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## Criminal Law and Procedure

Michael T. Judge

*Medicaid Fraud Control Unit*

Stephen R. McCullough

*State Solicitor General, Office of the Attorney General, Commonwealth of Virginia*

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## CRIMINAL LAW AND PROCEDURE

*Michael T. Judge* \*

*Stephen R. McCullough* \*\*

### I. INTRODUCTION

The authors have endeavored to select from the many cases and bills those that have the most significant practical impact on the daily practice of criminal law in the Commonwealth. Due to space constraints, the authors have shied away from discussing settled principles, with a focus on the “take away” for a particular case.

Before diving into the specific cases, several general observations are in order. First, the Supreme Court of Virginia remains very interested in criminal cases, which continue to comprise a substantial portion of the court’s docket. Second, although the Supreme Court of Virginia’s opinions frequently are unanimous, the court remains divided, often by 4-3 vote, in some Fourth Amendment areas.<sup>1</sup> Third, for good or for ill, the court has been far less concerned about stare decisis than it has been in the past. The court continues to overrule precedents, both recent and more ancient. That is a welcome trend for attorneys seeking to overturn decisions viewed as unwise or confusing, but a frustrating development for judges and practitioners who favor stability and predictability in the law.

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\* Deputy Director, Medicaid Fraud Control Unit, Office of the Attorney General, Commonwealth of Virginia. J.D., 1989, George Mason University School of Law; B.S., 1986, George Mason University.

\*\* State Solicitor General, Office of the Attorney General, Commonwealth of Virginia. J.D., 1997, University of Richmond School of Law; B.A., 1994, University of Virginia.

1. *See, e.g.*, *Rudolph v. Commonwealth*, 277 Va. 209, \_\_\_ S.E.2d \_\_\_ (2009). The Commonwealth has appealed this decision. *Commonwealth v. Rudolph*, 277 Va. 209, \_\_\_ S.E.2d \_\_\_ *appeal docketed*, No. 09-102 (U.S. Feb. 27, 2009), *available at* <http://origin.www.supremecourtus.gov/docket/09-102.htm>.

## II. CRIMINAL PROCEDURE

### A. *Alibi Defense and Jury Instruction*

In *Cooper v. Commonwealth*, the Supreme Court of Virginia set out to rationalize its jurisprudence on whether the defendant is entitled to an alibi instruction when he requests one.<sup>2</sup> The defendant asked for an alibi instruction from the model jury instruction book.<sup>3</sup> The trial court refused to grant it, reasoning that the jury instructions covering the burden of proof beyond a reasonable doubt, the elements of the offense, and the presumption of innocence were sufficient.<sup>4</sup> On appeal, the Supreme Court of Virginia acknowledged that its precedents had sent mixed signals regarding whether a specific alibi instruction was required.<sup>5</sup> For example, in a 1932 decision, *Draper v. Commonwealth*, the court concluded that alibi was not so much a defense to the crime as it was a “rebuttal of the state’s evidence.”<sup>6</sup> The *Cooper* court repudiated this view of alibi and held that it had changed its consideration of the alibi concept.<sup>7</sup> From now on, “an alibi instruction should be granted when there is ‘evidence that the accused was elsewhere than at the scene of the crime at the exact time or for the entire period during which it was or could have been committed.’”<sup>8</sup> The court noted that this clear rule “will promote uniformity where uniformity is desirable.”<sup>9</sup>

Although *Cooper* clarifies conflicting precedents, the way the rule is worded may create problems. An alibi instruction is now required when there is evidence that the defendant was elsewhere than at the crime scene (1) at the “*exact time*” the crime was committed, or (2) “for the *entire period* during which [the crime] was or could have been committed.”<sup>10</sup> However, the time of

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2. See 277 Va. 377, 380–81, 673 S.E.2d 185, 187 (2009).

3. *Id.* at 380, 673 S.E.2d at 187.

4. *Id.*

5. See *id.* at 381–84, 673 S.E.2d at 187–89.

6. 132 Va. 648, 661, 111 S.E. 471, 475 (1922) (quoting 2 THE AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 53–54 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1896)).

7. *Cooper*, 277 Va. at 384–85, 673 S.E.2d at 189.

8. *Id.* at 385, 673 S.E.2d at 190 (quoting *Johnson v. Commonwealth*, 210 Va. 16, 20, 168 S.E.2d 97, 100 (1969)).

9. *Id.* at 385–86, 673 S.E.2d at 190.

10. *Id.* at 385, 673 S.E.2d at 190 (quoting *Johnson*, 210 Va. at 20, 168 S.E.2d at 100) (emphasis added).

the crime cannot always be determined with exactitude. Nor will alibi witnesses always be able to testify to the defendant's whereabouts with precision. Will an instruction be required if evidence shows the defendant was elsewhere during a portion of the time that the crime might have been committed? What if the evidence is not entirely clear? Future litigation will have to answer these questions.

### B. *Batson* Challenges

The importance of building a record to support a conviction is an aspect of all criminal trials, but the content of the record is paramount when dealing with *Batson*<sup>11</sup> challenges. In *Hopkins v. Commonwealth*, the prosecution exercised all four of its peremptory strikes to remove African-American jurors, which left only one African-American juror on the panel.<sup>12</sup> The prosecutor offered to the trial judge that he had struck two prospective jurors because they had criminal records.<sup>13</sup> Two other panel members were struck because they had family members who had been charged with drug-related offenses and might be more sympathetic to the defendant.<sup>14</sup> The prosecutor, however, did not address the fact that seven other jurors had family members charged with drug-related offenses, at least three of whom were not African-American, and the Commonwealth did not strike them.<sup>15</sup> While the trial court found that one of the stricken panel members (who had family members charged with drug-related offenses) seemed very uneasy when asked about family members with drug charges, the prosecutor gave no such reason for his strike of that individual.<sup>16</sup>

In short, the record did not provide a complete explanation for the strikes *from the prosecutor* as required by *Batson*.<sup>17</sup> Whether the trial court believed a juror was “uneasy” is not a substitute for

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11. *Batson v. Kentucky*, 476 U.S. 79, 191 (1986). In *Batson*, the United States Supreme Court held that a prosecutor's use of peremptory challenge—the dismissal of jurors without stating a valid cause for doing so—may not be used to exclude jurors based solely on their race. *See id.*

12. 53 Va. App. 394, 396, 672 S.E.2d 890, 891 (Ct. App. 2009).

13. *Id.*

14. *Id.*

15. *See id.* at 396–97, 400, 672 S.E.2d at 891, 893.

16. *Id.* at 400, 672 S.E.2d at 893.

17. *Batson*, 476 U.S. at 97.

the necessity of the prosecutor providing a reason for the strike.<sup>18</sup> The *Hopkins* court refused to substitute the trial court's reason when the prosecutor had not stated the reason, noting that

“[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.”<sup>19</sup>

The Commonwealth's stated reason for striking two jurors “was equally applicable to other jurors who were not African-American and were not [stricken].”<sup>20</sup> The prosecutor failed to ensure that the record provided the Commonwealth's explanation for the inconsistency as required by prior opinions of the Court of Appeals of Virginia.<sup>21</sup> Consequently, the stated reason was not a satisfactory race-neutral explanation for the Commonwealth's strikes and the case was reversed and remanded.<sup>22</sup>

### C. *Brady*—Disclosure of Exculpatory Evidence

*Gagelonia v. Commonwealth* clarifies jurisprudence discussing what types of evidence fall within the parameters of exculpatory evidence.<sup>23</sup> Different tests apply depending upon whether the Commonwealth withheld exculpatory evidence in violation of *Brady*, or the Commonwealth failed to preserve exculpatory evidence.<sup>24</sup> *Gagelonia's* *Brady* claims were premised upon the Commonwealth's failure to notify him that a videotape and cell phones had disappeared from an investigator's custody prior to trial.<sup>25</sup> *Gagelonia* claimed these items may have impeached a police officer's trial testimony.<sup>26</sup>

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18. *Id.* at 400, 672 S.E.2d at 893.

19. *Id.* at 400–01, 672 S.E.2d at 893 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005)).

20. *Id.* at 401, 672 S.E.2d at 893.

21. *Id.*

22. *Id.*

23. *See* 52 Va. App. 99, 113–14, 661 S.E.2d 502, 510 (Ct. App. 2008).

24. *See id.* at 112–15, 661 S.E.2d at 509–10; *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Brady*, the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material to either guilt or to punishment . . .” *Brady*, 373 U.S. at 87.

25. *Gagelonia*, 52 Va. App. at 113–14, 661 S.E.2d at 510.

26. *Id.* at 115, 661 S.E.2d at 510.

The Commonwealth's failure to disclose that the videotape and cell phones had disappeared did not constitute a *Brady* violation, the Court of Appeals of Virginia reasoned, because the defendant failed to show that the Commonwealth knew of their alleged exculpatory value at the time they disappeared.<sup>27</sup> Since *Brady* applies to evidence that has known exculpatory value, evidence of an alleged exculpatory value that did not arise until after the evidence was lost cannot form the basis of a *Brady* claim.<sup>28</sup> The court noted that the defendant could not "meet his burden of proving that this evidence was exculpatory merely by demonstrating its absence . . . ."<sup>29</sup> With respect to the cell phones, Gagelonia could have obtained the alleged exculpatory evidence from another source—his own cell phone records—and thus could never raise a viable *Brady* claim.<sup>30</sup> The court went on to note that the related due process claim for the loss of the items was likewise without merit because Gagelonia failed under all three prongs of the appropriate test: he did not show the evidence had exculpatory value before it was lost; he failed to establish he could not obtain the evidence from other sources; and he failed to establish bad faith on the part of the officer that lost the evidence.<sup>31</sup>

#### D. *Confrontation Clause*

The implications of the Supreme Court of the United States' decision in *Crawford v. Washington* continue to ripple through the practice of criminal law.<sup>32</sup>

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27. *Id.* at 115–16, 661 S.E.2d at 510–11.

28. *See id.* at 114–15, 661 S.E.2d at 510–11.

29. *Id.* at 117, 661 S.E.2d at 511.

30. *Id.* at 116, 661 S.E.2d at 511.

31. *Id.* at 115–16, 661 S.E.2d at 510–11.

[A] defendant seeking a new trial on the basis of missing evidence formerly in the Commonwealth's possession must show that (1) the evidence possessed an apparent exculpatory value, (2) the defendant could not obtain comparable evidence from other sources, and (3) the Commonwealth, in failing to preserve the evidence, acted in bad faith. Furthermore, "[t]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."

*Id.* at 115, 661 S.E.2d at 510 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 56 n.\* (1988)).

32. *See* 541 U.S. 36 (2004).

In *Harper v. Commonwealth*, the Court of Appeals of Virginia held that the Confrontation Clause test articulated in *Crawford* did not apply to a sentencing proceeding.<sup>33</sup> The court reasoned that *Crawford* itself did not purport to disturb settled precedent in this regard.<sup>34</sup> Moreover, the court noted that every United States Court of Appeals to have considered the issue refused to apply *Crawford* to sentencing proceedings.<sup>35</sup> Therefore, the trial court could properly admit, during the sentencing phase, hearsay testimony from a witness who relayed statements by the child victim.<sup>36</sup>

### E. Guilty Pleas

In *Cobbins v. Commonwealth*, the defendant asked for a continuance to replace his court-appointed attorney with private counsel.<sup>37</sup> The trial court refused to grant the continuance.<sup>38</sup> The defendant later entered an *Alford* plea.<sup>39</sup> After pleading guilty to a robbery charge and other crimes, Cobbins retained private counsel.<sup>40</sup> Cobbins then sought to withdraw his *Alford* plea, saying that he was just “buying time” to obtain a lawyer who would “fight this thing properly.”<sup>41</sup> He also explained that he had some unspecified evidence that would impeach the victim and that “other issues” might exonerate him.<sup>42</sup>

On appeal, Cobbins raised two issues: he contended that he should have been permitted to withdraw his guilty pleas, and that the trial court erred in denying the requested continuance.<sup>43</sup> To withdraw his *Alford* pleas, the court of appeals observed, the defendant was required “(i) to establish a good-faith basis for making the guilty plea and later seeking to withdraw it, and (ii)

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33. See 54 Va. App. 21, 22, 675 S.E.2d 841, 842 (Ct. App. 2009).

34. See *id.* at 27, 675 S.E.2d at 844.

35. *Id.* at 29, 675 S.E.2d at 845.

36. See *id.* at 23, 675 S.E.2d at 842.

37. 53 Va. App. 28, 32, 668 S.E.2d 816, 818 (Ct. App. 2008).

38. *Id.*

39. *Id.* at 32 & n.1, 668 S.E.2d at 818 & n.1 (“When offering an *Alford* plea, a defendant asserts his innocence but admits that sufficient evidence exists to convict him of the offense.” (citing *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970))).

40. *Id.* at 31–33, 668 S.E.2d at 818–19.

41. *Id.* at 33, 668 S.E.2d at 819 (citation omitted).

42. *Id.* (citation omitted).

43. *Id.*

to proffer evidence of a reasonable basis for contesting guilt.”<sup>44</sup> The court held that Cobbins failed the first part of this test, and noted that “[t]he guilty pleas served as a subterfuge designed to manipulate the court, against its better judgment, into unwittingly continuing the trial date. Because Cobbins acted in bad faith, he could not justly expect the trial court to reward his duplicitous conduct.”<sup>45</sup>

The court of appeals further concluded that Cobbins had waived the continuance issue by pleading guilty.<sup>46</sup> The court reasoned that an *Alford* plea is a type of guilty plea, and a guilty plea waives all issues except for jurisdictional ones.<sup>47</sup> Therefore, the court declined to examine whether the trial court abused its discretion in denying the continuance.<sup>48</sup>

#### F. *Flight*

In *Turman v. Commonwealth*, the Supreme Court of Virginia addressed the propriety of granting a flight instruction.<sup>49</sup> The victim testified that she was raped and subjected to sexual battery.<sup>50</sup> She said that, after the rape, she demanded that the defendant leave or she would call the police.<sup>51</sup> At that point, the defendant “[lung[ed]’ at the victim and took the telephone from her.”<sup>52</sup> The victim ran to her bedroom and called the police.<sup>53</sup> She then heard the door to her apartment close.<sup>54</sup> The defendant insisted that the sexual encounter was consensual and that he had left when the victim became angry.<sup>55</sup> When he was stopped that evening, he al-

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44. *Id.* at 34, 668 S.E.2d at 819 (citing *Justus v. Commonwealth*, 274 Va. 143, 155–56, 645 S.E.2d 284, 289–90 (2007)).

45. *Id.* at 35–36, 668 S.E.2d at 820.

46. *Id.* at 36–37, 668 S.E.2d at 820.

47. *Id.* at 36, 668 S.E.2d at 820.

48. *Id.* at 37, 668 S.E.2d at 820.

49. *See* 276 Va. 558, 560–61, 667 S.E.2d 767, 768 (2008).

50. *See id.* at 562, 667 S.E.2d at 769.

51. *Id.*

52. *Id.* at 563, 667 S.E.2d at 769.

53. *Id.*

54. *Id.*

55. *Id.*

so told police that he had been in Prince William County, whereas the victim lived in Fairfax County.<sup>56</sup>

In reversing the convictions, the court focused on the victim's statements to the defendant asking him to leave and noted that the defendant had started to dress himself.<sup>57</sup> The court did not address the fact that the defendant left the apartment only after he "lunged" at the victim, that he took the telephone from her, and that the victim ran to a place of safety in another room from which she threatened to call the police.<sup>58</sup>

Furthermore, in *Clagett v. Commonwealth*, the court had held that "[f]light is not limited to physically leaving a jurisdiction for an extended period, but includes the taking of any action, even of short duration, intended to disguise one's identity and distance oneself from the crime."<sup>59</sup> The *Turman* court's failure to distinguish *Clagett* is perplexing since the court of appeals specifically relied on this language in *Clagett* in upholding the jury instruction.<sup>60</sup> *Turman's* silence on *Clagett* may make it easier to distinguish in future cases that do not involve sexual assault defendants who have past relationships with their victims and leave the scene of the crime when the victim has secured a place of safety in another room. In short, *Turman's* impact may be limited to similar facts.

### G. Juvenile Transfer Hearings

Virginia Code section 16.1-277.1(B) requires a juvenile and domestic relations court to conduct a transfer hearing within 120 days from the date a petition is filed for juveniles who are not held in secure detention or who are released after spending some time in secure detention.<sup>61</sup> In *Harris v. Commonwealth*, the defendant's hearing was held after this 120-day period.<sup>62</sup> He con-

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56. *Id.* The victim's address is not provided in the case, but the authors assume she lives in Fairfax County because the crime allegedly occurred at her residence, and the case jurisdiction is Fairfax County.

57. *See id.* at 565, 667 S.E.2d at 771.

58. *See id.* at 565-66, 667 S.E.2d at 771.

59. 252 Va. 79, 93-94, 472 S.E.2d 263, 271 (1996).

60. *See Turman v. Commonwealth*, No. 0838-06-4, 2007 Va. App. LEXIS 354, at \*11-12 (Ct. App. Sept. 25, 2007) (citing *Clagett*, 252 Va. at 93-94, 472 S.E.2d at 271).

