated violent juvenile felonies.”<sup>474</sup> The court of appeals disagreed, holding that, under the plain language of the statute, once the juvenile court has certified the charge it is divested of jurisdiction.<sup>475</sup> The statute “makes no provision for any [remaining] dormant jurisdiction” that can be revived later.<sup>476</sup>

Finally, in *B.P. v. Commonwealth*,<sup>477</sup> the court of appeals affirmed the broad authority of a juvenile court to ensure crime prevention and juvenile rehabilitation.<sup>478</sup> The juvenile court found that the child was in need of supervision because she was habitually absent from school.<sup>479</sup> The court directed the preparation of a report on the child’s needs and also ordered the child to attend school.<sup>480</sup> When she did not, the court found her in contempt and sentenced her to ten days in the juvenile detention center.<sup>481</sup> The juvenile appealed, arguing that the court lacked the authority to order her to attend school.<sup>482</sup> She relied upon Virginia Code section 16.1-278.5 for her argument that the court lacked the authority to issue the order.<sup>483</sup> She asserted that the court could issue such an order only after filing an agency report assessing her needs.<sup>484</sup> The court of appeals did not agree with this argument.<sup>485</sup> The court held that the Virginia Code grants juvenile courts broad authority in such matters and nothing in the present situation divested the court of the authority to issue such an interlocutory order.<sup>486</sup> The court also reasoned that it would be “absurd” to permit a juvenile, already found to be habitually absent from school, to continue to avoid compulsory school attendance.<sup>487</sup>

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474. *Id.* at 454–55, 573 S.E.2d at 327.

475. *Id.* at 458, 573 S.E.2d at 328.

476. *Id.* at 459, 573 S.E.2d at 329.

477. 38 Va. App. 735, 568 S.E.2d 412 (Ct. App. 2002).

478. *See id.* at 737, 568 S.E.2d at 412.

479. *Id.* For additional discussion of juveniles and school authority, see Shepherd, *supra* note 469, at 177.

480. *B.P.*, 38 Va. App. at 737, 568 S.E.2d at 412–13.

481. *Id.* at 737, 568 S.E.2d at 413.

482. *Id.*

483. *Id.* at 738, 568 S.E.2d at 413.

484. *Id.*

485. *Id.*

486. *Id.* at 738–39, 568 S.E.2d at 413–14.

487. *Id.* at 739, 568 S.E.2d at 414.



### E. *Severing Charges*

The court of appeals previously held that, in a jury trial, a charge of felon in possession of a firearm must be severed and tried separately from other charges to avoid any unfair prejudice to the defendant.<sup>488</sup> In *Vanhook v. Commonwealth*,<sup>489</sup> the court of appeals held that when this scenario occurs in a bench trial, the felon in possession of a firearm charges need not be severed.<sup>490</sup> A judge, unlike a jury, has the training and experience to avoid the prejudice that might affect a jury's perception stemming from the knowledge that the defendant had been previously convicted of a felony.<sup>491</sup>

## VI. SENTENCING

Most cases in the area of sentencing and punishment are very fact-driven and specific. Often they are not particularly useful in the context of application to other cases. However, there are a few recently decided cases in this area that will be noted.

In *McCullough v. Commonwealth*,<sup>492</sup> the Court of Appeals of Virginia found that the trial court did not err when it ordered restitution in an amount greater than the amount proved in the guilt phase of trial.<sup>493</sup> This was a question of first impression in Virginia and the Supreme Court of Virginia awarded an appeal from the decision of the court of appeals.<sup>494</sup>

In *Cuffee-Smith v. Commonwealth*,<sup>495</sup> the Court of Appeals of Virginia found that where a defendant is required to serve a mandatory minimum sentence—in this case, the second or subsequent offense of driving after having been declared an habitual offender<sup>496</sup>—that defendant is ineligible for electronic home monitoring, as permitted under Virginia Code section 53.1-131.2, for

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488. See, e.g., *Johnson v. Commonwealth*, 20 Va. App. 49, 56, 455 S.E.2d 261, 265 (Ct. App. 1995).

489. 40 Va. App. 130, 578 S.E.2d 71 (Ct. App. 2003).

