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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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I. INTRODUCTION

The authors have endeavored to select from the many appellate cases those that have the most significant precedential value. This year was characterized by a number of important decisions involving the Fourth Amendment and the Confrontation Clause. This article discusses decisions from the Court of Appeals of Virginia and the Supreme Court of Virginia up to and including the cases handed down at the Supreme Court of Virginia's June 2008 sitting. Given the volume of noteworthy cases, the authors have stressed the "take away" from the case without a lengthy discussion of procedural history or settled legal principles. This article also outlines some of the most consequential changes to Virginia law enacted by the 2008 General Assembly in the areas of criminal law and procedure.

II. CRIMINAL PROCEDURE

A. *Disclosure of Exculpatory Evidence*

For a variety of reasons, some prosecutors discharge their *Brady*[1] obligations by disclosing redacted or summary versions of exculpatory evidence rather than verbatim versions. The defendant

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1. Brady v. Maryland, 373 U.S. 83 (1963).

in *Garnett v. Commonwealth* contended that he was entitled to the "best evidence available for impeachment."[2] Addressing the propriety of providing redacted information, the Supreme Court of Virginia cautioned that "'the more prudent and expeditious route would have been for the government to provide the recordings and transcripts.'"[3] The court observed that "summaries of exculpatory evidence must be complete and accurate."[4] If a summary contains "omissions or inaccuracies" that "result[ ] in the prejudicial suppression of material evidence favorable to the defendant," a defendant could bring a viable *Brady* claim.[5] After reviewing in detail the summaries provided by the Commonwealth, the court ultimately concluded that the defendant's due process rights were not violated in this case.[6]

B. *Right To Choose Counsel*

The Constitution protects a defendant's right to a lawyer of his choosing.[7] In some instances, however, that right must yield to other considerations. In *Johnson v. Commonwealth*, the defendant argued that his right to counsel was infringed when the court removed his attorney on the basis of a conflict of interest.[8] The defendant relied on the decision of the Supreme Court of the United States in *United States v. Gonzalez-Lopez*.[9] In that case, the Court held that an error by the trial court in refusing to permit the defendant to choose his attorney constituted "structural" error.[10] The Court of Appeals of Virginia first noted that labeling an error as "structural" does not answer the question of whether any error has been committed.[11] Analyzing the decision in *Gonzalez-Lopez*, the Court of Appeals held that the Supreme Court of the United States did not set out to alter the wide latitude afforded to trial courts in determining whether an attorney should

2. 275 Va. 397, 406, 657 S.E.2d 100, 106 (2008).

3. *Id.* at 407, 657 S.E.2d at 107 (quoting Garnett v. Commonwealth, 49 Va. App. 524, 532, 642 S.E.2d 782, 786 (Ct. App. 2007)).

4. *Id.* at 409, 657 S.E.2d at 108.

5. *Id.* at 409–10, 657 S.E.2d at 108.

6. *Id.* at 410–16, 657 S.E.2d at 108–12.

7. U.S. CONST. amend. VI.

8. 50 Va. App. 600, 603–04, 652 S.E.2d 156, 157–58 (Ct. App. 2007).

9. *Id.*; *see* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

10. *Gonzalez-Lopez*, 548 U.S. at 150.

11. *Johnson*, 50 Va. App. at 604, 652 S.E.2d at 158.

be removed from a particular case.[12] In the case at bar, the trial court properly concluded that counsel suffered from a conflict because counsel for Johnson also represented the principal witness for the prosecution on different charges.[13] At trial, counsel would have had to either vigorously cross-examine one client to discredit his sworn testimony or protect one client at the expense of the other by reducing the intensity of cross-examination.[14] Finally, the court concluded that counsel's having obtained a waiver from his client did not alter the outcome.[15] Ultimately, the structural-error analysis of *Gonzalez-Lopez* does not alter the discretion traditionally afforded to trial courts in this area.

C. *Confrontation Clause*

Courts continue to address the implications of the Supreme Court of the United States' decision in *Crawford v. Washington*.[16] In three cases consolidated under the style of *Magruder v. Commonwealth*, the Supreme Court of Virginia addressed whether a defendant has a right under the Sixth Amendment of the Constitution to cross-examine the analyst who produces a certificate of analysis of a substance.[17] Each defendant objected at trial on the ground that the certificate of analysis constituted "testimonial" evidence and, therefore, admitting the certificate of analysis without the live testimony of the analyst offended the Confrontation Clause.[18] The court declined to reach the issue of whether the certificates were in fact "testimonial."[19] Instead, a closely divided court concluded that the procedure set forth in Virginia Code section 19.2-187.1 sufficed to protect a defendant's constitutional rights.[20] The court reasoned that the Confrontation Clause provides four safeguards to a defendant: "physical presence, oath, cross-examination, and observation of demeanor by the trier of

12. *Id.* at 604–05, 652 S.E.2d at 158.
13. *Id.* at 603–04, 652 S.E.2d at 157.
14. *Id.* at 606, 652 S.E.2d at 159.
15. *Id.* at 607, 652 S.E.2d at 159.
16. 541 U.S. 36 (2004).
17. 275 Va. 283, 288, 657 S.E.2d 113, 115 (2008).
18. *Id.* at 289, 291, 293, 657 S.E.2d at 115–17.
19. *Id.* at 295, 657 S.E.2d at 118.
20. *Id.* at 289, 657 S.E.2d at 115.

fact."[21] The court held that the statutory mechanism found in Virginia Code section 19.2-187.1 meets each of these safeguards.

The *Magruder* court also rejected the defendants' argument that section 19.2-187.1 improperly requires defendants "to take certain affirmative steps" to assert their confrontation rights.[22] In other contexts, the court noted, defendants must make certain disclosures or take certain steps to vindicate their constitutional rights.[23] The court brushed aside the defendants' argument that the statutory procedure impermissibly requires them to produce a witness, concluding that these due process concerns were not properly before the court.[24] The court also observed that trial courts can obviate these problems by requiring the prosecution to call the witness in the first instance.[25] Furthermore, the court rejected the argument that the record must affirmatively reflect a waiver of this right.[26] Ultimately, the court agreed with the conclusion of the Court of Appeals of Virginia that "'Code § 19.2-187.1 sets out a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial.'"[27] Three justices dissented from this holding.[28] Two of the defendants in these cases have filed a consolidated petition for a writ of certiorari in the Supreme Court of the United States.[29]

The defendant in *Gilman v. Commonwealth* was held in contempt by a juvenile and domestic relations court.[30] The court prepared a "certificate of conviction" detailing the circumstances of the finding of contempt.[31] When the defendant appealed the contempt finding to the circuit court, she claimed a right to confront

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21. *Id.* at 298–99, 657 S.E.2d at 120 (quoting Maryland v. Craig, 497 U.S. 836, 846 (1990)).

22. *Id.* at 299, 657 S.E.2d at 121.

23. *Id.* at 300, 657 S.E.2d at 121.

24. *Id.* at 301, 657 S.E.2d at 122.

25. *See id.* at 301, 657 S.E.2d at 122.

26. *Id.* at 303–04, 657 S.E.2d at 123.

27. *Id.* at 301, 657 S.E.2d at 122 (quoting Brooks v. Commonwealth, 49 Va. App. 155, 164, 638 S.E.2d 131, 136 (Ct. App. 2006)).

28. *Id.* at 309, 657 S.E.2d at 127 (Keenan, J., dissenting).

29. Petition for Writ of Certiorari, Briscoe v. Virginia (No. 07-__) (U.S. Mar. 29, 2008), *available at* http://www-personal.umich.edu/~rdfrdman/briscoepetition.pdf.

30. 275 Va. 222, 225, 657 S.E.2d 474, 475 (2008).

31. *Id.* at 225–26, 657 S.E.2d at 475.

the judge who held her in contempt.[32] The Supreme Court of Virginia rejected this claim and held that adjudications for contempt, including the summary petty contempt at issue here, were not "criminal prosecutions" and thus did not fall within the scope of the Confrontation Clause.[33] The court further disagreed with Gilman's argument that her trial de novo in circuit court implicated the Sixth Amendment.[34] The court found that while a defendant generally has a right to a de novo trial in circuit court, the Virginia Code carves out a special and separate status for contempt cases that does not result in a de novo trial.[35] The court noted that the circuit court is specifically permitted to consider as evidence the district court's factual summary of the events that occurred during the proceedings in the lower court.[36] The court concluded that no Confrontation Clause violation had occurred.[37]

In *Wimbish v. Commonwealth*, the defendant invoked the *Crawford* framework in an effort to exclude the results of his breath test generated by an intoxilyzer machine.[38] First, with respect to the test results generated by the machine, the Court of Appeals of Virginia held that the intoxilyzer machine was not a "witness" that could be "confronted."[39] The court observed that the defendant "blew into the machine, the machine analyzed his breath and reported the results of its analysis. The machine was the sole source of the test results. Thus the result of the breath test was merely data produced by a machine, not a statement produced by a witness."[40]

Second, the court held that the attestations made by the officer likewise did not implicate the Confrontation Clause.[41] As to the statement by the officer that he had complied with approved methods in testing the defendant's breath, the court concluded that this statement was not hearsay but was simply the officer's opi-

32. *Id.* at 226, 657 S.E.2d at 475.
33. *Id.* at 228, 657 S.E.2d at 476.
34. *Id.*, 657 S.E.2d at 476–77.
35. *Id.* at 230–31, 657 S.E.2d at 477–78 (citing VA. CODE ANN. § 18.2-459 (Repl. Vol. 2004 & Cum. Supp. 2008)).
36. *Id.* at 230–31, 657 S.E.2d at 478.
37. *Id.* at 231, 657 S.E.2d at 478.
38. 51 Va. App. 474, 479, 658 S.E.2d 715, 718 (Ct. App. 2008).
39. *Id.* at 483–84, 658 S.E.2d at 719–20.
40. *Id.* at 483, 658 S.E.2d at 719–20.
41. *Id.* at 485–86, 658 S.E.2d at 721.

nion that he had complied with the methods of the Department of Forensic Science.[42] Because the Confrontation Clause is concerned only with testimonial hearsay, and the attestation was not hearsay, the defendant's right to confront witnesses was not violated.[43] Next, the court addressed whether the statement by the officer that "the equipment on which the breath test was conducted has been tested within the past six months and found to be accurate" infringed on the defendant's confrontation rights.[44] The court held that the statement was hearsay, but not "testimonial" hearsay, for two reasons.[45] First, the certification was admissible as a business record.[46] Second, the statement was not "accusatory" evidence presented "against" the defendant, but was merely non-testimonial foundational evidence.[47]

In order to use the prior testimony of a witness, the witness must be "unavailable."[48] To establish unavailability, the prosecution must first make a good-faith effort to locate the witness.[49] In *Morgan v. Commonwealth*, at the defendant's preliminary hearing, a witness had identified the defendant as the man who robbed her, and the witness was then cross-examined.[50] After the preliminary hearing, this witness was deported to Pakistan.[51] The prosecution issued two subpoenas for her, but she did not appear.[52] The trial court concluded that the witness was unavailable, and that the prosecution had exercised due diligence in seeking to obtain her presence at trial.[53]

The Court of Appeals of Virginia upheld this ruling, observing that due diligence in this context is "that amount of prudence 'as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances.'"[54] Reasonable effort is required, but "every possibility, no

42. *Id.* at 486, 658 S.E.2d at 721.
43. *Id.*
44. *Id.*
45. *Id.* at 486–88, 658 S.E.2d at 721–22.
46. *Id.* at 489, 658 S.E.2d at 723.
47. *Id.*
48. Crawford v. Washington, 541 U.S. 36, 68 (2004).
49. Barber v. Page, 390 U.S. 719, 724–25 (1968).
50. 50 Va. App. 369, 371, 650 S.E.2d 541, 542 (Ct. App. 2007).
51. *Id.* at 372, 650 S.E.2d at 542.
52. *Id.*
53. *Id.* at 373–74, 650 S.E.2d at 543.
54. *Id.* at 375, 379, 650 S.E.2d at 544, 546 (quoting McDonnough v. Commonwealth,

matter how remote, [need not] be exhausted."[55] The court noted that the prosecution had served two subpoenas and that the witness had twice before honored a subpoena.[56] Furthermore, the prosecution had written letters to the victim's immigration attorney seeking a postponement of the deportation proceedings until after the trial.[57] The prosecution also wrote to immigration authorities to inform them of the need for the victim's testimony at trial.[58] Finally, the court held that the prosecution was not required to seek an expedited visa for the witness from the embassy in Pakistan.[59] The court noted that it did not "delineate precisely what steps the Commonwealth must take to demonstrate good faith and due diligence in attempting to ensure the presence at trial of a deported witness."[60] On the facts of this case, however, the trial court committed no abuse of discretion in determining that the witness was, in fact, unavailable.[61]

In *Abney v. Commonwealth*, the Court of Appeals of Virginia reviewed a challenge to testimony admitted under the past recollection recorded exception to the hearsay rule.[62] After detectives reopened this cold case, the defendant was charged with murdering his wife.[63] The prosecution presented testimony of the defendant's girlfriend from the time of the murder and an affidavit that had been prepared in connection with litigation over a life insurance policy for the defendant's deceased wife.[64] The defendant objected on Confrontation Clause grounds to the portions of the affidavit that the witness could not independently recall.[65] The Court of Appeals of Virginia concluded that the defendant's rights under the Confrontation Clause were not violated by the introduction of this affidavit.[66] The court reasoned that the witness was, in fact, present for trial and the defendant could cross-

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25 Va. App. 120, 128, 486 S.E.2d 570, 574 (Ct. App. 1997)).

55. *Id.* at 375, 650 S.E.2d at 544 (quoting *McDonnough*, 25 Va. App. at 129, 486 S.E.2d at 574).

56. *Id.*

57. *Id.*

58. *Id.*, 650 S.E.2d at 544–45.

59. *Id.* at 376–77, 650 S.E.2d at 545.

60. *Id.* at 379, 650 S.E.2d at 546.

61. *Id.*

62. 51 Va. App. 337, 346, 657 S.E.2d 796, 800 (Ct. App. 2008).

63. *Id.* at 343–44, 657 S.E.2d at 799.

64. *Id.* at 345–46, 657 S.E.2d at 800.

65. *Id.* at 348–49, 657 S.E.2d at 801.

66. *Id.* at 351–52, 657 S.E.2d at 803.

examine her.[67] The court further reasoned that "[t]he Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion."[68]

D. *Juries*—Ex Parte *Communications*

At trial in *Commonwealth v. Juares*, the jury heard translations of a videotaped statement by the defendant from both the officer who conducted the interview and from a court-appointed interpreter.[69] During the course of its deliberations, the jury asked court personnel if it could have an interpreter to assist in understanding portions of the defendant's videotaped statement.[70] The court personnel did not convey this request to the court or the parties, and responded that no interpreter would be provided to the jury.[71] Upon learning of this exchange, the defendant unsuccessfully sought a mistrial.[72] The Court of Appeals of Virginia reversed, concluding that the Commonwealth had failed to refute the presumption of prejudice associated with *ex parte* communications between jurors and third parties.[73] The Supreme Court of Virginia upheld the decision of the trial court and reversed the Court of Appeals of Virginia.[74]

The supreme court noted the existence of a presumption of prejudice if the *ex parte* communication between the jury and the third party concerns "the matter pending before the jury."[75] The key question for the court in such a case is whether the communication "convey[s] any additional facts or opinions regarding the guilt or innocence of [the defendant] [or] contain[s] any comment on the law, the evidence or the testimony presented during the trial."[76] In this instance, the communication between the jury and

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67. *Id.*

68. *Id.* at 350, 657 S.E.2d at 802 (quoting Delaware v. Fensterer, 474 U.S. 15, 21–22 (1985) (per curiam)).