61. VA. CODE ANN. § 16.1-277.1 (Repl. Vol. 2003 & Cum. Supp. 2009).

62. 52 Va. App. 735, 739-40, 667 S.E.2d 809, 811-12 (Ct. App. 2008).

tended that this delay required dismissal of the charges.<sup>63</sup> The Court of Appeals of Virginia rejected the argument, concluding that the defect was not jurisdictional.<sup>64</sup> The court noted that in *Jamborsky v. Baskins*, the Supreme Court of Virginia held that the transfer deadline specified in Virginia Code section 16.1-269(E) was not mandatory.<sup>65</sup> The court relied on the reasoning in *Jamborsky*, concluding that

Code § 16.1-277.1(B) imparts no substantive right. Rather, in setting forth the time within which the adjudicatory or transfer hearing should be held, the statute merely directs the mode of proceeding by the J&DR court. The language in the statute is not prohibitory or limiting. Indeed, the statute does not expressly prohibit the court from conducting the transfer or adjudicatory hearing beyond the 120 days absent good cause. Nor is there any language in the statute that renders invalid an adjudicatory or transfer hearing held beyond the 120 days absent good cause. Thus, finding no manifestation of a contrary intent in the statute, we hold the provisions of Code § 16.1-277.1(B) are directory and procedural, rather than mandatory and jurisdictional.<sup>66</sup>

The court also noted that the defendant suffered no prejudice from the delay.<sup>67</sup> Finally, by statute, the return of the indictments by the grand jury cured any defects in the transfer statute.<sup>68</sup>

#### H. *Indispensible Party*

The court of appeals has dismissed appeals because of a minor but critical aspect of appellate litigation—making sure the appeal is noted against the proper party. In criminal cases, the choice of parties is limited to the Commonwealth or a locality when the conviction is for a violation of a local ordinance.<sup>69</sup> The overwhelming majority of cases involve appeals against the Commonwealth,

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63. *Id.* at 742–43, 667 S.E.2d at 813.

64. *Id.* at 744, 667 S.E.2d at 814.

65. *Id.* at 743–44, 667 S.E.2d at 813–14 (citing *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638–39 (1994)).

66. *Id.* at 744, 667 S.E.2d at 814.

67. *Id.* at 746, 667 S.E.2d at 814.

68. *Id.*, 667 S.E.2d at 815 (citing VA. CODE ANN. § 16.1-269.1(E) (Cum. Supp. 2009)).

69. *See* VA. CODE ANN. § 15.2-1429 (Repl. Vol. 2008) (granting localities authority to prescribe fines and other punishments for violations of ordinances).

but failure to name the proper and indispensable party on convictions of local ordinances instead of a state statute will result in dismissal.<sup>70</sup>

The appellate process is initiated by the filing of a notice of appeal.

The notice of appeal is an important aspect of appellate litigation for several reasons. First, it initiates the appeal. Second, it gives notice to the parties that the litigation is not yet over and the victory in the lower court may be short-lived. Third, it transfers jurisdiction of the case from the circuit court to the appellate court. And fourth, and most important for this case, it joins the indispensable and necessary parties to the appeal and subjects them to the authority of the appellate court.<sup>71</sup>

In *Woody v. Commonwealth*, even though there may have been actual notice to the county, and not just the state, the failure to include the county in the notice of appeal prevented the court of appeals from acquiring jurisdiction over an indispensable party, and required dismissal of the appeal.<sup>72</sup>

### I. *Nolle Prosequi*

*Wright v. Commonwealth* provides the end to a legal journey that began many decades ago: the legal consequence of denying a defendant his statutory right to a preliminary hearing.<sup>73</sup> In 1963, the Supreme Court of Virginia held that denying a defendant his statutory right to a preliminary hearing did not violate his due process rights under either the Constitution of Virginia or the United States Constitution.<sup>74</sup> In 1972, the Supreme Court of Virginia held in *Triplett v. Commonwealth* that the denial of an accused's statutory right to a preliminary hearing could be reversible error.<sup>75</sup> Twenty-six years later, in *Armel v. Commonwealth*, the Court of Appeals of Virginia held that "upon *nolle prosequi* of the offenses charged in the original warrants, [the] defendant was

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70. See *Woody v. Commonwealth*, 53 Va. App. 188, 197, 199, 670 S.E.2d 39, 44–45 (Ct. App. 2008) (holding that in cases where a locality is the prosecuting authority, that locality is an indispensable party and noting that the failure to join an indispensable party requires dismissal of the appeal).

71. *Id.* at 195–96, 670 S.E.2d 39 at 43 (2008) (citations omitted).

72. *Id.* at 194, 200, 670 S.E.2d at 42, 45.

73. See 52 Va. App. 690, 695, 667 S.E.2d 787, 790 (Ct. App. 2008) (en banc).

74. *Webb v. Commonwealth*, 204 Va. 24, 31, 129 S.E.2d 22, 28 (1963).

75. 212 Va. 649, 651, 186 S.E.2d 16, 17 (1972).

no longer ‘arrested on a charge of felony’ [as] contemplated by Code § 19.2-218” and thus could be indicted without the benefit of a preliminary hearing.<sup>76</sup> In *Armel*, “good cause,” as required by Virginia Code section 19.2-265.3 for the entry of nolle prosequi existed because a necessary witness was unavailable.<sup>77</sup>

*Wright* answers the question of what happens when there is no “good cause” for granting nolle prosequi. Since the preliminary hearing requirement is a creature of statute, it is not surprising that *Wright* found the answer to this question in the language of the statute itself.<sup>78</sup> The *Wright* court found that a preliminary hearing statute only applies if the defendant “is *actually under arrest* on a felony charge prior to indictment . . . .”<sup>79</sup> *Wright* noted that after nolle prosequi was entered, the defendant was no longer “a person who is detained in custody by authority of law or who is under a legal restraint,” and that the absence of legal restraint, which terminated with the entry of nolle prosequi, negated the requirement of a preliminary hearing.<sup>80</sup> The court of appeals rejected the defendant’s attempt to have the general district court’s entry of nolle prosequi declared void.<sup>81</sup> *Wright* held that absent fraud in the procurement of nolle prosequi, there was no basis for declaring such an order void; and there was no basis for appeal of such an order to a circuit court because the General Assembly had not provided for review of such orders.<sup>82</sup> Unless there exists a factual scenario similar to *Triplett* or fraud, it is unlikely that a defendant will ever be able to prevail on appeal for any alleged deprivation related to a preliminary hearing.

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76. 28 Va. App. 407, 411, 505 S.E.2d 378, 380 (Ct. App. 1998) (quoting VA. CODE ANN. § 19.2-218 (Repl. Vol. 2008 & Supp. 2009)).

77. See *id.* at 408, 505 S.E.2d at 379; see also VA. CODE ANN. § 19.2-265.3 (Repl. Vol. 2008)).

78. See *Wright*, 52 Va. App. at 710–11, 667 S.E.2d at 797 (citing VA. CODE ANN. § 19.2-218 (Repl. Vol. 2008 & Cum. Supp. 2009)).

79. *Id.* at 700, 667 S.E.2d at 792 (quoting *Moore v. Commonwealth*, 218 Va. 388, 394, 237 S.E.2d 187, 192 (1977)).

80. *Id.* at 700–01, 667 S.E.2d at 792 (quoting *Moore*, 218 Va. at 394, 237 S.E.2d at 192).

81. *Id.* at 704–05, 667 S.E.2d at 794.

82. *Id.* at 706, 667 S.E.2d at 795.

### J. *Revocation Hearings*

In *Dickens v. Commonwealth*, the Court of Appeals of Virginia concluded that the failure to afford a defendant the opportunity to cross-examine the preparer of an affidavit at a revocation hearing did not infringe upon the Due Process Clause.<sup>83</sup> The trial court considered an affidavit at the revocation hearing without affording the defendant an opportunity to cross-examine the witness.<sup>84</sup> In the affidavit, the custodian of the records of the sex offender registry averred that the defendant had not registered as a sex offender.<sup>85</sup> The court of appeals observed that “probation revocation hearings are not a stage of criminal prosecution and therefore a probationer is not entitled to the same due process protections afforded a defendant in a criminal prosecution.”<sup>86</sup> Furthermore, a trial court can consider hearsay evidence, including affidavits, at the revocation hearing.<sup>87</sup> Given these relaxed evidentiary standards, the court held that due process did not require cross-examination of the affiant.<sup>88</sup>

### K. *Witness Immunity*

In *Murphy v. Commonwealth*, the defendant agreed to testify at a preliminary hearing against a co-defendant, in exchange for which the prosecution would nolle prosequi a charge of transporting drugs.<sup>89</sup> After the defendant testified, he claimed that Virginia Code section 18.2-262 required all charges to be dismissed.<sup>90</sup> That section states:

No person shall be excused from testifying . . . for the Commonwealth as to any offense alleged to have been committed by another under this article or under the Drug Control Act (§ 54.1-3400 et seq.) by reason of his testimony . . . tending to incriminate himself, but

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83. 52 Va. App. 412, 422, 663 S.E.2d 548, 553 (Ct. App. 2008).

84. *Id.* at 416–17, 663 S.E.2d at 550.

85. *Id.* at 416, 663 S.E.2d at 550.

86. *Id.* at 417, 663 S.E.2d at 550 (citing *Davis v. Commonwealth*, 12 Va. App. 81, 84, 402 S.E.2d 684, 686 (1991)).

87. *Id.* at 421–22, 663 S.E.2d at 552–53.

88. *See id.* at 422–23, 663 S.E.2d at 553.

89. 277 Va. 221, 224, 672 S.E.2d 884, 885 (2009).

90. *Id.*, 672 S.E.2d at 885–86.

the testimony given . . . by such person on behalf of the Commonwealth when called for by the trial judge or court trying the case, or by the attorney for the Commonwealth, or when summoned by the Commonwealth and sworn as a witness by the court or the clerk and sent before the grand jury, shall be in no case used against him nor shall he be prosecuted as to the offense as to which he testifies.<sup>91</sup>

The circuit court denied the motion to dismiss, and Murphy appealed.<sup>92</sup> The Supreme Court of Virginia affirmed, holding that the plain language of the statute grants immunity only to witnesses whose testimony is compelled.<sup>93</sup> The court further reasoned that extending transactional immunity to such testimony is consistent with the Fifth Amendment privilege against self-incrimination.<sup>94</sup> The court observed that “Murphy’s testimony was voluntarily given in return for the Commonwealth’s oral agreement to dismiss the pending transportation of marijuana charge . . . .”<sup>95</sup>

### III. SEARCH AND SEIZURE

#### A. *Lawfulness of a Search*

The scope of a personal frisk was at issue in *Bandy v. Commonwealth*.<sup>96</sup> Police observed two men, in a public housing project plagued by drug crime, walk up to a residence.<sup>97</sup> The men knocked, but received no answer and began walking away.<sup>98</sup> As the police officers approached the men, the defendant’s companion threw something in a bush.<sup>99</sup> That something turned out to be crack cocaine.<sup>100</sup> The officer asked if he could speak with the defendant for a minute, and the defendant agreed.<sup>101</sup> The defendant could not provide the name of the person he was visiting,

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91. *Id.*, 672 S.E.2d at 886 (quoting VA. CODE ANN. § 18.2-262 (Repl. Vol. 2009)).

92. *Id.* at 225, 672 S.E.2d at 886.

93. *Id.* at 228, 672 S.E.2d at 888.

94. *Id.* at 227–28, 672 S.E.2d at 887–88.

95. *Id.* at 228, 672 S.E.2d at 888.

96. *See* 52 Va. App. 510, 513, 664 S.E.2d 519, 520 (Ct. App. 2008).

97. *Id.*

98. *Id.*

99. *Id.* at 514, 664 S.E.2d at 521.

100. *Id.*

101. *Id.*

nor could he give an address.<sup>102</sup> His answers to the officer's questions were "extremely evasive."<sup>103</sup> The defendant was nervous and kept shifting his hands in his pockets.<sup>104</sup> The officer suspected the defendant might have a weapon and informed him that he needed to pat him down.<sup>105</sup> On the first pass, the officer felt a bulge in the defendant's pocket and heard a crinkle.<sup>106</sup> When the officer made a second pass over the object with his fingers, he immediately and correctly recognized the item as several crack cocaine rocks.<sup>107</sup> The defendant contended that both the stop and the frisk were improper.<sup>108</sup>

The court of appeals first concluded that although the encounter was initially consensual, the defendant was seized when the officer told him he was going to perform the pat-down.<sup>109</sup> However, the court held that the seizure was proper because the officer had reasonable suspicion that the defendant might be involved in drug-related activity and that the defendant might be trespassing.<sup>110</sup> The public housing property had several "No Trespassing" signs, and the defendant provided inconsistent and evasive answers concerning his presence.<sup>111</sup>

Next, the court concluded that the officer could perform a pat-down because the officers could reasonably suspect that the defendant was armed and dangerous.<sup>112</sup> The defendant was in a "high-drug, high-crime" neighborhood and accompanied a man who had just discarded cocaine.<sup>113</sup> The court observed that the link between drugs and violence is well established.<sup>114</sup> The defen-

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 515, 664 S.E.2d at 521.

107. *Id.*

108. *Id.* at 515-16, 664 S.E.2d at 521-22.

109. *Id.* at 517, 664 S.E.2d at 522.

110. *Id.* at 518, 664 S.E.2d at 523.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* ("[T]he connection between illegal drug operations and guns is a tight one.") (quoting *Jones v. Commonwealth*, 272 Va. 692, 701 n.3, 636 S.E.2d 403, 407 n.3 (2006) (internal quotation marks omitted)).

dant appeared nervous and repeatedly put his hands in his pockets, even though the officer had told him not to do so.<sup>115</sup>

Finally, the court turned to the heart of the case—whether the officer exceeded the scope of a proper frisk.<sup>116</sup> The defendant complained that the officer impermissibly manipulated the items in the defendant's pocket.<sup>117</sup> The court observed that the Fourth Amendment does not necessarily forbid an officer from squeezing, sliding, or manipulating items felt during a pat-down.<sup>118</sup> The purpose of the pat-down is to determine if the defendant is carrying a concealed weapon.<sup>119</sup> “Such searches necessarily involve a certain amount of squeezing, sliding and otherwise manipulating of a suspect’s outer clothing, in an attempt to discern whether weapons are hidden underneath.”<sup>120</sup> The court explained that

[t]he crux of any analysis of whether an officer exceeds the scope of a *Terry* “frisk” is simply whether the actions of the frisking officer go beyond the basic determination of whether a suspect is armed. If the officer’s actions are reasonably calculated to determine whether the suspect possesses a weapon, then the pat down is constitutionally proper. Conversely, the officer exceeds the constitutional constraints of a *Terry* frisk if he is trying to determine, through his sense of touch, the nature or identity of an object he knows cannot be a weapon.<sup>121</sup>

The court held that the officer’s pat-down was properly directed at a search for weapons.<sup>122</sup>

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115. *Id.* at 518–19, 664 S.E.2d at 523.

116. *See id.* at 519, 664 S.E.2d at 523.

117. *Id.* at 521, 664 S.E.2d at 524.

118. *See id.*

119. *Id.*

120. *Id.* (quoting *United States v. Yamba*, 506 F.3d 251, 258 (3d Cir. 2007)) (internal quotation marks omitted).

121. *Id.* at 521–22, 664 S.E.2d at 524. A *Terry* stop occurs when a police officer searches an individual without probable cause to arrest. *See Terry v. Ohio*, 392 U.S. 1, 20 (1968). Such a search does not violate the individual’s Fourth Amendment rights as long as the officer has reasonable suspicion that the person has committed, is committing, or is about to commit a crime. *See id.*

122. *Id.* at 522, 664 S.E.2d at 525.

### B. *Lawfulness of a Stop*

In *Harris v. Commonwealth*, a police officer received an anonymous tip about a drunk driver.<sup>123</sup> The dispatcher who called with the tip said the informant had described the defendant as “Joseph Harris” and that Harris was driving “[a green] Altima, headed south, towards the city, possibly towards the south side.”<sup>124</sup> The caller had provided a partial license plate number of “Y8066” and said the driver was wearing a striped shirt.<sup>125</sup> A police officer promptly located a vehicle that matched this description.<sup>126</sup> The officer observed the driver slow down at an intersection, even though the driver had the right of way.<sup>127</sup> He also slowed down well in advance of a red light.<sup>128</sup> At no point did the driver swerve or exceed the speed limit.<sup>129</sup> After being followed for a few minutes, the driver pulled to the side of the road, and the officer made a traffic stop.<sup>130</sup> It quickly became apparent that Harris was driving drunk.<sup>131</sup> He was convicted of driving under the influence, after having twice been convicted of the same offense.<sup>132</sup> He challenged his conviction on the basis that the officer had conducted an improper *Terry* stop.<sup>133</sup>

The Supreme Court of Virginia observed that anonymous tips have “a relatively low degree of reliability, requiring more information to sufficiently corroborate the information contained in the tip.”<sup>134</sup> The reliability of an anonymous tip can be bolstered when it contains predictive information.<sup>135</sup> Such predictions must relate to criminal behavior, not “observable or available to anyone.”<sup>136</sup> In this instance, the tip contained no predictions about the

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123. 276 Va. 689, 693, 668 S.E.2d 141, 144 (2008).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See id.*

132. *Id.*

133. *Id.* at 694–95, 668 S.E.2d at 144–45.

