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CRIMINAL LAW AND PROCEDURE

*Virginia B. Theisen **

I. INTRODUCTION

Once more, the past year yielded a wealth of developments in the area of criminal law and procedure. The author has endeavored to cull the most significant decisions and legislative enactments, with an eye toward the “takeaway” from a case rather than a discussion of settled principles.

II. CRIMINAL PROCEDURE

A. Appeals

In *Congdon v. Commonwealth*, the Court of Appeals of Virginia held a juvenile waived his right to appeal to the circuit court as part of his plea agreement in the juvenile court.¹ The prosecutor charged the defendant, a juvenile, with felony vandalism.² He entered a written plea agreement with the Commonwealth, which provided for dismissal of the felony charge upon Congdon’s successful completion of the drug court program.³ The plea agreement also provided that the defendant “WAIVES or gives up” his right to appeal the judgment to the circuit court.⁴ The juvenile court accepted this plea agreement, “confirmed the voluntariness of Congdon’s consent, deferred the disposition of the felony vandalism charge, and ordered Congdon into the juvenile drug court program.”⁵ Over a year later, the juvenile court, upon finding the

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1. 57 Va. App. 692, 694, 705 S.E.2d 526, 527 (2011).

2. *Id.*

3. *Id.*

4. *Id.* (citation omitted).

5. *Id.*

defendant had violated the rules of the drug court program, terminated his participation in the program, revoked the deferred disposition, and found Congdon delinquent.⁶ Congdon appealed the judgment to the circuit court, which dismissed the case, finding Congdon made “an intelligent and effective” waiver of the right to appeal.⁷

In the appellate court, Congdon argued his right to appeal from the juvenile court to the circuit court could not be waived, but the court of appeals rejected his argument.⁸ The court reviewed a number of constitutional rights that can be waived and noted the right of a juvenile to appeal to circuit court is a purely statutory right.⁹ The court noted that the majority of courts addressing the issue have found express waivers of appeal enforceable,¹⁰ and Virginia has held a criminal defendant can waive his right to appeal if the waiver is a knowing, voluntary, and intelligent waiver.¹¹ Thus, the court of appeals affirmed the judgment of the circuit court.¹²

The Supreme Court of Virginia clarified its “right for the wrong reason” line of cases in *Perry v. Commonwealth*, in which the question was the extent that the appellee must advance an argument at trial to rely on that argument on appeal.¹³ The court concluded that

[f]ailure to make the argument before the trial court is not the proper focus of the right result for the wrong reason doctrine. Consideration of the facts in the record and whether additional factual presentation is necessary to resolve the newly-advanced reason is the proper focus of the application of the doctrine.¹⁴

In *Perry*, the issue was whether the police conducted a proper pat down of the defendant.¹⁵ At trial, the argument centered on whether the police officer had a reasonable basis to suspect the defendant of being armed and dangerous and, therefore, patting

6. *Id.*, 705 S.E.2d at 527–28.

7. *Id.*, 705 S.E.2d at 528 (internal quotation marks omitted).

8. *Id.* at 694–95, 705 S.E.2d at 528.

9. *Id.* at 695–96, 705 S.E.2d at 528.

10. *Id.* at 698 & n.3, 705 S.E.2d at 530 & n.3.

11. *Id.* at 699, 705 S.E.2d at 530.

12. *Id.* at 699–700, 705 S.E.2d at 530.

13. 280 Va. 572, 579–80, 701 S.E.2d 431, 435–36 (2010).

14. *Id.* at 580, 701 S.E.2d at 436.

15. *Id.* at 576, 701 S.E.2d at 434.

him down.¹⁶ On appeal, the court affirmed on an alternative ground, that the officer had probable cause to arrest and, therefore, lawfully searched the defendant incident to the arrest.¹⁷

Banks v. Commonwealth offers another example of how the Supreme Court of Virginia applies “right for the wrong reason” principles. The defendant challenged the seizure of a weapon, contending the seizure was the fruit of an illegal search.¹⁸ The Court of Appeals of Virginia upheld the search on the alternative ground, not raised by the Commonwealth, that the search was consensual.¹⁹ The supreme court reversed, concluding the “right for the wrong reason” doctrine did not apply because the evidence of consent was conflicting, and the record did not disclose how the trial court “resolved the dispute nor indicated how it weighed or credited the contradicting testimony” with respect to the issue of consent.²⁰

B. *Collateral Review*

Based upon the decision of the United States Supreme Court in *Padilla v. Kentucky*,²¹ Emmanuel Morris sought a writ of *audita querela* and a writ of error *coram vobis* in the Alexandria Circuit Court, and Wellyn Chan filed petitions for the same writs in the Norfolk Circuit Court.²² The petitioners sought relief from their sentences, which rendered them subject to deportation, based on allegations trial counsel were ineffective in their advice to the petitioners regarding the immigration consequences of their convictions and sentences.²³ The trial courts granted the petitioners’ relief, but the Commonwealth appealed the rulings, and the Supreme Court of Virginia reversed the judgments.²⁴

16. *Id.* at 576–77, 701 S.E.2d at 434.

17. *Id.* at 577, 701 S.E.2d at 434.

18. 280 Va. 612, 615, 701 S.E.2d 437, 439 (2010).

19. *Id.* at 616, 701 S.E.2d at 439.

20. *Id.* at 618, 701 S.E.2d at 440.

21. 559 U.S. ___, 130 S. Ct. 1473, 1486–87 (2010) (holding that counsel’s failure to inform the client that a conviction carried a risk of deportation rendered counsel’s representation constitutionally deficient).

22. *Commonwealth v. Morris*, 281 Va. 70, 74–75, 705 S.E.2d 503, 504–05 (2011), *petition for cert. denied*, 2011 U.S. LEXIS 5486 (2011).

23. *See id.*

24. *Id.* at 74–75, 83, 705 S.E.2d at 504–05, 509.

The court began its analysis by noting that while judgments are final pursuant to Rule 1:1 for twenty-one days after entry of the judgment, unless modified within that time period, the Rule is not absolute.²⁵ The writ of *audita querela* and the writ of error *coram vobis*, pursuant to Virginia Code section 8.01-677, “provide exceptions to Rule 1:1 under proper circumstances.”²⁶

The law restricts *coram vobis* to correction of “clerical errors and certain errors of fact.”²⁷ The errors of fact subject to review are errors that render the judgment void, not merely voidable.²⁸ The court identified the pertinent question for *coram vobis* as “whether there was an ‘error of fact not apparent on the record, not attributable to the applicant’s negligence, and which if known by the court would have *prevented rendition* of the judgment.’”²⁹ Although ineffective assistance of counsel may render a judgment voidable, “it does not render the trial court *incapable* of rendering judgment.”³⁰ The court noted a possible successful claim of ineffective counsel, based on *Padilla*, if Morris and Chan had filed timely habeas petitions, but both failed to do so.³¹

As to the writs of *audita querela*, the court noted that while the common law writ “continues in force today,” it “has never been [available] to modify a criminal sentence in Virginia.”³² Thus, the court concluded the petitioners could not use the writ for their post-conviction attacks on their criminal sentences.³³

C. Collateral Estoppel

A jury acquitted Collin Anthony Rice of malicious wounding, use of a firearm in the commission of malicious wounding, attempted murder, use of a firearm in the commission of attempted murder, and discharging a firearm into an occupied vehicle, but,

25. *Id.* at 77, 705 S.E.2d at 506 (citing VA. SUP. CT. R. pt. 1, R. 1:1) (Repl. Vol. 2011)).

26. *Id.*

27. *See id.* at 78, 705 S.E.2d at 506.

28. *Id.* at 79, 705 S.E.2d at 508.

29. *Id.* (quoting *Dobie v. Commonwealth*, 198 Va. 762, 769, 96 S.E.2d 747, 752 (1957)).

30. *Id.* at 80, 705 S.E.2d at 507.

31. *Id.* at 81, 705 S.E.2d at 508 (citing *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010)).

32. *Id.* at 82, 705 S.E.2d at 509.

33. *Id.* at 83, 705 S.E.2d at 509.

simultaneously, the trial court convicted Rice of possession of a firearm by a convicted felon.³⁴ Following his conviction, Rice moved for reconsideration of that conviction on the ground that principles of collateral estoppel prohibited his conviction.³⁵ The Court of Appeals of Virginia rejected his argument and affirmed his conviction in *Rice v. Commonwealth*.³⁶

The court of appeals noted Rice based his argument on an assertion that the jury, in acquitting him of the other charges, necessarily concluded that he did not possess the firearm.³⁷ The court recognized four requirements must be met for application of the bar of collateral estoppel:

- (1) the parties to the two proceedings must be the same; (2) the factual issue sought to be litigated must have been actually litigated in the prior proceeding; (3) the factual issue must have been essential to the judgment rendered in the prior proceeding; and (4) the prior proceeding must have resulted in a valid, final judgment against the party to whom the doctrine is sought to be applied.³⁸

The court of appeals held that these four elements “presuppose a prior action.”³⁹ The court concluded the doctrine does not apply to simultaneous prosecutions as in Rice’s case and, thus, affirmed the judgment of the trial court.⁴⁰

D. Confrontation Clause

Courts continue to deal with the effects of the decision in *Crawford v. Washington*.⁴¹ *Crawford* determined that the key concept triggering the application of the Confrontation Clause is whether the evidence in question is “testimonial.”⁴² In *Walker v. Com-*

34. *Rice v. Commonwealth*, 57 Va. App. 437, 441, 703 S.E.2d 254, 256 (2011). The Commonwealth and Rice agreed that the trial court would try Rice on the charge of possession of a firearm by a felon, while the jury would decide the remaining felony charges. *See id.*

35. *Id.* at 441–42, 703 S.E.2d at 256–57.