69. 274 Va. 812, 814, 651 S.E.2d 646, 647 (2007).

70. *Id.* at 815, 651 S.E.2d at 647.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 817, 651 S.E.2d at 648.

75. *Id.* at 816, 651 S.E.2d at 647 (quoting Riner v. Commonwealth, 268 Va. 296, 315, 601 S.E.2d 555, 565 (2004)).

76. *Id.*, 651 S.E.2d at 648.

court personnel was not about such matters. Therefore, no presumption of prejudice arose.[77] It then became incumbent upon the defendant to establish the existence of prejudice, which he failed to do.[78]

E. *Role of the Court in Preliminary Hearings*

The Supreme Court of Virginia addressed the role of the judge in a preliminary hearing in *Commonwealth v. Jackson*, where the Commonwealth sought to commit the defendant as a sexually violent predator.[79] Although sexually violent predator commitments are civil, the court stated that the probable cause hearings in that setting were analogous to preliminary hearings in criminal cases.[80] The trial court conducted a statutorily required[81] probable cause hearing to determine whether the case should proceed to trial, and the court concluded that the evidence was not sufficient for a finding of probable cause.[82]

The Commonwealth appealed, arguing that the trial court must find probable cause if the Commonwealth's evidence establishes a prima facie case and the evidence is not "proven manifestly wrong or so inherently incredible that a reasonable person would not believe it."[83] The Supreme Court of Virginia disagreed, explaining that "[i]nherent in the court's function at a preliminary hearing is the exercise of the court's discretion in weighing the evidence to determine whether probable cause has been shown."[84] The fact that the Commonwealth has produced "more than a scintilla of evidence that a crime has been committed and that the defendant committed that crime" is not dispositive.[85] As in a preliminary hearing in a criminal case, in a probable cause hearing for a sexually violent predator commitment, a trial court "acts as the trier of fact, considers the witnesses' testimony, observes the reaction of the witnesses during cross-examination,

77. *Id.* at 817, 651 S.E.2d at 648.
78. *Id.*
79. 276 Va. 184, 188, 661 S.E.2d 810, 811 (2008).
80. *Id.* at 191, 661 S.E.2d at 813.
81. VA. CODE ANN. § 37.2-906 (Repl. Vol. 2005 & Cum. Supp. 2008).
82. *Jackson*, 276 Va. at 191, 661 S.E.2d at 813.
83. *Id.* at 193, 661 S.E.2d at 814.
84. *Id.*
85. *Id.*

and evaluates the credibility of the witnesses."[86] The court held that the trial court could make an adverse credibility finding with respect to the critical testimony of the Commonwealth's expert, and that the court on appeal would not substitute its judgment for that of the trial court.[87]

Justices Lemons and Kinser dissented, taking issue with the fact-finding role ascribed to trial courts at preliminary hearings.[88] Specifically, the two dissenting justices took the view that the credibility of a witness is reserved for the trial unless the witness is incredible as a matter of law.[89] Thus, in their view, a judge's role at a preliminary hearing is "more circumscribed" than the majority suggests.[90] *Jackson* may, in the long term, significantly alter preliminary hearing practice in Virginia.

F. *Withdrawing a Guilty Plea*

The Court of Appeals of Virginia addressed the scope of a defendant's ability to withdraw a guilty plea in *Coleman v. Commonwealth*.[91] Based on a "written agreed disposition," Coleman entered a guilty plea to "two counts of robbery, one count of use of a firearm in the commission of robbery, and three misdemeanor counts of assault and battery."[92] The prosecution dismissed two other charges, including one count of abduction and one charge of possession of a firearm by a convicted felon.[93] A few days before his sentencing proceeding, Coleman moved to withdraw his guilty plea, contending that he felt pressure to avoid a life sentence, that he was stressed out, and that he had pled guilty out of fear.[94] He also said he wanted to prove his innocence.[95] However, he offered no affidavits or other evidence to support a defense to the charges.[96] The trial court denied the motion.[97]

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86. *Id.*
87. *Id.* at 197, 661 S.E.2d at 816.
88. *Id.* at 198, 661 S.E.2d at 817 (Kinser, J., dissenting).
89. *Id.* at 201, 661 S.E.2d at 819.
90. *Id.* at 199, 661 S.E.2d at 818.
91. 51 Va. App. 284, 286, 657 S.E.2d 164, 165 (Ct. App. 2008).
92. *Id.* at 286–87, 657 S.E.2d at 165–66.
93. *Id.*
94. *Id.* at 287–88, 657 S.E.2d at 166.
95. *Id.* at 288, 657 S.E.2d at 166.
96. *Id.*
97. *Id.*

The Court of Appeals of Virginia upheld this decision.[98] The defendant, quoting from *Parris v. Commonwealth*,[99] asserted that "the least influence" and "fear" required the trial court to grant the motion to vacate his guilty plea.[100] The court found this argument unpersuasive, however, noting that "every guilty plea is the product of some influence on a defendant."[101] A guilty plea that is prompted by a fear of a harsh sentence cannot *require* a court to grant a guilty plea.[102] Such a holding would run counter to the discretion trial courts are afforded in such matters.[103] The court also concluded that the record offered no support for the defendant's assertions that he was "going crazy" and his "mind was gone."[104]

Finally, the defendant, relying on *Justus v. Commonwealth*,[105] contended that so long as he had any defense to the crimes, the trial court was required to grant his motion to vacate his pleas.[106] His defense, he argued, was that the eyewitnesses were mistaken in their identification.[107] The court noted that in *Justus,* the defendant presented affidavits to show that she resided in the dwelling that she had been charged with burglarizing and, therefore, she could not be guilty of burglary.[108] The defendant in *Justus* had also presented evidence that she acted in self-defense.[109] In contrast, Coleman provided the court with no evidence of mistaken identity.[110] The eyewitness to the crime had testified earlier that he knew the defendant because he had worked with him at the Goodwill store the defendant was charged with robbing.[111] Five witnesses said they immediately recognized the defendant when he entered the store.[112] Under these facts, the court concluded that the defense was "dilatory or formal" rather than a

98. *Id.* at 293, 657 S.E.2d at 169.
99. 189 Va. 321, 52 S.E.2d 872 (1949).
100. *Coleman*, 51 Va. App. at 290, 657 S.E.2d at 167.
101. *Id.*
102. *Id.* at 291, 657 S.E.2d at 168.
103. *Id.*, 657 S.E.2d at 167.
104. *Id.* at 291–92, 657 S.E.2d at 168.
105. 274 Va. 143, 645 S.E.2d 284 (2007).
106. *Coleman*, 51 Va. App. at 292, 657 S.E.2d at 168.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 292–93, 657 S.E.2d at 168.
111. *Id.* at 292, 657 S.E.2d at 168.
112. *Id.*

"reasonable basis for [a] substantive" defense.[113] Given these circumstances, the court held that the trial court committed no abuse of discretion in denying the motion to withdraw the guilty pleas.[114]

Future cases will provide guidance concerning the breadth of a trial court's discretion to deny a motion to withdraw a guilty plea before sentencing for cases that fall somewhere between the two extremes of *Justus* and *Coleman*.

G. *Venue*

The defendant in *Morris v. Commonwealth,* after becoming unconscious, was transported from her home in Henrico County to a hospital in Hanover County.[115] At the hospital, medical personnel discovered syringes and a smoking device which led to criminal charges against the defendant for possession of heroin and possession of cocaine.[116] The defendant contended that Hanover County was not a proper venue because she was unconscious at the time she possessed the drugs in Hanover County, and, therefore, did not knowingly and voluntarily possess the drugs in that county.[117] The Court of Appeals of Virginia disagreed, noting that the defendant acknowledged that she originally had possessed the drugs with an understanding of their nature and character.[118] The court reasoned that possession of drugs is "an ongoing and continuing offense."[119] "The fact that [the defendant] may have been unconscious when she was transported into Hanover does not negate the fact that she knowingly and intentionally possessed the narcotics when she chose to carry them on her person."[120] Therefore, venue in Hanover County was proper.[121]

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113. *Id.* at 293, 657 S.E.2d at 168–69 (quoting Justus v. Commonwealth, 274 Va. 143, 155–56, 645 S.E.2d 284, 290 (2007)).

114. *Id.*, 657 S.E.2d at 169.

115. 51 Va. App. 459, 463, 658 S.E.2d 708, 710 (Ct. App. 2008).

116. *Id.*

117. *Id.* at 464, 658 S.E.2d at 710.

118. *Id.* at 466, 658 S.E.2d at 711.

119. *Id.* at 467, 658 S.E.2d at 712.

120. *Id.* at 468, 658 S.E.2d at 712.

121. *Id.* at 469, 658 S.E.2d at 713.

H. *Sentencing Issues*

Virginia Code section 19.2-295.2 permits, and in some cases requires, a trial court to impose—in addition to the sentence recommended by a jury—a period of post-release supervision.[122] In *Alston v. Commonwealth*, after convicting the defendant of voluntary manslaughter, a jury sentenced him to serve three years in prison.[123] Over Alston's objection, the court imposed an additional three-year period of post-release supervision.[124] Alston contended that the period of post-release supervision constituted a sentence in excess of the statutory maximum and thus contravened the holdings of the Supreme Court of the United States.[125]

In *Apprendi v. New Jersey*, the Supreme Court of the United States, examining the scope of the right to a jury trial under the Sixth Amendment, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[126] Building on this framework, in *Blakely v. Washington*, the Court explained that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[127]

The Supreme Court of Virginia concluded that the term of post-release supervision imposed on Alston did not contravene this precedent.[128] The court first observed that the post-release supervision statute, section 19.2-295.2, can be read harmoniously with section 19.2-295, which provides that the jury ascertains a defendant's punishment.[129] The relevant statutory maximum, for purposes of Virginia law, includes the term imposed by the jury plus the term of post-release supervision.[130] The court further

122. VA. CODE ANN. § 19.2-295.2 (Repl. Vol. 2008).
123. 274 Va. 759, 762, 652 S.E.2d 456, 458 (2007).
124. *Id.* at 763, 652 S.E.2d at 458.
125. *Id.*
126. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
127. Blakely v. Washington, 542 U.S. 296, 303 (2004).
128. *Alston*, 274 Va. at 771, 652 S.E.2d at 463.
129. *Id.* at 769, 652 S.E.2d at 461–62. Section 19.2-295 states that "the term of confinement . . . of a person convicted of a criminal offense, shall be ascertained by the jury." VA. CODE ANN. § 19.2-295 (Repl. Vol. 2008).
130. *See Alston*, 274 Va. at 769–70, 652 S.E.2d at 462.

reasoned that Virginia law, unlike the sentencing schemes at issue in *Apprendi* and *Blakely*, does not infringe upon the Sixth Amendment because it "does not require that a trial court find proof of particular facts independent of the jury's conviction."[131]

The defendant in *Wright v. Commonwealth*[132] raised a different challenge to the period of post-release supervision. He contended that the trial court could not impose a period of post-release supervision on him because it was not a part of the "Agreed Disposition" that was the basis for his plea of guilty.[133] This plea agreement specified, among other things, that the prosecution would amend the indictment from capital murder to first degree murder and that the defendant was to plead guilty to the first degree murder charge and receive a life sentence.[134] However, the plea agreement was silent on the subject of a period of post-release supervision.[135] The defendant contended that he should either be sentenced in accord with his plea agreement, or be permitted to withdraw his guilty plea.[136] In rejecting this argument, the Supreme Court of Virginia first observed that the period of post-release supervision, and its concomitant suspended period of incarceration, is mandatory.[137] Second, drawing from principles of contract law, the court held that the period of post-release supervision, along with the suspended period of incarceration, formed a part of the legal background of the plea agreement and was therefore incorporated into the plea agreement.[138] The trial court thus did not "reject" the negotiated plea agreement, and the defendant could not withdraw from it.[139]

The Supreme Court of Virginia held in *Martin v. Commonwealth* that a trial court can order a defendant to pay child support as part of a suspended sentence.[140] The defendant was con-

131. *Id.* at 771, 652 S.E.2d at 463 (quoting Alston v. Commonwealth, 49 Va. App. 115, 121, 637 S.E.2d 344, 347 (Ct. App. 2006)).

132. 275 Va. 77, 655 S.E.2d 7 (2008).

133. *Id.* at 79–80, 655 S.E.2d at 8.

134. *Id.* at 79, 655 S.E.2d at 8.

135. *See id.*

136. *Id.* at 81, 655 S.E.2d at 9. Rule 3A:8(c)(4) permits a defendant to withdraw from a guilty plea such as the one at issue in *Wright* if the trial court rejects it. Va. S. Ct. R. 3A:8(c)(4) (Repl. Vol. 2008).

137. *Wright*, 275 Va. at 81, 655 S.E.2d at 9.

138. *Id.* at 81–82, 655 S.E.2d at 10.

139. *Id.* at 82, 655 S.E.2d at 10.

140. 274 Va. 733, 735–36, 652 S.E.2d 109, 111 (2007).

victed of driving after having been declared a habitual offender.[141] He contended that the order to pay child support was improper because it was unrelated to his conviction.[142] The Supreme Court of Virginia disagreed, noting that trial courts are statutorily permitted to require child or spousal support upon placing a defendant on probation.[143] Therefore, the trial court committed no abuse of discretion.[144]

A trial court's sentencing discretion, while broad, is not unlimited. In *Howell v. Commonwealth*, the Supreme Court of Virginia held that a trial court abused its discretion in ordering a defendant who burglarized a store to install a security system as part of an order of restitution.[145] The court reasoned that the purpose of restitution is to replace losses caused by the crime and to make good an injury suffered by the victim.[146] The alarm system and the owners' fear that resulted from the burglary were "related" to the crime but, ultimately, the connection between the burglary and the alarm system was too attenuated to force a defendant to pay for the alarm system as part of an order of restitution.[147]

In *Booker v. Commonwealth*, the jury inquired during its deliberations whether the judge could alter the jury's sentence.[148] The trial court answered, over the defendant's objection, that "the Court has the power to reduce, but not increase the sentence. However, you shall not concern yourselves with what happens after your verdict is returned."[149] The defendant contended that this response would lead the jury to speculate about what the court might do and thus tainted the jury's sentencing recommendation.[150] The Supreme Court of Virginia agreed. The court reasoned that there is

141. *Id.* at 734, 652 S.E.2d at 110.
142. *Id.* at 735, 652 S.E.2d at 110.
143. *Id.*, 652 S.E.2d at 111 (citing VA. CODE ANN. § 19.2-305(B) (Repl. Vol. 2008)).
144. *Id.* at 736, 652 S.E.2d at 111.
145. 274 Va. 737, 741, 652 S.E.2d 107, 109 (2007).
146. *Id.* at 740, 652 S.E.2d at 108.
147. *Id.* at 740–41, 652 S.E.2d at 108–09.
148. 276 Va. 37, 39, 661 S.E.2d 461, 462 (2008).
149. *Id.*
150. *Id.* at 40, 661 S.E.2d at 462.