134. *Id.* at 695, 668 S.E.2d at 145.

135. *Id.*

136. *Id.* at 695–96, 668 S.E.2d at 145–46.

defendant's future behavior.<sup>137</sup> Finally, although the officer observed "unusual" driving behavior, he had not observed any "erratic" driving by the defendant.<sup>138</sup> Therefore, the court concluded, the officer lacked sufficient reasonable suspicion and the stop violated the Fourth Amendment.<sup>139</sup> Three justices dissented from this holding, and the Commonwealth has sought a writ of certiorari.<sup>140</sup>

### C. Drug Dogs and Probable Cause

Drug detection dogs are an increasingly common feature of traffic stops. In *Jones v. Commonwealth*, the defendant was stopped for having an improper license plate registration.<sup>141</sup> The stop occurred in an area known for its drug problems.<sup>142</sup> The officer summoned a drug detection dog before running the defendant's driver's license.<sup>143</sup> The drug dog arrived within three to five minutes, and immediately alerted the officer to the presence of drugs.<sup>144</sup> Based on the alert, the officers searched the car and found a loaded weapon and a small amount of marijuana.<sup>145</sup> The defendant contended that the dog's alert was not sufficiently reliable to justify the search because the prosecution had presented no evidence of the dog's testing, training, and oversight.<sup>146</sup>

After examining its own analogous precedents, as well as precedents from other courts, the court set forth the following standard:

[A] positive alert from a narcotics detection dog establishes probable cause to conduct a search of a vehicle and . . . evidence seized during the search is admissible after a proper foundation has been laid to show that the dog was sufficiently trained to be reliable in detecting narcotics. The narcotics detection dog's reliability can be established

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137. *Id.* at 696, 668 S.E.2d at 146.

138. *Id.* at 697-98, 668 S.E.2d at 146-47.

139. *Id.* at 698, 668 S.E.2d at 147.

140. *Id.*; *Commonwealth v. Harris*, 276 Va. 689, 668 S.E.2d 141 (2008), *appeal docketed*, No. 08-1385 (U.S. May 11, 2009), available at <http://origin.www.supremecourtus.gov/docket/08-1385.htm>.

141. 277 Va. 171, 174, 670 S.E.2d 727, 729 (2009).

142. *Id.*

143. *Id.* at 175, 670 S.E.2d at 729.

144. *See id.*

145. *Id.*

146. *Id.* at 179, 670 S.E.2d at 729-30.

from its training and experience, as well as a proven track record of previous alerts to the existence of illegal narcotics. Specific certifications and the results of field testing are not required to establish a sufficient foundation. However, if the dog's qualifications are challenged, the trial court may consider any relevant evidence in determining whether the Commonwealth has established the dog's reliability in detecting narcotics.<sup>147</sup>

Applying this standard to the facts of the case, the court held that the search was proper.<sup>148</sup> The officer testified in detail about the drug detection dog's qualifications, extensive training and experience, and success in detecting illegal drugs.<sup>149</sup> The fact that the police did not conduct "backwards checks" to assess the dog's reliability did not render the evidence inadmissible in light of the totality of the evidence before the court.<sup>150</sup>

#### D. *Consent to Search*

Another drug dog issue arose in *Ellis v. Commonwealth*.<sup>151</sup> The police stopped Ellis for an inoperative brake light.<sup>152</sup> The officer retrieved Ellis's driver's license to process it when he recalled that Ellis had a narcotics history.<sup>153</sup> He approached Ellis and asked her if she would consent to a search of the car, but she refused.<sup>154</sup> The officer then called for a drug detection dog.<sup>155</sup> The drug dog arrived about five minutes later, while the officer was preparing the paperwork for the traffic-related summons.<sup>156</sup> Within two minutes, the drug dog "alerted multiple times to the presence of drugs in Ellis's vehicle."<sup>157</sup> Ellis then consented to a search of her person.<sup>158</sup> During the search, police recovered cocaine.<sup>159</sup>

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147. *Id.* at 180–81, 670 S.E.2d at 732–33.

148. *See id.* at 181, 670 S.E.2d at 733.

149. *See id.*

150. *Id.*

151. *See* 52 Va. App. 220, 662 S.E.2d 640 (Ct. App. 2008).

152. *Id.* at 223, 662 S.E.2d at 641.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 224, 662 S.E.2d at 642.

157. *Id.*

158. *Id.*

159. *Id.*

Before trial and on appeal, the defendant argued that an unreasonably long detention had tainted her consent to search.<sup>160</sup> The Court of Appeals of Virginia disagreed, affirming the defendant's conviction.<sup>161</sup> The court observed that the traffic stop was proper, and the only amount of time spent on drugs was the officer's request to search the vehicle.<sup>162</sup> At all other times, the officer was preoccupied with the paperwork for the summons.<sup>163</sup>

The court framed the issue as "whether such a *de minimis* delay, caused by questioning unrelated to the specific reason for the detention, invalidates a later, voluntary consent to search."<sup>164</sup> Examining persuasive authority from other jurisdictions, the court concluded that

"where a seizure of a person is based on probable cause to believe that a traffic violation was committed, an officer does not violate the Fourth Amendment by asking a few questions about matters unrelated to the traffic violation, even if this conversation briefly extends the length of the detention."<sup>165</sup>

The court held that the officer's questions did not violate the Fourth Amendment and did not vitiate the defendant's consent.<sup>166</sup>

#### IV. EVIDENTIARY ISSUES

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

##### A. *Expert Witnesses*

Crimes against children present unique challenges. In *Kilby v. Commonwealth*, the defendant challenged the admissibility of expert testimony on the issue of delayed disclosure of a child's allegations of sexual abuse, contending the expert was not quali-

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160. *Id.* at 224–25, 662 S.E.2d at 642.

161. *See id.* at 222, 662 S.E.2d at 641.

162. *See id.* at 224–26, 662 S.E.2d at 642–43.

163. *Id.* at 225, 662 S.E.2d at 642.

164. *See id.* at 226, 662 S.E.2d at 643.

165. *Id.* at 227, 662 S.E.2d at 643 (quoting *United States v. Olivera-Mendez*, 484 F.3d 505, 510 (8th Cir. 2007)).

166. *Id.* at 228, 662 S.E.2d at 644.

fied.<sup>167</sup> The expert had spent nine years as a forensic interviewer and served as the lead forensic interviewer in the child abuse program of a children's hospital.<sup>168</sup> She earned a bachelor's degree in social work, attended numerous forensic training programs, and previously qualified as an expert in child sexual abuse cases in three circuit courts and several military tribunals.<sup>169</sup> The Court of Appeals of Virginia held that these qualifications were sufficient and that the trial court committed no abuse of discretion.<sup>170</sup>

The court found the defendant's reliance on *Davison v. Commonwealth* inapposite.<sup>171</sup> In that case, the court held that a witness was not qualified to testify as an expert on the issue of recantation by child victims of sexual abuse.<sup>172</sup> The expert in *Davison* had "degrees in psychology and social work and an acquaintance with a single article" on recantation.<sup>173</sup> The expert witness in *Kilby*, the court concluded, was "much more qualified than the [expert] witness in *Davison*."<sup>174</sup>

## B. Other Crimes Evidence

*Pearce v. Commonwealth* concerns the admissibility of evidence regarding a defendant's use of alcohol and illegal drugs near in time to his encounter with the police, and prior to his arrest.<sup>175</sup> The police observed the defendant, and others in a group, drinking alcohol from open containers.<sup>176</sup> During the encounter with the group, members of the group—despite requests by officers not to do so—continually placed their hands in their pockets.<sup>177</sup> As the police started to pat-down members of the group, the defendant fled.<sup>178</sup> An officer gave chase, saw the defendant throw an object,

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167. See 52 Va. App. 397, 403–05, 663 S.E.2d 540, 543–44 (Ct. App. 2008).

168. *Id.* at 403, 663 S.E.2d at 543.

169. *Id.*, 663 S.E.2d at 544.

170. *Id.* at 410–11, 663 S.E.2d at 547.

171. *Id.* (citing *Davison v. Commonwealth*, 18 Va. App. 496, 504, 445 S.E.2d 683, 687 (Ct. App. 1994)).

172. *Davison*, 18 Va. App. at 504, 445 S.E.2d at 687.

173. *Id.*

174. *Kilby*, 52 Va. App. at 411, 663 S.E.2d at 547.

175. See 53 Va. App. 113, 116, 669 S.E.2d 384, 386 (Ct. App. 2008).

176. *Id.* at 116–17, 669 S.E.2d at 386.

177. *Id.* at 117, 669 S.E.2d at 386.

178. *Id.*

and tackled the defendant.<sup>179</sup> The officer returned to the area where he had seen the defendant throw the object and found a handgun.<sup>180</sup> At trial, the defendant testified that he did not throw a gun.<sup>181</sup>

The trial court allowed the prosecutor to cross-examine the defendant regarding his drug use and alcohol consumption at the time of his arrest, over the defendant's other crimes objection.<sup>182</sup> The court of appeals found this practice permissible, noting that the evidence impeached the defendant's credibility, and was "highly relevant" to the defendant's "perception, recordation, recollection, narration, or sincerity."<sup>183</sup>

The court in *Pearce* also rejected the defendant's attempt to apply the Virginia Supreme Court's recent other crimes decision in *McGowan v. Commonwealth*.<sup>184</sup> In *McGowan*, the prosecutor was allowed to introduce evidence to rebut a defendant's testimony that she "wouldn't know crack cocaine if [she] saw it."<sup>185</sup> The defendant, who was charged with distribution of crack cocaine, denied possessing the substance when she was arrested several months later.<sup>186</sup> The prosecutor then introduced testimony through the arresting officer that the defendant had possessed crack cocaine at the time of her subsequent arrest.<sup>187</sup> *McGowan* held that because of the remoteness in time of the subsequent possession, it was reversible error to allow the defendant to be impeached on this extrinsic point.<sup>188</sup>

The *Pearce* court noted that, in contrast, the other crimes evidence at issue was not remote in time, and that the prosecutor had neither attempted to introduce the evidence as substantive evidence in his case-in-chief nor sought to introduce extrinsic evidence on a substantive point.<sup>189</sup> Instead, the prosecutor sought to

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179. *Id.*

180. *Id.*

181. *Id.*, 669 S.E.2d at 387.

182. *Id.*, 669 S.E.2d at 386-87.

183. *Id.* at 120, 122, 669 S.E.2d at 388-89 (quoting *McCarter v. Commonwealth*, 38 Va. App. 502, 506, 566 S.E.2d 868, 869-70 (Ct. App. 2002)).

184. *Id.* at 121-23, 669 S.E.2d at 388-89 (citing *McGowan v. Commonwealth*, 274 Va. 689, 696, 652 S.E.2d 103, 106 (2007)).

185. *McGowan*, 274 Va. at 693, 652 S.E.2d at 104.

186. *Id.*

187. *Id.*

188. *Id.* at 695-96, 652 S.E.2d at 106.

189. *Pearce*, 53 Va. App. at 122-23, 669 S.E.2d at 389.

introduce evidence to impeach the defendant by challenging his ability to remember.<sup>190</sup> Once the defendant contradicted the officer's testimony, the Commonwealth "had every right to" impeach his credibility with evidence that he was intoxicated, which "was highly relevant to his ability to perceive" the events as they happened.<sup>191</sup>

In *Ortiz v. Commonwealth*, the Supreme Court of Virginia affirmed the admission of other crimes evidence in a statutory rape case.<sup>192</sup> The prosecutor introduced pornographic videotapes seized from the defendant's home and a receipt for vaginal cream dated prior to the sexual abuse, as well as evidence of other acts of sexual intercourse between the thirteen-year-old victim and her step-grandfather to corroborate the victim's testimony.<sup>193</sup> The *Ortiz* court noted that other crimes evidence is generally inadmissible, but reaffirmed well-established precedent that allows evidence of

"acts of incestuous intercourse between the parties other than those charged in the indictment or information, *whether prior or subsequent thereto* . . . if not too remote in point of time . . . for the purpose of throwing light upon the relations of the parties and the incestuous disposition of the defendant toward the other party, and to corroborate the proof of the act relied upon for conviction . . . ."<sup>194</sup>

The evidence of other acts of sexual intercourse between the victim and the defendant not only showed the defendant's propensity to commit rape during the specific time period charged, but also fell within several exceptions that allow the admission of such evidence, including "to show the conduct or attitude of [the defendant] toward the [victim] to prove motive or method of committing the rape, to prove an element of the crime charged, or

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190. See *id.* at 122, 669 S.E.2d at 389. The defendant also argued that even if the trial court properly admitted the evidence, it committed reversible error by not instructing the jury that it could consider defendant's prior drug use only for impeachment purposes. *Id.* at 123, 669 S.E.2d at 389. *Pearce*, however, held that the defendant's failure to request such a limiting instruction precluded appellate review, and that the "ends of justice" exception was inapplicable because the limiting instruction did not relate to an element of the crime charged and was not vital to his defense. *Id.* at 123-24, 669 S.E.2d at 389-90.

191. *Id.* at 122, 669 S.E.2d at 389.

192. See 276 Va. 705, 714, 667 S.E.2d 751, 757 (2008).

193. *Id.* at 713-14, 716, 667 S.E.2d at 756, 758.

194. *Id.* at 714, 667 S.E.2d at 757 (quoting *Moore v. Commonwealth*, 222 Va. 72, 77, 278 S.E.2d 822, 825 (1981)).

to negate the possibility of accident or mistake.”<sup>195</sup> The court concluded that, given the existing exceptions, the trial court did not abuse its discretion in determining that the probative value of the evidence did not outweigh the prejudice to the defendant.<sup>196</sup>

The court assumed that the defendant’s possession of pornographic material and vaginal cream constituted “other crimes or bad acts,” but nevertheless found the defendant’s possession of these items was relevant to prove the commission of rape during the time period referenced in the amended indictments.<sup>197</sup> The victim testified at trial that the defendant played “tapes of ‘grownups doing something’” without clothes on and that he put cream on her private parts.<sup>198</sup> The receipt for the vaginal cream showed that it was purchased at a time when the victim’s grandmother was at work, in an area the defendant had access to, and at a time he was alone with the victim for several hours.<sup>199</sup> The pornographic tapes and vaginal cream, therefore, corroborated the victim’s allegations and also negated the possibility of accident or mistake.<sup>200</sup>

On a related issue, the court held that the trial court properly excluded evidence that the victim had made a false accusation against another and only made the allegation against the defendant because of the victim’s mother.<sup>201</sup> The court found that the victim’s prior allegations did not involve allegations of sexual intercourse.<sup>202</sup> Instead, she had stated that the other man had touched her vaginal area, but not “in a bad way.”<sup>203</sup> The other man admitted touching the victim during playful roughhousing and while tending to insect bites.<sup>204</sup>

The court further rejected the alternative argument that the defendant merely sought to impeach the victim with prior inconsistent statements as allowed by *Clinebell v. Commonwealth*.<sup>205</sup>

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195. *Id.* at 715, 667 S.E.2d at 757.

196. *See id.* at 716–17, 667 S.E.2d at 758.

197. *See id.* at 715–17, 667 S.E.2d at 758.

198. *Id.* at 716, 667 S.E.2d at 758.

199. *Id.*

200. *Id.*

201. *See id.* at 719, 667 S.E.2d at 759–60.

202. *Id.* at 718, 667 S.E.2d at 759.

203. *Id.*

204. *Id.* at 717, 667 S.E.2d at 758.

205. *See id.* at 719–20, 667 S.E.2d at 760 (citing *Clinebell v. Commonwealth*, 235 Va.

The court noted that, unlike the defendant in *Clinebell*, Ortiz had not demonstrated a reasonable probability that any of the statements were false.<sup>206</sup>

### C. *Invited Error and the Ends of Justice*

In *Rowe v. Commonwealth*, the defendant was charged with the attempted capital murder of a police officer.<sup>207</sup> An off-duty police officer, while still in uniform, approached a truck that had gone off the highway and into a ravine.<sup>208</sup> The officer directed the defendant to turn off the engine, and he complied.<sup>209</sup> As the officer approached, the defendant restarted the truck and drove it directly at the officer, who fired his weapon until the truck stopped.<sup>210</sup> The officer attempted to return to his vehicle but slipped.<sup>211</sup> The defendant then drove the truck directly at the officer a second time, while the officer was fully illuminated by the truck's headlights, and the officer again began to fire his weapon at the truck.<sup>212</sup> The truck then turned away from the officer and fled the scene.<sup>213</sup> The trial court, sitting without a jury, found the defendant guilty.<sup>214</sup> At trial, the defendant "advanced the assault charge—the charge of which he was never indicted but eventually convicted—as a more lenient alternative to the attempted murder charge he was then facing and maintained that it was a lesser included offense."<sup>215</sup>

In a post-verdict motion to reconsider, the trial court vacated its judgment and found the defendant guilty of the assault and battery of a law-enforcement officer.<sup>216</sup> The defendant "acquiesced without objection when the trial court accepted" the theory he had advanced at trial.<sup>217</sup> On appeal, the defendant asserted that

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319, 321–22, 325, 368 S.E.2d 263, 264, 266 (1988)).