36. *Id.* at 445–46, 703 S.E.2d at 259.

37. *Id.* at 442, 703 S.E.2d at 257.

38. *Id.* at 443, 703 S.E.2d at 257 (quoting *Glasco v. Ballard*, 249 Va. 61, 64, 452 S.E.2d 854, 855 (1995)).

39. *Id.* at 444, 703 S.E.2d at 258.

40. *Id.* at 446, 703 S.E.2d at 259.

41. *See generally* 541 U.S. 36, 51 (2004) (holding that the right under the Confrontation Clause of the Sixth Amendment “applies to . . . those who ‘bear testimony’”).

42. *See id.*

monwealth, the defendant, who faced a charge of larceny of an automobile, argued that the prosecution violated his rights under the Confrontation Clause when it relied on the National Automobile Dealer's Association "blue book" to establish the value of the automobile.⁴³ The Supreme Court of Virginia noted that evidence is testimonial if the prosecution initially produced it "for the purpose of establishing or proving some fact at trial."⁴⁴ The Supreme Court of Virginia concluded the "blue book" was not a testimonial document, observing that "[i]t is most improbable that the compilers of the 'blue book' ever heard of Walker or the charges against him and they certainly did not prepare the book for the purpose of assisting the Commonwealth in securing his conviction."⁴⁵

Sanders v. Commonwealth addresses a situation where a physician fulfills a dual role by assessing whether a child has been sexually abused, while at the same time providing medical treatment to the child.⁴⁶ A child abuse pediatrician, Dr. Clayton, who worked at the child abuse program at a children's hospital in Norfolk, examined a girl under the age of thirteen.⁴⁷ The physician sent samples to the hospital laboratory, which in turn sent a sample for testing to a laboratory in California.⁴⁸ Based on test results and a physical examination, the doctor diagnosed the girl with chlamydia.⁴⁹

The physician explained at trial that her duties are "multifaceted" and include determining the likelihood of abuse or neglect, as well as treating the child.⁵⁰ The defendant argued the trial court improperly permitted testimony concerning whether the child had a sexually transmitted disease because this testimony, based on the lab report, violated his rights under the Confrontation Clause.⁵¹ The Supreme Court of Virginia disagreed, focusing on "whether the laboratory report as referenced in Dr. Clayton's

43. 281 Va. 227, 229, 704 S.E.2d 124, 125 (2011).

44. *Id.* at 231, 704 S.E.2d at 126 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, ___, 129 S. Ct. 2527, 2539–40 (2009)) (internal quotation marks omitted).

45. *Id.*

46. 282 Va. 154, 166, 711 S.E.2d 213, 219 (2011).

47. *Id.* at 157, 167, 711 S.E.2d at 214.

48. *Id.*

49. *Id.* at 158, 711 S.E.2d at 214.

50. *Id.* at 159–60, 711 S.E.2d at 215.

51. *Id.* at 161, 711 S.E.2d at 216.

testimony was created for medical treatment purposes or forensic investigation purposes.”⁵² In this instance, the physician limited her role to conducting a medical evaluation.⁵³ She did not interview the child because the clinic hired experts who interview the children to determine whether sexual abuse occurred.⁵⁴ Law enforcement did not request the testing.⁵⁵ Instead, the physician requested the test after observing a vaginal discharge.⁵⁶ The purpose of the test, the court noted, is to determine whether a certain medical condition exists and, unlike DNA tests, does not provide the source of the infection.⁵⁷ Finally, upon receipt of the test results, the child received treatment.⁵⁸ Under these circumstances, the court concluded that “[t]he laboratory report was for medical treatment purposes as it was created to permit Dr. Clayton to medically diagnose and treat [the child] for sexually transmitted infections.”⁵⁹

Because reports created for medical treatment purposes are nontestimonial, “Sanders’s Sixth Amendment right to confront witnesses against him was not violated.”⁶⁰ Moreover, unlike the laboratory technician in *Melendez-Diaz*, no evidence showed that the technician in California, who performed the test, knew the results would be used in a trial.⁶¹ *Sanders* requires a fact-specific examination of a particular item of evidence to determine whether its admission would violate the Confrontation Clause.

The defendant in *Aguilar v. Commonwealth* argued the Commonwealth violated his Confrontation Clause rights because it failed to produce an analyst and a laboratory technician “who played preliminary roles in the DNA analysis.”⁶² Forensic analyst Catherine Columbo performed a preliminary screening to deter-

52. *Id.* at 164–66, 711 S.E.2d at 218–19.

53. *Id.* at 166, 711 S.E.2d at 219.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Compare *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, ___, 129 S. Ct. 2527, 2532 (2009) (finding that the technicians were aware of the affidavit’s evidentiary purpose), with *Sanders*, 282 Va. at 166–67, 711 S.E.2d at 219 (finding that the technicians did not expect the lab reports to be used in a trial).

62. 280 Va. 322, 326, 699 S.E.2d 215, 216 (2010), *cert. denied*, 131 S. Ct. 3089 (2011).

mine whether seminal fluid was present, and Nathan Himes physically observed Columbo perform the tests.⁶³ Columbo failed to find any fluid, but Himes, the analyst who prepared the certificate of analysis and who testified at trial, located some DNA when he separately examined the sample.⁶⁴ Later, a “PCR/STR technician,” Melanie Morris, processed the samples by operating certain machines, copied the DNA, and placed the sample in a gel for Himes to analyze.⁶⁵ Himes testified at trial that the DNA recovered from the victim matched the defendant.⁶⁶

The Supreme Court of Virginia noted that, following *Melendez-Diaz*, certificates of analysis indisputably are testimonial because they contain “solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.”⁶⁷ Regarding Columbo, the court found “that her preliminary screening ultimately had no role in the DNA analysis.”⁶⁸ Instead, Himes performed the analysis.⁶⁹ Therefore, the certificates of analysis never included the results of Columbo’s work product.⁷⁰ “In other words, she did not ‘bear testimony’ against [the defendant]” and, therefore, did not violate the defendant’s right to confront witnesses.⁷¹

With respect to the “PCR/STR technician,” the certificates of analysis “did not contain any notes or reports she might have generated during the course of her work; and they did not report any factual findings by Morris about the DNA analysis.”⁷² The prosecution never presented any evidence from Morris “to the fact-finder in a form ‘functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.’”⁷³ Thus, the absence of persons who participated in the testing process, but whose testimony is not conveyed to the fact-

63. *Id.* at 327, 699 S.E.2d at 217.

64. *Id.*

65. *Id.* at 327–28, 699 S.E.2d at 217.

66. *See id.* at 328–29, 699 S.E.2d at 217–18.

67. *Id.* at 333, 699 S.E.2d at 220 (quoting *Melendez-Diaz v. Massachusetts*, 537 U.S. ___, ___, 129 S. Ct. 2527, 2532 (2009)) (internal quotation marks omitted).

68. *Id.*

69. *Id.*, 699 S.E.2d at 220–21.

70. *Id.*, 699 S.E.2d at 221.

71. *Id.* at 333–34, 699 S.E.2d at 221 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

72. *Id.* at 334, 699 S.E.2d at 221.

73. *Id.* (quoting *Melendez-Diaz v. Massachusetts*, 537 U.S. ___, ___, 129 S. Ct. 2527, 2532 (2009)).

finder in a document, or some other form analogous to direct examination, may go to the weight of the evidence, but it does not constitute a Confrontation Clause problem.