> [a]n important distinction between instructions that properly further the goal of "truth in sentencing" by removing the possibility that a jury will act upon misconceptions, and those instructions that have the improper effect of inviting the jury to speculate concerning the likelihood of future actions that may ultimately affect the length of a defendant's incarceration.[151]

The court found that the instruction provided to the jury was of the latter variety because it permitted the jury to speculate that the trial court might later reduce the defendant's sentence, and it led the jury to conclude "that its role in the sentencing process was minimal."[152]

In *Smith v. Commonwealth*, the defendant pled guilty to charges of burglary and grand larceny.[153] During the sentencing phase of the case, the prosecution adduced evidence in the form of written declarations by the victims setting forth the value of stolen items.[154] The prosecution then asked for restitution based on these statements.[155] The defendant, who had received these statements well in advance of trial, objected that he could not determine from the statements whether the estimated losses represented new or replacement value.[156] He contended that the victims must be present in court and subjected to cross-examination.[157] The trial court overruled the objection and relied on the documents to assess the amount of restitution.[158] The Court of Appeals of Virginia affirmed, observing that the rules of evidence are relaxed during the sentencing proceeding, and, therefore, that a court can consider hearsay evidence in reaching an appropriate amount for restitution.[159] The court further noted that the defendant "did not challenge the factual accuracy of the proffer. Nor did he present any evidence contradicting the valuations or, for that matter, make any effort to compel the victims to take the stand and submit to cross-examination as adverse witnesses."[160] The court held that "a sentencing court, 'in determin-

151. *Id.* at 42, 661 S.E.2d at 463–64.
152. *Id.* at 42–43, 661 S.E.2d at 464.
153. 52 Va. App. 26, 28, 660 S.E.2d 691, 692 (Ct. App. 2008).
154. *Id.*
155. *Id.* at 28–29, 660 S.E.2d at 692.
156. *Id.* at 29, 660 S.E.2d at 692.
157. *Id.* at 30, 660 S.E.2d at 693.
158. *Id.*
159. *Id.* at 30–31, 660 S.E.2d at 693.
160. *Id.* at 33, 660 S.E.2d at 694.

ing the appropriate amount of restitution, may consider hearsay evidence that bears 'minimal indicia of reliability' so long as the defendant is given an opportunity to refute that evidence.'"[161]

The Supreme Court of Virginia addressed but did not resolve the ongoing controversy about "deferred disposition" in criminal cases in *Moreau v. Fuller*.[162] The defendant in *Moreau* was an adult charged with contributing to the delinquency of a minor.[163] At the conclusion of the trial, Judge Moreau of the Juvenile and Domestic Relations Court of the City of Danville ruled that the evidence was sufficient for a finding of guilt, but further ruled that the case would be continued to a later date for final disposition.[164] The Commonwealth's Attorney obtained a writ of mandamus in the Circuit Court of the City of Danville on the basis that the juvenile and domestic relations court lacked the statutory authority to make such a deferred finding.[165] The Supreme Court of Virginia reversed, concluding that a writ of mandamus does not lie when the function of the court is a discretionary one.[166] Entry of a judgment of guilt, the court held, is a discretionary rather than a ministerial function.[167] Furthermore, the court reasoned that the written order of the court at issue merely continued the case and that "[s]uch a disposition is within the discretionary authority of the court and as such is not subject to mandamus."[168] In two separate concurrences, Justice Koontz and Justice Kinser, joined by Justices Agee and Keenan, stressed that the court was not resolving the propriety of a "deferred disposition" in the absence of specific statutory authorization.[169]

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161. *Id.* (quoting United States v. Bourne, 130 F.3d 1444, 1447 (11th Cir. 1997)).

162. 276 Va. 127, 131, 661 S.E.2d 841, 843 (2008); *id.* at 139, 661 S.E.2d at 848 (Koontz, J., concurring).

163. *Id.* at 131, 661 S.E.2d at 843 (majority opinion).

164. *Id.* at 131–32, 661 S.E.2d at 843–44.

165. *Id.* at 132–33, 661 S.E.2d at 844.

166. *Id.* at 135, 661 S.E.2d at 845–46 (quoting *In re* Commonwealth's Attorney, 265 Va. 313, 318, 576 S.E.2d 458, 461 (2003)).

167. *Id.* at 138, 661 S.E.2d at 847.

168. *Id.* at 138–39, 661 S.E.2d at 847.

169. *Id.* at 139, 661 S.E.2d at 848 (Koontz, J., concurring); *id.* at 140, 661 S.E.2d at 848 (Kinser, J., concurring).

III. SEARCH AND SEIZURE

This year, the Supreme Court of Virginia, often by a divided vote, handed down several decisions that will be relied upon by the defense bar for years to come. However, the prosecution scored a significant victory in the *Moore* decision, discussed below.

A. *Lawfulness of a Search*

In *Moore v. Commonwealth*, the Supreme Court of Virginia concluded that a full custodial arrest, made in violation of the misdemeanor summons statute, rose to the level of a constitutional violation.[170] In Moore's case, police stopped him for driving on a suspended license and, rather than issue a summons and release him as required by statute, police subjected Moore to a full custodial arrest.[171] The search incident to arrest yielded a small quantity of cocaine.[172] Based on this and other evidence, he was convicted of possession with the intent to distribute.[173] The court concluded that because the arrest was unconstitutional, the exclusionary rule applied and the evidence against Moore should have been suppressed.[174] The court unanimously rejected the Commonwealth's argument that the officer's failure to issue a summons was not an error of constitutional magnitude.[175]

Virginia appealed this determination to the Supreme Court of the United States, which granted a writ of certiorari, and in a unanimous decision written by Justice Scalia, reversed.[176] The Court began by examining whether statutes and case law at the time of the nation's founding incorporated state strictures on arrests.[177] The Court could not find evidence for such a proposition and, in its absence, the Court turned to "traditional standards of

170. Moore v. Commonwealth, 272 Va. 717, 725, 636 S.E.2d 395, 400 (2006). For the summons statute, see VA. CODE ANN. § 19.2-74 (Repl. Vol. 2008).

171. *Id.* at 719, 636 S.E.2d at 396.

172. *Id.*

173. *Id.*

174. *Id.* at 725, 636 S.E.2d at 400.

175. *Id.* at 720, 636 S.E.2d at 397.

176. Virginia v. Moore, 128 S. Ct. 1598, 1601, 1608 (2008) (Justice Ginsburg authorized a concurring opinion agreeing with the outcome).

177. *Id.* at 1602–03.

reasonableness."[178] The Court observed that the standard of probable cause has long been equated with constitutional reasonableness, and the Court could see no reason to deviate from it in this context.[179] The Court concluded that "[a] State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional."[180] The Court also observed that the probable cause standard satisfies the need for administrable rules and for consistency in the Fourth Amendment context.[181] Finally, the Court upheld the search incident to arrest, concluding that because the arrest was constitutional, the officers could rely on the bright line rule announced in *United States v. Robinson* to search Moore.[182] The Court ultimately

> reaffirm[ed] against a novel challenge what [it has] signaled for more than half a century. When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.[183]

The scope of the exigent-circumstances search of a home was at issue in *Commonwealth v. Robertson*.[184] Danville police responded to a report of gunshots.[185] The gunman, Robertson, was alone in the home.[186] After a tense standoff lasting thirty-five minutes, the police subdued Robertson with a taser as he sat on a windowsill.[187] After arresting Robertson, police broke through the barricaded door to the home and seized a shotgun.[188] The defendant filed a motion to suppress the weapon, arguing that the officers' entry into the home violated his Fourth Amendment rights.[189]

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178. *Id.* at 1604.

179. *Id.*

180. *Id.* at 1606.

181. *Id.* at 1606–07.

182. *Id.* at 1607–08. In *United States v. Robinson*, the Supreme Court of the United States stated that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." 414 U.S. 218, 235 (1973).

183. *Moore*, 128 S. Ct. at 1608.

184. 275 Va. 559, 561, 659 S.E.2d 321, 323 (2008).

185. *Id.* at 562, 659 S.E.2d at 323.

186. *Id.* at 562–63, 659 S.E.2d at 323.

187. *Id.* at 562, 659 S.E.2d at 323.

188. *Id.* at 563, 659 S.E.2d at 324.

189. *Id.*

The defendant lost in the trial court, but prevailed in the Court of Appeals of Virginia.[190] The Commonwealth appealed to the Supreme Court of Virginia, and the supreme court likewise concluded that the search of the home was unconstitutional.[191]

The Commonwealth argued that the warrantless search of the defendant's home was justified on two grounds: first, as a "protective sweep" search, and second, pursuant to the exigent circumstances exception to the warrant requirement.[192] The court held that no protective sweep of the home was justified because the defendant was arrested outside of his home and there was no indication that the "home harbored anyone posing a danger to the individuals present at the arrest scene."[193] The court noted that the rationale of the "protective sweep" exception to the warrant requirement is to protect bystanders or the police from a dangerous person who might be hiding in the home.[194] That rationale simply did not apply in this case.[195]

The court further held that the exigent circumstances exception to the warrant requirement did not apply.[196] The court listed certain factors that can justify a warrantless entry based on exigent circumstances:

> (1) [T]he degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have a strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit.[197]

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190. *Id.* at 562, 566, 659 S.E.2d at 323, 325.

191. *Id.*

192. *Id.* at 564, 659 S.E.2d at 324.

193. *Id.* at 564–65, 659 S.E.2d at 324–25.

194. *Id.* at 564, 659 S.E.2d at 324.

195. *Id.* at 564–65, 659 S.E.2d at 325.

196. *Id.* at 565, 659 S.E.2d at 325.

197. *Id.* (quoting Robinson v. Commonwealth, 273 Va. 26, 41–42, 639 S.E.2d 217, 226 (2007)).

Applying these factors, the court found that no exigent circumstances were present that would justify a warrantless entry.[198] Therefore, the court upheld the court of appeals' decision that the evidence found in the home must be suppressed.[199]

In *Anderson v. Commonwealth*, the defendant challenged the propriety of a seizure of his DNA upon his arrest for rape.[200] Virginia Code section 19.2-310.2:1 requires that a DNA sample be taken for certain felony crimes.[201] Upon analysis, Anderson's DNA sample yielded a "cold hit" that linked him to a 1991 rape.[202] The defendant contended that the warrantless seizure of his DNA violated his rights under the Fourth Amendment.[203] The Supreme Court of Virginia rejected this argument, observing that, upon arrest, defendants are subjected to routine booking measures, including fingerprinting.[204] The court reasoned that "[a] DNA sample of the accused taken upon arrest, while more revealing, is no different in character than acquiring fingerprints upon arrest."[205] Once a defendant is arrested, the court found, the state has a legitimate interest not only in identifying the defendant but also in "'maintaining a permanent record to solve other past and future crimes.'"[206] Finally, the court observed that other state and federal courts have accepted the similarity between fingerprinting and DNA samples.[207] In sum, no "'additional finding of individualized suspicion'" was required for a DNA sample to be taken.[208]

B. *Probable Cause*

Whether an officer had individualized suspicion that a person might be armed and dangerous was at issue in *McCain v. Com-*

198. *Id.*

199. *Id.* at 565–66, 659 S.E.2d at 325.

200. 274 Va. 469, 472–73, 650 S.E.2d 702, 704 (2007), *cert. denied*, 128 S. Ct. 2473 (2008).

201. VA. CODE ANN. § 19.2-310.2:1 (Repl. Vol. 2008).

202. *Anderson*, 274 Va. at 473, 650 S.E.2d at 704.

203. *Id.* at 474, 650 S.E.2d at 704.

204. *Id.*, 650 S.E.2d at 705.

205. *Id.*

206. *Id.* at 474–75, 650 S.E.2d at 705 (quoting Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992)).

207. *Id.* at 475, 650 S.E.2d at 705.

208. *Id.* at 477, 650 S.E.2d at 706 (quoting *Jones*, 962 F.2d at 306).

monwealth.[209] In the early morning hours, the police made a traffic stop in a violent, high crime, high drug neighborhood.[210] The defendant was a passenger in the car.[211] Prior to the traffic stop, the police had observed the defendant walk up to a house and, less than a minute later, return to the car.[212] In addition, the police officer had been involved in a controlled drug purchase at this house "months" before the stop at issue.[213] Following the stop, the officer learned that the license of the driver of the vehicle was suspended.[214] He asked the defendant if he could perform a "frisk" or a "pat down," but the defendant refused.[215] Nevertheless, the officer proceeded to pat down the defendant, who appeared "edgy."[216] The officer recovered a gun from the defendant's waistband and placed him under arrest.[217] During the search incident to arrest, the officer discovered cocaine in the defendant's pocket.[218] At trial, the officer testified that he conducted a pat down of every person he interacted with in that neighborhood.[219] The trial court denied a motion to suppress the cocaine.[220]

The Supreme Court of Virginia concluded that the officer lacked sufficient facts to warrant the pat down.[221] Although the type of neighborhood and the time of day were relevant, the court reasoned, they did not provide the police with "a particularized and objective basis for suspecting" that the defendant was armed and dangerous.[222] The type of offense for which the vehicle was stopped, a minor traffic infraction, the court further noted, did not evince any danger.[223] Although the officer had what the court described as a "hunch" that the defendant might be involved in a drug transaction, his presence at a house where a drug transaction had occurred months before did not create sufficient reason-

209. *See* 275 Va. 546, 549, 659 S.E.2d 512, 514 (2008).
210. *Id.* at 550–51, 659 S.E.2d at 514–15.
211. *Id.* at 550, 659 S.E.2d at 514.
212. *Id.*
213. *Id.*
214. *Id.*, 659 S.E.2d at 514–15.
215. *Id.* at 550–51, 659 S.E.2d at 515.
216. *Id.* at 551, 659 S.E.2d at 515.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 549, 659 S.E.2d at 514.
221. *Id.* at 555, 659 S.E.2d at 517.
222. *Id.* at 554, 659 S.E.2d at 517.
223. *See id.*

able suspicion.[224] The fact that the defendant appeared nervous, the court concluded, did not alter the outcome because he was cooperative, did not make any furtive movements, and correctly identified himself to the officer.[225] Finally, the court stressed that officers are not authorized to "frisk all persons."[226] Three justices dissented from this holding, finding that the "specific articulable facts" known to the officers justified the search.[227]

The defendant in *Buhrman v. Commonwealth* challenged the existence of probable cause to arrest her for possession of a hand-rolled cigarette that the officer believed was a marijuana cigarette.[228] The officer had noticed Buhrman walking unsteadily inside a convenience store and observed her almost fall asleep beside a frozen drink machine.[229] The officer followed Buhrman to her car and "noticed hand-rolled cigarettes in the interior door handle."[230] Based on the faint odor and coloration of the cigarettes, the officer suspected that they contained marijuana.[231] The officer arrested the defendant for possession of marijuana.[232] During the search incident to the arrest, the officer found cocaine, heroin, and marijuana in the defendant's car and in her purse.[233] At trial, the defendant unsuccessfully sought to suppress this evidence.[234]

The Supreme Court of Virginia reversed.[235] The court first observed that hand-rolled cigarettes are often used for legitimate purposes and, therefore, that additional evidence to support a conclusion of illegal activity was necessary.[236] However, the defendant did not act elusively or appear nervous.[237] Nor did the testimony adduced at trial link the officer's observation of the

224. *Id.* at 554–55, 659 S.E.2d at 517.
225. *Id.* at 555, 659 S.E.2d at 517.
226. *Id.*
227. *Id.* at 555–56, 659 S.E.2d at 518 (Carrico, S.J., dissenting).
228. 275 Va. 501, 504, 659 S.E.2d 325, 326–27 (2008).
229. *Id.* at 503–04, 659 S.E.2d at 326.
230. *Id.* at 504, 659 S.E.2d at 326.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*, 659 S.E.2d at 327.
235. *Id.* at 508, 659 S.E.2d at 329.
236. *Id.* at 506, 659 S.E.2d at 328.
237. *Id.* at 506–07, 659 S.E.2d at 328.