206. *See id.* at 719, 667 S.E.2d at 760.

207. 277 Va. 495, 500, 675 S.E.2d 161, 163 (2009).

208. *See id.* at 498, 675 S.E.2d at 162.

209. *Id.* at 499, 675 S.E.2d at 163.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 500, 675 S.E.2d at 163.

215. *Id.* at 502, 675 S.E.2d at 164–65.

216. *Id.* at 500, 675 S.E.2d at 163.

217. *Id.* at 502–03, 675 S.E.2d at 165.

the trial court erred because assault is not a lesser included offense of attempted murder.<sup>218</sup> The *Rowe* court rejected the argument on procedural grounds, holding that the defendant could not “now complain of the trial court’s adoption of the legal theory he introduced and repeatedly urged the trial court to adopt.”<sup>219</sup>

Undaunted, the defendant pressed his case by asserting that the situation he had created constituted a miscarriage of justice and that the “ends of justice” exception required the court to address the matter on the merits.<sup>220</sup> The court’s dismissal of the argument provides guidance and insight as to what does not constitute a “grave injustice or the denial of essential rights,” either of which is necessary for the invocation of the “ends of justice” exception.<sup>221</sup> *Rowe* clearly states that the ends of justice exception will not be applied to review an error invited by a defendant.<sup>222</sup> Refusing to consider an alleged error invited by a defendant under the “ends of justice” does “not sanction . . . ‘a grave injustice or the denial of essential rights.’”<sup>223</sup>

#### D. *Proving Predicate Crimes or Adjudications*

Predictably, Virginia courts once again struggled with establishing prior adjudications based on flawed orders.

The defendant in *Mwangi v. Commonwealth* was charged with driving under the influence of alcohol as a second or subsequent offense.<sup>224</sup> To prove one of the defendant’s prior offenses, the prosecution introduced a summons showing that he entered a guilty plea, was tried and convicted, and was fined and sentenced to a term in jail.<sup>225</sup> However, the summons did not bear the signature of a judge.<sup>226</sup> The court found this defect fatal, holding that “[i]n a

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218. See *id.* at 501, 675 S.E.2d at 164.

219. *Id.* at 503, 675 S.E.2d at 165.

220. See *id.*

221. See *id.* (quoting *Charles v. Commonwealth*, 270 Va. 14, 17, 613 S.E.2d 432, 433 (2005)).

222. *Id.*

223. *Id.* (quoting *Charles*, 270 Va. at 17, 613 S.E.2d at 433).

224. See 277 Va. 393, 394, 672 S.E.2d 888, 889 (2009).

225. See *id.* at 394–95, 672 S.E.2d at 889.

226. *Id.* at 395, 672 S.E.2d at 889.

court-not-of-record, a judge's signature proves the rendition of a judgment."<sup>227</sup>

This result may surprise those who recall that in *Jefferson v. Commonwealth*, the court held precisely the opposite:

The rendition of a judgment must be distinguished from its entry on the court records. The rendition of a judgment duly pronounced is the judicial act of the court, and the entry or recording of the instrument memorializing the judgment "does not constitute an integral part of, and should not be confused with, the judgment itself." The absence of the judge's signature "does not invalidate the judgment rendered."<sup>228</sup>

The *Mwangi* court does not cite or distinguish *Jefferson*. To be sure, *Jefferson* considered a circuit court order rather than the order of a court-not-of-record.<sup>229</sup> It is not clear, however, why that should make a difference as to the efficacy or existence of a judgment.

In *McMillan v. Commonwealth*, the defendant challenged the admissibility of certain documents introduced to establish that he was a convicted felon and, therefore, prohibited from possessing a firearm.<sup>230</sup> To prove the prior conviction, the Commonwealth introduced a petition filed in a juvenile and domestic relations district court and a document captioned "Office Contacts & Court Proceedings" that contained a number of notations by an unknown scrivener.<sup>231</sup> The notations related to items such as the appointment of counsel and continuances.<sup>232</sup> One of those notations was "ATTEMPT ARSON," along with a citation to the attempt statute and the arson statute.<sup>233</sup> A further notation provided: "1-3-01 Def. present w/guardian & Atty. King. Def. offers a plea of guilty. Waiver & stipulation of the evid. Ct. accepts plea. Ct. finds def. guilty. Disposition 2-26-01."<sup>234</sup> These documents were certified by the court clerk as an authentic copy of a court record.<sup>235</sup> McMil-

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227. *Id.*, 672 S.E.2d at 889–90.

228. 269 Va. 136, 139, 607 S.E.2d 107, 109 (quoting *Rollins v. Bazile*, 205 Va. 613, 617–18, 139 S.E.2d 114, 117–18 (1964)).

229. *See id.* at 138, 607 S.E.2d at 109.

230. 277 Va. 11, 15, 671 S.E.2d 396, 397 (2009).

231. *Id.* at 20, 671 S.E.2d at 400.

232. *See id.* at 20–21, 671 S.E.2d at 400–01.

233. *See id.* at 20, 671 S.E.2d at 400.

234. *Id.* at 21, 671 S.E.2d at 400–01.

235. *See id.* at 30, 671 S.E.2d at 406.

lan contended that the documents did not establish the crime for which he pled guilty.<sup>236</sup>

The Supreme Court of Virginia observed that when a prior conviction is an element of an offense, it must be proved beyond a reasonable doubt and cannot be left to conjecture.<sup>237</sup> In the court's view, the notes introduced at trial indicated, at best, that the defendant pled guilty to an offense—not that the defendant was convicted of a felony.<sup>238</sup> Therefore, the documents were irrelevant and should not have been admitted.<sup>239</sup> Three justices dissented from this holding.<sup>240</sup>

*McMillan* suggests that prosecutors will have a difficult time establishing a prior conviction using anything other than a court order. Even then, the order must be signed if it originates from a court-not-of-record.

## V. SPECIFIC CRIMES

### A. *Aggravated Involuntary Manslaughter / Felony Homicide*

In *Payne v. Commonwealth*, the defendant contended that her conviction for felony homicide and aggravated involuntary manslaughter improperly placed her in double jeopardy because both convictions were predicated upon the death of a single victim.<sup>241</sup> 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.<sup>242</sup> The defendant then drove away, swerving erratically, and within a short distance, struck and killed a pedestrian.<sup>243</sup> The defendant again drove away.<sup>244</sup>

The court employed the *Blockburger* test to determine whether the defendant's convictions violated the constitutional protections

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236. See *id.* at 21, 671 S.E.2d at 401.

237. *Id.* at 24, 671 S.E.2d at 402.

238. *Id.* at 27, 671 S.E.2d at 404.

239. *Id.*

240. *Id.*

241. See 277 Va. 531, 538, 674 S.E.2d 835, 838 (2009).

242. See *id.* at 536, 674 S.E.2d at 837.

243. See *id.* at 536–37, 674 S.E.2d at 837.

244. See *id.* at 537, 674 S.E.2d at 837.

against double jeopardy.<sup>245</sup> The court observed that in this instance, “each offense requires proof of an element which the other does not.”<sup>246</sup> Specifically,

[t]o convict under the felony homicide statute, the Commonwealth must prove that the defendant committed the killing in the commission of a felonious act; however, the Commonwealth is not required to prove any level of intoxication or recklessness. To convict under the aggravated involuntary manslaughter statute, the Commonwealth must prove intoxication and recklessness; however, the Commonwealth is not required to prove that the defendant committed the killing in the commission of a felonious act.<sup>247</sup>

Therefore, the court held, the defendant was properly convicted of two offenses, notwithstanding the fact that both crimes involved a single victim.<sup>248</sup>

### B. *Burglary and Burglarious Tools*

The defendant in *Giles v. Commonwealth* argued that the prosecution did not meet its burden of proving that the house in question was a “dwelling house” for purposes of the burglary statute.<sup>249</sup> The owner of the house stayed at the house at least once or twice per month.<sup>250</sup> The pantry and refrigerator were stocked with food, and the water and power utilities were operational.<sup>251</sup> Additionally, six rooms in the house were furnished.<sup>252</sup>

The Supreme Court of Virginia observed that “[t]he focus has been and remains on the manner in which the place is used.”<sup>253</sup> The court set forth the following standard to assist lower courts in determining whether a house is a “dwelling house”:

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245. *See id.* at 540, 674 S.E.2d at 839 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). The *Blockburger* test is defined as follows: when the same criminal conduct violates more than one statute, the offenses are different if each requires proof of an element that the other does not. *Id.* If each requires proof of an element the other does not, then neither can be included within the other. *See id.*

246. *Id.*

247. *Id.* at 541, 674 S.E.2d at 840.

248. *See id.*

249. 277 Va. 369, 372, 672 S.E.2d 879, 881 (2009).

250. *Id.* at 371, 672 S.E.2d at 881.

251. *Id.*

252. *Id.*

253. *Id.* at 374, 672 S.E.2d at 882.

[A] house is a dwelling house pursuant to Code § 18.2-89 when the house is used for habitation, including periodic habitation. Periodic habitation does not require that the house be used at regular intervals. Rather, periodic habitation requires that when the house is used, it is used for the purpose of habitation. Thus, a dwelling house is a house that one uses for habitation, as opposed to another purpose.

Although the Commonwealth is not required to prove a structure is inhabited at regular intervals, it must provide sufficient evidence that the structure is used as a habitation to satisfy the “dwelling house” requirement of Code § 18.2-89. The circuit court must analyze the evidence presented to ascertain if there are sufficient indicia of habitation and actual use as a place of habitation for the structure to be deemed a dwelling house.<sup>254</sup>

Assessing the evidence under this standard, the court found that the house qualified as a dwelling house: it was regularly inhabited, it was furnished, utilities were connected, food was stocked in the pantry and refrigerator, and sheets, towels, and toiletries were all present.<sup>255</sup>

*Johns v. Commonwealth* offers a useful counterpoint to *Giles*.<sup>256</sup> In *Johns*, a house was burglarized at a time when it was uninhabited and in the process of renovation.<sup>257</sup> The electricity was disconnected, and no furniture was present in the home.<sup>258</sup> A burglar broke into the home and stole some tools.<sup>259</sup> Like the defendant in *Giles*, *Johns* argued that he could not be convicted of statutory burglary because the structure in question was not a “dwelling house.”<sup>260</sup> Applying the framework from *Giles*, the Court of Appeals of Virginia concluded that the house in question did not qualify as a “dwelling house” because no one currently or recently resided there, the house was completely unfurnished, and no electricity was connected to the home.<sup>261</sup>

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254. *Id.* at 375, 672 S.E.2d at 883.

255. *See id.* at 375–76, 672 S.E.2d at 883–84.

256. *See* 53 Va. App. 742, 675 S.E.2d 211 (Ct. App. 2009).

257. *See id.* at 744, 675 S.E.2d at 212.

258. *Id.*

259. *See id.* at 744–45, 675 S.E.2d at 213.

260. *Id.* at 746, 675 S.E.2d at 213.

261. *See id.* at 748–49, 675 S.E.2d at 214–15.

A different burglary conundrum arose in *Lacey v. Commonwealth*.<sup>262</sup> There, the defendant entered the open garage of a home and opened a door leading to the inside of the house.<sup>263</sup> Once inside, Lacey stole some cash and fled.<sup>264</sup> He argued that because the “breaking” element that is required for a burglary conviction occurred within the dwelling house, he could not be convicted of burglary.<sup>265</sup>

In addressing the issue, the Court of Appeals of Virginia observed that Lacey did not commit a “breaking” by entering the garage through the open door.<sup>266</sup> Furthermore, the court noted that “the breaking of a room within a dwelling house does not constitute the breaking of a dwelling as required by the burglary statutes; rather, only the breaking and entering from outside the dwelling into the dwelling suffices.”<sup>267</sup> Therefore, the key to the outcome was “whether a garage attached to a house represents part of the dwelling . . . .”<sup>268</sup>

The court found persuasive the holdings of other courts that a garage is part of the residence.<sup>269</sup> The court concluded that an attached garage is part of the dwelling, noting that it is structurally connected to the dwelling and is used for daily living.<sup>270</sup> Because the defendant broke into an interior room, the statutory element of an outside “breaking” was not satisfied, and the court reversed his burglary conviction.<sup>271</sup>

Whether a purse constitutes a “burglarious tool” was at issue in *Edwards v. Commonwealth*.<sup>272</sup> The defendant was caught stealing clothing by stuffing it into a large purse.<sup>273</sup> She was convicted of

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262. See 54 Va. App. 32, 675 S.E.2d 846 (Ct. App. 2009).

263. See *id.* at 34–35, 675 S.E.2d at 848.

264. See *id.* at 35, 675 S.E.2d at 848.

265. See *id.* at 34, 675 S.E.2d at 848.

266. *Id.* at 44, 675 S.E.2d at 852.

267. *Id.* at 40, 675 S.E.2d at 850 (citing *Hitt v. Commonwealth*, 43 Va. App. 473, 477, 481, 598 S.E.2d 783, 784–85, 787 (Ct. App. 2004)).

268. See *id.* at 41, 675 S.E.2d at 851.

269. See *id.* at 41–43, 675 S.E.2d at 851–52 (“[T]he record reveals the [attached] garage . . . [was] separated from the living quarters by a door. The same roof covered the garage as the rest of the residence. The living quarters surrounded the garage on two sides. It was structurally no different from any other room in the residence.” (quoting *State v. Wills*, 696 N.W.2d 20, 23 (Iowa 2005))).

270. See *id.* at 43, 675 S.E.2d at 852.

271. See *id.* at 44, 675 S.E.2d at 852.

272. See 53 Va. App. 402, 405, 672 S.E.2d 894, 895 (Ct. App. 2009) (en banc).

273. *Id.* at 404, 672 S.E.2d at 895.

possessing a burglarious tool with the intent to commit larceny.<sup>274</sup> On appeal, she argued that a purse is not “innately burglarious” as required by the statute and, second, even if the statute does not require for a tool to be “innately burglarious,” a purse is not a “tool, implement or outfit.”<sup>275</sup>

Virginia Code section 18.2-94 provides as follows:

[i]f any person [has] in his possession any tools, implements or outfit, with intent to commit burglary, robbery or larceny, upon conviction thereof he shall be guilty of a Class 5 felony. The possession of such burglarious tools, implements or outfit by any person other than a licensed dealer, shall be prima facie evidence of an intent to commit burglary, robbery or larceny.<sup>276</sup>

The Court of Appeals of Virginia parsed the language of the statute and prior precedents to conclude that the statute does not require burglarious tools to be innately burglarious.<sup>277</sup> Second, the court concluded that “an ordinary purse is neither a ‘tool’ nor an ‘implement.’”<sup>278</sup> The court had previously defined a tool as “an instrument (as a hammer or saw) [sic] used or worked by hand,’ or ‘an implement or object used in performing an operation or carrying on work of any kind.’”<sup>279</sup> The court noted that implements are “items associated with devices, instruments, equipment or machinery as they relate to an occupation or profession.”<sup>280</sup> The court then turned to whether a purse might constitute an “outfit.”<sup>281</sup> The court had previously defined an “outfit” as “(1) the act or process of fitting out or equipping, (2) materials, tools, or implements comprising the equipment necessary for carrying out a particular project, and (3) wearing apparel designed to be worn on a special occasion or in a particular situation.”<sup>282</sup> The court repudiated the third definition of outfit, reasoning that it would lead to absurd results and is inconsistent with the other two defini-

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274. *See id.* at 403, 672 S.E.2d at 894.

275. *Id.* at 403, 405, 672 S.E.2d at 894–95.

276. VA. CODE ANN. § 18.2-94 (Repl. Vol. 2009).

277. *See id.* at 408–09, 672 S.E.2d at 897.

278. *Id.* at 410, 672 S.E.2d at 897.

279. *Id.* at 409, 672 S.E.2d at 897 (quoting *Williams v. Commonwealth*, 50 Va. App. 337, 343, 649 S.E.2d 717, 720 (Ct. App. 2007)).

280. *Id.* (quoting *Williams*, 50 Va. App. at 345, 649 S.E.2d at 721).

281. *Id.* at 405–06, 672 S.E.2d at 895.

282. *Id.* at 410, 672 S.E.2d at 898 (quoting *Mercer v. Commonwealth*, 29 Va. App. 380, 384, 512 S.E.2d 173, 175 (Ct. App. 1999)).

tions.<sup>283</sup> Therefore, the court held that “the appropriate definition of ‘outfit’ is ‘the articles forming an equipment’ or ‘the tools or instruments comprised in any special equipment . . . .’”<sup>284</sup> Under this definition, a purse is not an “outfit.”<sup>285</sup>

### C. *Disrupting a Public Meeting*

*Howard v. Commonwealth* provides another illustration of Winston Churchill’s quip that democracy is the worst possible system, except for all the others.<sup>286</sup> In that case, the Roanoke City Council held an emotionally charged meeting to determine whether to renovate or demolish a memorial dedicated to World War II veterans.<sup>287</sup> The mayor admonished one of the speakers when the speaker said that the letter “L” in the mayor’s middle name stood for “liar.”<sup>288</sup> In response, Howard yelled loudly “let him speak, let him speak.”<sup>289</sup> Thus interrupted, the mayor called a recess so Howard could be removed.<sup>290</sup> A police officer then asked Howard if he would be a “gentleman” and walk out as a “full-grown adult[ ].”<sup>291</sup> Howard refused, claiming a right to speak.<sup>292</sup> He also told the officer, “if you want me out of here, you have to drag me out.”<sup>293</sup> The officer obliged by applying a “wristlock” and forcing Howard to leave.<sup>294</sup> Howard was ultimately convicted of violating a Roanoke municipal ordinance that provided:

“(a) A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

. . . .