In *Satterwhite v. Commonwealth*, the Court of Appeals of Virginia, after holding that traditional common law principles permitted the admission of the victim's statements, examined whether the Confrontation Clause barred the victim's dying declarations.⁷⁴ The statements came from a man who suffered injuries from being "shot four times at close range. As he faded in and out of consciousness, he identified the shooter as [the defendant]."⁷⁵ The court concluded *Crawford* did not upend the longstanding precedent admitting dying declarations.⁷⁶ First, the court observed the Supreme Court of Virginia answered this question 150 years ago in *Hill v. Commonwealth*, holding dying declarations admissible under the Confrontation Clause.⁷⁷ Second, the court noted that *Crawford* "left intact many aspects of the conventional understanding of the Confrontation Clause."⁷⁸ Finally, cementing its conclusion, the court also found that the Supreme Court, in dicta, repeatedly approved the admissibility of dying declarations under the Confrontation Clause.⁷⁹

E. *Deferred Findings*

In *Hernandez v. Commonwealth*, perhaps the most controversial decision of the year, the Supreme Court of Virginia concluded a trial court possesses "the inherent power, in the exercise of its discretion, to take the matter under advisement and to continue the case for future disposition, subject to such lawful conditions as the court might prescribe."⁸⁰ The supreme court reversed the

74. 56 Va. App. 557, 559, 565–68, 695 S.E.2d 555, 556, 559–60 (2010).

75. *Id.* at 559, 695 S.E.2d at 556.

76. *Id.* at 567, 695 S.E.2d at 560.

77. *Id.* at 565, 695 S.E.2d at 559 (citing *Hill v. Commonwealth*, 43 Va. (2 Gratt.) 594, 607–08 (1845)).

78. *Id.* at 567, 695 S.E.2d at 560.

79. *Id.* at 567–68, 695 S.E.2d at 560 (citing *Giles v. California*, 554 U.S. 353, 358 (2008); *Mattox v. United States*, 156 U.S. 237, 243–44 (1895)). For example in *Mattox v. United States*, the Supreme Court stated that "[dying declarations] are rarely made in the presence of the accused, they are made without any opportunity for . . . cross-examination, . . . yet from time immemorial they have been treated as competent testimony." 156 U.S. at 243.

80. 281 Va. 222, 226, 707 S.E.2d 273, 275 (2011).

holding of the court of appeals and of the circuit court, both of which concluded that such a power exists only if the legislature authorizes it.⁸¹

A grand jury indicted Rafael Hernandez for the felony of assaulting a police officer, in violation of Virginia Code section 18.2-57.⁸² After both parties presented their evidence at the bench trial, the defendant moved the court to defer disposition for a specified time, at the end of which the court would consider dismissing the charge, in place of a conviction.⁸³ The trial court found the evidence sufficient to find guilt, and, "even though the case might be an appropriate one for a deferred disposition, the court did not have inherent authority to do so."⁸⁴ The Court of Appeals of Virginia awarded an appeal and affirmed the judgment.⁸⁵

The Supreme Court of Virginia reversed the ruling, finding the statement by the trial judge declaring the evidence sufficient to support a conviction failed to constitute "a judgment of conviction."⁸⁶ The supreme court determined that "[u]ntil the court enters a written order finding the defendant guilty of a crime, the court has the inherent authority to take the matter under advisement or to continue the case for disposition at a later date."⁸⁷ The court did not decide, however, whether a trial court might "continue a case with a *promise* of a particular disposition."⁸⁸

F. *Fugitive Disentitlement*

The Court of Appeals of Virginia applied the doctrine of "fugitive disentitlement" and dismissed the appeal in *Reid v. Commonwealth*.⁸⁹ The trial court in Danville convicted Reid of possession of a firearm by a convicted felon and sentenced him to two years in prison.⁹⁰ He posted a cash appeal bond with surety.⁹¹ The

81. See *id.*, 707 S.E.2d at 275.

82. *Id.* at 224, 707 S.E.2d at 274 (citing VA. CODE ANN. § 18.2-57 (Repl. Vol. 2009 & Cum. Supp. 2011)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 225-26, 707 S.E.2d at 275.

87. *Id.* at 226, 707 S.E.2d at 275.

88. *Id.* at 225, 707 S.E.2d at 274.

89. 57 Va. App. 42, 44, 698 S.E.2d 269, 270 (2010).

90. *Id.* at 45, 698 S.E.2d at 270.

91. *Id.*

conditions of the bond included appearing at all court proceedings, remaining in contact with his attorney, appearing at all docket calls, reporting every two weeks to the Danville Probation and Parole Office, maintaining good behavior, and remaining in Virginia.⁹² Reid agreed in writing to the conditions.⁹³

The court issued a *capias* because Reid failed to report to the probation office and his probation officer was unable to contact him.⁹⁴ Reid also failed to appear at a preliminary hearing on a new felony charge, after which the Commonwealth moved to revoke his appeal bond.⁹⁵ The trial court revoked the appeal bond, issued another *capias*, and after a hearing conducted pursuant to a motion filed by the Commonwealth, declared Reid a fugitive from justice.⁹⁶ The prosecutor filed a motion to dismiss Reid's appeal to the court of appeals because of the "Fugitive Disentitlement Doctrine."⁹⁷

The court of appeals applied the doctrine and dismissed the appeal.⁹⁸ The court found that for the doctrine to apply: "(1) the appellant must be a fugitive, (2) there must be a nexus between the current appeal and the appellant's status as a fugitive, and (3) dismissal must be necessary to effectuate the policy concerns underlying the doctrine."⁹⁹ The court of appeals cautioned that trial courts must exercise restraint and only apply the doctrine "where no lesser sanction or remedy is available."¹⁰⁰

G. *Grand Juries*

In *Reed v. Commonwealth*, the Supreme Court of Virginia held the failure of the grand jury foreman to sign an indictment that the jury returned in open court was an error in form only and did

92. *Id.*

93. *Id.*

94. *Id.* at 45–46, 698 S.E.2d at 270.

95. *See id.* at 46, 698 S.E.2d at 270.

96. *Id.*, 698 S.E.2d at 270–71.

97. *Id.*, 698 S.E.2d at 271.

98. *Id.* at 58, 698 S.E.2d at 276.

99. *Id.* at 52, 698 S.E.2d at 273 (quoting *Sasson v. Shenhar*, 276 Va. 611, 623, 667 S.E.2d 555, 561 (2008)) (internal quotation marks omitted).

100. *Id.* at 57, 698 S.E.2d at 276 (quoting *Sasson*, 276 Va. at 623, 667 S.E.2d at 561) (internal quotation marks omitted).

not nullify the indictment.¹⁰¹ The grand jury indicted Reed for eight crimes arising from a robbery and murder.¹⁰² Each of the indictments contained a check mark indicating it was a “true bill,” but the grand jury foreman did not sign the indictments.¹⁰³ During pre-trial proceedings and at trial and sentencing, Reed’s counsel never raised an objection to the indictment based on the lack of signature.¹⁰⁴ Reed pled guilty to three charges “not directly related to the robbery and murder,” and a jury convicted him on the remaining charges.¹⁰⁵

Reed appealed his convictions to the Court of Appeals of Virginia and the Supreme Court of Virginia without raising the issue of the unsigned indictments on appeal.¹⁰⁶ Both courts denied his appeal.¹⁰⁷ Reed also unsuccessfully petitioned for a writ of habeas corpus based on allegations that his counsel was ineffective for failing to raise the issue of the unsigned indictments.¹⁰⁸

Additionally, “Reed filed a motion in the circuit court to vacate his convictions” as void, based on defective indictments, and the court *sua sponte* denied the motion.¹⁰⁹ On appeal from that judgment, the supreme court agreed with the Commonwealth’s argument that the absence of the signature on the indictments was “a defect in form only,” and, thus, “when the indictments were returned by the grand jury in open court, . . . this defect in form was cured, and the indictments became valid instruments under which to try Reed.”¹¹⁰ The court also rejected Reed’s argument that the indictments were fatally defective under Virginia Code section 19.2-227.¹¹¹

101. 281 Va. 471, 482, 706 S.E.2d 854, 860 (2011).

102. *Id.* at 474, 706 S.E.2d at 855.

103. *Id.* at 474–75, 706 S.E.2d at 856.

104. *Id.* at 475, 706 S.E.2d at 856.

105. *Id.*

106. *Id.* at 475–76, 706 S.E.2d at 856.

107. *Id.* at 476, 706 S.E.2d at 856.

108. *Id.*

109. *Id.* at 476–77, 706 S.E.2d at 857.

110. *Id.* at 478, 706 S.E.2d at 858.

111. *Id.* at 482, 706 S.E.2d at 860 (citing VA. CODE ANN. § 19.2-227 (Repl. Vol. 2008 & Cum. Supp. 2011)).

H. *Juries*

In *Saunders v. Commonwealth*, the Supreme Court of Virginia addressed the issue of under what circumstances a jury, rather than the court, may fix the punishment for a juvenile offender.¹¹² Charges of aggravated malicious wounding and use of a firearm in the commission of the wounding were certified against Saunders, a juvenile from the juvenile court.¹¹³ These charges arose from the shooting of a cab driver named Greg Powell.¹¹⁴ Prior to his scheduled trial in circuit court, Saunders filed a motion seeking to preclude jury sentencing, should the jury find him guilty of any charge.¹¹⁵ The circuit court denied the motion.¹¹⁶ Prior to the certification and indictments for the offenses involving the Powell shooting, the circuit court tried and convicted Saunders as an adult for shooting into an occupied dwelling.¹¹⁷ On that charge he received a sentence of ten years in prison, with eight years suspended.¹¹⁸

The following year, the jury convicted Saunders of the charges arising from the Powell shooting.¹¹⁹ The jury sentenced him to fifty-three years in prison, and the trial court sentenced him in accordance with the jury's verdict.¹²⁰ Saunders appealed the judgment to the Court of Appeals of Virginia, which granted the appeal and affirmed the trial court's judgment.¹²¹ The Supreme Court of Virginia granted the subsequent appeal.¹²²

The court focused its analysis on two sections of the Virginia Code.¹²³ First, the court noted that Virginia Code section 16.1-271 includes the following provision:

112. 281 Va. 448, 450, 706 S.E.2d 350, 351 (2011).