490. *Id.* at 136, 578 S.E.2d at 73–74.

491. *Id.* at 134–35, 578 S.E.2d at 73.

492. 38 Va. App. 811, 568 S.E.2d 449 (Ct. App. 2002).

493. *Id.* at 814, 568 S.E.2d at 450.

494. *McCullough v. Commonwealth*, 38 Va. App. 811, 568 S.E.2d 449, *appeal docketed*, No. 022250 (Va. Jan. 8, 2003).

495. 39 Va. App. 476, 574 S.E.2d 294 (Ct. App. 2002).

496. VA. CODE ANN. § 46.2-357 (Repl. Vol. 2002 & Cum. Supp. 2003).

the duration of the mandatory minimum sentence.<sup>497</sup> The court relied on the plain language of the statute in reaching this conclusion.<sup>498</sup>

## VII. POST TRIAL/REVOICATIONS

Virginia Code section 19.2-295.2 generally authorizes a trial court, subject to certain limitations, to impose a term of post release supervision in addition to any incarceration.<sup>499</sup> In *Lamb v. Commonwealth*,<sup>500</sup> the trial court sought to impose such a term of post-release supervision following a revocation proceeding, rather than after a criminal trial.<sup>501</sup> The court of appeals concluded that Virginia Code section 19.2-295.2 can only be employed following the original judgment of conviction.<sup>502</sup> The imposition of an additional term of post-release supervision following a revocation constituted error.<sup>503</sup>

In *Leitao v. Commonwealth*,<sup>504</sup> the Court of Appeals of Virginia reviewed the actions of a trial court that had repeatedly revoked portions of a suspended sentence.<sup>505</sup> During one of the revocations, the trial court did not explicitly re-suspend the balance of the original sentence.<sup>506</sup> This order reimposed only a portion of the original sentence and returned the defendant to probation following his release from prison.<sup>507</sup> The court concluded that this failure to explicitly re-suspend the balance of the original sentence did not eliminate this balance.<sup>508</sup> The court deferred to the trial court's interpretation of its own order and concluded that the trial court committed no error in later reimposing the remaining

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497. *Cuffee-Smith*, 39 Va. App. at 483, 574 S.E.2d at 297.

498. *Id.* at 482-83, 574 S.E.2d at 297.

499. VA. CODE ANN. § 19.2-295.2 (Repl. Vol. 2000 & Cum. Supp. 2003).

500. 40 Va. App. 52, 577 S.E.2d 530 (Ct. App. 2003).

501. *Id.* at 55, 577 S.E.2d at 531.

502. *Id.* at 57, 577 S.E.2d at 532.

503. *Id.* at 58, 577 S.E.2d at 533.

504. 39 Va. App. 435, 573 S.E.2d 317 (Ct. App. 2002).

505. *Id.* at 436-37, 573 S.E.2d at 318.

506. *Id.* at 437, 573 S.E.2d at 318.

507. *Id.*

508. *Id.* at 438, 573 S.E.2d at 319.

balance of the sentence.<sup>509</sup> This remaining balance, the court of appeals concluded, was implicitly suspended by the prior order.<sup>510</sup>

The court of appeals addressed a related issue in *McFarland v. Commonwealth*.<sup>511</sup> In that 1995 case, the trial court sentenced the defendant to a term of ten years, all suspended, for possessing a sawed-off shotgun and pointing a gun at two deputies.<sup>512</sup> The trial court also ordered supervised probation.<sup>513</sup> McFarland was “[o]rdered to keep the peace [and] be of good behavior.”<sup>514</sup> McFarland complied with the terms of his supervised probation, which the court terminated in 1996, again on the condition that he be of good behavior.<sup>515</sup> In 2001, McFarland desired to enlist in the armed services and sought to modify the 1995 order to eliminate the requirement that he be of good behavior.<sup>516</sup> The trial court concluded that it lacked jurisdiction to grant the defendant’s request.<sup>517</sup> The court of appeals agreed.<sup>518</sup> The court held that Virginia Code section 19.2-304 authorizes a court to alter the conditions of *probation*.<sup>519</sup> However, the statute does not confer this authority with respect to the conditions of a suspended sentence.<sup>520</sup> Therefore, the passage of more than twenty-one days after the entry of the final order deprived the trial court of jurisdiction to alter the “good behavior” condition of the suspended sentence.<sup>521</sup>

In *Miles v. Sheriff of the Virginia Beach City Jail*,<sup>522</sup> a habeas corpus case with sweeping implications for the volume of criminal appeals, the Supreme Court of Virginia concluded that even though a defendant pled guilty, if he timely and clearly instructed his attorney to appeal, the attorney must appeal.<sup>523</sup> A failure to appeal under those circumstances amounts to ineffective assis-

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509. *Id.* at 439, 573 S.E.2d at 319.