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283. *See id.* at 410–11, 672 S.E.2d at 898.

284. *Id.* at 411–12, 672 S.E.2d at 898 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1733 (2d ed. 1955)).

285. *See id.* at 412, 672 S.E.2d at 898–99.

286. *See* 277 Va. 184, 671 S.E.2d 156 (2009); Winston Churchill, Speech to the House of Commons (Nov. 11, 1947), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 221 (6th ed. 2004) (“No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”).

287. *See Howard*, 277 Va. at 187, 671 S.E.2d at 157.

288. *See id.*

289. *Id.* at 187–88, 671 S.E.2d at 157.

290. *See id.* at 188, 671 S.E.2d at 157–58.

291. *Id.* at 188, 671 S.E.2d at 157.

292. *Id.*

293. *Id.*

294. *See id.*, 671 S.E.2d at 158.

(2) Wilfully . . . disrupts any meeting of the city council . . . if such disruption interferes with the orderly conduct of such meeting . . . ; provided, however, such conduct shall not be deemed to include the utterance or display of any words.”<sup>295</sup>

The language of this ordinance parallels Virginia Code section 18.2-415.<sup>296</sup>

The defendant challenged his conviction on the ground that he could not be convicted under the ordinance merely for uttering words.<sup>297</sup> The Supreme Court of Virginia held that the defendant’s *actions* had caused the recess, and that his removal had disrupted the meeting.<sup>298</sup> The court also had no difficulty concluding that the defendant’s conduct was willful and affirmed his conviction.<sup>299</sup>

#### D. *Driving While Intoxicated*

In *Ratliff v. Commonwealth*, the defendant challenged her conviction under Virginia Code section 18.2-51.4.<sup>300</sup> That section prohibits anyone from “driving while intoxicated . . . in a manner so gross, wanton and culpable as to show a reckless disregard for human life, unintentionally caus[ing] the serious bodily injury of another person resulting in permanent and significant physical impairment.”<sup>301</sup> The defendant, drawing her definition of “intoxicated” from Virginia Code section 4.1-100, contended that she could be prosecuted only if she had been intoxicated from alcohol—not drugs.<sup>302</sup>

The Court of Appeals of Virginia rejected this argument.<sup>303</sup> The court reasoned that Virginia Code section 18.2-266, which is referenced in Virginia Code section 18.2-51.4, expressly provides that a person can be intoxicated from drugs.<sup>304</sup> Had the General Assembly intended to limit the definition of “intoxicated,” the court

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295. *Id.* at 186, 671 S.E.2d at 156–57 (quoting Roanoke, Va., Ordinance 38500, § 21-9 (June 15, 2009)).

296. *See* VA. CODE ANN. § 18.2-415 (Repl. Vol. 2009).

297. *See Howard*, 277 Va. at 189, 671 S.E.2d at 158.

298. *See id.* at 191–92, 671 S.E.2d at 159–60.

299. *See id.* at 192, 671 S.E.2d at 160.

300. *See* 53 Va. App. 443, 445, 672 S.E.2d 913, 914 (Ct. App. 2009).

301. *Id.* (quoting VA. CODE ANN. §18.2-51.4 (Repl. Vol. 2009)).

302. *Id.* at 446, 672 S.E.2d at 915.

303. *Id.*

304. *See id.*

noted, it would have done so as it has in the context of the involuntary manslaughter statute.<sup>305</sup> Virginia Code section 4.1-100, it held, is expressly limited to the Alcoholic Beverage Control Act.<sup>306</sup> Finally, the court rejected the defendant's argument that the definition of intoxicated in *Gardner v. Commonwealth* controlled the outcome, because nothing in that case purported to limit the definition of "intoxicated" to alcohol.<sup>307</sup>

### E. Drug Offenses

In *Brickhouse v. Commonwealth*, the Supreme Court of Virginia addressed the liability of principals in the second degree for a drug distribution scheme.<sup>308</sup> When police raided a house in Portsmouth, they discovered thirteen bags of crack cocaine.<sup>309</sup> In the room where the drugs were discovered, the police found papers belonging to the defendant, as well as papers belonging to the defendant's boyfriend, Wilkins.<sup>310</sup> Police also found packaging materials, as well as scales and a razor in other parts of the house.<sup>311</sup>

Brickhouse stated that she knew why the police were there and that "she wasn't the one doing it."<sup>312</sup> She also admitted she had seen Wilkins with bags of cocaine at the residence.<sup>313</sup> Brickhouse said she lived there with her aunt and uncle.<sup>314</sup> She admitted that her boyfriend had a key to the house and that he had been in the house without her.<sup>315</sup> Her fingerprints were not found on the drugs or the drug paraphernalia, nor was any incriminating evidence found on her person.<sup>316</sup> She denied any knowledge of drugs being stored at the house.<sup>317</sup> Significantly, the prosecution did not

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305. *Id.* at 447, 672 S.E.2d at 915.

306. *Id.* at 448, 672 S.E.2d at 915-16.

307. *See id.* at 448-50, 672 S.E.2d at 916-17 (citing *Gardner v. Commonwealth*, 195 Va. 945, 954, 81 S.E.2d 614, 619 (1954)).

308. 276 Va. 682, 684, 668 S.E.2d 160, 161 (2008).

309. *Id.*, 668 S.E.2d at 161-62.

310. *Id.* at 684-85, 668 S.E.2d at 162.

311. *Id.* at 685, 668 S.E.2d at 162.

312. *Id.* at 684, 668 S.E.2d at 162.

313. *Id.*

314. *Id.* at 685, 668 S.E.2d at 162.

315. *Id.*

316. *Id.*

317. *Id.*

present evidence concerning who owned, rented, or had legal possession of the residence.<sup>318</sup>

The court concluded that this evidence was not sufficient to convict Brickhouse, reasoning that

[g]iven that the principal in the first degree is unknown, and it was not proven that Brickhouse had exclusive control and authority over the residence where the drugs were found, the circumstantial evidence presented by the Commonwealth failed to exclude all reasonable inferences inconsistent with Brickhouse's guilt as a principal in the second degree. Even if Brickhouse knew the drugs were being stored at the residence, there is insufficient evidence to conclude that she is the person who permitted it, as opposed to another resident.<sup>319</sup>

*Dunn v. Commonwealth* offers a useful contrast to *Brickhouse*.<sup>320</sup> In *Dunn*, the defendant shared a house with her boyfriend, a drug dealer, and she was present when he sold methamphetamine to an undercover officer.<sup>321</sup> When the police later obtained a search warrant and searched the house, the defendant was present and seated next to scales, rolling papers, and a device containing marijuana residue.<sup>322</sup> In various places in the living room and kitchen, police found marijuana, methamphetamine, and various items connected to the drugs, such as smoking devices.<sup>323</sup>

Dunn admitted she knew that "dope" was in the house and that it was being sold there.<sup>324</sup> The defendant's boyfriend testified that neither he nor the defendant had a job, and that the drug sales provided income for the couple.<sup>325</sup> Both used "pinches" from the methamphetamine to support their drug habits.<sup>326</sup>

The Court of Appeals of Virginia found this evidence sufficient to support a conviction for possession of drugs with the intent to distribute as a principal in the second degree.<sup>327</sup> The court held that

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318. *Id.*

319. *Id.* at 687, 668 S.E.2d at 163.

320. *See* 52 Va. App. 611, 665 S.E.2d 868 (Ct. App. 2008) (en banc).

321. *See id.* at 614, 665 S.E.2d at 869.

322. *Id.* at 615, 665 S.E.2d at 869.

323. *See id.* at 615–16, 665 S.E.2d at 869–70.

324. *Id.* at 616, 665 S.E.2d at 870.

325. *Id.* at 616–17, 665 S.E.2d at 870.

326. *Id.* at 617, 665 S.E.2d at 870.

327. *See id.*

Dunn's consent to the drug sales in her home, her reliance on the income from the marijuana sales for her livelihood, and her reliance on the pinches from the methamphetamine to support her own drug habit supplied the "other circumstances" from which the jury, as the trier of fact to whom we must defer, could infer Dunn "assented" to the possession of the drugs with intent to distribute and "lent to it [her] countenance and approval, and was thereby aiding and abetting the same."<sup>328</sup>

*Dunaway v. Commonwealth* addresses several important points for drug prosecutions.<sup>329</sup> First, the court held that amending an indictment to increase the amount of a drug being distributed was permissible because it did not change the nature or character of the crime charged.<sup>330</sup> Specifically, the original indictment charged the defendant with running "a continuing criminal enterprise engaged, over the course of a year, in the distribution, or possession with the intent to distribute, of 'at least 2.5 kilograms but less than 5 kilograms of a mixture containing cocaine base . . . , in violation of [Virginia Code] § 18.2-248(H1).'"<sup>331</sup>

Subsequent to the indictment, the prosecution acquired additional evidence that the amount was five kilograms or greater.<sup>332</sup> The court allowed the prosecution to amend the indictment.<sup>333</sup> The court held that amending the indictment "did not alter the essential, underlying conduct on the part of appellant that was charged in the original indictment—that is to say, '[t]he overt acts constituting the crime [remained] the same.' . . . [T]he amendment merely subjected appellant to a higher mandatory minimum punishment for the same offense."<sup>334</sup> *Dunaway* specifically rejected the argument that an increase in punishment was the same as adding a new charge, which would be impermissible.<sup>335</sup>

*Dunaway* also simplified the prosecution's task in cases where the Commonwealth cannot rely on laboratory testing to deter-

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328. *Id.* at 621, 665 S.E.2d at 872 (quoting *Pugliese v. Commonwealth*, 16 Va. App. 82, 94, 428 S.E.2d 16, 25 (Ct. App. 1993)).

329. *See* 52 Va. App. 281, 663 S.E.2d 117 (Ct. App. 2008)

330. *Id.* at 298, 663 S.E.2d at 126.

331. *Id.* at 295, 663 S.E.2d at 124 (quoting VA. CODE ANN. § 18.2-248(H1)(3) (Repl. Vol. 2009)).

332. *Id.* at 292, 663 S.E.2d at 123.

333. *Id.* at 292–93, 663 S.E.2d at 123.

334. *Id.* at 297, 663 S.E.2d at 125 (quoting *Sullivan v. Commonwealth*, 157 Va. 867, 876, 161 S.E. 297, 300 (1931)).

335. *Id.* at 298, 663 S.E.2d at 126–26.

mine the nature of the substance. Nearly all of the Commonwealth's witnesses in *Dunaway* referred to the substance involved as "crack."<sup>336</sup> The prosecutor called a chemist who testified that "crack" is a common name for cocaine or cocaine base.<sup>337</sup> The *Dunaway* court discussed several federal decisions regarding "crack" and concluded that it would join the "universal agreement" in recognizing that "crack" was the same as cocaine base.<sup>338</sup> Thereafter, the court reaffirmed the long-established rule in Virginia that when "a substance cannot be 'recovered, tested or introduced into evidence,' its nature 'can be proved by proof of the circumstances and effects of its use,'" which includes the testimony of lay witnesses based on their "familiarity or experience" with the drug.<sup>339</sup>

The defendant in *Dunaway* also raised a cruel and unusual punishment claim because he had been sentenced to life without parole.<sup>340</sup> The panel had little trouble in rejecting the claim under the United States Constitution and Virginia's Constitution.<sup>341</sup> *Dunaway* noted that the United States Supreme Court had found "the imposition of a mandatory life sentence without possibility of parole for the possession of a mere 672 grams of cocaine did not constitute cruel and unusual punishment."<sup>342</sup> Therefore, the *Dunaway* panel could not "say that appellant's similar punishment for a more severe crime [distribution of greater than five kilograms of cocaine] is grossly disproportionate to the crime."<sup>343</sup>

Omissions and oversights in orders can inure to the benefit of defendants. For example, in *White v. Commonwealth*, the court placed the defendant on first offender status on December 21, 2004.<sup>344</sup> An express condition of her first offender disposition was

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336. *See id.* at 302–03, 663 S.E.2d at 127–28.

337. *See id.* at 301, 663 S.E.2d at 127.

338. *See id.* at 300–01, 663 S.E.2d at 126–27.

339. *Id.* at 301, 663 S.E.2d at 127 (citing *Hill v. Commonwealth*, 8 Va. App. 60, 63, 379 S.E.2d 134, 136 (1989)). The witnesses testified that the substance sold during the course of the period charged in the indictment was crack cocaine. *Id.* at 302–03, 663 S.E.2d at 127–28. *Dunaway* also noted the lack of evidence regarding complaints from buyers or users of the drugs sold, who had paid high prices for the drugs. *Id.* at 302–04, 663 S.E.2d at 127–28.

340. *Id.* at 310, 663 S.E.2d at 132.

341. *Id.* at 311, 663 S.E.2d at 132.

342. *Id.* at 312, 663 S.E.2d at 132 (citing *Harmelin v. Michigan*, 501 U.S. 957, 961–94 (1991)).

343. *Id.* at 313, 663 S.E.2d at 133.

344. *See* 276 Va. 725, 728, 667 S.E.2d 564, 565 (2008).

that she demonstrate "good behavior."<sup>345</sup> At a hearing on December 21, 2005, the trial court found that the defendant had satisfied all conditions set forth in the December 21, 2004, order, except the payment of court costs.<sup>346</sup> The trial court continued the matter for six months "to check the status of payment."<sup>347</sup> The December 21, 2005, order was silent regarding continuing supervised probation.<sup>348</sup> Nevertheless, the probation officer continued to monitor the defendant, and the defendant tested positive on several occasions after December 21, 2005, for drugs.<sup>349</sup> The court scheduled a revocation hearing regarding the defendant's first offender status and revoked that status on August 2, 2006.<sup>350</sup> The court acknowledged that a condition of good behavior is generally implied.<sup>351</sup> However, the court held that this principle did not apply because the trial court had made good behavior an express condition of probation in the original order, but did not continue that requirement past December 21, 2005.<sup>352</sup>

First offender dispositions are common, and *White* establishes that prosecutors and trial judges need to be cognizant of what is in the original order. If there is any need to continue the matter, the continuance order must expressly indicate which conditions are being continued.<sup>353</sup> This should include some indication of whether first offender status is also being continued or whether that has ended. In reversing and dismissing the case, the *White* court expressly rejected the Commonwealth's arguments that first offender status and probation extended past December 21, 2005.<sup>354</sup> Instead, *White* held that the 2004 order granting the defendant first offender status explicitly stated that the defendant's probation ended on December 21, 2005.<sup>355</sup>

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345. *See id.*

346. *See id.* at 729, 667 S.E.2d at 565.

347. *See id.* at 729, 667 S.E.2d at 565-66.

348. *Id.* at 729, 667 S.E.2d at 566.

349. *See id.*

350. *Id.*

351. *See id.* at 731, 667 S.E.2d at 567.

352. *See id.*

353. *See id.* 732-33, 667 S.E.2d at 567-68.

354. *See id.* at 732-33, 667 S.E.2d at 568.

355. *Id.* at 733, 667 S.E.2d at 568.

## F. *Felony Hit and Run*

The felony hit and run statute provides that

[t]he driver of any vehicle involved in an accident . . . in which an attended vehicle . . . is damaged shall immediately stop as close to the scene of the accident as possible . . . and report his name, address, driver's license number, and vehicle registration number forthwith to the State Police or local law-enforcement agency . . . or to the driver or some other occupant of the vehicle collided with . . .<sup>356</sup>

The defendant in *Milazzo v. Commonwealth* contended that he could not be convicted of felony hit and run because his ramming of a police vehicle was intentional, and thus, "he was not involved in an 'accident.'"<sup>357</sup> The Supreme Court of Virginia rejected this argument, noting that the purpose of the statute was to protect persons who are injured during the course of "an unfortunate vehicular event."<sup>358</sup> An accident, the court concluded, can stem from either deliberate or unintended conduct.<sup>359</sup> The court further reasoned that the purpose of the statute was to protect innocent persons.<sup>360</sup> Therefore, "it makes no difference whether the collision was intentional or unintentional."<sup>361</sup> The court concluded that an accident had occurred, regardless of the fact that the defendant's conduct was intentional.<sup>362</sup>

## G. *Malicious Wounding*

In *Blow v. Commonwealth*, the Court of Appeals of Virginia applied the doctrine of transferred intent to affirm a malicious wounding conviction.<sup>363</sup> During a domestic altercation, as the defendant was stabbing his wife, their daughter intervened.<sup>364</sup> The defendant, still trying to stab his wife, cut his daughter's hand.<sup>365</sup> The defendant was convicted of maliciously wounding his daugh-

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356. VA. CODE ANN. § 46.2-894 (Repl. Vol. 2005 & Cum. Supp. 2009).

357. 276 Va. 734, 736-37, 668 S.E.2d 158, 159-60 (2008).

358. *See id.* at 738, 668 S.E.2d at 160.