"faint odor" and "coloration" of the cigarettes to marijuana.[238] Moreover, the court observed that the evidence of the defendant's intoxication did not indicate that hand-rolled cigarettes contained marijuana, as opposed to tobacco.[239] Under the totality of the circumstances, the court held, the officer lacked probable cause to arrest the defendant for possession of marijuana.[240] Three justices dissented from this holding.[241]

C. *"Plain Feel" Search*

In *Cost v. Commonwealth*, the defendant contended that the officer lacked probable cause to seize capsules of heroin from his pocket.[242] As the officer walked past the defendant, who was seated in a car, he noticed the defendant "immediately reach[ ] across his body towards his left front pants pocket."[243] Suspicious of this sudden movement, the officer "asked Cost what he was reaching for."[244] The officer instructed the defendant to exit the vehicle, whereupon the defendant agreed to a pat down, but not to a search.[245] When the officer touched the pocket toward which the defendant had been reaching, he immediately felt numerous capsules inside.[246] The officer retrieved a plastic bag, which was later determined to contain twenty capsules of heroin.[247] The defendant contended that this evidence should have been suppressed at trial because the illegal nature of the capsules could not have been apparent to the officer.[248] The Supreme Court of Virginia agreed with the defendant. The court observed that an officer is justified in removing an item during a pat-down "when the character of the object felt by the officer is immediately apparent either as a weapon or some form of contraband."[249] The court found that other legal drugs are commonly packaged in cap-

238. *Id.* at 507, 659 S.E.2d at 328.
239. *Id.* at 506–07, 659 S.E.2d at 328.
240. *Id.* at 507–08, 659 S.E.2d at 329.
241. *Id.* at 508–09, 659 S.E.2d at 329–30 (Lemons, J., dissenting).
242. 275 Va. 246, 249, 657 S.E.2d 505, 506 (2008).
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 251, 657 S.E.2d at 507.
249. *Id.* at 251–52, 657 S.E.2d at 508.

sule form.[250] Therefore, it could not have been "immediately apparent" that the capsules contained heroin.[251] Nor was there any action on the part of the defendant that could be characterized as "furtive."[252] As for the defendant's refusal to respond to the officer's questions, the defendant was not required to answer any questions.[253] Justices Lemons and Kinser dissented from the court's holding.[254]

D. *Consent To Search*

Two cases illustrate the difficulty of suppressing evidence once consent is given for a search. In *Malbrough v. Commonwealth*, during the course of a traffic stop, police officers noticed a handgun in plain sight.[255] After a brief conversation and a check of the occupants' driver's licenses, the police sought and obtained consent to search the car.[256] An officer placed the gun in his waistband and another conducted a search of the two passengers, which yielded no contraband.[257] The officer then told the defendant that he was free to leave.[258] After making this statement, the officer asked the defendant if he could search the vehicle and whether the defendant "had anything illegal on his person."[259] In response, the defendant began to pull items from his pockets.[260] The officer told the defendant "'not to put his hands in his pockets . . . I would do the checking.'"[261] The defendant stated that "'it was all right'" and raised his hands in the air.[262] The officer found cocaine and marijuana in the defendant's pants pocket.[263] The police vehicles did not block the defendant's car and the entire encounter lasted thirteen minutes.[264]

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250. *Id.* at 253, 657 S.E.2d at 508.
251. *Id.* at 254, 657 S.E.2d at 509.
252. *Id.* at 253, 657 S.E.2d at 508–09.
253. *Id.*, 657 S.E.2d at 509.
254. *Id.* at 254–55, 657 S.E.2d at 509–10 (Lemons, J., dissenting).
255. 275 Va. 163, 166, 655 S.E.2d 1, 2 (2008).
256. *Id.* at 167, 655 S.E.2d at 2–3.
257. *Id.*
258. *Id.*, 655 S.E.2d at 3.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 166, 168, 655 S.E.2d at 2, 3.

The defendant sought to suppress this evidence, arguing that the search was invalid because "a reasonable person would not have felt free to leave the scene."[265] The Supreme Court of Virginia disagreed. The court noted that the defendant's vehicle was not hemmed in by the police vehicles, his driver's license and registration had been returned to his vehicle, and he had been told he was free to leave.[266] Although the police still had the defendant's gun, he did not ask for its return and there was no further mention made of it.[267] Although the defendant was questioned about a shooting, the officers were satisfied with the answers they received.[268] Also important for the court was the fact that the officers did not draw or brandish their weapons, use hostile tones of voice, accuse the defendant of wrongdoing, or make any intimidating gestures.[269] Finally, the court deferred to the trial court's factual finding that the defendant had consented to the search.[270] Justice Koontz, joined by Chief Justice Hassell, dissented.[271]

The consent to search, this time of a home, was at issue in *Glenn v. Commonwealth*.[272] Police officers, seeking to arrest Glenn in connection with a robbery, arrived at his grandparents' home.[273] The officers promptly arrested Glenn and inquired of his grandfather, Ernest Brooks, if he owned the home.[274] Brooks could not speak because of a stroke, but he nodded to indicate he did own the home.[275] Brooks then expressed his assent to a search of the home.[276] In one of the bedrooms used by the defendant, the officers found a backpack that contained evidence linking Glenn to the robbery.[277] Glenn contended that his grandfather could not authorize a search of Glenn's personal property

265. *Id.* at 169, 655 S.E.2d at 4.
266. *Id.* at 170, 655 S.E.2d at 4.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 171, 655 S.E.2d at 5.
271. *Id.* at 172, 655 S.E.2d at 6 (Koontz, J., dissenting).
272. 275 Va. 123, 127, 654 S.E.2d 910, 911 (2008).
273. *Id.* at 127–28, 654 S.E.2d at 911.
274. *Id.* at 128, 654 S.E.2d at 911–12.
275. *Id.*, 654 S.E.2d at 912.
276. *Id.*
277. *Id.*

that was located in a closed container in a bedroom that Glenn occupied.[278]

On appeal to the Supreme Court of Virginia, the court found that the resolution turned on the authority of Glenn's grandfather to consent to a search of closed containers located in a house owned by the grandfather.[279] The court found that the grandfather's actual authority was not critical to the outcome.[280] The key for the court was whether the defendant's grandfather possessed "apparent authority to consent to the search, as it appeared to an objectively reasonable police officer."[281] If he did, "the consent [was] valid for Fourth Amendment purposes."[282] The court noted that the backpack did not bear any particular indicia of ownership that might have signaled its ownership by the defendant and it was found in a room open to all occupants of the house.[283] The fact that it was later determined that the defendant owned the backpack did not alter the outcome, the court found.[284] The existence of some ambiguity regarding the ownership of the backpack did not render the actions of the police unreasonable.[285] Finally, Glenn never objected to the search of the backpack.[286] In sum, "[t]he facts available to the officers at the time of the search of the Brooks house were sufficient to lead an objectively reasonable police officer to believe that Brooks had authority to consent to a search of the backpack."[287]

IV. EVIDENTIARY ISSUES

Virginia Courts addressed a number of evidentiary issues that arose in the criminal context.

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278. *Id.* at 128–29, 654 S.E.2d at 912.
279. *Id.* at 131, 654 S.E.2d at 914.
280. *Id.* at 133, 654 S.E.2d at 914.
281. *Id.*, 654 S.E.2d at 915.
282. *Id.*
283. *Id.* at 133–34, 654 S.E.2d at 915.
284. *Id.* at 134, 654 S.E.2d at 915.
285. *Id.* at 134–36, 654 S.E.2d at 915–16 (citing United States v. Melgar, 227 F.3d 1038, 1040–42 (7th Cir. 2000)).
286. *Id.* at 137, 654 S.E.2d at 917.
287. *Id.* at 137–38, 654 S.E.2d at 917.

A. *Marital Privilege*

In *Carpenter v. Commonwealth*, the defendant was charged with the rape of his stepdaughter.[288] At trial, the Commonwealth introduced statements the defendant had made to his wife.[289] After the defendant made the statements at issue, but before his trial, the General Assembly amended the statute governing the admissibility of husband/wife communications.[290] The amendment provided that the privilege "'may not be asserted in any proceeding in which . . . either spouse is charged with a crime . . . against the minor child of either spouse.'"[291] On appeal, Carpenter argued that using at trial the statements he made to his wife violated the Ex Post Facto Clauses of the United States and Virginia Constitutions.[292] The court acknowledged that one way a state can run afoul of the prohibitions against ex post facto laws is when the state "'alters the *legal* rules of *evidence*, and receives less, or different testimony, than the law required at the time of the commission of the offence [sic], *in order to convict the offender*.'"[293] However, the change to the rules of evidence at issue here, the court explained, did not lower the bar for the prosecution because the quantum of evidence needed for a conviction remained the same.[294] Instead, the change in the law addressed the competency or admissibility of evidence, which does not fall within the prohibition of the Ex Post Facto Clause.[295]

B. *Medical Records*

Hairston v. Commonwealth makes clear that counsel seeking medical records from the victim of a crime must carefully follow the requirements specified by statute.[296] The defendant, who was

288. 51 Va. App. 84, 87, 654 S.E.2d 345, 347 (Ct. App. 2007).

289. *Id.* at 89–90, 654 S.E.2d at 347–48.

290. *Id.* at 89, 654 S.E.2d at 348.

291. *Id.*, 654 S.E.2d at 348 (quoting VA. CODE ANN. § 8.01-398 (Repl. Vol. 2007 & Supp. 2008)).

292. *Id.* at 91, 654 S.E.2d at 348–49; *see also* U.S. CONST. art. I, § 9, cl.3; VA. CONST. art. I, § 9.

293. *Carpenter*, 51 Va. App. at 91, 654 S.E.2d at 349 (quoting Calder v. Bull, 3 U.S. 386, 390 (1798)).

294. *Id.* at 93, 654 S.E.2d at 350.

295. *Id.* at 93–94, 654 S.E.2d at 350 (citing People v. Dolph-Hostetler, 664 N.W.2d 254, 258 (Mich. Ct. App. 2003)).

296. 50 Va. App. 64, 68–70, 646 S.E.2d 32, 33–34 (Ct. App. 2007).

charged with a number of sex crimes, issued a subpoena for the victim's counseling records.[297] The prosecution made a motion to quash this subpoena, which the trial court granted.[298] On appeal, the Court of Appeals of Virginia upheld the decision of the trial court, concluding that the subpoena did not comply with Virginia Code section 32.1-127.1:03.[299] The court first held that this statute creates a right of privacy in a patient's medical records.[300] The court further held that the counseling records at issue were covered by the plain language of the statute.[301] Finally, the court held that this statute applied to the records sought by the defense in the case.[302] The court then turned to whether the subpoena complied with the strictures of Virginia Code section 32.1-127.1:03. The court observed that although the subpoena complied with Virginia Supreme Court Rule 3A:12(b), which generally governs subpoenas in criminal cases, the subpoena for the counseling records was inadequate to satisfy the requirements of Virginia Code section 32.1-127.1:03.[303] Specifically, the statute requires (1) that a copy of the subpoena be provided to the non-party witness; (2) that the moving party provide a notice to the patient, informing the patient of the right to quash the subpoena; and (3) that a notice be provided to the health care provider, stating that if the healthcare provider receives a motion to quash, or the health care provider itself moves to quash the subpoena, the documents must be provided under seal to the clerk of court.[304] Because the subpoena at issue did not satisfy any of these requirements, the trial court properly quashed it.[305] Finally, the court concluded that the specific strictures of Virginia Code section 32.1-127.1:03 controlled over the general provisions of Virginia Supreme Court Rule 3A:12.[306]

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297. *Id.* at 66–67, 646 S.E.2d at 33.
298. *Id.* at 67–68, 646 S.E.2d at 33.
299. *Id.* at 68, 646 S.E.2d at 33.
300. *Id.*, 646 S.E.2d at 33–34.
301. *Id.* at 70–71, 646 S.E.2d at 34–35.
302. *Id.* at 69, 646 S.E.2d at 34.
303. *Id.* at 69–70, 646 S.E.2d at 34–35.
304. *Id.* at 70, 646 S.E.2d at 34–35; *see also* VA. CODE ANN. § 32.1-127.1:03 (Cum. Supp. 2008).
305. *Hairston*, 50 Va. App. at 70–71, 646 S.E.2d at 35.
306. *See id.* at 71–72, 646 S.E.2d at 35.

C. *Evidence of Other Crimes*

The defendant in *Scott v. Commonwealth* objected to the joinder of nine robbery charges in a single trial.[307] The prosecution contended that the robberies were part of a "common scheme or plan" under Virginia Rule 3A:6(b) and could, therefore, be tried together.[308] The robberies shared the following similarities: (1) each occurred between 10:00 p.m. and 12:30 a.m. in residential areas; (2) the victims were all adults who were alone and either stepping out of a vehicle or in a garage; (3) the robber made threats and demanded personal property; (4) in five instances, the robber demanded a personal identification number from the victim to gain access to a bank account; and (5) each robbery was committed by a lone black male.[309] The Supreme Court of Virginia first noted that although it had not defined the term "common scheme or plan" in the context of Rule 3A:6(b), this term had been applied in discussing pattern offenses or modus operandi.[310] The court held that "[t]he term 'common scheme' describes crimes that share features idiosyncratic in character, which permit an inference that each individual offense was committed by the same person or persons as part of a pattern of criminal activity involving certain identified crimes."[311] A "common plan," which is distinct from a "common scheme," "describes crimes that are related to one another for the purpose of accomplishing a particular goal."[312] The court concluded that the evidence did not support either the existence of a "common scheme" or the presence of a "common plan," but instead showed only "a general similarity of manner" without any "idiosyncratic features."[313] Therefore, the court reversed and remanded the case.[314]

In *McGowan v. Commonwealth*, the defendant was charged with distributing cocaine.[315] On March 4, 2004, a suspected drug dealer was approached by a confidential informant who told the

307. 274 Va. 636, 639–40, 651 S.E.2d 630, 631–32 (2007).
308. *Id.* at 639, 651 S.E.2d at 631.
309. *Id.*, 651 S.E.2d at 631–32.
310. *Id.* at 644–45, 651 S.E.2d at 635.
311. *Id.* at 645, 651 S.E.2d at 635.
312. *Id.* at 646, 651 S.E.2d at 635.
313. *Id.* at 646–47, 651 S.E.2d at 636.
314. *Id.* at 648, 651 S.E.2d at 636.
315. 274 Va. 689, 692, 652 S.E.2d 103, 104 (2007).

suspected dealer that he wanted a "20 rock."[316] The suspected drug dealer instructed the informant to follow her because her "'girl [was] across the street at McDonald's.'"[317] Once there, the informant watched as the suspected dealer spoke with the defendant, who then reached under her shirt and handed something to the suspected drug dealer.[318] The suspected drug dealer then approached the informant and handed him two rocks of cocaine in exchange for twenty dollars.[319] McCowan was arrested several months later and when she was searched, several pieces of cocaine were recovered from her bra.[320] At her trial, McGowan testified that she had no knowledge of the drug transaction of March 4th and denied any participation in the drug sale, instead stating that she had removed money from her bra and given it to her friend for the purpose of buying a meal at the McDonald's restaurant.[321] During cross-examination—rather than on direct examination—McGowan said she "'wouldn't know crack cocaine if [she] saw it.'"[322] Concluding that the defendant had "opened the door," the trial court permitted the prosecution to impeach McGowan with the evidence recovered from the search of her person at the time of her arrest.[323]

The Supreme Court of Virginia held that it was error to allow the prosecution to adduce this evidence.[324] In the court's view, the fact that McGowan possessed cocaine several months later "had little, if any, tendency to prove that McGowan had knowledge of cocaine on March 4, 2004."[325] Because this evidence implicated her in another crime and had little probative value, the court concluded that its prejudice outweighed its probative value.[326] Finally, the court held that although the prosecution had a right to cross-examine McGowan, the prosecution "cannot be allowed to essentially smuggle into evidence during its cross-examination of a defendant proof of another crime not admissible

316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 693, 652 S.E.2d at 104.
322. *Id.*
323. *Id.*
324. *Id.* at 696, 652 S.E.2d at 106.
325. *Id.*
326. *Id.*

in its case-in-chief, which is not only highly inflammatory and misleading to a jury, but lacking in serious probative value as well."[327]