510. *Id.* at 438, 573 S.E.2d at 319.

511. 39 Va. App. 511, 574 S.E.2d 311 (Ct. App. 2002).

512. *Id.* at 513, 574 S.E.2d at 312.

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.* at 513–14, 574 S.E.2d at 312.

517. *Id.* at 513, 574 S.E.2d at 312.

518. *Id.*

519. *Id.* at 515, 574 S.E.2d at 313.

520. *Id.*

521. *Id.* at 517, 574 S.E.2d at 314.

522. 266 Va. 110, 581 S.E.2d 191 (2003).

523. *Id.* at 112, 581 S.E.2d at 192.

tance of counsel.<sup>524</sup> The court rejected the respondent's argument that the narrow range of issues that can be appealed following a guilty plea required a habeas petitioner to identify a viable appellate issue.<sup>525</sup> Of course, if there are only frivolous issues to appeal, counsel should file an *Anders* brief.<sup>526</sup>

## VIII. LEGISLATION

### A. *Capital Litigation*

Following the decision in *Atkins v. Virginia*,<sup>527</sup> prohibiting the execution of the mentally retarded,<sup>528</sup> the General Assembly enacted legislation that defines mental retardation, establishes procedures for determining whether a defendant meets the definition, and establishes procedures for the appointment of experts to conduct the evaluation.<sup>529</sup> The finding of mental retardation is a factual determination to be made by the jury, or the judge in a bench trial.<sup>530</sup> The defendant bears the burden of establishing retardation by a preponderance of the evidence.<sup>531</sup> Virginia Code section 8.01-654.2 also creates a procedure to raise such claims for persons sentenced to death prior to the *Atkins* decision.<sup>532</sup> Finally, during the course of the sentencing proceeding, the Commonwealth cannot use any statements that the defendant makes while being evaluated.<sup>533</sup>

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524. *Id.* at 115–16, 581 S.E.2d at 194.

525. *Id.* at 116, 581 S.E.2d at 195.

526. *Anders v. California*, 386 U.S. 738 (1967); *see also* *Brown v. Warden*, 238 Va. 551, 385 S.E.2d 587 (1989); *Kuzminski v. Commonwealth*, 8 Va. App. 106, 378 S.E.2d 632 (Ct. App. 1989).

527. 536 U.S. 304 (2002). For a more extensive discussion of the *Atkins* decision, see Jaime L. Henshaw, Note, *Atkins v. Virginia, The Court's Failure to Recognize What Lies Beneath*, 37 U. RICH. L. REV. 1185 (2003).

528. *Atkins*, 536 U.S. at 321.

529. Act of May 1, 2003, ch. 1040, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 8.01-654.2 (Cum. Supp. 2003); *id.* §§ 19.2-264.3:1.1, -264.3:1.2, -264.3:1.3 (Cum. Supp. 2003)).

530. VA. CODE ANN. § 19.2-264.3:1.1(C) (Cum. Supp. 2003).

531. *Id.*

532. *Id.* § 8.01-654.2 (Cum. Supp. 2003).

533. *Id.* § 19.2-264.3:3 (Cum. Supp. 2003).