359. *See id.*

360. *See id.*

361. *Id.*

362. *See id.*

363. *See* 52 Va. App. 533, 547, 665 S.E.2d 254, 261 (Ct. App. 2008).

364. *See id.* at 536, 665 S.E.2d at 255.

365. *Id.*

ter.<sup>366</sup> The defendant argued that the doctrine of transferred intent did not apply because he had already been convicted of the malicious wounding of his wife.<sup>367</sup> He also argued that his daughter's attempt to aid her mother caused the injury.<sup>368</sup> The court disagreed, reasoning that the defendant created the situation and his daughter's intervention was a foreseeable event.<sup>369</sup> Second, although states are divided on the issue, a majority upheld the application of the doctrine of transferred intent "when any harm comes to an unintended victim as a result of a defendant's volitional act."<sup>370</sup>

The defendant in *Blow* was not finished after stabbing his wife and daughter. He was spotted by the police and a high-speed chase ensued.<sup>371</sup> During the chase, the defendant intentionally struck an officer's car several times before the defendant spun out and hit a wall.<sup>372</sup> The defendant maintained that the evidence supported the reasonable hypothesis that he was merely trying to flee.<sup>373</sup> The court found this argument unpersuasive, reasoning that the defendant,

while attempting to flee, led the officers on a dangerous, high-speed, twenty-eight-mile-long car chase. During this chase, [the defendant] drove recklessly on busy highways, changed lanes erratically, and made illegal u-turns. Despite the lengthy chase, [the defendant] was unable to escape . . . and was about to be forced to a stop. From these facts the trial court could reasonably infer that [the defendant] intended to prevent this from happening by deliberately crashing into [the officer's] car. This act would "obviously cause a serious wreck, maiming, disfiguring, disabling or killing anyone involved in it."<sup>374</sup>

In *Johnson v. Commonwealth*, the court of appeals affirmed a conviction for malicious wounding where the injury was inflicted by a single blow from a fist.<sup>375</sup> The defendant had attacked a pros-

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366. *Id.* at 535, 665 S.E.2d at 255.

367. *Id.* at 540-41, 665 S.E.2d at 257-58.

368. *Id.* at 542, 665 S.E.2d at 258.

369. *Id.* at 542-43, 665 S.E.2d at 258-59.

370. *Id.* at 545, 665 S.E.2d at 260.

371. *See id.* at 537, 665 S.E.2d at 255-56.

372. *Id.* at 537-38, 665 S.E.2d at 256.

373. *See id.* at 539, 665 S.E.2d at 257.

374. *Id.* at 540, 665 S.E.2d at 257 (quoting *Luck v. Commonwealth*, 32 Va. App. 827, 833, 531 S.E.2d 41, 43 (Ct. App. 2000)).

375. *See* 53 Va. App. 79, 87, 669 S.E.2d 368, 372 (Ct. App. 2009).

ecutor by punching him in the head.<sup>376</sup> The prosecutor fell to the ground, the defendant was subdued, and medical personnel were called to treat the prosecutor.<sup>377</sup> The prosecutor “suffered a concussion, two cuts in his ear, one of which required four stitches, and soreness in his shoulder lasting for several weeks.”<sup>378</sup> The defendant subsequently made numerous statements expressing pride about the injuries he had inflicted.<sup>379</sup>

The *Johnson* court acknowledged that ordinarily a single blow would not be a sufficient basis for finding the requisite intent of permanent injury.<sup>380</sup> However, the particular facts in this attack, which included an unprovoked, defenseless victim, a blow to the head, and the tremendous force with which the defendant struck the victim, warranted a finding that the defendant had attacked with the intent to inflict a permanent injury.<sup>381</sup>

#### H. Sex Offender Registration

Given the constant movement of persons across state lines, issues are bound to arise with respect to the legal effect that should be given to prior criminal convictions. In *Johnson v. Commonwealth*, the defendant contended that he should not have been convicted for failure to register as a sex offender in Virginia because his North Carolina convictions were not “substantially similar” to Virginia crimes that require registration.<sup>382</sup> Johnson was convicted in North Carolina of aiding and abetting a second-degree rape and a second-degree sex offense.<sup>383</sup> In analyzing the claim, the Court of Appeals of Virginia first relied on the requirement that the provisions of the sex offender registry are to be liberally construed.<sup>384</sup> Second, the court observed that registration is required in Virginia if an offense committed in another state is “similar” to a Virginia offense that requires registration—

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376. *Id.*

377. *See id.*

378. *Id.*

379. *See id.*

380. *See id.* at 103, 669 S.E.2d at 380.

381. *See id.* at 103–04, 669 S.E.2d at 380.

382. 53 Va. App. 608, 609–10, 674 S.E.2d 541, 541–42 (Ct. App. 2009).

383. *Id.* at 610, 674 S.E.2d at 542.

384. *See id.* at 611, 674 S.E.2d at 542 (citing VA. CODE ANN. § 9.1-920 (Repl. Vol. 2006)).

a substantial similarity between the Virginia offense and the other state's offense is not required under the plain language of the applicable Virginia Code section.<sup>385</sup> Comparing the two statutes, the court observed that the Virginia rape statute is broader than the North Carolina statute.<sup>386</sup> As a result, "any act which results in a conviction of second-degree rape under North Carolina law would necessarily result in a conviction of rape in Virginia."<sup>387</sup> Finally, the court made short work of the defendant's argument that only a principal in the first degree should be required to register.<sup>388</sup> Such a stricture, the court reasoned, would be inconsistent with the statute's mandate of liberal construction and the fact that the law treats principals in the second degree the same way as principals in the first degree.<sup>389</sup>

### I. *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.<sup>390</sup> Ostrander previously entered a guilty plea to the charge of solicitation and contended that the Double Jeopardy Clause precluded a subsequent prosecution for attempted capital murder.<sup>391</sup> The Court of Appeals of Virginia concluded that double jeopardy imposed no bar to a conviction for attempted capital murder.<sup>392</sup>

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."<sup>393</sup> 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 cap-

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385. See *id.* at 613–14, 674 S.E.2d at 543–44 (citing VA. CODE ANN. § 9.1-902 (Cum. Supp. 2009)).

386. *Id.* at 615, 674 S.E.2d at 544.

387. *Id.*

388. See *id.* at 615–16, 674 S.E.2d at 544.

389. See *id.*

390. 51 Va. App. 386, 391, 658 S.E.2d 346, 348 (Ct. App. 2008).

391. *Id.* at 389, 658 S.E.2d at 347.

392. See *id.* at 394, 658 S.E.2d at 350.

393. See *id.* at 392–93, 658 S.E.2d at 349.

ture[s] for [the defendant] any special protections against successive prosecutions under the [D]ouble [J]eopardy [C]lause.”<sup>394</sup> The court then turned to whether the defendant was twice subjected to prosecution for the same offense.<sup>395</sup> The test is “whether each [offense] requires proof of a fact which the other does not.”<sup>396</sup> 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.”<sup>397</sup>

The court noted that “[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.”<sup>398</sup> 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.”<sup>399</sup> In the second scenario, where the hired killer commits the murder, the killer clearly could not be convicted of solicitation.<sup>400</sup> 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 murder for hire conviction does not—namely, that the accused solicited another person to commit a murder.”<sup>401</sup> Consequently, the court held, the two offenses are not the “same offense” and the defendant suffered no deprivation of his protection against double jeopardy.<sup>402</sup>

### J. *Failure to Appear*

The defendant in *Bowling v. Commonwealth* pled guilty to a charge of driving while intoxicated and possession of marijuana

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394. *Id.* at 393, 658 S.E.2d at 349 (quoting *Rea v. Commonwealth*, 14 Va. App. 940, 944, 421 S.E.2d 464, 467 (1992)).

395. *Id.* at 395, 658 S.E.2d at 350.

396. *Id.* (quoting *West v. Dir. of the Dep't of Corr.*, 273 Va. 56, 63, 639 S.E.2d 190, 195 (2007)).

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

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

399. *Id.* at 397, 658 S.E.2d at 351 (citation omitted).

400. *Id.*

401. *Id.*

402. *See id.*

with the intent to distribute.<sup>403</sup> However, he failed to appear for his sentencing proceeding.<sup>404</sup> After he was apprehended, he was convicted of failing to appear.<sup>405</sup> The defendant observed that the failure to appear statute criminalized a willful failure to appear for persons who are “charged” with a felony.<sup>406</sup> Because he pled guilty, he contended, he was not “charged” with a felony but rather was “convicted” of a felony.<sup>407</sup> 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.<sup>408</sup> The court also rejected the defendant’s interpretation on the ground that it would lead to absurd results.<sup>409</sup>

### K. *Felony Escape*

The sufficiency of the evidence for a felony escape charge was at issue in *Hubbard v. Commonwealth*.<sup>410</sup> The defendant, seeking to avoid a traffic stop, engaged in a high-speed pursuit with the police.<sup>411</sup> He eventually fled on foot.<sup>412</sup> A fight ensued between Hubbard and the police officer, who eventually managed to subdue him.<sup>413</sup> Hubbard was charged with, and convicted of, felonious escape from custody.<sup>414</sup> The Supreme Court of Virginia reversed this conviction.<sup>415</sup> 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.”<sup>416</sup>

The court held that the Commonwealth must prove, as an element of this offense, that the defendant was charged with a crim-

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403. 51 Va. App. 102, 104, 654 S.E.2d 354, 355 (Ct. App. 2007).

404. *Id.* at 105, 654 S.E.2d at 355.

405. *See id.*

406. *See id.* at 107–08, 654 S.E.2d at 357 (citing VA. CODE ANN. § 19.2-128(B) (Repl. Vol. 2008 & Supp. 2009)).

407. *Id.*

408. *See id.* at 108, 654 S.E.2d at 357.

409. *See id.* at 110, 654 S.E.2d at 358.

410. 276 Va. 292, 293, 661 S.E.2d 464, 465 (2008).

411. *See id.* at 294, 661 S.E.2d at 466.

412. *See id.*

413. *See id.*

414. *See id.*

415. *Id.* at 297, 661 S.E.2d at 467.

416. VA. CODE ANN. § 18.2-478 (Repl. Vol. 2009) (emphasis added).

inal offense before the escape occurred.<sup>417</sup> The evidence was insufficient here because no criminal charge was pending at the time of the defendant's flight from the police.<sup>418</sup> The court reasoned that probable cause to arrest for an offense is not the same as a criminal charge.<sup>419</sup> Instead, a charge is a "formal accusation" or a "formal written complaint" of a crime.<sup>420</sup> The Commonwealth had presented no evidence of a criminal charge and, therefore, failed to establish this element of the offense.<sup>421</sup>

#### L. *Forcible Sodomy and Aggravated Sexual Battery*

*Bowden v. Commonwealth* demonstrates the need for prosecutors to consider (1) which, if any, other offenses should be charged within the indictment and (2) why some seemingly similar charges, such as forcible sodomy and sexual battery, are distinct for double jeopardy purposes.<sup>422</sup> In *Bowden*, the defendant argued that the Commonwealth had failed to establish penetration, which is necessary to prove forcible sodomy.<sup>423</sup> The prosecutor countered that even if penetration had not been proven, the defendant could still be convicted of the lesser-included offense of aggravated sexual battery.<sup>424</sup> The trial judge agreed.<sup>425</sup>

On appeal, the defendant asserted that the trial court erred in finding aggravated sexual battery was a lesser-included offense of forcible sodomy.<sup>426</sup> The court of appeals agreed and reversed the conviction.<sup>427</sup> The court analyzed the elements of both offenses in the abstract to determine if aggravated sexual battery contained an element that forcible sodomy did not.<sup>428</sup> As the Commonwealth admitted on appeal, forcible sodomy required proof of penetration,

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417. See *Hubbard*, 276 Va. at 295, 661 S.E.2d at 466.

418. See *id.* at 296, 661 S.E.2d at 467.

419. See *id.*

420. See *id.*

421. *Id.*

422. 52 Va. App. 673, 667 S.E.2d 27 (Ct. App. 2008).

423. *Id.* at 675, 667 S.E.2d at 28.

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 678, 667 S.E.2d at 29.

428. See *id.* at 676–77, 667 S.E.2d at 28–29.

while sexual battery only required proof that the defendant touched the clothing covering a victim's intimate parts.<sup>429</sup>

### M. *Indecent Liberties*

The Supreme Court of Virginia generally has adhered to the rule of statutory construction regarding the plain meaning of the words used in statutes. In *Sadler v. Commonwealth*, a softball coach, who was not associated with a school program, was convicted of indecent liberties with a minor with whom he maintained a custodial or supervisory relationship.<sup>430</sup> The victim, a seventeen-year-old female, was a member of the coach's traveling softball team.<sup>431</sup> The coach went to the player's residence, knowing that she was alone, and gave her cards and presents for her and her family.<sup>432</sup> The coach then kissed the player and rubbed the back of her legs and buttocks.<sup>433</sup> Several days later, the player traveled with the team and the coach to a tournament.<sup>434</sup>

The coach argued that his actions did not fall within the purview of the applicable statute because the evidence did not show a custodial or supervisory relationship "at the time of the offensive

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429. See *id.* at 677-78, 667 S.E.2d at 29. *Bowden* also noted that the intent element of each offense was different. *Id.*, 667 S.E.2d at 28-29. Aggravated sexual battery is a specific intent offense, while sodomy is a general intent offense. See *id.* at 678, 667 S.E.2d at 29.

430. 276 Va. 762, 763, 667 S.E.2d 783, 784 (2008). Virginia Code section 18.2-370.1 states in relevant part:

A. Any person 18 years of age or older who, except as provided in § 18.2-370, maintains a custodial or supervisory relationship over a child under the age of 18 and is not legally married to such child and such child is not emancipated who, with lascivious intent, knowingly and intentionally (i) proposes that any such child feel or fondle the sexual or genital parts of such person or that such person feel or handle the sexual or genital parts of the child; or (ii) proposes to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361; or (iii) exposes his or her sexual or genital parts to such child; or (iv) proposes that any such child expose his or her sexual or genital parts to such person; or (v) proposes to the child that the child engage in sexual intercourse, sodomy or fondling of sexual or genital parts with another person; or (vi) sexually abuses the child as defined in § 18.2-67.10 (6), shall be guilty of a Class 6 felony.

VA. CODE ANN. § 18.2-370.1(A) (Repl. Vol. 2009).

431. *Sadler*, 276 Va. at 764, 667 S.E.2d at 784.

432. *Id.*

433. *Id.*

434. *Id.*

conduct.”<sup>435</sup> The *Sadler* court dismissed the coach’s interpretation of the statute, noting that

Sadler’s interpretation of Code § 18.2-370.1 imposes a limitation on the plain meaning of the words used in the statute. In enacting this provision, the General Assembly provided that the only prerequisite for its application is that the offender “maintains a custodial or supervisory relationship” at the time of the offense. Sadler’s construction of the section limits this prerequisite to instances in which the parties are engaged in activities related to that relationship at the time the offensive conduct occurs. The language of the statute does not support such a limitation and it is well established that in construing penal statutes the Court “must not add to the words of the statute, nor ignore its actual words, and must strictly construe the statute and limit its application to cases falling clearly within its scope.”<sup>436</sup>

In so reasoning, the *Sadler* court created a bright-line rule: it is necessary that a custodial or supervisory relationship exists under the statute, but it is not necessary that the prohibited conduct be committed in the specific context of the relationship.<sup>437</sup> This holding is consistent with the statute’s purpose “to protect minors from adults who might exploit certain types of relationships.”<sup>438</sup>

#### N. *Larceny*

In *McEachern v. Commonwealth*, the defendant claimed that the evidence was insufficient to establish larceny because it did not prove a permanent intent to deprive the victim of the vehicle.<sup>439</sup> Instead, he argued, the taking was only temporary.<sup>440</sup> The defendant had engaged in a protracted and very violent altercation with his girlfriend in which he threatened to drive her to a bridge, kill her there, and then commit suicide.<sup>441</sup> Fortunately, the victim managed to escape and call the police.<sup>442</sup> The victim observed the defendant driving away in her car and both she and

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435. *Id.* at 765, 667 S.E.2d at 784.

436. *Id.*, 667 S.E.2d at 784–85 (quoting *Phelps v. Commonwealth*, 275 Va. 139, 142, 654 S.E.2d 926, 927 (2008)).

437. *Id.* (citing VA. CODE ANN. § 18.2-370.1 (Cum. Supp. 2008)).

438. *Id.*, 667 S.E.2d at 785.

439. 52 Va. App. 679, 682–83, 667 S.E.2d 343, 344 (Ct. App. 2008).

440. *Id.*, 667 S.E.2d at 344–45.

441. *See id.* at 681–82, 667 S.E.2d at 344.