D. *Proving Predicate Crimes or Adjudications*

Year after year, incomplete or missing documentation from courts not of record has bedeviled prosecutors—and provided a boon for defense attorneys—when prosecutors attempt to establish prior convictions or adjudications. In *Perez v. Commonwealth*, police pulled over a car and discovered a gun under the driver's seat.[328] The defendant was charged with possession of a concealed weapon and possession of a firearm after having been adjudicated delinquent of an offense that would have been a felony if it had been committed by an adult.[329] At trial, the prosecution relied on three documents to establish the predicate crime: two petitions purportedly from the Prince William County Juvenile and Domestic Relations District Court, as well as a disposition order from a juvenile court in Fairfax County.[330] The name and the charges matched on all three documents, but only three of four case numbers were the same.[331] The disposition order provided that the "'child has been found guilty of 2 counts—B&E + Larceny'" and that the child had been "'committed to D.J.J.'"[332] The order adjudicating Perez specified that he was a "child" at the time of the adjudication, and the documents referenced Perez's date of birth.[333] The commitment order was signed but not dated.[334] The defendant asserted that "'[a]n undated order purporting to be a predicate juvenile adjudication is insufficient'" to sustain the charges of felony possession of a firearm and of a concealed firearm.[335] The Supreme Court of Virginia found that, unlike prior cases where the fact or nature of the conviction was in doubt, "the fact finder in this case did not need to engage in conjecture or surmise to find beyond a reasonable doubt that Perez

327. *Id.*
328. 274 Va. 724, 726, 652 S.E.2d 95, 95–96 (2007).
329. *Id.*, 652 S.E.2d at 96.
330. *Id.* at 726–27, 652 S.E.2d at 96.
331. *Id.* at 727, 652 S.E.2d at 96.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 728, 652 S.E.2d at 97.

was convicted of a felonious act prior to . . . the date of the possession offense charged."[336] Therefore, the court held the jury could find that these documents established the predicate offense.[337]

E. *Scientific Evidence*

With the growing use of science in the courtroom, courts have fashioned rules to ensure its reliability. In *Billips v. Commonwealth*, the defendant was convicted of sexual crimes against a minor.[338] At his sentencing proceeding, the Commonwealth adduced evidence of a test based on a "penile plethysmograph," a device "'designed to measure sexual responsiveness to a variety of stimuli.'"[339] The trial court overruled the defendant's objection that the prosecution had failed to demonstrate the scientific reliability of this testing.[340] The Court of Appeals of Virginia sustained the admissibility of the evidence, reasoning that sentencing proceedings operated under relaxed standards of admissibility of evidence.[341] The Supreme Court of Virginia reversed this holding.[342] The court reasoned that judges, jurors, and lawyers generally lack knowledge about scientific advances and that laymen often credit testimony that appears to be scientific.[343] "That tendency," the court noted, "has given rise to frequent complaints of 'junk science' in the courts."[344] To combat this problem, courts must make a "'threshold finding of fact with respect to the reliability of the scientific method offered,'" subject to certain exceptions.[345] Moreover, the proponent of the scientific evidence bears

336. *Id.* at 730, 652 S.E.2d at 98.

337. *Id.*

338. 274 Va. 805, 807, 652 S.E.2d 99, 100 (2007).

339. *Id.* at 807–08, 652 S.E.2d at 100–01.

340. *Id.* at 808, 652 S.E.2d at 101.

341. Billips v. Commonwealth, 48 Va. App. 278, 300, 307, 630 S.E.2d 340, 351, 355 (Ct. App. 2006).

342. *Billips*, 274 Va. at 810, 652 S.E.2d at 102.

343. *Id.* at 809, 652 S.E.2d at 101–02.

344. *Id.*, 652 S.E.2d at 102.

345. *Id.* at 809–10, 652 S.E.2d at 102 (quoting Spencer v. Commonwealth, 240 Va. 78, 97, 393 S.E.2d 609, 621 (1990)). Those exceptions include evidence that "is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis; or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law, such as 'lie detector' tests; or unless its admission is regulated by statute, such as blood–alcohol test results." *Spencer*, 240 Va. at 97, 393 S.E.2d at 621 (internal citations omitted).

the burden of establishing its reliability.[346] The court concluded that the prosecution had not attempted to meet its burden in the case at bar.[347]

V. SPECIFIC CRIMES

A. *Aggravated Involuntary Manslaughter/Felony Homicide*

In *Payne v. Commonwealth*, the defendant contended that her convictions for both felony homicide and aggravated involuntary manslaughter violated her protections against double jeopardy because both convictions were predicated upon the death of a single victim.[348] After a day of drinking on the job, the defendant drove away from her employer's parking lot and promptly collided with a car that was stopped at a red light.[349] The defendant then drove away, swerving erratically, and, within a short distance, struck and killed a pedestrian and again drove away.[350] The court employed the *Blockburger* test to determine whether the defendant's convictions violated the constitutional protections against double jeopardy.[351] The court considered the two offenses in the abstract to assess whether each crime requires proof of a fact that the other offense does not require.[352] The court observed that in this instance, each crime "requires proof of a fact which the other does not."[353] The felony homicide statute, "unlike the aggravated involuntary manslaughter statute, requires proof that the defendant was engaged in a felonious act at the time of the unintended killing."[354] Aggravated involuntary manslaughter, "unlike the felony homicide statute, requires proof that the defendant caused a death because she drove, while intoxicated, in a manner so gross and culpable as to demonstrate a reckless disre-

346. *Billips*, 274 Va. at 810, 652 S.E.2d at 102.
347. *Id.*
348. 52 Va. App. 120, 122, 661 S.E.2d 513, 514 (Ct. App. 2008).
349. *Id.* at 123, 661 S.E.2d at 514.
350. *Id.* at 123–24, 661 S.E.2d at 514.
351. *Id.* at 126, 661 S.E.2d at 515 (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).
352. *Id.*, 661 S.E.2d at 516.
353. *Id.* at 126–27, 661 S.E.2d at 516.
354. *Id.* at 127, 661 S.E.2d at 516.

gard for human life."[355] Therefore, the defendant was properly convicted of two offenses, notwithstanding the fact that both crimes involved a single victim.[356]

B. *Aggravated Sexual Battery*

In *De'Armond v. Commonwealth,* the Court of Appeals of Virginia addressed the "unit of prosecution" that the prosecution must establish to sustain a conviction for aggravated sexual battery.[357] The defendant had forced his granddaughter to touch his penis after which she left his room to complete her homework.[358] When she returned to his room, he again placed her hand on his penis and then touched her vagina and her chest.[359] In the defendant's view, these facts justified a single charge because they were all a part of one continuous transaction.[360] His conviction on multiple charges, he asserted, violated his rights under the Double Jeopardy Clause.[361] The key in determining the statutory unit of prosecution, the court observed, is legislative intent.[362] Under Virginia law, a sexual battery has occurred when the defendant "sexually abuses" the victim.[363] Sexual abuse, in turn, is defined as "'an act committed with the intent to sexually molest, arouse, or gratify any person'" and includes situations where the defendant touches the victim's "intimate parts."[364] "Intimate parts" are the "genitalia, anus, groin, breast, or buttocks of any person."[365] Construing these provisions together, the court found that the Virginia Code "creates a unit of prosecution for every act of sexual abuse and, at a minimum, contemplates separate acts for each of the separate 'intimate parts' described in Code § 18.2-67.10(2)."[366] The court found that this construction was consis-

355. *Id.*
356. *Id.* at 129, 661 S.E.2d at 517.
357. 51 Va. App. 26, 32–33, 654 S.E.2d 317, 320 (Ct. App. 2007).
358. *Id.* at 30, 654 S.E.2d at 319.
359. *Id.*
360. *Id.* at 34, 654 S.E.2d at 321.
361. *Id.* at 32, 654 S.E.2d at 320; *see* U.S. CONST. amend. V.
362. *De'Armond*, 51 Va. App. at 32–33, 654 S.E.2d at 320.
363. *Id.* at 33, 654 S.E.2d at 320 (quoting VA. CODE ANN. § 18.2-67.3(A)(1) (Repl. Vol. 2004 & Cum. Supp. 2008)).
364. *Id.* (citing VA. CODE ANN. § 18.2-67.10(6)(a) to -67.10(6)(d) (Repl. Vol. 2004 & Cum. Supp. 2008)).
365. *Id.* (quoting VA. CODE ANN. § 18.2-67.10(2) (Repl. Vol. 2004 & Cum. Supp. 2008)).
366. *Id.*

tent with the unit of prosecution in other sexual crime statutes.[367] Finally, the court rejected the defendant's contention that the rule of lenity favored a more narrow construction of the statute, noting that the rule only applies to ambiguous statutes.[368] The statute at issue was not ambiguous and, therefore, did not call for the application of the rule of lenity.[369]

C. *Brandishing a Firearm*

In *Huffman v. Commonwealth*, the Court of Appeals of Virginia examined whether, to be convicted of brandishing a gun, a defendant must cause the victim to experience actual fear.[370] The defendant, who was in his girlfriend's yard, was intoxicated and yelling at several individuals.[371] The defendant pulled out a gun, loaded it, and threatened to shoot a neighbor who had told him to put the gun down.[372] Based on these facts, the defendant was convicted of brandishing a gun.[373] On appeal, the defendant contended that the Commonwealth had not adduced any evidence that his neighbor was actually placed in fear.[374] Rejecting the argument, the court noted that the use of the term "fear" is misleading because the law does not require *"that the victim be frightened*; it is necessary merely that she be reasonably apprehensive of injury."[375] The court held that the victim showed apprehension when she, too, asked the defendant to put away his gun.[376] Finally, the court held that the victim need not expressly state that she was fearful or apprehensive to establish this element of the offense.[377]

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367. *Id.* (citing Nelson v. Commonwealth, 41 Va. App. 716, 740, 589 S.E.2d 23, 35 (Ct. App. 2003); Carter v. Commonwealth, 16 Va. App. 118, 128–29, 428 S.E.2d 34, 42 (Ct. App. 1993)).

368. *Id.* at 34, 654 S.E.2d at 321.

369. *Id.* at 34–36, 654 S.E.2d at 321–22.

370. 51 Va. App. 469, 472–73, 658 S.E.2d 713, 714–15 (Ct. App. 2008).

371. *Id.* at 471, 658 S.E.2d at 713–14.

372. *Id.*, 658 S.E.2d at 714.

373. *Id.*

374. *Id.* at 472, 658 S.E.2d at 714.

375. *Id.* at 473, 658 S.E.2d at 714 (quoting Seaton v. Commonwealth, 42 Va. App. 739, 749, 595 S.E.2d 9, 14 (Ct. App. 2004)).

376. *Id.*, 658 S.E.2d at 715.

377. *See id.*

D. *Burglary and Burglarious Tools*

The defendant in *Williams v. Commonwealth* argued that a plastic bag he had used to steal a pair of shoes did not qualify as a "burglarious tool."[378] The Court of Appeals of Virginia agreed and reversed his conviction for possession of burglarious tools.[379] The burglarious tools statute prohibits the possession of "any tools, implements or outfit, with intent to commit burglary, robbery or larceny."[380] After examining several dictionary definitions, the court concluded that an "'implement'" in this context is "a device, apparatus, instrument or equipment used in a trade, vocation or profession, or an 'object used in performing an operation or carrying on work of any kind[, such as] an instrument or apparatus necessary . . . in the practice of [a] vocation or profession.'"[381] Based on this definition, the court held, an ordinary plastic bag does not qualify as an implement under the statute.[382] This conclusion, the court reasoned, was consistent with precedent and legislative history and would avoid absurd results.[383]

E. *Credit Card Fraud*

The Court of Appeals of Virginia examined the scope of the credit card fraud statute in *Saponaro v. Commonwealth*.[384] The defendant's employer issued a credit card for employment-related purchases to the defendant, who then incurred personal charges amounting to several thousand dollars on the card.[385] Under Virginia Code section 18.2-195, "[a] person is guilty of credit card fraud when, with intent to defraud any person he . . . [o]btains money, goods, services or anything else of value by representing . . . without the consent of the cardholder that he is the holder of a specified card or credit card number."[386] The "cardholder" is

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378. 50 Va. App. 337, 340, 649 S.E.2d 717, 718 (Ct. App. 2007).

379. *Id.* at 339, 649 S.E.2d at 718.

380. VA. CODE ANN. § 18.2-94 (Repl. Vol. 2004 & Cum. Supp. 2008).

381. *Williams*, 50 Va. App. at 342, 345, 649 S.E.2d at 721 (quoting THIRD NEW INTERNATIONAL DICTIONARY 2408 (1993)) (alteration in original).

382. *Id.* at 345, 649 S.E.2d at 721.

383. *Id.* at 345–47, 649 S.E.2d at 721–22.

384. 51 Va. App. 149, 655 S.E.2d 49 (Ct. App. 2008).

385. *Id.* at 150, 655 S.E.2d at 49.

386. VA. CODE ANN. § 18.2.195 (Repl. Vol. 2004 & Cum. Supp. 2008).

"the person or organization named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer."[387] The court of appeals observed that the defendant unquestionably had the consent of the owner of the card, his employer, to hold the card and that the statute did not restrict the use of a card by one who had the consent of the cardholder to hold it.[388] Because the defendant had lawful possession of the card, he could not be convicted under the statute.[389]

F. *Constructive Possession of Drugs*

Although the cases in this area are legion, two recent decisions from the Supreme Court of Virginia, reversing convictions for constructive possession of drugs, demonstrate the obstacles prosecutors face in proving these cases. In *Young v. Commonwealth*, the defendant was stopped for a traffic violation.[390] She cooperated during the stop and agreed to a search of the car, which produced a prescription bottle with the name "Stephanie Woody" on the label.[391] Although the label described the contents of the bottle as OxyContin, the bottle in fact contained morphine and Trazodone.[392] At trial, Stephanie Woody testified that she lived with her uncle, Andre Gatewood.[393] Gatewood owned the car in which the drugs were discovered and he was the boyfriend of the defendant.[394] Woody testified that the pills were hers, that she had inadvertently left them in her uncle's car, and that the defendant told her that she had the pills.[395] Woody also said that she put different pills in one bottle, so she would not have to carry several bottles.[396] The defense adduced evidence that Woody had prescriptions for morphine, trazodone, and oxycodone.[397] The trial court and the Court of Appeals of Virginia found the evidence sufficient for a conviction.[398] In particular, the court of appeals

387. *Id.* § 18.2-191 (Repl. Vol. 2004).
388. *Saponaro*, 51 Va. App. at 151, 655 S.E.2d at 50.
389. *Id.* at 152–53, 655 S.E.2d at 50–51.
390. 275 Va. 587, 589, 659 S.E.2d 308, 309 (2008).
391. *Id.*
392. *Id.*
393. *Id.* at 590, 659 S.E.2d at 309.
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*, 659 S.E.2d at 309–10.

drew the inference "that possession of a controlled drug gives rise to an inference that the defendant was aware of its character."[399] The Supreme Court of Virginia reversed.[400]

The court stressed that "an essential element of the crime" of possession of an illegal drug is "that the defendant intentionally and consciously possessed it *with knowledge of its nature and character*."[401] The court noted that "[c]ountless scenarios can be envisioned in which controlled substances may be found in the possession of a person who is entirely unaware of their nature and character."[402] In the case at bar, the court concluded, "the record is devoid of evidence of any acts, statements or conduct tending to show guilty knowledge on her part."[403] Because the Commonwealth failed to prove the defendant knew of the nature and character of the pills, the court reversed her conviction.[404]