## B. Identification

Following on the heels of anti-terrorist legislation enacted over the past few years, the General Assembly created a Class 6 felony offense for those who obtain Department of Motor Vehicles documents through the use of counterfeit, forged, or altered documents.<sup>534</sup> The law also restricts the issuance of such documents to United States citizens or those legally present in the country.<sup>535</sup> In addition, the law imposes more stringent requirements for obtaining licenses, permits, and identification cards.<sup>536</sup>

## C. Alcohol

A front-page article in *Lawyer's Weekly* brought attention to an unpublished order by the Court of Appeals of Virginia, *Dalton v. Commonwealth*,<sup>537</sup> which reversed the finding of the circuit court that the court had jurisdiction in an underage possession of alcohol case.<sup>538</sup> The juvenile was found intoxicated in an automobile but not in "possession" of an alcoholic beverage.<sup>539</sup> The difficulty arose in establishing where the juvenile had possessed the alcohol.<sup>540</sup> In response, the General Assembly amended Virginia Code section 4.1-305, which now permits the prosecution "either in the county or city in which the alcohol was possessed or consumed, or in the county or city in which the person exhibits evidence of physical indicia of consumption of alcohol."<sup>541</sup> The General Assembly also changed the law requiring a court to dismiss DUI or refusal proceedings against a juvenile if: (1) the license has been restored; (2) the terms and conditions imposed have been met; and (3) the violation did not result in death or injury of any person.<sup>542</sup> Now, the courts will have the discretion to dismiss such

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534. Act of Mar. 22, 2003, ch. 819, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 46.2-105.2 (Supp. 2003)).

535. VA. CODE ANN. § 46.2-328.1 (Supp. 2003).

536. *Id.* Portions of this legislation become effective on January 1, 2004 and others become effective on July 1, 2004. *Id.*

537. No. 1466-01-3, 2002 Va. App. LEXIS 113 (Ct. App. Jan. 22, 2002) (unpublished order).

538. John D. Tuerck, *Jurisdiction Is Key in DUI 'Possession' Case*, VA. LAW. WKLY., Feb. 18, 2002, at 1.

539. *Id.* at 13.

540. *Id.* at 1.

541. Act of Mar. 22, 2003, ch. 845, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 4.1-305(A) (Cum. Supp. 2003)).

542. Act of Mar. 16, 2003, ch. 118, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE

proceedings.<sup>543</sup> Finally, the legislature eliminated the requirement that police officers provide the accused with information concerning how to obtain an independent analysis of the second vial of blood.<sup>544</sup>

#### D. *Drugs/Tobacco*

The General Assembly altered the punishment for persons who possess firearms while possessing a Schedule I or II drug. Previously, all such cases required a mandatory minimum term of incarceration of three years.<sup>545</sup> Under the amendments to Virginia Code section 18.2-308.4: (1) *constructive* possession of a firearm while possessing drugs is a Class 6 felony with no mandatory minimum;<sup>546</sup> (2) possession of a firearm *on or about the person* while possessing drugs constitutes a Class 6 felony with a mandatory minimum punishment of two years;<sup>547</sup> and finally, (3) one who possesses drugs and uses, displays, or attempts to use a firearm is guilty of a Class 6 felony and faces a mandatory minimum of five years.<sup>548</sup>

A defendant no longer must intend to distribute the drugs on or near school property to fall under the strictures of Virginia Code section 18.2-255.2.<sup>549</sup> This amendment to the law effectively reverses the Court of Appeals of Virginia's decision in *Toliver v. Commonwealth*,<sup>550</sup> which concluded that a defendant must intend to sell the drugs within 1,000 feet of the school zone to be convicted under this provision.<sup>551</sup>

The legislature also minted a new crime, prohibiting the sale or purchase of "wrappings" to minors.<sup>552</sup> The new legislation defined

ANN. § 16.1-278.9 (Repl. Vol. 2003)).

543. *See id.*

544. Act of Mar. 24, 2003, ch. 936, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-268.6 (Cum. Supp. 2003)).

545. Act of Mar. 24, 2003, ch. 949, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-308.4(B) (Cum. Supp. 2003)).

546. *Id.* (codified as amended at VA. CODE ANN. § 18.2-308.4(A) (Cum. Supp. 2003)).

547. *Id.* (codified as amended at VA. CODE ANN. § 18.2-308.4(B) (Cum. Supp. 2003)).

548. *Id.* (codified as amended at VA. CODE ANN. § 18.2-308.4(C) (Cum. Supp. 2003)).

549. Act of Mar. 16, 2003, ch. 80, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-255.2(A) (Cum. Supp. 2003)).

550. 38 Va. App. 27, 561 S.E.2d 743 (Ct. App. 2002).