442. *Id.* at 682, 667 S.E.2d at 344.

the police called the defendant on his cell phone.<sup>443</sup> The defendant then spoke on the telephone with the victim.<sup>444</sup> Perhaps lacking a grasp of the obvious, the defendant demanded to know why she had given the police his cell phone number.<sup>445</sup> In turn, the victim demanded that the defendant return her car.<sup>446</sup> The defendant responded that he had abandoned the vehicle with the keys at a gas station.<sup>447</sup> The victim found it there the next day.<sup>448</sup>

The Court of Appeals of Virginia agreed that to be convicted of larceny, the accused must intend to permanently deprive the owner of property.<sup>449</sup> The court noted that a trespassory taking permits an inference, unless circumstances negate the inference, that the taker intended to steal the property.<sup>450</sup> The defendant's stated plan was to take the victim and kill her.<sup>451</sup> Had he succeeded with this plan, the defendant would have permanently deprived the victim of her property.<sup>452</sup> Although the defendant ultimately abandoned the vehicle, the court of appeals noted that the fact finder could conclude that "he was retreating from a foiled attempt at stealing the vehicle and murdering the victim after it became apparent to him the police were involved."<sup>453</sup> Abandoning the plan later on did not alter the fact that the larceny was complete at the time the defendant took the car.<sup>454</sup>

In *Britt v. Commonwealth*, the Supreme Court of Virginia concluded that the evidence must show that the defendant exercised dominion and control over goods abandoned or left behind for these goods to "count" towards the \$200 threshold required for a felony larceny conviction.<sup>455</sup> In this case, a group of thieves broke into a convenience store in the early hours of the morning.<sup>456</sup> The

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443. *Id.*

444. *See id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *See id.* at 684–855, 667 S.E.2d at 345–46.

450. *Id.* at 685, 667 S.E.2d at 346.

451. *Id.* at 687, 667 S.E.2d at 347.

452. *Id.* at 687–88, 667 S.E.2d at 347.

453. *Id.* at 688, 667 S.E.2d at 347.

454. *See id.* (citing *Slater v. Commonwealth*, 179 Va. 264, 267, 18 S.E.2d 909, 911 (1942)).

455. *See* 276 Va. 569, 574–75, 667 S.E.2d 763, 766 (2008).

456. *See id.* at 571, 667 S.E.2d at 764.

defendant was apprehended shortly thereafter, following a chase.<sup>457</sup> When the police were chasing him, he discarded packs of cigarettes.<sup>458</sup> There were also packs of cigarettes strewn on the floor of the convenience store.<sup>459</sup> The evidence did not establish their precise location on the floor.<sup>460</sup>

The defendant argued that the cigarettes could have been knocked down rather than taken.<sup>461</sup> Because larceny requires complete dominion and control over the stolen items, he contended, these items could not count towards establishing the value of the stolen goods.<sup>462</sup> The court agreed.<sup>463</sup> The court reasoned that the evidence did not establish that the defendant actually exercised dominion and control over the merchandise found on the floor of the store, nor did the evidence prove asportation of this merchandise.<sup>464</sup> Because the estimated value of the stolen merchandise included the items recovered on the floor of the store, the court remanded the case for a reevaluation of the amount of the goods actually stolen.<sup>465</sup>

The sufficiency of the evidence to prove the defendant's larcenous intent was at issue in *Vincent v. Commonwealth*.<sup>466</sup> Police arrived at a store shortly after the manager found shattered glass.<sup>467</sup> A videotape of the defendant's movements in the store was introduced into evidence.<sup>468</sup> When the defendant was apprehended in a state of intoxication several hours later, no merchandise was found on the defendant, and the store manager could not tell whether any merchandise had been stolen.<sup>469</sup> The defendant was convicted of breaking and entering with the intent to commit larceny.<sup>470</sup> The Supreme Court of Virginia observed that in drawing an inference of larcenous intent, "a trier of fact may not reasona-

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457. *See id.* at 572, 667 S.E.2d at 764.

458. *Id.*

459. *See id.*

460. *See id.*

461. *See id.* at 573, 667 S.E.2d at 765.

462. *Id.* at 572-73, 667 S.E.2d at 765.

463. *See id.* at 575, 667 S.E.2d at 766.

464. *Id.*

465. *See id.* at 575-76, 667 S.E.2d at 766.

466. *See* 276 Va. 648, 650, 668 S.E.2d 137, 138 (2008).

467. *See id.*

468. *Id.* at 650 n.1, 668 S.E.2d at 138 n.1.

469. *See id.* at 650-51, 668 S.E.2d at 138-39.

470. *Id.* at 650, 668 S.E.2d at 138.

bly infer the specific intent to commit larceny merely from the absence of evidence showing a different intent."<sup>471</sup> The court held that the evidence failed to show such an intent and reversed his conviction.<sup>472</sup> In short, vandalism is not tantamount to larceny.

In *Williams v. Commonwealth*, a man broke into two trailers and stole copper and brass.<sup>473</sup> The items were too heavy to lift alone, so the thief called the defendant.<sup>474</sup> The defendant agreed to help; once there, he assisted by lifting the containers of copper and brass onto a truck.<sup>475</sup> Later, after the defendant was arrested on unrelated charges, he admitted that he and the other person did not have permission to take the containers.<sup>476</sup> The defendant was convicted of grand larceny and conspiracy to commit grand larceny.<sup>477</sup>

On appeal, the defendant did not challenge that he and the other man had "agreed . . . to steal the containers of metal . . ." <sup>478</sup> Instead, he seized on the word "preconcert" in the Commonwealth's jurisprudence and argued that he could not be guilty of conspiracy because his fellow thief "had already committed larceny before the two men entered into an agreement."<sup>479</sup> The court of appeals, however, rejected the defendant's attempt to place himself outside of the offense of conspiracy by noting that larceny, unlike many other offenses, is a continuing offense.<sup>480</sup>

"[W]here property has been feloniously taken, every act of removal or change of possession by the thief constitute[s] a new taking and asportation; and, as the right of possession, as well as the right of property, continues in the owner, every such act is a new violation of the owner's right of property and possession."<sup>481</sup>

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471. *Id.* at 654, 668 S.E.2d at 141.

472. *See id.* at 655, 668 S.E.2d at 141.

473. 53 Va. App. 50, 54, 669 S.E.2d 354, 355 (Ct. App. 2008).

474. *See id.*

475. *Id.*

476. *See id.*

477. *See id.* at 54–55, 669 S.E.2d at 356.

478. *Id.* at 60, 669 S.E.2d at 358.

479. *Id.*

480. *See id.* at 60, 669 S.E.2d at 359 (citing *Commonwealth v. Cousins*, 29 Va. (2 Leigh) 708 (1830)).

481. *Id.* (quoting *Dunlavey v. Commonwealth*, 184 Va. 521, 527, 35 S.E.2d 763, 766 (1945)).

Consequently, the evidence was sufficient to sustain the defendant's conspiracy to commit larceny conviction.<sup>482</sup> The "new act" of asportation by the defendant and the original thief, after the containers had been removed from the trailers, constituted a new taking and asportation that was the result of an express prior agreement.<sup>483</sup>

### O. *Pandering*

Virginia Code section 18.2-357 provides in relevant part that "[a]ny person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, *except for a consideration deemed good and valuable in law, shall be guilty of pandering . . .*"<sup>484</sup> In other words, the defendant should not be convicted of pandering if the money he received from a prostitute was for some legitimate reason.

In a case aptly styled *Tart v. Commonwealth*, the defendant was charged with pandering.<sup>485</sup> He requested a jury instruction placing the burden on the prosecution to prove that he did not receive "consideration [ ] deemed good and valuable in law' . . ." <sup>486</sup> The Commonwealth responded that this was an affirmative defense, with the burden resting on the defendant.<sup>487</sup> To resolve the question, the Court of Appeals of Virginia relied on a passage from a 1947 decision of the Supreme Court of Virginia. In the context of analyzing whether an indictment impermissibly created a variance, that court had stated:

"The [pandering] statute pronounces the crime when a person knowingly receives money from the earnings of a prostitute except for a good or valuable consideration. The character of the consideration becomes important only when evidence is offered that there was consideration. *If such evidence is offered*, the Commonwealth would have to show that the consideration was not good or valuable . . ." <sup>488</sup>

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482. *Id.* at 61, 669 S.E.2d at 359.

483. *See id.* at 60–61, 669 S.E.2d at 359.

484. VA. CODE ANN. § 18.2-357 (Repl. Vol. 2009) (emphasis added).

485. 52 Va. App. 272, 274, 663 S.E.2d 113, 114 (Ct. App. 2008).

486. *See id.* at 276, 663 S.E.2d at 115.

487. *See id.*

488. *Id.* at 279, 663 S.E.2d at 116–17 (quoting *Saunders v. Commonwealth*, 186 Va. 1000, 1005–06, 45 S.E.2d 307, 311 (1947)).

Based on this description of the offense, the Court of Appeals of Virginia concluded that the defendant was required to raise as an affirmative defense that “there was some consideration given in exchange for the earnings of the prostitute.”<sup>489</sup> The court further ruled that the defendant had failed to produce any evidence that would have entitled him to a jury instruction on this issue.<sup>490</sup> The defendant had received money from the prostitute, but he had spent the funds plying her with alcohol and illegal drugs and paying for hotel rooms so that she could engage in prostitution.<sup>491</sup> None of this, the court concluded, constituted “consideration as a matter of law.”<sup>492</sup>

#### P. *Photographing Intimate Parts*

In *Wilson v. Commonwealth*, a young woman wearing a dress was examining clothes on a clothing rack when she noticed the defendant.<sup>493</sup> He was crouched or lying on the ground underneath a rack of clothes, and he photographed her legs and undergarments.<sup>494</sup> The defendant contended that, because the incident unfolded in a public place, the victim had no “reasonable expectation of privacy” and, therefore, he could not be convicted for his actions under Virginia Code section 18.2-386.1.<sup>495</sup> The Court of Appeals of Virginia rejected this argument.<sup>496</sup> The court observed that the statute contained two applicable clauses.<sup>497</sup> The first clause prohibits photographing or videotaping the victim in non-public locations such as restrooms and tanning booths.<sup>498</sup> The second clause addresses photographing or videotaping “beneath or between [the victim’s] legs,” regardless of whether the victim is in a public or a private place, provided that the victim’s “intimate parts or undergarments covering those intimate parts”

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489. *Id.* at 279–80, 663 S.E.2d at 117.

490. *See id.* at 280, 663 S.E.2d at 117.

491. *Id.* at 280–81, 663 S.E.2d at 117.

492. *Id.* at 281, 663 S.E.2d at 117.

493. 53 Va. App. 599, 606, 673 S.E.2d 923, 926 (Ct. App. 2009).

494. *See id.*

495. *See id.* at 602, 673 S.E.2d at 924 (citing VA. CODE ANN. § 18.2-386.1(A) (Cum. Supp. 2008)).

496. *Id.* at 604, 673 S.E.2d at 925.

497. *Id.*

498. *See id.*, 673 S.E.2d at 925 (quoting VA. CODE ANN. § 18.2-386.1(A)(i) (Repl. Vol. 2009)).

were not “visible to the general public.”<sup>499</sup> The requirement that the victim otherwise have a “reasonable expectation of privacy” applies to both provisions of the statute, the court concluded.<sup>500</sup> The court observed that “[t]he victim . . . was wearing clothing covering her undergarments while shopping in a public location” and, therefore, had a “reasonable expectation of privacy” as to those undergarments for purposes of the statute.<sup>501</sup>

#### Q. *Protective Orders*

Although fact-bound to a certain degree, *Elliott v. Commonwealth* provides examples of what types of conduct are sufficient to sustain a finding that a defendant violated a protective order.<sup>502</sup> In this case, a juvenile and domestic relations district court issued a protective order directing the defendant to cease contact with his wife and their minor child.<sup>503</sup> On July 6, 2007, after the protective order had been issued, the defendant called his wife, asking to talk to their child.<sup>504</sup> On July 17, 2007, the defendant parked a block from his wife’s residence, but he did not telephone or approach her.<sup>505</sup> The defendant was convicted of violating the protective order for each incident.<sup>506</sup> On appeal, the defendant contended that the evidence was insufficient, claiming that he had not phoned his wife and thus had made no direct contact with her on July 17, and that “the visual contact was not a violation of the protective order.”<sup>507</sup>

The Supreme Court of Virginia affirmed the conviction for the telephone call because a telephone call constitutes contact in violation of the order.<sup>508</sup> As to the second incident, however, the court reversed the conviction because, although the defendant made himself openly visible to his wife, he was parked a block

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499. *Id.* (quoting VA. CODE ANN. § 18.2-386.1(A)(ii) (Repl. Vol. 2009) (emphasis removed).

500. *Id.* at 605, 673 S.E.2d at 926.

501. *See id.*

502. *See* 277 Va. 457, 675 S.E.2d 178 (2009).

503. *See id.* at 460, 675 S.E.2d at 180.

504. *Id.*

505. *Id.* at 460–61, 675 S.E.2d at 180.

506. *Id.* at 460, 675 S.E.2d at 180.

507. *Id.* at 461, 675 S.E.2d at 180.

508. *See id.* at 463, 675 S.E.2d at 181–82.

away and posed no threat of harm.<sup>509</sup> Due to the absence of potential harm or an intent to communicate with his wife, the court reasoned that there could be no violation of the protective order.<sup>510</sup> Such orders are issued to safeguard the health and physical safety of the wife.<sup>511</sup>

The court offered guidance as to what would be considered a contact that may violate a protective order in the future.<sup>512</sup> Although the order prohibited “any” contact, the court interpreted the order to only include “intentional acts.”<sup>513</sup> The court refused to further specify the limits of the term “contacts,” stating that “the statute permits a protective order that prohibits the respondent from entering a reasonable distance-defined space around the petitioner and, thus, intentionally making visual contact with the petitioner.”<sup>514</sup> Virginia courts will no doubt revisit the issue of how close is too close to protect the health and safety of a victim.

In *Nolen v. Commonwealth*, the defendant was charged with the felony of violating a protective order.<sup>515</sup> This charge requires proof that the defendant inflicts a “serious bodily injury.”<sup>516</sup> In that case, a juvenile and domestic relations district court issued a protective order against the defendant, the victim’s former boyfriend.<sup>517</sup> About two weeks after the order was issued, the defendant surprised the victim as she tried to enter her home.<sup>518</sup> He grabbed her keys as she tried to open her door, hit her, and dragged her toward the backyard.<sup>519</sup> “As she sat on the ground, leaning against the house, he kicked her repeatedly in her head, chest, shoulders, face, and back. She estimated he hit or kicked her fifteen to twenty times.”<sup>520</sup>

In denying the defendant’s motion to strike, the trial court noted that the victim had a cut and bleeding lip, adding that

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509. *See id.* at 464, 675 S.E.2d at 182–83.

510. *Id.*

511. *See id.* at 463, 675 S.E.2d at 182.

512. *See id.* at 463–64, 675 S.E.2d at 182.

513. *See id.* at 464, 675 S.E.2d at 182.

514. *Id.*

515. 53 Va. App. 593, 599, 673 S.E.2d 920, 923 (Ct. App. 2009).

516. *Id.* at 597 n.2, 693 S.E.2d at 922 n.2.

517. *Id.* at 595, 673 S.E.2d at 921.

518. *See id.* at 595–96, 673 S.E.2d at 921.

519. *Id.* at 596, 673 S.E.2d at 921.

520. *Id.*

“[W]hen a woman is stomped so hard that three days after the injury she has a tread mark of a shoe or work boot on her head, that’s a serious injury.”<sup>521</sup>

The Court of Appeals of Virginia rejected the defendant’s attempts to import definitions of “serious bodily injury” from other statutes.<sup>522</sup> The court noted that, in each of the statutes the defendant cited, the legislature had used language limiting the definition to that particular statute.<sup>523</sup> Turning then to the plain language of the statute at issue, Virginia Code section 16.1-253.2, the court found that the evidence established that the victim “was bruised and lacerated, bore marks on her body, and bled. She missed several days of work and suffered pain, requiring medication for an extended period of time. “Bodily injury comprehends, it would seem, *any bodily hurt* whatsoever.” Unquestionably, the victim suffered bodily injury.”<sup>524</sup> Nevertheless, the court reviewed the dictionary definitions and found

[a] “serious bodily injury” as proscribed by Code § 16.1-253.2 is one that can fairly and reasonably be deemed not trifling, grave, giving rise to apprehension, giving rise to considerable care, and attended with danger. The injuries inflicted upon the victim satisfy this definition and support the trial court’s holding that they constituted “serious” bodily injuries.<sup>525</sup>

It would be a mistake, however, to conclude that *Nolen* set a floor for the minimum necessary to sustain a conviction. Future cases will delineate that threshold with greater precision.

## R. Robbery

In *McMorris v. Commonwealth*, the Supreme Court of Virginia made clear that participating in the battery of the victim does not necessarily translate into criminal liability when the victim is also robbed.<sup>526</sup> The defendant, along with others, attacked the vic-

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521. *Id.*

522. *See id.* at 597, 673 S.E.2d at 922.

523. *Id.* (citing VA. CODE ANN. § 16.1-283(E) (Repl. Vol. 2003 & Cum. Supp. 2009) (termination of parental rights for serious bodily injury)); *id.* § 18.2-371.1 (Repl. Vol. 2009) (infliction of serious injury on minor child in custodial relationship)).

524. *Id.* at 597–98, 673 S.E.2d at 922 (quoting *Bryant v. Commonwealth*, 189 Va. 310, 316, 53 S.E.2d 54, 57 (1949)).

525. *Id.* at 599, 673 S.E.2d at 923.