In *Maxwell v. Commonwealth*, the Supreme Court of Virginia again reversed a conviction for constructive possession of drugs.[405] Around 11:00 a.m., a police officer approached the defendant outside a shopping center and asked to speak with him in connection with a check.[406] The defendant's hands were placed "down the front of his pants."[407] Concerned for his safety, the officer asked the defendant to remove his hands, whereupon he refused and ran away.[408] The officer gave chase and observed the defendant emerge "from behind several stacks of plywood located between [an] alley and a chain-link fence that enclosed [a] lumberyard."[409] Eventually, the police brought in a drug dog, who alerted on a lumber pallet.[410] An officer reached in and found a plastic bag that contained pieces of crack cocaine.[411] A fingerprint was recovered from the baggie, but it did not match the defen-

399. *Id.*, 659 S.E.2d at 310.
400. *Id.* at 593, 659 S.E.2d at 311.
401. *Id.* at 591, 659 S.E.2d at 310 (quoting Burton v. Commonwealth, 215 Va. 711, 713, 213 S.E.2d 757, 759 (1975)).
402. *Id.* at 592, 659 S.E.2d at 310–11.
403. *Id.*, 659 S.E.2d at 311.
404. *Id.* at 592–93, 659 S.E.2d at 311.
405. 275 Va. 437, 444, 657 S.E.2d 499, 503 (2008).
406. *Id.* at 440, 657 S.E.2d at 501.
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*

dant's fingerprints.[412] The court concluded this evidence was insufficient to prove that the defendant possessed the recovered cocaine.[413]

The supreme court first noted that the officer's concern about the defendant's hands in his pocket stemmed from a concern for officer safety, not from the officer's belief that the defendant's conduct signaled the presence of drugs.[414] The court found that the defendant's flight was suspicious, but may have been triggered by the defendant's desire to avoid speaking with the police about the check.[415] The court also discounted testimony by employees of the lumberyard—that they had not seen anyone near the pallet that morning—on the ground that these employees did not keep a constant surveillance.[416] Indeed, neither of the lumberyard employees had noticed the defendant.[417] Moreover, the plywood was located in an unfenced area and any pedestrian could have readily placed the drugs there.[418] Furthermore, the court found it significant that when the defendant was observed walking between the stacks of plywood and the fence, he did not act furtively and did not appear to have anything in his hands.[419] Finally, the court found that the fact that the defendant became less talkative after he noticed the drugs were discovered was of no consequence.[420] Two justices dissented from this holding.[421]

G. *Driving Under the Influence/Unreasonable Refusal*

By statute, a driver's license is administratively suspended for sixty days when the driver's breath test shows a blood alcohol concentration of .08 percent or more.[422] In *Depsky v. Commonwealth*, the defendant argued that double jeopardy protections precluded her conviction for driving under the influence because

412. *Id.* at 441, 657 S.E.2d at 502.
413. *Id.* at 443, 657 S.E.2d at 502–03.
414. *Id.*, 657 S.E.2d at 503.
415. *Id.*
416. *Id.* at 444, 657 S.E.2d at 503.
417. *Id.*
418. *Id.*
419. *Id.* at 443, 657 S.E.2d at 503.
420. *Id.* at 443–44, 657 S.E.2d at 503.
421. *Id.* at 445, 657 S.E.2d at 504 (Lemons, J., dissenting).
422. VA. CODE ANN. § 46.2-391.2(A) (Repl. Vol. 2005 & Cum. Supp. 2008).

she had already been punished by the sixty-day suspension.[423] The Court of Appeals of Virginia disagreed.[424]

The court relied on the framework articulated by the Supreme Court of the United States in *Hudson v. United States*.[425] First, in determining whether a sanction is civil or criminal, courts must look to how the legislature labeled the measure.[426] If the sanction is deemed a civil one, the court's inquiry ends unless a defendant can establish that the measure is "so punitive in purpose or effect" that it is in reality a criminal penalty.[427] After finding that the measure was civil, the court of appeals examined the *Hudson* factors to determine whether the statute is in reality a criminal punishment masquerading as a civil measure.[428] Those factors are:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution or deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."[429]

Applying those factors to the administrative license suspension, the court concluded that "notwithstanding any incidental punitive effect it may have, the sixty-day administrative suspension of a person's privilege to drive in Virginia pursuant to Code § 46.2-391.2 constitutes a civil sanction and, thus, does not offend the constitutional prohibition against double jeopardy."[430]

The defendant in *Brothers v. Commonwealth* contended that his refusal to take a breath test was not unreasonable because it was based on his desire to first speak with an attorney.[431] The

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423. 50 Va. App. 454, 459, 650 S.E.2d 867, 870 (Ct. App. 2007).

424. *Id.* at 468, 650 S.E.2d at 874.

425. *Id.* at 460–61, 650 S.E.2d at 871 (citing Hudson v. United States, 522 U.S. 93 (1997)).

426. *Id.* (quoting *Hudson*, 522 U.S. at 99).

427. *Id.* at 461, 650 S.E.2d at 871 (quoting *Hudson*, 522 U.S. at 99).

428. *Id.* at 464–66, 650 S.E.2d at 872–74.

429. *Id.* at 461, 650 S.E.2d at 871 (quoting *Hudson*, 522 U.S. at 99–100).

430. *Id.* at 466–67, 650 S.E.2d at 874.

431. 50 Va. App. 468, 470, 650 S.E.2d 874, 875 (Ct. App. 2007).

Court of Appeals of Virginia affirmed his conviction for refusing to take the test, concluding that the reasoning in *Deaner v. Commonwealth* disposed of this argument.[432] In *Deaner*, the court had concluded that "'the consent to take a blood test is given when a person operates a motor vehicle.'"[433] This consent is neither qualified nor conditional.[434] Furthermore, allowing a suspect to wait for an attorney "'would virtually nullify the [i]mplied [c]onsent [l]aw.'"[435] The fact that *Deaner* was an administrative license suspension, rather than a crime, did not diminish the force of the holding.[436] The narrow grounds that render a refusal "unreasonable," such as when a blood withdrawal would endanger a person's health, did not extend to a refusal conditioned on a suspect's desire to first consult with counsel.[437]

The Supreme Court of Virginia reversed the defendant's conviction for driving under the influence of drugs in *Jackson v. Commonwealth*.[438] At the emergency room, the defendant received a powerful narcotic drug.[439] After he was discharged from the emergency room, he crashed his vehicle into a telephone pole.[440] The defendant contended that he could not be charged with driving under the influence of drugs because the drugs were not "self-administered."[441] Virginia Code section 18.2-266 prohibits driving "'while . . . under the influence of any narcotic drug or *any other self-administered* intoxicant or drug of whatsoever nature.'"[442] Applying the canon that penal statutes must be strictly construed, the court held that because the defendant's drug was not "self-administered," his conviction must be vacated.[443] Future cases will determine how broadly the court's conception of "self-administered" will sweep.

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432. *Id.* at 476–78, 650 S.E.2d at 878–79 (citing Deaner v. Commonwealth, 210 Va. 285, 170 S.E.2d 199 (1969)).

433. *Id.* at 474, 650 S.E.2d at 877 (quoting *Deaner*, 210 Va. at 292, 170 S.E.2d at 204).

434. *Id.* (citing *Deaner*, 210 Va. at 292, 170 S.E.2d at 204).

435. *Id.* (quoting *Deaner*, 210 Va. at 293, 170 S.E.2d at 204) (alterations in original).

436. *Id.* at 476–77, 650 S.E.2d at 878–79.

437. *Id.* at 475–76, 650 S.E.2d at 878.

438. 274 Va. 630, 652 S.E.2d 111 (2007).

439. *Id.* at 632–33, 652 S.E.2d at 112.

440. *Id.* at 633, 652 S.E.2d at 112.

441. *Id.* at 633–34, 602 S.E.2d at 112–13.

442. *Id.* at 634, 652 S.E.2d at 113 (quoting VA. CODE ANN. § 18.2-266 (Cum. Supp. 2008)) (emphasis added).

443. *Id.* at 633–34, 652 S.E.2d at 113.

In *Brown-Fitzgerald v. Commonwealth*, the defendant was arrested for driving under the influence.[444] In transit to the detention center, she experienced difficulty breathing, which continued upon arrival.[445] She was offered and agreed to take a blood test.[446] At trial, she claimed that she should have been provided with a breath test and the officer's failure to provide one denied her the benefit of exculpatory evidence.[447] The Court of Appeals of Virginia disagreed. The implied consent statute currently provides that a driver who operates a motor vehicle in Virginia "'shall be deemed thereby, as a condition of such operation, to have consented [upon arrest for driving under the influence] to have samples of his blood, breath, or both blood and breath taken for a chemical test to determine the alcohol . . . content of his blood.'"[448] Furthermore, "'[a]ny person so arrested . . . shall submit to a breath test. If the breath test is unavailable or the person is physically unable to submit to the breath test, a blood test shall be given.'"[449] The court noted that although the arrested person must submit to the breath test, the statute "does not impose any obligation upon the police officer to offer a breath test."[450] Indeed, the officer need not offer any chemical testing at all.[451] Examining the history of the statute, the court could not find any evidence that the purpose of the statute was to benefit the arrested driver.[452] Accordingly, the court concluded that the defendant "was never denied a statutorily mandated test."[453]

H. *Felony Eluding*

The felony eluding statute provides that a person is guilty of felony eluding if the person receives a visible or audible signal from a law enforcement officer to stop the vehicle, but nevertheless "drives such motor vehicle in a willful and wanton disregard of

444. 51 Va. App. 232, 234, 656 S.E.2d 422, 423 (Ct. App. 2008).
445. *Id.*
446. *Id.*
447. *Id.*
448. *Id.* at 236, 656 S.E.2d at 424 (quoting VA. CODE ANN. § 18.2-268.2(A) (Cum. Supp. 2008)).
449. *Id.* (quoting VA. CODE ANN. § 18.2-268.2(B) (Cum. Supp. 2008)).
450. *Id.*
451. *Id.*
452. *Id.* at 235–36, 656 S.E.2d at 423–24.
453. *Id.* at 237, 656 S.E.2d at 424.

such signal so as to interfere with or endanger the operation of the law-enforcement vehicle or endanger *a person* . . . ."[454] In *Phelps v. Commonwealth*, the defendant ignored a police officer's signal to stop, sped away, and eventually crashed his car.[455] He was the sole occupant of the car.[456] He argued that he could not be convicted of felony eluding because he was the only person endangered by his conduct.[457] The Supreme Court of Virginia disagreed, concluding that "the term 'a person' means any individual human being . . . including the defendant."[458] Had the General Assembly wished to exclude the defendant from the plain meaning of the statute, it would have done so.[459] Therefore, he was properly convicted because he endangered "a person"—himself.[460]

I. *Sex Offender Registration*

The Supreme Court of Virginia rejected two constitutional challenges to registration requirements for the sex offender registry. First, in *McCabe v. Commonwealth*, the defendant contended that the General Assembly could not make her registration regime more burdensome after she pled guilty to a charge that required her to register as a sex offender.[461] Initially, based on her conviction for taking indecent liberties with a minor while in a custodial or supervisory relationship, McCabe was classified as a "sex offender."[462] However, the General Assembly later changed the law and classified this offense as a "sexually violent offense."[463] The change in classification imposed a more lengthy and onerous reregistration burden on McCabe.[464] McCabe initiated litigation to challenge her reclassification, arguing that it violated her substantive due process and equal protection rights.[465] The Supreme Court of Virginia first concluded that McCabe had failed to dem-

454. VA. CODE ANN. § 46.2-817(B) (Cum. Supp. 2008) (emphasis added).
455. 275 Va. 139, 141, 654 S.E.2d 926, 927 (2008).
456. *Id.*
457. *Id.*
458. *Id.* at 142, 654 S.E.2d at 927.
459. *Id.*
460. *Id.* at 143, 654 S.E.2d at 928.
461. *See* 274 Va. 558, 562, 650 S.E.2d 508, 510 (2007).
462. *Id.* at 561, 650 S.E.2d at 510.
463. *Id.*; *see* Act of Apr. 5, 2001, ch. 840, 2001 Acts 1186 (codified as amended at VA. CODE ANN. § 9.1-902(E) (Cum. Supp. 2008)).
464. *McCabe*, 274 Va. at 561, 650 S.E.2d at 510.
465. *Id.* at 561–62, 650 S.E.2d at 510.

onstrate that the registration requirement infringed on a fundamental right.[466] Indeed, the court found "[t]o the contrary . . . liberty rights of convicted felons may be curtailed more than those of the general populace."[467] Furthermore, McCabe did not challenge the registration requirement on the basis that it failed "rational basis" scrutiny.[468]

Finally, McCabe contended that her procedural due process rights were infringed because she was not provided with a hearing to establish that she did not present a danger to the public.[469] The court rejected this contention, noting that the reclassification "of a crime as a 'sexually violent offense' . . . is based solely on the nature of the crime, not on a determination of current dangerousness."[470] Therefore, the court concluded, "no process is necessary to prove a fact not material to the classification determination."[471]

In *Morency v. Commonwealth*,[472] the petitioner brought a different challenge to his registration requirement. Morency was convicted of aggravated sexual battery and was required to register as a sex offender and to re-register with the state police every ninety days for life.[473] In 2002, Morency filed a petition in the circuit court to obtain relief from the quarterly registration requirement, which was granted.[474] The order granting the petition specified that the clerk should notify the state police to remove Morency's name and information from the website maintained by the state police.[475] In 2006, the provision requiring removal of an officer's information from the Internet registry was removed.[476] The state police then notified Morency that the amendment applied retroactively, and that Morency's information would, therefore, be reposted on the registry.[477] Relying on Virginia Code section 1-239, Morency argued that this change infringed on a vested

466. *Id.* at 565, 650 S.E.2d at 512.
467. *Id.*
468. *Id.* at 566, 650 S.E.2d at 513.
469. *Id.* at 566–67, 650 S.E.2d at 513.
470. *Id.* at 567, 650 S.E.2d at 513.
471. *Id.*
472. 274 Va. 569, 649 S.E.2d 682 (2007).
473. *Id.* at 572, 649 S.E.2d at 683.
474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.*

right he had acquired based on the judgment order that removed him from the website.[478]

The Supreme Court of Virginia held that "once a plaintiff acquires . . . a vested right, it cannot be disturbed by the subsequent repeal of the statute under which it was obtained."[479] Although "a final judgment order may vest a litigant with an accrued right for purposes of Code § 1-239," the specific nature of the "right" at issue must be determined.[480] Analyzing the statutory right at issue, the court found that under Virginia Code section 9.1-909(A), the petitioner could obtain an order that relieved him of the obligation to reregister quarterly.[481] The statute did not authorize a circuit court to direct the state police to remove the petitioner's information from the Internet.[482] The duty of the state police to remove a petitioner's information from the website was self-executing.[483] Because of the manner in which the statute operated, the court concluded that the order of the trial court directing the state police to remove Morency from the website did not create a vested or substantive right so that Morency could prevent his information from being posted on the Internet.[484] Instead, the removal of his information from the Internet registry "was solely an action directed by statute by virtue of the receipt of the September 30, 2004 order."[485] Accordingly, the legislature could alter the regime "at will."[486] Justice Koontz, joined by Chief Justice Hassell, dissented.[487]

J. *Solicitation To Commit Murder and Attempted Murder*

The defendant in *Ostrander v. Commonwealth*, was convicted of both solicitation to commit murder and attempted capital murder for hire.[488] Ostrander had entered a guilty plea to the charge of solicitation and contended that the Double Jeopardy Clause

478. *Id.* at 573, 649 S.E.2d at 683.
479. *Id.* at 574, 649 S.E.2d at 684.
480. *Id.* at 574–75, 649 S.E.2d at 684.
481. *Id.* at 576, 649 S.E.2d at 685.
482. *Id.*
483. *Id.*
484. *Id.* at 577, 649 S.E.2d at 686.
485. *Id.*
486. *Id.*
487. *Id.* (Koontz, J., dissenting).
488. 51 Va. App. 386, 391, 658 S.E.2d 346, 348 (Ct. App. 2008).

precluded a subsequent prosecution for attempted capital murder.[489] The Court of Appeals of Virginia concluded that double jeopardy imposed no bar to convict for attempted capital murder.[490] The court first rejected the argument that the defendant's guilty plea, followed by a trial on the remaining charge, constituted separate prosecutions for the "same offense."[491] Relying on settled precedent, the court concluded that "a defendant's election to plead guilty at trial to one charge and not guilty to another charge arising from the same criminal act 'neither transform[s] the single prosecution into two separate prosecutions nor capture[s] for [the defendant] any special protections against successive prosecutions under the [D]ouble [J]eopardy [C]lause.'"[492] The court then turned to whether the defendant was twice subjected to prosecution for the same offense. The test is "'whether each [offense] requires proof of a fact which the other does not.'"[493] This test considers the elements of the two offenses "in the abstract, rather than in the context of the facts of the particular case being reviewed."[494]

As the defendant conceded, "[T]he offense of attempted capital murder for hire requires proof of a fact that the offense of solicitation to commit murder does not—namely, that the accused performed a direct act toward the commission of the contemplated murder."[495] The attempted capital murder statute contains two distinct provisions. It "allows an accused to be convicted of capital murder for hire if he either hires someone to do the killing . . . or does the killing himself after having been hired by someone else to do it."[496] In the second scenario, where the hired killer commits the murder, the killer clearly could not be convicted of solicitation.[497] Therefore, "when considered in the abstract without reference to the particular facts, a solicitation to commit murder conviction requires proof of a fact that an attempted capital mur-

489. *Id.*

490. *Id.* at 394, 658 S.E.2d at 349–50.