113. *Id.* Subsequently, "a grand jury indicted Saunders for these two offenses and also for [a charge of] participation in an act of violence in association with a criminal street gang." *Id.*

114. *Id.* at 450–51, 706 S.E.2d at 351.

115. *Id.* at 451, 706 S.E.2d at 351.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 451–52, 706 S.E.2d at 351.

121. *Id.* at 452, 706 S.E.2d at 351–52.

122. *Id.*, 706 S.E.2d at 352.

123. *Id.*

Any juvenile who is tried and convicted in a circuit court as an adult under the provisions of this article shall be considered and treated as an adult in any criminal proceeding resulting from any alleged future criminal acts and any pending allegations of delinquency which have not been disposed of by the juvenile court at the time of the criminal conviction.¹²⁴

On the other hand, the court observed, Virginia Code section 16.1-272 provides that:

In any case in which a juvenile is indicted, the offense for which he is indicted and all ancillary charges shall be tried in the same manner as provided for in the trial of adults, except as otherwise provided with regard to sentencing. Upon a finding of guilty of any charge, the court shall fix the sentence without the intervention of a jury.¹²⁵

The supreme court ruled “the *only* plausible interpretation of” the statutes is that “[s]ection 16.1-272 does not apply to youthful offenders who fall within the scope of 16.1-271.”¹²⁶ The court held that when Saunders appeared for sentencing on the convictions arising from the Powell shooting, “[h]e had been previously convicted as an adult on an unrelated charge and given an adult sentence. . . . The necessary conclusion, therefore, is that the jury was correctly allowed to sentence Saunders on the three charges.”¹²⁷

I. *Speedy Trial*

The tolling of Virginia’s speedy trial statute occurs in certain circumstances, including when the Commonwealth seeks a continuance and the defendant does not object.¹²⁸ The statute does not specify whether the statutory time limit is tolled when the trial court enters a continuance *sua sponte* and the defense does not object.¹²⁹ Under settled law, however, if a particular situation is not covered by the express terms of the statute, courts may look

124. *Id.* (quoting VA. CODE ANN. § 16.1-271 (Rep. Vol. 2010 & Supp. 2011)).

125. *Id.* (quoting VA. CODE ANN. § 16.1-272(A) (Repl. Vol. 2010 & Supp. 2011)).

126. *Id.* at 454, 706 S.E.2d at 353 (internal quotation marks omitted).

127. *Id.*

128. VA. CODE ANN. § 19.2-243(4) (Cum. Supp. 2011).

129. *See id.*

to situations of a “similar nature” that also toll the time for bringing the defendant to trial.¹³⁰

In *Howard v. Commonwealth*, the Supreme Court of Virginia considered whether a continuance entered *sua sponte* by the trial court, without objection by the defendant, is of a “similar nature” to other continuances that toll the operation of the statutorily specified time for bringing the defendant to trial.¹³¹ The court reasoned that “every continuance postpones the trial date regardless of the reason for the continuance or the identity of the moving party.”¹³² In light of this fact, the court concluded that “[b]ecause a continuance entered by the court *sua sponte* has the same effect as a continuance entered at the request of the defendant or the Commonwealth, . . . a court-initiated continuance is of ‘a similar nature’ and therefore is subject to the same requirements regarding objections as other continuances.”¹³³ In sum, a defendant who wishes to preserve a speedy trial claim must object to the entry of a continuance that the trial court entered *sua sponte*.

In *Brown v. Commonwealth*, the circuit court initially deemed the defendant incompetent to stand trial.¹³⁴ Later, a clinical psychologist at Central State Hospital mailed a report to the court “opin[ing] that [the defendant] had been restored and was competent to stand trial.”¹³⁵ The psychologist sent the report by error to the district court rather than to the circuit court.¹³⁶ The report came to the attention of the circuit court approximately seven months after the psychologist mailed it to the general district court.¹³⁷ The defendant contended this delay caused a violation of the speedy trial statute.¹³⁸

In analyzing the issue, the Court of Appeals of Virginia first concluded that when the trial court continued the case for an indefinite time, and the defendant did not object, that time did not

130. See *Stephens v. Commonwealth*, 225 Va. 224, 230, 301 S.E.2d 22, 25 (1983).

131. 281 Va. 455, 457–58, 460, 706 S.E.2d 885, 886–88 (2011).

132. *Id.* at 460, 706 S.E.2d at 888.

133. *Id.* at 461, 706 S.E.2d at 888 (quoting *Stephens*, 225 Va. at 230, 301 S.E.2d at 25).

134. 57 Va. App. 381, 387, 702 S.E.2d 582, 584–85 (2010).

135. *Id.* at 387–88, 702 S.E.2d at 585.

136. *Id.* at 388, 702 S.E.2d at 586.

137. *Id.* at 388–89, 702 S.E.2d at 586.

138. *Id.* at 389, 702 S.E.2d at 586.

count for purposes of the speedy trial statute.¹³⁹ The court further concluded that the report of the clinical psychologist did not resume the running of the speedy trial clock, because under Virginia Code section 19.2-169.1(E), an order of the trial court finding the defendant competent to be tried was necessary.¹⁴⁰ The report by itself did not suffice.¹⁴¹ Moreover, the court found the trial court “promptly” determined the defendant’s competence as required under Virginia Code section 19.2-169.1(E) because it acted promptly when it received the report.¹⁴² Finally, the court of appeals noted that resuming the speedy trial period is not the remedy if the trial court fails to promptly determine the defendant’s competency.¹⁴³

J. *Withdrawing Guilty Pleas*

The Supreme Court of Virginia, in *Bottoms v. Commonwealth*, addressed the standard for withdrawing guilty pleas articulated in *Justus v. Commonwealth*.¹⁴⁴ Bottoms, pursuant to a plea agreement, pled guilty to two counts of construction fraud.¹⁴⁵ Later, having retained new counsel, the defendant sought to withdraw his plea.¹⁴⁶ He argued that not taking his medication for depression “may have inhibited [him] from fully understanding . . . the proceedings.”¹⁴⁷ Counsel later stated that the defendant had some defenses to the charges.¹⁴⁸ Specifically, the defense counsel contended the defendant lacked the intent to defraud because he intended to perform on the contracts, but after discovering he lacked the proper permits and license, he stopped working until he could locate a qualified contractor to supervise the work.¹⁴⁹ The defendant adduced evidence that he had completed part of the

139. *Id.* at 391–92, 702 S.E.2d at 587–88.

140. *Id.* at 392–93, 702 S.E.2d at 588 (citing VA. CODE ANN. § 19.2-169.1(E) (Cum. Supp. 2011)).

141. *Id.*, 702 S.E.2d at 588.

142. *Id.* at 394, 702 S.E.2d at 588–89 (citing VA. CODE ANN. § 19.2-169.1(E) (Cum. Supp. 2011)).

143. *Id.* at 395, 702 S.E.2d at 589.

144. 281 Va. 23, 32–34, 704 S.E.2d 406, 411–12 (2011) (citing *Justus v. Commonwealth*, 274 Va. 143, 154–55, 645 S.E.2d 284, 289 (2007)).

145. *Id.* at 26 n.1, 704 S.E.2d at 408 n.1.

146. *Id.* at 28, 704 S.E.2d at 409.

147. *Id.*

148. *Id.* at 29, 704 S.E.2d at 409.

149. *Id.*

work, hired workers, and purchased materials.¹⁵⁰ The trial court denied the motion to withdraw the guilty plea, finding that “[t]he record reveals a knowing and voluntary guilty plea with knowledge of the consequences.”¹⁵¹

On appeal, the defendant contended the trial court applied an erroneous standard to his motion to withdraw the guilty plea, and the Supreme Court of Virginia agreed.¹⁵² The proper standard, the court held, is whether “the motion to withdraw a guilty plea is being made in good faith and is premised upon a reasonable basis that the defendant can present substantive, and not merely dilatory or formal, defenses to the charges.”¹⁵³ The court found it improper to rely on the defendant’s statements in his guilty plea colloquy when ruling on a motion to withdraw a guilty plea.¹⁵⁴ The court reasoned that when making the motion to withdraw the defendant necessarily repudiates those statements.¹⁵⁵ In reversing, the court concluded that the defendant made the motion to withdraw the guilty plea before sentencing in a timely manner and raised the defense of lacking the fraudulent intent.¹⁵⁶

K. *Jurisdiction Over Crimes That Occur, in Part, in Other States*

The decision in *Goble v. Commonwealth* addresses an interesting jurisdictional point in an age of growing electronic commerce.¹⁵⁷ The defendant’s listing of three mounted deer heads on the Internet auction site eBay led to charges under Virginia Code section 29.1-553, which prohibits the sale of wild animals or wild animal parts except as provided by law.¹⁵⁸ The defendant posted the heads for sale “on eBay from his home [in Virginia] and received payment in Virginia.”¹⁵⁹ After individuals purchased the

150. *Id.* at 30, 704 S.E.2d at 410.