526. *See* 276 Va. 500, 507–08, 666 S.E.2d 348, 352 (2008).

tim.<sup>527</sup> During the course of the beating, the victim's wallet and cell phone fell to the ground.<sup>528</sup> One of the assailants, but not the defendant, grabbed the wallet and the telephone.<sup>529</sup> The defendant did not leave with the person who took the wallet and phone.<sup>530</sup> McMorris was convicted of robbery as a principal in the second degree.<sup>531</sup> He appealed, contending that the evidence was insufficient.<sup>532</sup>

The Supreme Court of Virginia agreed.<sup>533</sup> The court noted that to be convicted as a principal in the second degree, the defendant must share the criminal intent of the person carrying out the crime and mere presence does not suffice for conviction.<sup>534</sup> A lack of intent to commit the crime is a defense, except where there is concert of action.<sup>535</sup> Where concert of action is present, a defendant may be held liable if the crime is a "natural and probable consequence of the intended wrongful act."<sup>536</sup> Applying these principles to the facts before it, the court concluded that there was no direct evidence linking McMorris to the robbery.<sup>537</sup> The circumstantial evidence did "not exclude the reasonable conclusion that McMorris did not observe [the victim's] property fall to the ground and that he did not have knowledge of the principal's intent to commit the robbery."<sup>538</sup> Finally, the theory of concert of action did not establish McMorris's criminal liability because a robbery is not a "natural and probable consequence" of a battery.<sup>539</sup>

### S. *Weapons Offenses*

Established precedents continue to tumble following the Supreme Court of Virginia's decision in *Farrakhan v. Common-*

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527. *See id.* at 504, 666 S.E.2d at 350.

528. *Id.*

529. *Id.*

530. *Id.*

531. *Id.* at 505, 666 S.E.2d at 350.

532. *See id.* at 503, 666 S.E.2d at 349.

533. *See id.* at 508, 666 S.E.2d at 352.

534. *Id.* at 505, 666 S.E.2d at 350-51.

535. *See id.* at 506, 666 S.E.2d at 351 (citing *Spradlin v. Commonwealth*, 195 Va. 523, 528, 79 S.E.2d 443, 445 (1954)).

536. *Id.*

537. *See id.*

538. *Id.* at 507, 666 S.E.2d at 351.

539. *Id.* at 507-08, 666 S.E.2d at 352.

*wealth*.<sup>540</sup> In that case, the court held that not every item would qualify as a “weapon of like kind” under Virginia Code section 18.2-308(A).<sup>541</sup> Rather, the item in question must be a “weapon.”<sup>542</sup> If it qualifies as a weapon, it must also constitute a weapon that shares characteristics with the enumerated items in the statute “such that its concealment is prohibited.”<sup>543</sup> In *Delcid v. Commonwealth*, the Court of Appeals of Virginia concluded that a “butterfly knife” was a “weapon of like kind” for purposes of the statute prohibiting felons from possessing a concealed weapon.<sup>544</sup> Eight years later, in *Thompson v. Commonwealth*, the Supreme Court of Virginia overruled *Delcid*.<sup>545</sup> The court relied on the testimony of a police officer at trial to conclude that the butterfly knife was indeed a weapon.<sup>546</sup> However, the court found that the knife was not a weapon of like kind to those enumerated in the statute.<sup>547</sup> The court reasoned that the butterfly knife did not resemble a dirk, because the butterfly knife contains a single sharp edge instead of two, has no protective guard, and is not set in a hilt.<sup>548</sup> In the court’s view, the butterfly knife in question was more like a pocket knife than a sword or dirk.<sup>549</sup> The court did not compare the butterfly knife to a switchblade, one of the weapons enumerated in the statute, but noted in passing that the butterfly knife does not resemble the other enumerated weapons.<sup>550</sup> Virginia courts used to be quite generous in concluding that a weapon was one of “like kind,” but it is now abundantly clear that the Supreme Court of Virginia will construe very strictly any attempt to categorize a weapon as one “of like kind.”

The defendant in *King v. Commonwealth* conceded that he had discharged a firearm within 1000 feet of the property line of a private therapeutic day school that operated under a lease with a Catholic church.<sup>551</sup> The defendant asserted that the evidence was

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540. 273 Va. 177, 639 S.E.2d 227 (2007).

541. *See id.* at 182–83, 639 S.E.2d at 230.

542. *Id.* at 182, 639 S.E.2d at 230.

543. *Id.*

544. *See* 32 Va. App. 14, 18, 526 S.E.2d 273, 275 (Ct. App. 2000).

545. 277 Va. 280, 291, 673 S.E.2d 469, 474 (2009).

546. *See id.* at 288–89, 673 S.E.2d at 472–73.

547. *See id.* at 289, 673 S.E.2d at 473.

548. *See id.* at 290–91, 673 S.E.2d at 473–74.

549. *See id.*

550. *See id.* at 291, 673 S.E.2d at 474.

551. 53 Va. App. 257, 260–61, 670 S.E.2d 767, 769 (Ct. App. 2009).

nevertheless insufficient to establish his guilt of discharging a firearm within 1000 feet of a school because he discharged the firearm after 8:00 p.m. and the school's lease allowed them access to the premises from only 7:00 a.m. to 6:00 p.m.<sup>552</sup>

The court of appeals found the plain meaning of the statute dispositive.<sup>553</sup> The court noted that Virginia Code section 18.2-280(C) drew no distinction between schools that lease facilities and those that do not, nor did it limit its application to schools that were in session.<sup>554</sup> In short, the property was either a school or not a school, and the court would not consider who may be using the property at any given time in making such a determination.<sup>555</sup> Moreover, the court observed that the legislature had enacted certain exceptions to the prohibitions set forth therein, and the defendant's scenario did not fit within any of the exceptions.<sup>556</sup> Finally, the court reasoned that the legislature is undoubtedly aware that many schools are used for a variety of activities by any number of groups in our communities.<sup>557</sup> Adopting the defendant's interpretation of the statute, therefore, would not only conflict with the rules of statutory construction, but also would significantly encumber enforcement of the statute.<sup>558</sup>

In a case that will likely inure to the benefit of prosecutors, the Court of Appeals of Virginia applied the doctrine of constructive possession to Virginia Code section 18.2-308.4(C).<sup>559</sup> In *Wright v. Commonwealth*, police seized a small amount of cocaine from the defendant.<sup>560</sup> The defendant admitted he had more cocaine at his residence and gave the officer the keys to his apartment.<sup>561</sup> The detective recovered a loaded gun, 114 grams of crack cocaine,

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552. *Id.*

553. *See id.* at 262–63, 670 S.E.2d at 770. Virginia Code section 18.2-280(C) provides:

If any person willfully discharges or causes to be discharged any firearm upon any public property within 1,000 feet of the property line of any public, private or religious elementary, middle or high school property he shall be guilty of a Class 4 felony, unless he is engaged in lawful hunting.

VA. CODE ANN. § 18.2-280(C) (Repl. Vol. 2009).

554. *See King*, 53 Va. App. at 264–65, 670 S.E.2d at 771.

555. *See id.* at 265, 670 S.E.2d at 771.

556. *Id.* at 263–64, 670 S.E.2d at 770.

557. *See id.* at 265, 670 S.E.2d at 771.

558. *See id.* at 264, 670 S.E.2d at 771.

559. *Wright v. Commonwealth*, 53 Va. App. 266, 287, 670 S.E.2d 772, 782 (Ct. App. 2009).

560. *Id.* at 270, 670 S.E.2d at 774.

561. *Id.*

scales, and packaging paraphernalia from the apartment.<sup>562</sup> On appeal, the defendant challenged the sufficiency of the evidence for his conviction for possessing a firearm while possessing cocaine with the intent to distribute.<sup>563</sup> The defendant argued that the Commonwealth had to prove he was in actual, simultaneous possession of the drugs and firearm to sustain a conviction.<sup>564</sup>

The *Wright* court upheld the defendant's conviction.<sup>565</sup> The court based its decision on the plain language of the statute and the differences between subsection C, under which the defendant was convicted, and the other subsections.<sup>566</sup> Subsection C, unlike the other subsections of the statute, does not require actual possession on one's person.<sup>567</sup> This phrasing is consistent with the application of the principles of constructive possession. Additionally, the court found that the evidence established a nexus between the firearm and the drugs, which the defendant admitted owning.<sup>568</sup> A constructively possessed firearm can "further, advance, or help" a dealer because "an accessible gun provides defense against anyone who may attempt to rob the trafficker of his drugs or drug profits . . . [and] possessing a gun, and letting everyone know that you are armed, lessens the chances that a robbery will even be attempted."<sup>569</sup>

The defendant in *Rose v. Commonwealth* asserted that he could not be convicted of "using" a firearm in the commission of a robbery when the use consisted of beating the victim with the gun to force the victim to relinquish a bag of cash.<sup>570</sup> The defendant argued that Virginia Code section 18.2-53.1 does not prohibit clubbing the victim with a gun.<sup>571</sup>

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562. *Id.*

563. *See id.* at 269, 670 S.E.2d at 773.

564. *See id.* at 271, 670 S.E.2d at 774.

565. *Id.* at 269, 670 S.E.2d at 773.

566. *See id.* at 277-78, 670 S.E.2d at 777-78.

567. *Id.* at 280, 670 S.E.2d at 779.

568. *Id.* at 286-87, 670 S.E.2d at 782.

569. *Id.* at 283, 670 S.E.2d at 780 (quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 412 (5th Cir. 2000)). The court of appeals affirmed a nearly identical case, *Hargrove v. Commonwealth*, in 2009. 53 Va. App. 545, 561, 673 S.E.2d 896, 904 (Ct. App. 2009). In *Hargrove*, the defendant admitted "the pistol located on the kitchen table, adjacent to the pantry where he placed the marijuana package, belonged to him and that he used it for his protection." *Id.* at 560, 673 S.E.2d at 904.

570. *See* 53 Va. App. 505, 508-09, 673 S.E.2d 489, 490 (Ct. App. 2009).

571. *Id.* at 508, 673 S.E.2d at 490.

The Court of Appeals of Virginia first noted that the defendant did not contest the fact that the weapon he used was, in fact, a firearm.<sup>572</sup> Next, the court reasoned that the term “use” should be construed according to its plain meaning.<sup>573</sup> The court also noted that the purposes of the statute are to “deter violent criminal conduct,” and to “prevent[ ] actual physical injury and also to discourage criminal conduct that produces fear of physical harm.”<sup>574</sup> The court held that both the plain language of the statute and its purpose supported a conviction for using a firearm when that firearm is used as a club.<sup>575</sup> The court bolstered this conclusion by noting that other state courts construing similar statutes had un-animously reached the same conclusion.<sup>576</sup>

The defendant also argued that in order to be convicted of use of a firearm in the commission of a felony, the victim must perceive the gun as a firearm.<sup>577</sup> The court again disagreed, observing that the statute was written in the disjunctive, prohibiting either the “use” or the “display” of the firearm.<sup>578</sup> In light of this distinction, the court held,

it is clear that the victim’s perception is relevant only in instances when the object is being displayed, not used. In such a case, the injury is intimidation or fear of physical harm. However, if the victim sustains actual physical injury from the use of an actual firearm, the victim’s belief of whether or not the gun is a dangerous weapon is irrelevant. In those instances, the offense is completed when the injury is inflicted.<sup>579</sup>

#### T. *Use of a Communications System to Solicit from a Minor*

In *Podracky v. Commonwealth*, Podracky was arrested at a hotel after he used his computer to make arrangements to meet two teenage girls for a tryst.<sup>580</sup> He was convicted of using a communi-

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572. *Id.* at 513, 673 S.E.2d at 492.

573. *Id.* at 512, 673 S.E.2d at 492.

574. *Id.* (citing *Holloman v. Commonwealth*, 221 Va. 196, 198, 269 S.E.2d 356, 358 (1980)).

575. *See id.* at 512–13, 673 S.E.2d at 492.

576. *See id.* at 510–12, 673 S.E.2d at 491–92.

577. *Id.* at 513, 673 S.E.2d at 492.

578. *Id.* at 513–14, 673 S.E.2d at 493.

579. *Id.* at 516, 673 S.E.2d at 494.

580. 52 Va. App. 130, 133, 662 S.E.2d 81, 83 (Ct. App. 2008).

cations system to solicit sexual favors from a minor.<sup>581</sup> He challenged his conviction on the ground that the statute is facially overbroad under the First Amendment.<sup>582</sup>

In rejecting the claim, the court of appeals first noted that offers to engage in illegal activity do not benefit from First Amendment protection.<sup>583</sup> The court found inapt the analogy between the Virginia statute at issue and the Communications Decency Act.<sup>584</sup> Unlike the Communications Decency Act, which was invalidated by the United States Supreme Court in *Reno v. ACLU*, the Virginia statute does not prohibit communicating indecent materials to minors; rather, it prohibits the knowing use of a communications system to solicit a minor for criminal acts.<sup>585</sup> The court observed that other courts had upheld similar statutes against a First Amendment challenge.<sup>586</sup> Finally, the fact that the defendant could be mistaken about the age of the person solicited—thinking he was soliciting a minor, but in actuality soliciting an adult—did not give rise to any constitutional problem.<sup>587</sup> The court observed that “[o]ffers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer.”<sup>588</sup>

## IX. LEGISLATION

Given the Commonwealth’s severe budgetary constraints, legislative changes this year were modest.

### A. Arrest Warrants

Magistrates are now prohibited from issuing felony arrest warrants based on a citizen complaint without prior consultation

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581. *Id.* at 132, 662 S.E.2d at 82.

582. *See id.*

583. *Id.* at 135–36, 662 S.E.2d at 84.

584. *See id.* at 136–38, 662 S.E.2d at 84–86.

585. *Id.* at 137–38, 662 S.E.2d at 85; *see also* *Reno v. ACLU*, 521 U.S. 844 (1997).

586. *See id.* at 136, 662 S.E.2d at 84.

587. *See id.* at 141, 662 S.E.2d at 87.

588. *Id.* (quoting *United States v. Williams*, 553 U.S. \_\_\_, \_\_\_, 128 S. Ct. 1830, 1843 (2008)).

with the Commonwealth's Attorney, or, if none is available, with a law enforcement officer.<sup>589</sup>

### B. *Audio and Video Appearance*

District courts are now required to use two-way electronic video and audio communication, if available, for pre-trial appearances to determine bail or representation by counsel.<sup>590</sup>

### C. *Illegal Drugs*

Existing Virginia law provided for a sentencing enhancement for persons who were convicted more than once of possession of drugs with the intent to distribute.<sup>591</sup> Now, persons previously convicted in another state of a similar offense will see their subsequent sentences in Virginia enhanced as well.<sup>592</sup>

### D. *Investigating Crime*

With counterfeit purses and the like readily available, the General Assembly expanded the jurisdiction of multi-jurisdictional grand juries to include trademark infringement cases.<sup>593</sup> The General Assembly also authorized circuit courts to issue a search warrant for corporations located out of state that provide electronic communication services or remote computing services in Virginia.<sup>594</sup>

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589. See VA. CODE ANN. § 19.2-45 (Supp. 2009). However, given the holding in *Virginia v. Moore*, a failure to follow this rule would not have any significance for purposes of suppressing evidence under the Fourth Amendment. 553 U.S. \_\_\_, \_\_\_, 128 S. Ct. 1598, 1608 (2008).

590. VA. CODE ANN. § 19.2-3.1(A) (Supp. 2009).

591. See VA. CODE ANN. § 18.2-248(C) (Repl. Vol. 2009).

592. See VA. CODE ANN. § 18.2-248 (Repl. Vol. 2009).

593. See Act of Mar. 27, 2009, ch. 491, 2009 Va. Acts 215, 215 (codified as amended at VA. CODE ANN. § 19.2-215.1 (Supp. 2009)).

594. See Act of Mar. 27, 2009, ch. 378, 2009 Va. Acts 747, 747 (codified as amended at VA. CODE ANN. § 19.2-70.3(C) (Supp. 2009)). Whether out of state corporations and jurisdictions will comply with such warrants remains to be seen.

### E. *One Year and a Day Rule Abolished*

At common law, a prosecution for murder or manslaughter could not be initiated if more than one year and a day had passed between the defendant's act and the victim's death.<sup>595</sup> This rule is now abolished, and a prosecution for murder can proceed regardless of the time lapse between the defendant's actions and the victim's death.<sup>596</sup>

### F. *Possession of Ammunition by Convicted Felons*

Convicted felons previously could not possess a firearm.<sup>597</sup> Now they are also expressly forbidden from possessing ammunition for a firearm.<sup>598</sup>

### G. *Texting While Driving*

To the extent there was any doubt that the reckless driving statute prohibited the practice, composing and reading text messages while driving is now expressly forbidden.<sup>599</sup> Law enforcement and emergency personnel are exempted.<sup>600</sup>

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595. See *Carpenter v. Commonwealth*, 51 Va. App. 84, 95, 654 S.E.2d 345, 351 (Ct. App. 2007).

596. See VA. CODE ANN. § 19.2-8.1 (Supp. 2009).

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

598. VA. CODE ANN. § 18.2-308.2 (Repl. Vol. 2009).

599. See VA. CODE ANN. § 46.2-1078.1(A) (Cum. Supp. 2009).

600. *Id.* § 46.2-107.8.1(B).

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