491. *Id.* at 392–93, 658 S.E.2d at 349.

492. *Id.* at 393, 658 S.E.2d at 349 (citing Rea v. Commonwealth, 14 Va. App. 940, 944, 421 S.E.2d 464, 467 (Ct. App. 1992)) (alteration in original) (internal quotations omitted).

493. *Id.* at 395, 658 S.E.2d at 350 (citing West v. Dir. of Dep't of Corr., 273 Va. 56, 63, 639 S.E.2d 190, 195 (2007)).

494. *Id.* at 396, 658 S.E.2d at 350 (citing *West*, 273 Va. at 63, 639 S.E.2d at 195).

495. *Id.*, 658 S.E.2d at 351.

496. *Id.* at 397, 658 S.E.2d at 351 (citations omitted).

497. *Id.*

der for hire conviction does not—namely, that the accused solicited another person to commit a murder."[498] Consequently, the court held, the two offenses are not the "same offense," and the defendant suffered no deprivation of his protection against double jeopardy.[499]

K. *Failure To Appear*

The defendant in *Bowling v. Commonwealth* pled guilty to charges of driving while intoxicated and possession of marijuana with the intent to distribute.[500] After failing to appear for his sentencing proceeding, he later turned himself in and was convicted of failing to appear.[501] The defendant observed that the failure-to-appear statute criminalized a willful failure to appear for persons who are "charged" with a felony.[502] Because he pleaded guilty, he contended, he was no longer "charged" with a felony but rather was "convicted" of a felony.[503] The Court of Appeals of Virginia disagreed, reasoning that the defendant's guilty plea did not alter the fact that he remained charged with a crime.[504] The court also rejected the defendant's interpretation on the ground that it would lead to absurd results.[505]

L. *Felony Escape*

The sufficiency of the evidence for a felony-escape charge was at issue in *Hubbard v. Commonwealth*.[506] The defendant, seeking to avoid a traffic stop, engaged in a high speed pursuit with the police and eventually fled on foot.[507] A fight ensued between Hubbard and the police officer, who briefly managed to subdue the defendant before he escaped.[508] Hubbard was charged with,

498. *Id.*
499. *Id.*
500. 51 Va. App. 102, 104, 654 S.E.2d 354, 355 (Ct. App. 2007).
501. *Id.* at 104–05, 654 S.E.2d at 355.
502. *Id.* at 107–08, 654 S.E.2d at 357; *see* VA. CODE ANN. § 19.2-128(B) (Repl. Vol. 2008).
503. *Bowling*, 51 Va. App. at 107–08, 654 S.E.2d at 357.
504. *Id.* at 108, 654 S.E.2d at 357.
505. *Id.* at 110, 654 S.E.2d at 358.
506. 276 Va. 292, 293, 661 S.E.2d 464, 465 (2008).
507. *Id.* at 294, 661 S.E.2d at 465–66.
508. *Id.*, 661 S.E.2d at 466.

and convicted of, felonious escape from custody.[509] The Supreme Court of Virginia reversed this conviction.[510] The statute provides that "if any person lawfully in the custody of any police officer *on a charge of criminal offense* escapes from such custody by force or violence, he shall be guilty of a Class 6 felony."[511] The court observed that the Commonwealth must prove as an element of this offense that the defendant was charged with a criminal offense before the escape occurred.[512] The court concluded that the evidence was insufficient because no criminal charge was pending at the time of the defendant's flight from the police.[513] Probable cause to arrest for an offense, the court held, is not the same as a criminal charge.[514] Instead, a charge is a "formal accusation" or a "formal written complaint" of a crime.[515] The Commonwealth had presented no evidence of a criminal charge and, therefore, the evidence failed to establish this element of the offense.[516]

M. *Felony Murder—Arson*

In *Kennemore v. Commonwealth*, the defendant was charged with felony murder based on evidence that linked him to the charred remains of a woman.[517] The evidence did not conclusively show whether the victim had died before or after the fire.[518] When the jury inquired whether the victim had to be alive at the time of the fire, the trial court instructed the jury as follows: "In the commission of arson as used in these instructions means a killing before, during or after arson or attempted arson where the killing is so closely related to the arson in time, place, and causal connection as to make it part of the same criminal enterprise."[519]

In the defendant's view, this instruction was incorrect and should have instead stated that the killing must be "*while the* [de-

509. *Id.*
510. *Id.* at 296–97, 661 S.E.2d at 467.
511. VA. CODE ANN. § 18.2-478 (Repl. Vol. 2004 & Cum. Supp. 2008) (emphasis added).
512. *Hubbard*, 276 Va. at 295, 661 S.E.2d at 466.
513. *Id.* at 296, 661 S.E.2d at 467.
514. *Id.*
515. *Id.*
516. *Id.*
517. 50 Va. App. 703, 705, 653 S.E.2d 606, 607 (Ct. App. 2007).
518. *Id.* at 706, 653 S.E.2d at 607.
519. *Id.*

fendant] *was engaged in* the arson."[520] In resolving this question, the Court of Appeals of Virginia first cautioned against equating a jury question with a jury finding of any kind.[521] The court next held that under the *res gestae* limitation on the felony- murder doctrine, a killing falls under the felony-murder doctrine if it "'is so closely related to the felony in time, place, and causal connection as to make it a part of the same criminal enterprise.'"[522] Where the felony and the killing are "inextricably interwoven . . . it does not matter whether the killing precedes the felony or follows it."[523] Therefore, the trial court's instruction to the jury "fairly restated the governing principles of the *res gestae* limitation on the felony-murder doctrine."[524]

N. *Fortified Drug House*

In *Jones v. Commonwealth*, a case of first impression, the Supreme Court of Virginia addressed the prohibition on a "fortified drug house."[525] Police obtained a warrant to search a house where drug transactions occurred and, as police approached, the defendant and another individual pushed a stove against the rear door of the house.[526] To steady the stove, they also placed a board between the stove and a stairway.[527] After police officers battered down the door to gain entry, they also noticed a screwdriver placed in the latch of the door.[528] The defendant maintained that this evidence did not demonstrate that he had "substantially altered [the house] from its original status" and, therefore, the evidence against him was insufficient.[529] Giving this phrase its ordinary meaning, the court held that the measures taken by the defendant did not constitute a "substantial modification" of the structure.[530] Moving personal property within the house, the

520. *Id.* at 708, 653 S.E.2d at 608.
521. *Id.* at 709, 653 S.E.2d at 609.
522. *Id.* at 710, 653 S.E.2d at 609 (quoting Haskell v. Commonwealth, 218 Va. 1033, 1043–44, 243 S.E.2d 477, 483 (1978)).
523. *Id.* (citing *Haskell*, 218 Va. at 1041–43, 243 S.E.2d at 482–83).
524. *Id.* at 711, 653 S.E.2d at 610.
525. 276 Va. 121, 123, 661 S.E.2d 412, 413 (2008).
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.*, 661 S.E.2d at 413–14; *see* VA. CODE ANN. § 18.2-258.02 (Repl. Vol. 2004).
530. *Jones*, 276 Va. at 125, 661 S.E.2d at 414–15.

court concluded, does not alter the house's original status.[531] Finally, the court declined to set forth a comprehensive definition of the phrase "substantially altered from its original status." Instead, the court held, each case will turn on its own facts.[532]

O. *Habitual Offender*

Changes made in 1999 to the habitual offender regime left intact the criminal provision that prohibited persons who had been previously declared habitual offenders from driving.[533] In *Lilly v. Commonwealth*, the defendant, who had been adjudicated a habitual offender before 1999, contended that this partial repeal violated her rights under the Equal Protection and the Due Process Clauses of the United States and Virginia Constitutions.[534] The defendant noted that the changes to the law placed recidivist drivers into two categories: first, persons declared habitual offenders before July 1, 1999, who faced certain criminal penalties for driving as habitual offenders; and second, persons who committed certain offenses after July 1, 1999, who faced a separate set of specific penalties.[535] The defendant contended that identically situated persons would be treated differently.[536]

The Court of Appeals of Virginia found the statute "free of any constitutional infirmity."[537] The classification at issue, the court noted, did not involve a fundamental right or a suspect class.[538] In such cases, the law benefits from "a strong presumption of validity" and will be sustained upon a showing that "'a rational relationship exists between the disparity of treatment and some legitimate governmental purpose.'"[539] The court held that the legislative change at issue served several rational goals. First, the General Assembly could rationally choose to "balance[ ] the need to reform the cumbersome civil administrative process of declaring a driver to be an habitual offender with the corresponding

531. *Id.*
532. *Id.*, 661 S.E.2d at 415.
533. Lilly v. Commonwealth, 50 Va. App. 173, 180, 647 S.E.2d 517, 520 (Ct. App. 2007).
534. *Id.* at 178, 181, 647 S.E.2d at 520–21; *see* U.S. CONST. amend. XIV § 1.
535. *Lilly*, 50 Va. App. at 181, 647 S.E.2d at 521.
536. *Id.* at 183, 647 S.E.2d at 522.
537. *Id.* at 182, 647 S.E.2d at 522.
538. *Id.* at 181, 647 S.E.2d at 521.
539. *Id.* at 181–82, 647 S.E.2d at 521 (quoting Gray v. Commonwealth, 274 Va. 290, 308, 645 S.E.2d 448, 459 (2007)).

need to retain the benefits of the old system."[540] This strategy also allowed for "more tightly calibrated future recidivism punishments to underlying offenses."[541] Furthermore, the change avoided any ex post facto concerns that might arise if persons classified before 1999 were subjected to a different range of punishments that existed under the prior law.[542] The fact that these changes may cause certain individuals to face differing punishments based on the same set of facts did not render the action of the General Assembly irrational.[543] The court also held that the corresponding provisions of the Virginia constitution did not go any further than the federal protections and, therefore, the outcome was the same as to those provisions.[544] In a similar vein, the court concluded that the law satisfied the rational basis scrutiny required for challenges under the prohibition on "special, private, or local law[s]" found in the Constitution of Virginia.[545]

Finally, the court held that the defendant did not have any right to advise the jury during the guilt phase of the trial about the mandatory minimum sentence she faced if convicted.[546] The court of appeals observed that courts have "reject[ed] efforts by both prosecutors and defense counsel to inject issues of punishment into the guilt phase of a jury trial."[547]

P. *Disorderly Conduct*

The Court of Appeals of Virginia addressed the scope of a specific limitation for disorderly conduct prosecutions in *Battle v. Commonwealth*.[548] A defendant cannot be prosecuted for disorderly conduct where his conduct is "'otherwise made punishable'" under title 18.2.[549] This phrase, the court concluded, does not preclude a conviction for disorderly conduct merely because a de-

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540. *Id.* at 183, 647 S.E.2d at 522.

541. *Id.*

542. *Id.*

543. *Id.* at 184, 647 S.E.2d at 522 (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

544. *Id.*, 647 S.E.2d at 522–23.

545. *Id.* at 184–85, 647 S.E.2d at 523; *see* Va. CONST. art. IV, §§ 14–15.

546. *Lilly*, 50 Va. App. at 185, 647 S.E.2d at 523.

547. *Id.* at 186, 647 S.E.2d at 524.

548. 50 Va. App. 135, 137–38, 647 S.E.2d 499, 500 (Ct. App. 2007).

549. *Id.* at 140, 647 S.E.2d at 501 (quoting VA. CODE ANN. § 18.2-415) (Cum. Supp. 2008).

fendant could be *prosecuted* for another criminal offense; rather, it applies to "Title 18.2 crimes for which the defendant could be found guilty beyond a reasonable doubt."[550]

The court then applied this principle to the facts before it. A police officer noticed the defendant engaged in a loud argument after he was escorted out of a nightclub.[551] The officer could see the defendant making a "striking motion" towards another individual, but the officer could not see if the blow had landed.[552] When the officer asked the defendant to move from the sidewalk to avoid obstructing the passage of those who wished to enter the club, the defendant vehemently cursed at the officer.[553] The court first observed that the assault could not qualify as disorderly conduct because that conduct was otherwise made punishable by the assault and battery statute.[554] Similarly, the fact that the defendant cursed at the officer was punishable, if at all, as fighting words under Virginia Code section 18.2-416.[555] Finally, the defendant's failure to move from the sidewalk was punishable under Virginia Code section 18.2-404.[556] Therefore, because the defendant's actions were otherwise punishable, he could not be convicted of disorderly conduct.[557]

Q. *Rape*

In *Velasquez v. Commonwealth*, the defendant, who was on trial for charges of burglary and rape, took issue with a jury instruction providing that "[i]n the absence of evidence showing a contrary intent, you may infer that a defendant's unauthorized presence in a building of another was with the intent to commit rape."[558] In a prior burglary case, *Tompkins v. Commonwealth*, the Supreme Court of Virginia had approved an instruction stating that "when the Commonwealth has proven beyond a reasona-

550. *Id.*
551. *Id.* at 137, 647 S.E.2d at 500.
552. *Id.*
553. *Id.*
554. *Id.* at 141, 647 S.E.2d at 502.
555. *Id.*
556. *Id.* This statute criminalizes the obstruction of the free passage of others who are coming and going in a public place in the face of a request by an officer to move. *See* VA. CODE ANN. § 18.2-404 (Repl. Vol. 2004).
557. *Battle*, 50 Va. App. at 142, 647 S.E.2d at 502.
558. 276 Va. 326, 328 & n.1, 661 S.E.2d 454, 455 & n.1 (2008).

ble doubt that the defendant made an unlawful entry into a dwelling house in the night time, the presumption is that the entry was made for an unlawful purpose and the purpose may be inferred from the surrounding facts and circumstances."[559]

The court affirmed the validity of the *Tompkins* instruction in the context of a burglary charge, but distinguished its application to the specific intent crime of burglary from the general intent crime of rape.[560] The court reasoned that burglary is a specific intent crime, and it is appropriate to instruct the jury accordingly.[561] In contrast, rape, a general intent crime, is proved when the prosecution shows that the defendant knowingly and intentionally committed the acts that constitute rape.[562] Although the instruction was provided in reference to the burglary charge, the court observed, the instruction had a "collateral effect" on the rape charge and "amounted to an improper comment on the evidence."[563] The court also concluded that the instruction was legally erroneous.[564] The *Tompkins* instruction, the court noted, left for the jury the determination of what intent the defendant harbored.[565] Here, the instruction improperly suggested to the jury what conclusion it should draw from the facts in evidence.[566] The court further concluded, however, that the error was harmless because of the overwhelming evidence against the defendant.[567]

R. *Weapons Offenses*

Virginia law continues its realignment following the Supreme Court of Virginia's decision in *Farrakhan v. Commonwealth*.[568] In that case, the court held that not just any item would qualify as a "weapon of like kind" under Virginia Code section 18.2-308(A).[569]

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559. 212 Va. 460, 461, 184 S.E.2d 767, 768 (1971).
560. *Velasquez*, 276 Va. at 329, 661 S.E.2d at 456.
561. *Id.*
562. *Id.* at 329–30, 661 S.E.2d at 456 (citing Commonwealth v. Minor, 267 Va. 166, 173, 591 S.E.2d 61, 66 (2004)).
563. *Id.* at 330, 661 S.E.2d at 456.
564. *Id.*
565. *Id.*, 661 S.E.2d at 456–57.
566. *Id.*, 661 S.E.2d at 456.
567. *Id.* at 330–31, 661 S.E.2d at 457.
568. 273 Va. 177, 639 S.E.2d 227 (2007).
569. *Id.* at 182, 639 S.E.2d at 230; *see* VA. CODE ANN. § 18.2-308(A) (Cum. Supp. 2008).