151. *Id.*

152. *Id.* at 32–33, 704 S.E.2d at 411–12.

153. *Id.* at 33, 704 S.E.2d at 412.

154. *Id.*

155. *Id.*

156. *Id.* at 34–36, 704 S.E.2d at 412–13.

157. 57 Va. App. 137, 147, 698 S.E.2d 931, 936 (2010).

158. *Id.* at 143, 698 S.E.2d at 934 (citing VA. CODE ANN. § 29.1-553 (Repl. Vol. 2009)).

159. *Id.* at 147, 698 S.E.2d at 936.

deer heads, the defendant shipped them from their location at his father's house in Pennsylvania.¹⁶⁰

The defendant argued the trial court lacked proper jurisdiction because the sales took place in Pennsylvania.¹⁶¹ In analyzing this claim, the Court of Appeals of Virginia acknowledged the principle that "[a crime] must take place within this [s]tate to give our courts jurisdiction."¹⁶² The court determined that the evidence "failed to prove either (1) in which state the auctioneer announced the sale by the fall of the hammer or other customary means or (2) in which state physical delivery of the mounted deer heads occurred."¹⁶³ Therefore, "under the traditional view of jurisdiction," no "sale" occurred in Virginia.¹⁶⁴

The court then turned to whether an exception to traditional jurisdiction, known as the "immediate result doctrine," applied to the facts of the case.¹⁶⁵ Under this theory of jurisdiction, "if an act or acts committed outside the Commonwealth constitute key elements in the prosecution for the crime at issue, those extraterritorial acts, or the chain of events set in motion by them, must be the immediate cause of the harm the Commonwealth seeks to punish."¹⁶⁶ The court observed that no law or prior ruling required the crime to begin with extraterritorial acts.¹⁶⁷ The court noted that the defendant "*started* the sequence of events culminating in the illegal sales *inside* the Commonwealth" when he formulated the intent to sell and posted the items for sale on eBay while in Virginia.¹⁶⁸ In addition, he received payment in Virginia.¹⁶⁹ Finally, the court concluded that "the Commonwealth, which has the duty to safeguard its resources for all Virginians, has a legitimate interest in preventing its deer and deer parts

160. *Id.* at 145, 698 S.E.2d at 935.

161. *Id.* at 147, 698 S.E.2d at 936.

162. *Id.* at 148, 698 S.E.2d at 936 (quoting *Farewell v. Commonwealth*, 167 Va. 475, 479, 189 S.E. 321, 323 (1937)) (internal quotation marks omitted).

163. *Id.*

164. *Id.*

165. *Id.* at 148, 698 S.E.2d at 936–37 (citation omitted).

166. *Id.* at 150, 698 S.E.2d at 937.

167. *Id.*

168. *Id.* at 151–52, 698 S.E.2d at 938.

169. *Id.* at 152, 698 S.E.2d at 938.

from being sold in a manner that violates Virginia statutes and regulations.”¹⁷⁰

III. SEARCH AND SEIZURE

A. *Exigent Circumstances*

Ordinarily, police officers cannot enter a home without first obtaining a warrant.¹⁷¹ One exception to this general rule is the doctrine of exigent circumstances.¹⁷² At issue in *Smith v. Commonwealth* was whether exigent circumstances justified the police entry.¹⁷³ An anonymous caller contacted the police and stated that a white male drug dealer, Jimmy Smith, was at the dealer’s residence distributing drugs to an African American male.¹⁷⁴ Responding to the call, an officer quickly went to the named address and knocked on the door.¹⁷⁵ Upon identifying himself as a police officer, the officer looked through the partially opened door and observed an African American male spring up from a couch.¹⁷⁶ The officer noticed a small white object in the male’s hand, but the officer could not identify the precise nature of the object.¹⁷⁷ The officer pushed his way in, ran after the man, placed him in investigative detention, and walked him back through Smith’s apartment.¹⁷⁸ In Smith’s living room, the officer noticed, in plain view, a number of smoking devices, including one later determined to contain cocaine residue.¹⁷⁹

170. *Id.*

171. *Payton v. New York*, 445 U.S. 573, 590 (1980) (“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.”).

172. *Id.* (“Absent exigent circumstances, that threshold [to the home] may not reasonably be crossed without a warrant.”); *Verez v. Commonwealth*, 230 Va. 405, 410–11, 337 S.E.2d 749, 752–53 (listing ten exigent circumstances that might justify a warrantless entry, including “the officers’ reasonable belief that contraband is about to be removed or destroyed”).

173. 56 Va. App. 592, 596, 696 S.E.2d 211, 212–13 (2010).

174. *Id.*, 696 S.E.2d at 213.

175. *Id.*

176. *Id.*

177. *Id.* at 596–97, 696 S.E.2d at 213.

178. *Id.* at 597, 696 S.E.2d at 213.

179. *Id.*

The Court of Appeals of Virginia upheld the seizure of the items.¹⁸⁰ First, the court concluded that exigent circumstances existed.¹⁸¹ The court observed that one purpose of the doctrine of exigent circumstances is to preserve evidence of a crime.¹⁸² To seize evidence, the officer need not obtain “concrete proof that the occupants of the room [are] on the verge of destroying evidence.”¹⁸³ It is sufficient for the officer to reasonably believe an item constitutes evidence of a crime.¹⁸⁴ Due to the anonymous tip of drug dealing, the sudden flight of the African American male at the officer’s arrival, and the presence of a white object in the man’s hand, the court concluded the officer reasonably believed the destruction of evidence might occur.¹⁸⁵

A second closely related requirement is the existence of probable cause.¹⁸⁶ Although the tip was anonymous, the officer corroborated the tip when he observed the actions through the open door.¹⁸⁷ Therefore, the court concluded that the facts were sufficient to establish the presence of probable cause.¹⁸⁸

B. Search

In *Watts v. Commonwealth*, the Court of Appeals of Virginia reversed and remanded the defendant’s conviction for possession of cocaine and marijuana.¹⁸⁹ The court determined the definition of “abandonment” used in property law was not the correct definition to apply in Fourth Amendment analysis.¹⁹⁰ In the latter context, an individual’s “intent to retain a reasonable expectation of

180. See *id.* at 606, 696 S.E.2d at 218.

181. *Id.* at 598–99, 696 S.E.2d at 214.

182. *Id.* at 598, 696 S.E.2d at 214.

183. *Id.* at 599, 696 S.E.2d at 214 (quoting *United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991)) (internal quotation marks omitted).

184. *Id.*

185. See *id.* at 600, 696 S.E.2d at 214–15.

186. *Id.*, 696 S.E.2d at 215.

187. *Id.* at 603, 606, 696 S.E.2d at 216–18.

188. *Id.* at 606, 696 S.E.2d at 217–18.

189. 57 Va. App. 217, 222, 700 S.E.2d 480, 483 (2010).

190. *Id.* at 228, 700 S.E.2d at 485 (citing *Commonwealth v. Holloway*, 9 Va. App. 11, 18, 384 S.E.2d 99, 103 (1989)).

privacy '[governs] whether the property has been abandoned' . . . [and] is to be determined by objective standards."¹⁹¹

In *Watts*, a Norfolk police officer saw the defendant driving a car "with a peeling inspection sticker, a missing front license plate, and a temporary rear license tag" into a private apartment complex lot.¹⁹² Watts parked the car and began walking away from it.¹⁹³ During an encounter with Watts, the officer saw a bulge in Watts's waistband, which the officer believed might be a weapon.¹⁹⁴ After he advised Watts he was going to conduct a pat down, Watts fled.¹⁹⁵ When the officer returned to the apartment parking lot, he spoke to some residents standing in the parking lot.¹⁹⁶

A check on the car's temporary tag revealed a car company owned the car.¹⁹⁷ The officer decided to tow the car because it occupied a space that a resident of the apartments used.¹⁹⁸ In preparation for the tow, the officer searched the car and discovered marijuana and crack cocaine when he opened the loose center console.¹⁹⁹ Based on other contents of the car, including photographs, the officer discerned Watts's identity.²⁰⁰

At a hearing on Watts's motion to suppress the drugs, "the Commonwealth argued [Watts] abandoned the [car] when he fled and, thus, . . . he lacked standing to contest the search."²⁰¹ The circuit court denied the suppression motion.²⁰² The court of appeals, however, found that Watts did not abandon the car because he "neither denied ownership of the car nor relinquished physical control of it[.]" and the evidence failed to prove that "[Watts] lacked authority to park where he did."²⁰³ While the officer spoke

191. *Id.* (alteration in original) (quoting *Holloway*, 9 Va. App. at 18, 384 S.E.2d at 103)).