551. *Id.* at 33-34, 561 S.E.2d at 746.

552. Act of Mar. 18, 2003, ch. 615, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-371.2(A) (Cum. Supp. 2003)).

wrappings to include papers made for rolling tobacco.<sup>553</sup> The General Assembly also amended Virginia Code section 18.2-371.2 to prohibit the attempted purchase, as well as the completed purchase, of tobacco products by a minor.<sup>554</sup>

### E. *Parental Neglect Defense*

Press reports nationwide and in Virginia have highlighted the problem of newborn infants who are abandoned by their birth mother. To offer an incentive for the mother to leave the child in a safe place, the legislature created an affirmative defense to a prosecution for child neglect for a parent who leaves a child no older than fourteen days old with a hospital or rescue squad.<sup>555</sup> The affirmative defense only immunizes the act of abandoning the infant, rather than any other abuse the child may have been subjected to at the hands of that parent.<sup>556</sup>

### F. *Indictments*

The General Assembly amended Virginia Code section 18.2-111 to provide that proof of embezzlement is sufficient to sustain a conviction for larceny.<sup>557</sup> This legislation nullifies the holding in *Bruhn v. Commonwealth*,<sup>558</sup> which held that the Commonwealth's proof of embezzlement did not establish the charged offense of larceny.<sup>559</sup>

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553. *Id.* (codified as amended at VA. CODE ANN. § 18.2-371.2(H) (Cum. Supp. 2003)).

554. Act of Mar. 16, 2003, ch. 114, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-371.2(B) (Cum. Supp. 2003)).

555. Act of Mar. 22, 2003, ch. 822, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-371 (Cum. Supp. 2003)).

556. VA. CODE ANN. § 18.2-371.1 (Cum. Supp. 2003). For additional discussion of child neglect and abuse issues in Virginia over the past year, see Shepherd, *supra* note 469, at 186-90.

557. Act of Mar. 19, 2003, ch. 733, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-111 (Cum. Supp. 2003)).

558. 37 Va. App. 537, 559 S.E.2d 880 (Ct. App. 2002).

559. *Id.* at 546-47, 559 S.E.2d at 885. For an extensive analysis of the *Bruhn* decision and the General Assembly's reaction, see John G. Douglass, *Annual Survey of Virginia Law: Rethinking Theft Crimes in Virginia*, 38 U. RICH. L. REV. 13 (2003).

### G. *Resisting Arrest*

The legislature fashioned a new offense of resisting arrest. Under Virginia Code section 18.2-479.1, someone “who intentionally prevents or attempts to prevent a law-enforcement officer from lawfully arresting him, . . . is guilty of a Class 1 misdemeanor.”<sup>560</sup> The law defines “intentionally preventing or attempting to prevent a lawful arrest” as:

fleeing from a law-enforcement officer when (i) the officer applies physical force to the person, or (ii) the officer communicates to the person that he is under arrest and (a) the officer has the legal authority and the immediate physical ability to place the person under arrest, and (b) a reasonable person who receives such communication knows or should know that he is not free to leave.<sup>561</sup>

### H. *Sex Crimes*

Extensive media coverage of the impending release of an individual convicted of violent sexual offenses prompted passage of legislation permitting the civil commitment of “[s]exually violent predators.”<sup>562</sup> The effective date of this previously enacted legislation was advanced from 2004 to effective from its passage.<sup>563</sup> The law targets prisoners who have been convicted of certain predicate violent sexual offenses.<sup>564</sup> The law defines a sexually violent predator as a person with a qualifying offense who, “because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior.”<sup>565</sup> The individual must receive a certain score on a sex offender risk assessment instrument.<sup>566</sup> The Attorney General must file a petition and prove that the individ-

560. Act of Mar. 20, 2003, ch. 805, 2003 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 18.2-479.1(A) (Cum. Supp. 2003)).

561. VA. CODE ANN. § 18.2-479.1(B) (Cum. Supp. 2003).

562. Act of Apr. 2, 2003, ch. 989, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 37.1-70.1 to -70.6, and 37.1-70.9 to -70.16 (Cum. Supp. 2003)). Although civil, the legislation implicates criminal convictions and is included here.