The item in question must be a "weapon."[570] If the item qualifies as a weapon, it must also constitute a weapon that shares characteristics with the list of weapons enumerated in the statute.[571]

In *Harris v. Commonwealth*, the Supreme Court of Virginia examined whether a box cutter fell within the sweep of proscribed items or as a "weapon of like kind" under Virginia law.[572] The Commonwealth argued that a box cutter is analogous to a razor, one of the items listed in the statute.[573] The court rejected the comparison, finding that a box cutter differs from a razor.[574] Strictly construing the statute, the court found that a box cutter is an implement designed to open boxes, and is not a weapon.[575] In reaching this conclusion, the court overruled a decision from the Court of Appeals of Virginia to the extent it reached a differing conclusion.[576] The supreme court acknowledged that box cutters can be dangerous, but considered itself bound by the limits of the statute.[577]

The Supreme Court of Virginia addressed a different aspect of the prohibition on carrying a concealed weapon in *Pruitt v. Commonwealth*.[578] In that case, the trial court accepted the defendant's testimony that, following a collision, he placed his gun in the center console of his car.[579] Previously, the pistol had been in plain view on the front seat.[580] When the police arrived at the scene, Pruitt was standing outside of his vehicle, the windows of the car were rolled up, and the doors were closed.[581] The defendant was charged and convicted for possessing a concealed wea-

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570. *Farrakhan*, 273 Va. at 182, 639 S.E.2d at 230.

571. *Id.*

572. 274 Va. 409, 413, 650 S.E.2d 89, 90 (2007). Code section § 8.2-308.2(A) makes it unlawful for a convicted felon "to knowingly and intentionally carry . . . any weapon described in" § 18.2-308(A). VA. CODE ANN. § 18.2-308.2(A) (Cum. Supp. 2008).

Section 18.2-308(A) proscribes listed weapons and "any weapon of like kind." *Id.* § 18.2-308(A) (Cum. Supp. 2008).

573. *Harris*, 274 Va. at 413–14, 650 S.E.2d at 91; *see* VA. CODE ANN. § 18.2-308(A) (Cum. Supp. 2008).

574. *Harris*, 274 Va. at 414–15, 650 S.E.2d at 91.

575. *Id.* at 415, 650 S.E.2d at 91–92.

576. *Id.*, 650 S.E.2d at 91 (overruling O'Banion v. Commonwealth, 33 Va. App. 47, 59, 531 S.E.2d 599, 605 (Ct. App. 2000)).

577. *Id.*, 650 S.E.2d at 92.

578. 274 Va. 382, 650 S.E.2d 684 (2007).

579. *Id.* at 384–85, 650 S.E.2d at 684–85.

580. *Id.* at 384, 650 S.E.2d at 684.

581. *Id.* at 385, 650 S.E.2d at 685.

pon.[582] The statute in question, Virginia Code section 18.2-308(A), prohibits a person from "carr[ying] about his person, hidden from common observation . . . any pistol."[583] Pruitt argued that he was not carrying a pistol "about his person."[584] The court agreed, holding that "[t]here simply is no evidence demonstrating that Pruitt remained in the vehicle for any appreciable length of time beyond that necessary to place his pistol in the console compartment."[585] The danger contemplated by the statute—the risk of "prompt and immediate use" of the weapon—was simply not present.[586] Thus, although the pistol was concealed, it was not about the defendant's person and the court reversed his conviction.[587] The decision in *Pruitt* is based on unusual facts. Nevertheless, the decision could prove helpful to a defendant who faces a similar situation.

S. *Welfare Fraud*

In *Burrell v. Commonwealth*, the defendant challenged her conviction for making a false application for welfare.[588] In her application for food stamps, she had stated that she and her five children resided in Isle of Wight County.[589] Based on this information, she received over $3000 in welfare benefits.[590] The Commonwealth learned that the defendant, in fact, resided in Newport News.[591] Drawing from the perjury statute, Burrell argued that not just any false statement would suffice for a conviction, but, rather, only a "material" one.[592]

The Court of Appeals of Virginia rejected the defendant's argument based on the plain language of the statute. Unlike the perjury statute, the statute criminalizing a false statement on a welfare application prohibits the falsification of "'any matter or

582. *Id.* at 386, 650 S.E.2d at 685.
583. VA. CODE ANN. § 18.2-308(A) (Cum. Supp. 2008).
584. *Pruitt*, 274 Va. at 386–87, 650 S.E.2d at 686.
585. *Id.* at 388, 650 S.E.2d at 687.
586. *Id.* at 389, 650 S.E.2d at 687.
587. *Id.*
588. 50 Va. App. 72, 76, 646 S.E.2d 35, 37 (Ct. App. 2007).
589. *Id.* at 76–77, 646 S.E.2d at 38.
590. *Id.* at 78, 646 S.E.2d at 38.
591. *Id.* at 78–80, 646 S.E.2d at 38–39.
592. *Id.* at 80–81, 646 S.E.2d at 39–40.

thing required by the provisions of this title."'[593] The court further held that the defendant's address was required to obtain welfare benefits, and, therefore, the defendant was properly convicted of making a false statement related to a matter "required by" the statute.[594] Finally, the court concluded that the defendant was properly convicted of welfare fraud.[595] The defendant asserted that she was eligible for food stamps due to her financial situation, and the fact that the application was processed in the wrong locality was of no moment.[596] The court observed that each locality appropriates funds for public assistance and for the administrative costs of providing assistance.[597] Because of this, the court held, the appellant "was not 'entitled' to food stamps from Isle of Wight County; the fact that she may have been entitled to food stamps in a different locality is immaterial to the present offense."[598]

VI. LEGISLATION

In the criminal area, the Virginia General Assembly continued the past trend from recent sessions by enacting legislation that focuses on sexual crimes against children.

A. *Sex Crimes*

It is now a Class 1 misdemeanor for persons eighteen years or older to, with lascivious intent, "kiss[ ] a child under the age of 13 on the mouth while knowingly and intentionally penetrating the mouth of such child with his tongue."[599] A conviction for this offense triggers registration as a sex offender.[600]

After July 1, 2008, persons convicted of an "offense prohibiting proximity to children" are now proscribed as a part of their sentence from "going for the purpose of having any contact whatsoever with children that are not in his custody, within 100 feet of

593. *Id.* (quoting VA. CODE ANN. § 63.2-502 (Repl. Vol. 2007 & Cum. Supp. 2008)).
594. *Id.* at 81–82, 646 S.E.2d at 40.
595. *Id.* at 83, 646 S.E.2d at 41.
596. *Id.* at 82, 646 S.E.2d at 40.
597. *Id.* at 83, 646 S.E.2d at 41.
598. *Id.*
599. VA. CODE ANN. § 18.2-370.6 (Cum. Supp. 2008).
600. *Id.* § 9.1-902-(B)(3) (Cum. Supp. 2008).

the premises of any place owned or operated by a locality that he knows or should know is a playground, athletic field or facility, or gymnasium."[601] This measure expands the scope of the existing prohibition on proximity to children.[602]

Police and prosecutors are now barred from requiring the victim of a sex crime to submit to a polygraph examination "or other truth-telling device" as a condition to proceed with an investigation of the offense.[603]

Defendants charged with certain sex crimes involving minors can no longer marry their way out of a conviction.[604] That "safe harbor" has been repealed.[605]

The General Assembly has enacted a fairly narrow residency prohibition for certain sex crime convicts. Persons convicted after July 1, 2008 of raping a child under the age of thirteen, forcible sodomy of a child under the age of thirteen, or animate or inanimate object penetration of a child under the age of thirteen, if the offense is committed in conjunction with an abduction, burglary or a malicious wounding, are forbidden from residing within 500 feet of a specified public park.[606] The park must be owned and operated by a county, city, or town, share a boundary with a primary, secondary, or high school, and the park must be regularly used for school activities.[607] Violating this statute constitutes a Class 6 felony.[608]

Under previously existing law, persons convicted of a sexually violent offense were prohibited from entering and being present on school grounds during school hours.[609] As of 2008, this prohibition has been extended to a prohibition on presence during

601. *Id.* § 18.2-370.2 (Cum. Supp. 2008).

602. *See id.*

603. *Id.* § 19.2-9.1 (Repl. Vol. 2008)).

604. Code section 18.2-66 previously made a defendant immune from prosecution if he had subsequently married the victim of certain sex crimes. The victim also must have consented and been over fourteen years old. *Id.* § 18.2-66 (Repl. Vol. 2004).

605. Act of Mar. 3, 2008, ch. 174, 2008 Va. Acts __ (repealing VA. CODE ANN. § 18.2-66 (Cum. Supp. 2008)).

606. VA. CODE ANN. § 18.2-370.3(C) (Cum. Supp. 2008); *see id.*§ 18.2-61(A) (Cum. Supp. 2008) (rape); *id.* § 18.2-67.1(A)(1) (Cum. Supp. 2008) (forcible sodomy); *id.* § 18.2-67.2(A)(1) (Cum. Supp. 2008) (object sexual penetration).

607. *Id.* § 18.2-370.3(C) (Cum. Supp. 2008).

608. *Id.*

609. *Id.* § 18.2-370.5 (Cum. Supp. 2007).

school-related and school-sponsored activities.[610] Therefore, such convicts should avoid athletic contests or practices that take place on school grounds.

B. *Animal Fighting*

In 2008, the General Assembly significantly increased the penalties associated with animal fighting.[611] Among other measures, aiding and abetting an animal fight, or even attending one, can constitute a Class 6 felony.[612]

C. *Civil Remedial Fees*

The General Assembly, bowing to strong public pressure, repealed the despised civil remedial fees imposed upon conviction for certain traffic-related crimes.[613]

D. *Credit Card Offenses*

A prosecution for credit card offenses is now proper in any city or county where a credit card number is used, attempted to be used, or possessed with the intent to commit credit card forgery or fraud.[614] This change nullifies the outcome in *Meeks v. Commonwealth*.[615]

E. *Jury Confidentiality*

In a measure that essentially codifies existing practice, the General Assembly has expressly authorized a court to enter an order, on its own motion or upon a motion by one of the parties,

610. *Id.* § 18.2-370.5 (Cum. Supp. 2008).

611. Act of Mar. 11, 2008, ch. 543, 2008 Va. Acts __ (codified as amended at VA. CODE ANN. § 3.1-796.124 (Repl. Vol. 2008)); Act of Mar. 27, 2008, ch. 707, 2008 Va. Acts __ (codified as amended at VA. CODE ANN. § 3.1-796.124) (Repl. Vol. 2008)).

612. VA. CODE ANN. § 3.1-796.124 (Repl. Vol. 2008).

613. Act of Mar. 27, 2008, ch. 656, 2008 Va. Acts __ (repealing VA. CODE ANN. § 46.2-206.1 (Cum. Supp. 2008)).

614. Act of Apr. 2, 2008, ch. 797, 2008 Va. Acts __ (codified as amended at VA. CODE ANN. § 18.2-198.1 (Cum. Supp. 2008)).

615. 274 Va. 798, 803–04, 651 S.E.2d 637, 640 (2007) (overturning conviction for credit-card theft based on incorrect venue).

for good cause shown, limiting the disclosure of jurors' personal information to anyone other than the attorneys for the parties.[616]

F. *Firearms*

Under prior law, a juvenile who was adjudicated delinquent of certain offenses after July 1, 2005 could not possess a firearm.[617] The General Assembly deleted this time limitation.[618] Therefore, juveniles who have been adjudicated delinquent of the specified offenses at any time are now prohibited from possessing a firearm.[619]

G. *Illegal Aliens*

The General Assembly established a presumption that illegal aliens charged with certain crimes are ineligible for bail.[620] One significant limitation on this measure is for misdemeanors and crimes involving illegal drugs. In those cases, the presumption does not apply unless (1) "the United States Immigration and Customs Enforcement has guaranteed that, in all such cases in the Commonwealth, it will issue a detainer for the initiation of removal proceedings"; and (2) further agrees to reimburse the locality for the cost of incarceration from the time of the issuance of the detainer.[621]

It is now a Class 6 felony to sell a firearm to a person who is not lawfully present in the United States.[622]

H. *Underage DUI*

The General Assembly changed the punishment for underage drinking and driving.[623] The offense is now a Class 1 misdemea-

616. Act of Mar. 11, 2008, ch. 538, 2008 Va. Acts __ (codified at VA. CODE ANN. § 19.2-263.3 (Repl. Vol. 2008)).

617. VA. CODE ANN. § 18.2-308.2 (Repl. Vol. 2004).

618. Act of Mar. 27, 2008, ch. 752, 2008 Va. Acts __ (codified as amended at VA. CODE ANN. § 18.2-308.2 (Cum. Supp. 2008)).

619. VA. CODE ANN. § 18.2-308.2 (Cum. Supp. 2008).

620. Act of Mar. 8, 2008, ch. 469, 2008 Va. Acts __ (codified at VA. CODE ANN. § 19.2-120.1 (Repl. Vol. 2008)).

621. VA. CODE ANN. § 19.2-120.1 (Repl. Vol. 2008).

622. VA. CODE ANN. § 18.2-308.2:1 (Cum. Supp. 2008).

623. Act of Mar. 27, 2008, ch. 729, 2008 Va. Acts __ (codified as amended at VA. CODE

nor, and includes a mandatory minimum fine of $500 or performance of a mandatory minimum of fifty hours of community service.[624] The driver's license must also now be suspended for one year.[625]

I. *Misuse of Public Property*

The misuse of public property for personal purposes is now a Class 4 felony if the value of such use exceeds $1000 within a twelve-month period.[626]

J. *Public Defenders—Salary Supplements*

The General Assembly authorized localities to supplement the pay for public defenders, to parallel this authorization for prosecutors.[627]

ANN. § 18.2-266.1 (Cum. Supp. 2008)).

624. VA. CODE ANN. § 18.2-266.1 (Cum. Supp. 2008).

625. *Id.*

626. *Id.* § 18.2-112.1(B) (Cum. Supp. 2008).

627. Act of Mar. 11, 2008, ch. 536, 2008 Va. Acts __ (codified at VA. CODE ANN. § 19.2-163.01:1 (Repl. Vol. 2008)).

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