192. *Id.* at 223, 700 S.E.2d at 483.

193. *Id.*

194. *Id.* at 224, 700 S.E.2d at 483.

195. *Id.*

196. *Id.*, 700 S.E.2d at 483–84.

197. *Id.*, 700 S.E.2d at 484.

198. *Id.*

199. *Id.* at 224–25, 700 S.E.2d at 484.

200. *Id.* at 225, 700 S.E.2d at 484.

201. *Id.*

202. *Id.*

203. *Id.* at 229–30, 700 S.E.2d at 486.

to some of the residents of the apartments, he did not speak to all residents, and he never spoke to a manager of the apartments.²⁰⁴ The court concluded the evidence failed to establish that Watts intended to abandon the vehicle when he fled from the officer.²⁰⁵

In *Redmond v. Commonwealth*, the Court of Appeals of Virginia upheld the ruling of the trial court, which denied Redmond's motion to suppress and affirmed Redmond's conviction for possession of a firearm by a convicted felon.²⁰⁶ An Alcohol, Tobacco and Firearms officer received information that Redmond, a convicted felon, possessed firearms in his home that were for sale.²⁰⁷ The officer contacted the real estate agent and arranged to view the home but did not inform the real estate agent that he was a law enforcement officer.²⁰⁸ Two officers viewed the home and saw several guns in a gun cabinet, located in the den, as well as ammunition.²⁰⁹ Based on these observations, one of the officers prepared an affidavit for a search warrant.²¹⁰ A magistrate issued a search warrant, and police seized guns and ammunition pursuant to the warrant.²¹¹

Redmond moved to suppress the seized evidence on the ground that the initial entry by the police into his home "under the guise of being a potential buyer . . . [constituted] an illegal subterfuge," which invalidated the basis for the search warrant.²¹² The trial court denied the motion.²¹³

The court of appeals found that placing the house on the market extended a general invitation to the public to view the interior of the home, and, "the officers did not violate any reasonable expectation of privacy [if their] actions while inside the home did not exceed what one would expect of a prospective purchaser."²¹⁴ Applying this standard, the court found the officers in this case

204. See *id.* at 224, 700 S.E.2d at 484.

205. *Id.* at 230, 700 S.E.2d at 486–87.

206. 57 Va. App. 254, 257, 701 S.E.2d 81, 82 (2010).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 257–58, 701 S.E.2d at 83.

211. *Id.* at 258, 701 S.E.2d at 83.

212. *Id.* at 259–60, 701 S.E.2d at 83–84.

213. See *id.*

214. *Id.* at 263, 701 S.E.2d at 85–86.

acted reasonably, and the trial court correctly denied the suppression motion.²¹⁵

In *Commonwealth v. Smith*, the Supreme Court of Virginia addressed the basis of knowledge required to justify a frisk.²¹⁶ Following the denial of his motion to suppress by the trial court, Smith entered a conditional guilty plea for possession of a firearm by a convicted felon.²¹⁷ Although the Court of Appeals of Virginia reversed the conviction, ruling the trial court erred in denying the suppression motion, the supreme court reversed the ruling of the court of appeals, and reinstated the trial court's judgment.²¹⁸

Police officers stopped a car for a broken tail light and asked for identification from the driver and the passenger, Smith.²¹⁹ A police database, available by computer in the police car, alerted the officers that Smith was "probably armed and a narcotics seller/user."²²⁰ Smith stepped out of the car upon request and stated that he had no weapons or drugs on him.²²¹ After an officer advised Smith the officer needed to pat Smith down for weapons, Smith refused the search.²²² While conducting the pat down, the officer felt and seized a gun from Smith's pocket.²²³

The supreme court noted that the issue was whether information known to the officer making the entry into the police database as well as the personal knowledge of the officers on the scene provided reasonable suspicion for the frisk.²²⁴ The officers knew Smith was a convicted felon, and his criminal history included an arrest eleven months prior for possession of a firearm by a convicted felon and an arrest for possession of cocaine with intent to distribute, an offense "closely associated with firearms."²²⁵ The court concluded "the knowledge of Smith's specific criminal history involving weapons and narcotics, which was im-

215. *Id.*, 701 S.E.2d at 86.

216. 281 Va. 582, 586, 709 S.E.2d 139, 140 (2011).

217. *See id.* at 586–87, 709 S.E.2d at 140–41.

218. *Id.* at 587, 596, 709 S.E.2d at 141, 146.

219. *Id.* at 586, 709 S.E.2d at 140.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 592, 709 S.E.2d at 143.

225. *Id.* at 592–93, 709 S.E.2d at 143–44.

puted to the officers based upon the [police database] system justified the frisk.”²²⁶

At issue in *Armstead v. Commonwealth* was the validity of a search of the defendant’s vehicle.²²⁷ A police officer arrested the defendant for providing false information during a traffic stop after he twice gave misleading information about his identification and the status of his driver’s license.²²⁸ To determine the defendant’s identity, the officer proceeded to search the car.²²⁹ In plain view the officer saw the remains of a marijuana cigar in the ash-tray and two plastic bags containing crack cocaine in the center console.²³⁰ Relying on *Arizona v. Gant*, the defendant contended the trial court erred in not suppressing the drugs. The Court of Appeals of Virginia disagreed.²³¹ In *Gant*, the Supreme Court of the United States rejected a broad right to make a suspicionless search of a vehicle following the arrest of an occupant of the vehicle.²³² Instead, a search is permitted, first, if the person is within reach of the passenger compartment and might try to obtain a weapon, or second, if it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”²³³ The court of appeals found the officer reasonably believed the car might contain evidence relevant to the crime of providing false identifying information to a police officer, namely, “Armstead’s true identity and his driving status.”²³⁴

The court also rejected the defendant’s complaint that “the arrest was pretextual and a mere ruse to search the vehicle” for the presence of illegal drugs.²³⁵ Under settled Fourth Amendment principles, the subjective motivation of the officer is irrelevant, so long as the officer actually has probable cause to arrest.²³⁶ Because the officer had probable cause to arrest Armstead for

226. *Id.* at 596, 709 S.E.2d at 146.

227. 56 Va. App. 569, 574–76, 695 S.E.2d 561, 563–64 (2010).

228. *Id.* at 573, 695 S.E.2d at 562–63.

229. *Id.* at 574, 695 S.E.2d at 563.

230. *Id.*

231. *Id.* at 575–76, 695 S.E.2d at 564 (citing 556 U.S. ___, 129 S. Ct. 1710 (2009)).

232. *See* 556 U.S. at ___, 129 S. Ct. at 1723–24.

233. *Id.* at ___, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)) (internal quotation marks omitted).

234. *Armstead*, 56 Va. App. at 577, 695 S.E.2d at 565.

235. *Id.* at 574, 579, 695 S.E.2d at 563, 566.

236. *Id.* at 578–79, 695 S.E.2d at 565.

providing false identity information to him, the officer reasonably searched the car on the basis that it could contain evidence of that crime.²³⁷

C. *Standing*

The principal issue in *Atkins v. Commonwealth* was whether the defendant had standing to challenge an inventory search of the car in which he was a passenger.²³⁸ Two officers stopped the car for a burned out license plate light.²³⁹ Shortly after the stop, the driver of the vehicle fled on foot.²⁴⁰ When the defendant passenger dropped a bottle containing heroin, the officers arrested him.²⁴¹ Given the flight of the driver and the defendant's arrest, the police officers proceeded to conduct an inventory search and recovered two firearms.²⁴² When the defendant challenged the search, the prosecution responded by asserting that the defendant, a passenger, lacked standing to contest the search.²⁴³ The Court of Appeals of Virginia concluded that a defendant only has standing when he "objectively ha[s] a reasonable expectation of privacy at the time and place of the disputed search."²⁴⁴ A totality of the circumstances test determines whether this expectation exists.²⁴⁵

In reaching its decision, the court of appeals found *Rakas v. Illinois* controlling.²⁴⁶ In *Rakas*, the Supreme Court concluded a passenger lacked standing to challenge the search of a locked glove compartment and the area underneath the front passenger seat.²⁴⁷ The court of appeals found *Brendlin v. California*, cited by the defendant, inapposite.²⁴⁸ In *Brendlin*, the Supreme Court held that a passenger in a car only has standing to challenge the stop

237. *Id.* at 579, 695 S.E.2d at 566.

238. 57 Va. App. 2, 10, 698 S.E.2d 249, 253 (2010).