563. See *id.* (codified as amended at VA. CODE ANN. § 2.2-3703 (Cum. Supp. 2003); *id.* §§ 37.1-70.1 to -70.6, 37.1-70.9 to -70.16, 37.1-103, 37.1-104, and 37.1-104.1 (Cum. Supp. 2003)).

564. *Id.*

565. VA. CODE ANN. § 37.1-70.1 (Cum. Supp. 2003).

566. *Id.* § 37.1-70.5(B) (Cum. Supp. 2003).



ual is a sexual predator by “clear and convincing evidence.”<sup>567</sup> The law restricts the prisoner’s ability to challenge his prior convictions.<sup>568</sup> Either party can request a civil jury.<sup>569</sup> The law restricts access to discovery in such cases.<sup>570</sup> Finally, the prisoner’s right to use evidence in his defense is curtailed if he refuses to cooperate with a mental examination.<sup>571</sup>

In *Ashcroft v. Free Speech Coalition*,<sup>572</sup> the Supreme Court of the United States struck, on First Amendment grounds, portions of a federal law prohibiting the possession of certain “virtual” child pornography images—*i.e.* computer generated images that appear to be children.<sup>573</sup> In response, the General Assembly enacted a proposal by the Attorney General to create a registry of images.<sup>574</sup> The registry will assist law enforcement in determining whether the child pornography images in the possession of a defendant are real or virtual.<sup>575</sup>

### I. *Statutory Double Jeopardy*

The General Assembly amended Virginia Code section 19.2-294 to prevent re-prosecution for the “same act.”<sup>576</sup> The prior provision precluded a prosecution in state court once a federal prosecution had commenced, with “commenced” defined as “the return of an indictment by a grand jury or the filing of an information.”<sup>577</sup> That provision was broadened to provide that a federal prosecution commences when jeopardy attaches.<sup>578</sup>

567. *Id.* § 37.1-70.11(C) (Cum. Supp. 2003).

568. *Id.* § 37.1-70.2 (Cum. Supp. 2003).

569. *Id.* § 37.1-70.9(B) (Cum. Supp. 2003).

570. *Id.* § 37.1-70.9(C) (Cum. Supp. 2003).

571. *Id.* § 37.1-70.2 (Cum. Supp. 2003).

572. 535 U.S. 234 (2002).

573. *See id.* at 258.

574. Act of Mar. 24, 2003, ch. 938, 2003 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 19.2-390.3 (Cum. Supp. 2003)).

575. VA. CODE ANN. § 19.2-390.3(B) (Cum. Supp. 2003).

576. Act of Mar. 19, 2003, ch. 736, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 19.2-294 (Cum. Supp. 2003)).

577. VA. CODE ANN. § 19.2-294 (Repl. Vol. 2000).

578. Act of Mar. 19, 2003, ch. 736, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 19.2-294 (Cum. Supp. 2003)).

## J. *Criminal Investigations/Grand Juries*

To combat the growing problem of money laundering, the General Assembly, at the request of the Attorney General, enacted a provision requiring financial institutions or credit card issuers to disclose certain records and information pursuant to the issuance of a subpoena duces tecum.<sup>579</sup> The legislation also allows financial institutions to seek to quash or modify unduly burdensome subpoenas.<sup>580</sup> The General Assembly expanded the power of a grand jury to enable the grand jury to subpoena “tangible things.”<sup>581</sup> Also, the number of grand jurors summoned to serve was expanded from seven to nine.<sup>582</sup>

## IX. CONCLUSION

The past year witnessed extensive changes to an ever more complex body of law. This richness and complexity presents both daunting challenges and great rewards for the prepared practitioner. Consequently, a wise practitioner will always research the law before trying a case.

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579. Act of Mar. 16, 2003, ch. 223, 2003 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 19.2-10.1(A) (Cum. Supp. 2003)).

580. *Id.*

581. Act of Mar. 18, 2003, ch. 565, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 19.2-208 (Cum. Supp. 2003)).

582. Act of Mar. 22, 2003, ch. 825, 2003 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 19.2-194 (Cum. Supp. 2003)).

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