239. *Id.* at 8, 698 S.E.2d at 252.

240. *Id.* at 9, 698 S.E.2d at 252.

241. *Id.*, 698 S.E.2d at 253.

242. *Id.* at 9–10, 698 S.E.2d at 253.

243. *Id.* at 10, 698 S.E.2d at 253.

244. *Id.* at 12, 698 S.E.2d at 254 (quoting *McCoy v. Commonwealth*, 2 Va. App. 309, 311, 343 S.E.2d 383, 385 (1986)) (internal quotation marks omitted).

245. *Id.* at 13, 698 S.E.2d at 254.

246. *Id.* at 11, 698 S.E.2d at 253 (citing 439 U.S. 128 (1978)).

247. 439 U.S. at 130, 148.

248. *Atkins*, 57 Va. App. at 12, 698 S.E.2d at 254.

of the car, not a search of the vehicle.²⁴⁹ Therefore, the Court of Appeals of Virginia concluded that the defendant, who carried the burden of establishing standing to challenge the search, failed to meet that burden.²⁵⁰ The court observed that the defendant

made no showing that he had a possessory interest in the car, that he had the right to exclude others from the vehicle, that he had exhibited a subjective expectation that the vehicle and its contents would remain free from governmental invasion, that he exercised control over the vehicle, or that appellant took any precautions to maintain his privacy.²⁵¹

In sum, standing to challenge the search of a vehicle requires more than “simply being a legitimate passenger.”²⁵²

IV. SPECIFIC CRIMES

A. *Abduction*

In *Burton v. Commonwealth*, the Supreme Court of Virginia held the evidence was insufficient to prove the necessary element of intent to deprive the victim of her personal liberty and, accordingly, reversed the abduction conviction.²⁵³ In mid-afternoon at a shopping mall parking lot, the defendant, dressed in a mechanic’s uniform, knocked on the window of the victim’s car and told her the car appeared to be leaking brake fluid.²⁵⁴ In fact, the victim recently had work done on the car’s brakes and was not satisfied with the work.²⁵⁵ The defendant looked under the hood of the car and then directed the victim to lie across the front seats of the car.²⁵⁶ The victim complied, but after several minutes, she felt uncomfortable, exited the car, “and saw [the defendant] squatting down near the rear wheel with his hand inside his unzipped pants.”²⁵⁷ The victim told the defendant she wanted to leave.²⁵⁸

249. See 551 U.S. 249, 255, 257 (2007).

250. *Atkins*, 57 Va. App. at 13–14, 698 S.E.2d at 254–55.

251. *Id.* at 14, 698 S.E.2d at 255.

252. *Id.*

253. 281 Va. 622, 627–29, 708 S.E.2d 892, 895–96 (2011).

254. *Id.* at 625, 708 S.E.2d at 893.

255. *Id.*

256. *Id.*

257. *Id.*, 708 S.E.2d at 894.

258. *Id.*

While the defendant initially blocked the victim from leaving, he moved when she repeated her need to leave.²⁵⁹

The supreme court held “the evidence fail[ed] to prove that [the defendant] detained the victim with the intent to deprive her of her personal liberty.”²⁶⁰ The court concluded the defendant intended to receive sexual gratification by having the victim lie across the front seat of her car.²⁶¹ The fact that the defendant did not persist in detaining the victim after she repeated her need to leave supported the conclusion that the defendant lacked the requisite intent.²⁶² Therefore, the court held that “[e]ven though [the victim] was deceived into remaining briefly in a certain location due to Burton’s ruse, under the facts before us, we cannot say that there was evidence that Burton had the intent to deprive [the victim] of her personal liberty.”²⁶³

B. *Animal Cruelty*

The defendant in *Sullivan v. Commonwealth* challenged the sufficiency of the evidence for her conviction of animal cruelty.²⁶⁴ Virginia Code section 3.2-6570(A) makes it a Class 1 misdemeanor to “deprive[] any animal of necessary food, drink, shelter or emergency veterinary treatment.”²⁶⁵ The Virginia Code defines emergency veterinary treatment as “veterinary treatment to stabilize a life-threatening condition, alleviate suffering, prevent further disease transmission, or prevent further disease progression.”²⁶⁶ In *Sullivan*, an animal control officer responded to a telephone report and discovered an emaciated, non-responsive, weak horse, unable to lift its head to a bucket to drink.²⁶⁷ Despite subsequent medical treatment, the horse died.²⁶⁸

259. *Id.*

260. *Id.* at 627–28, 708 S.E.2d at 895.

261. *Id.* at 628, 708 S.E.2d at 895.

262. *Id.* at 628–29, 708 S.E.2d at 895.

263. *Id.* at 629, 708 S.E.2d at 896.

264. 280 Va. 672, 673, 701 S.E.2d 61, 62 (2010).

265. VA. CODE ANN. § 3.2-6570(A)(ii), (vi) (Repl. Vol. 2008 & Cum. Supp. 2011).

266. *Id.* § 3.2-6500 (Repl. Vol. 2008).

267. 280 Va. at 674–75, 701 S.E.2d at 62–63.

268. *Id.* at 675, 701 S.E.2d at 63.

At trial, expert testimony established the horse's condition developed over a period of weeks, and the horse suffered from a variety of problems, including parasites that prevented the horse from obtaining sufficient nutrition.²⁶⁹ The Supreme Court of Virginia found this evidence sufficient to sustain a conviction for depriving an animal of emergency veterinary care, noting the factfinder was not required to accept the defendant's "incredible" account that she never noticed the horse's deterioration until she found it lying down.²⁷⁰

C. *Child Endangerment*

In *Carosi v. Commonwealth*, the Supreme Court of Virginia affirmed the defendant's convictions for three counts of child endangerment, pursuant to Virginia Code section 40.1-103(A) because she allowed illegal drugs to be kept in her home in a place accessible to her three children.²⁷¹

Pursuant to a search warrant, a state police agent searched the Stafford County home Angela Carosi shared with her three children and Cavell Thomas, "the father of two of the children."²⁷² Another jurisdiction held Thomas in custody for drug charges when the search occurred.²⁷³ In an unlocked wardrobe in the master bedroom shared by Carosi and Thomas, the agent found marijuana, smoking devices, a digital scale with powder residue, and plastic bags.²⁷⁴ The agent also discovered prescription bottles containing oxycodone and ecstasy in an unlocked safe in the wardrobe.²⁷⁵ The agent noticed the location of all the drugs was "within the reach of a small child."²⁷⁶ Carosi told the agent she kept clothing in the wardrobe but denied any knowledge of the drugs.²⁷⁷

269. *Id.*

270. *Id.* at 677, 701 S.E.2d at 64.

271. 280 Va. 545, 549, 557, 701 S.E.2d 441, 444, 447–48 (2010) (citing VA. CODE ANN. § 40.1-103(A) (Cum. Supp. 2011)).

272. *Id.* at 548, 701 S.E.2d at 442–43.

273. *Id.*, 701 S.E.2d at 443.

274. *Id.* at 549, 701 S.E.2d at 443.

275. *Id.*

276. *Id.*

277. *Id.*

At trial, Carosi argued the Commonwealth failed to produce evidence sufficient to convict her of child endangerment because no evidence showed the children knew the contraband was in the house or actually had accessed it.²⁷⁸ Thomas testified on Carosi's behalf and claimed he hid the drugs in the wardrobe.²⁷⁹ During her testimony, Carosi admitted her children occasionally went into her bedroom.²⁸⁰ The supreme court, however, held the jury reasonably could have found Carosi "was . . . aware of the presence and character of the drugs."²⁸¹

The supreme court held that showing the defendant acted in a criminally negligent manner satisfied the mens rea requirement for child endangerment.²⁸² The court concluded that, depending on the facts of a specific case, "rearing children in a home where illegal drugs are readily accessible may constitute" child endangerment.²⁸³ Thus, the jury properly determined the issue, and their conclusion "was [not] plainly wrong or without [evidentiary] support."²⁸⁴

In *Wood v. Commonwealth*, the Court of Appeals of Virginia affirmed convictions for felony child neglect resulting from the defendant driving her two preschool-aged children while intoxicated with alcohol and the sleep-inducing drug Ambien.²⁸⁵ A shopper in a parking lot observed the defendant sitting in her car and behaving oddly with two small children seated in child safety seats in the back seat.²⁸⁶ Concerned, the shopper called the police and reported the matter.²⁸⁷ Wood drove her car a short distance in the parking lot before police officers stopped her.²⁸⁸ Although she told police she only drank a glass of wine at lunch and took Paxil, the

278. *Id.* at 550, 701 S.E.2d at 443.

279. *Id.*, 701 S.E.2d at 444.

280. *Id.* at 551, 701 S.E.2d at 444.

281. *Id.* at 555, 701 S.E.2d at 446.

282. *Id.* at 553, 701 S.E.2d at 445.

283. *Id.* at 557, 701 S.E.2d at 447–48.

284. *Id.*

285. 57 Va. App. 286, 291–93, 701 S.E.2d 810, 812–13 (2010).

286. *Id.* at 292, 701 S.E.2d at 812.

287. *Id.*, 701 S.E.2d at 813.

288. *See id.*

defendant showed signs of extreme intoxication and responded belligerently to the police officers.²⁸⁹

At trial, the Commonwealth introduced expert testimony that Wood's blood alcohol level, which measured .19 when tested several hours after the incident, would have measured between .22 and .26 when she drove.²⁹⁰ Based on the level of the hypnotic drug Ambien in Wood's blood, the expert further testified that at the time of the driving, Wood should have been sleeping.²⁹¹ The expert also opined there is "an addictive effect" when two central nervous system depressants like alcohol and Ambien are both consumed.²⁹²

The court of appeals held the evidence established the requisite criminal negligence because Wood, "while in a semi-conscious state," took her children from the safety of their home and drove them to a parking lot with its attendant dangers.²⁹³ The court noted that the defendant's "bizarre behavior" demonstrated her inability to "protect and supervise" her children, and her belligerence indicated a "lack of control and judgment."²⁹⁴ The court also "underscore[d]" that "[Wood's] high level of intoxication . . . *alone* justifie[d] a finding of [criminal negligence]."²⁹⁵

D. *Child Pornography*

In *Chapman v. Commonwealth*, after the police discovered twenty child pornography images cached on the defendant's computer, the defendant was charged with one count of possession of child pornography and nine counts of possession of child pornography, second or subsequent offense.²⁹⁶ The defendant challenged "four of the ten charges," arguing that the language of the statute required the court to strike them.²⁹⁷ In making his argument that

289. *Id.* at 292–93, 701 S.E.2d at 813.

290. *Id.* at 293–94, 701 S.E.2d at 813.

291. *Id.* at 294, 701 S.E.2d at 814.

292. *Id.* at 295, 701 S.E.2d at 814.

293. *Id.* at 300–01, 701 S.E.2d at 816–17.

294. *Id.* at 300, 701 S.E.2d at 816.

295. *Id.* at 301, 701 S.E.2d at 817 (emphasis added).

296. 56 Va. App. 725, 728–29, 697 S.E.2d 20, 22 (2010).

297. *Id.* at 729, 697 S.E.2d at 23 (citing VA. CODE ANN. § 18.2-3741.1(A) (Repl. Vol. 2008 & Cum. Supp. 2011)).

each charge of child pornography required three images, the defendant relied on the statute's definition of "sexually explicit visual material," and, more specifically, on an amendment to the statute italicized below.²⁹⁸ The Virginia Code provides "that sexually explicit visual material" is

a picture, photograph, drawing, sculpture, motion picture film, digital image, *including such material stored in a computer's temporary Internet cache when three or more images or streaming videos are present*, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity . . . or sexual excitement, sexual conduct or sadomasochistic abuse . . . or a book, magazine or pamphlet which contains such a visual representation.²⁹⁹

The Court of Appeals of Virginia rejected this argument. The court observed that the paramount purpose of the statute forbidding the possession of child pornography "was to protect children from the harm they suffer when they are induced to" pose for sexually explicit materials.³⁰⁰ The court found it unlikely that in amending the statute the General Assembly intended to reduce the culpability of persons in possession of child pornography.³⁰¹ The proper reading of Virginia Code section 18.2-374.1(A) is that three images constitute a threshold for convictions of child pornography "based on materials found in a defendant's temporary Internet cache."³⁰² After satisfying this initial threshold, "the permissible unit of prosecution for possession of child pornography . . . corresponds to the number of individual items of sexually explicit visual material."³⁰³

E. *Driving Under the Influence*

To be convicted of driving under the influence of alcohol, the defendant must "operate" a motor vehicle.³⁰⁴ In *Nelson v. Com-*

298. *Id.* at 732, 697 S.E.2d at 23–24 (quoting VA. CODE ANN. § 18.2-374.1(A) (Repl. Vol. 2009 & Cum. Supp. 2011)) (internal quotation marks omitted).

299. VA. CODE ANN. § 18.2-374.1(A) (Repl. Vol. 2009 & Cum. Supp. 2011) (emphasis added).

300. *Chapman*, 56 Va. App. at 733, 697 S.E.2d at 24 (quoting *Freeman v. Commonwealth*, 223 Va. 301, 309, 288 S.E.2d 461, 465 (1982)) (internal quotations marks omitted).

301. *Id.*, 697 S.E.2d at 25.

302. *Id.* at 734, 697 S.E.2d at 25.

303. *Id.* (quoting *Mason v. Commonwealth*, 49 Va. App. 39, 48, 636 S.E.2d 480, 484 (2006)) (internal quotation marks omitted).

304. VA. CODE ANN. § 18.2-266 (Repl. Vol. 2009 & Cum. Supp. 2011).

monwealth, before falling asleep, the defendant placed the key in the ignition to the “accessory” position.³⁰⁵ When the police officer approached the car, he noticed the radio was turned on and the “gearshift lever was in the ‘park’ position,” but the engine was not running.³⁰⁶ The Supreme Court of Virginia held that to “operate” the vehicle, the defendant must “engag[e] the machinery of the vehicle which alone, or in sequence, will activate the motive power of the vehicle.”³⁰⁷ Although the act of turning the key did not activate the motive power of the vehicle, it constituted “an action taken ‘in sequence’ up to the point of activation, making [the defendant] the operator of the vehicle within the meaning of Code § 18.2-266.”³⁰⁸

In *Rix v. Commonwealth*, the Supreme Court of Virginia applied the holding in *Nelson* to a situation where the defendant, originally a front seat passenger, switched places with the driver after the police stopped the vehicle.³⁰⁹ Upon approaching the vehicle, the police observed the key in the ignition and the engine running.³¹⁰ The defendant, however, was also drunk when she switched places with the driver.³¹¹ Applying its holding in *Nelson*, the court found the defendant guilty of driving under the influence because she had “actual physical control of a fully operational motor vehicle on a highway, with its ignition key in the ‘on’ position and its engine running.”³¹² Therefore, she qualified as the “operator” of the motor vehicle.³¹³

A defendant’s conviction for driving under the influence may also depend on the admissibility of blood alcohol test results. In *Roseborough v. Commonwealth*, the admissibility of the defendant’s blood test results hinged on the validity of his arrest.³¹⁴ Dis-

305. 281 Va. 212, 214, 707 S.E.2d 815, 816 (2011).

306. *Id.*

307. *Id.* at 216, 707 S.E.2d at 817 (quoting *Stevenson v. City of Falls Church*, 243 Va. 434, 438, 416 S.E.2d 435, 438 (1992)) (internal quotation marks omitted).

308. *Id.* at 219, 707 S.E.2d at 818 (citing VA. CODE ANN. § 18.2-266 (Repl. Vol. 2009 & Cum. Supp. 2011)).

309. 282 Va. 1, 3, ___ S.E.2d ___, ___ (2011) (citing *Nelson*, 281 Va. at 219, 707 S.E.2d at 818).

310. *Id.* at 1, ___ S.E.2d at ___.

311. *Id.* at 1–2, ___ S.E.2d at ___.

312. *Id.* at 3, ___ S.E.2d at ___ (citing *Nelson*, 281 Va. at 219, 707 S.E.2d at 818).

313. *Id.*

314. 281 Va. 233, 238, 704 S.E.2d 414, 416 (2011).

patch sent the police officers to a gated apartment complex in Alexandria, where, upon arrival, they found a single-vehicle accident on one of the private roads.³¹⁵ The police arrested the defendant and administered a breath test, which revealed a blood alcohol content that exceeded the legal limit.³¹⁶ The Supreme Court of Virginia focused its analysis on the implied consent statute that allows police to take breath samples of persons arrested for driving under the influence.³¹⁷ The arrest, of course, must still be a valid one.³¹⁸

Although an officer can arrest for a misdemeanor that occurred in his presence, the accident had not occurred in the officer's presence.³¹⁹ The Virginia Code also permits an officer to validly arrest a suspect "without a warrant, at the scene of an accident involving a motor vehicle on any of the highways of the Commonwealth, on reasonable grounds to believe that a crime has been committed by such person."³²⁰ Additionally, the Virginia Code allows warrantless arrests for "such accident[s]" if the officer arrests the person within three hours of the accident and makes the arrest based on probable cause that the driver was driving while intoxicated.³²¹ The Supreme Court of Virginia concluded that the term "such accident" refers to "highways of the Commonwealth."³²² Therefore, the legislature "confine[d] an officer's authority to make a warrantless arrest for a misdemeanor in cases of this kind to situations in which there has been a vehicular accident on the highways of the Commonwealth."³²³ The accident took place on a private road that was not "open to the use of the public for purposes of vehicular travel."³²⁴ Because none of the exceptions applied, the arrest was not valid.³²⁵ Without a

315. *Id.* at 235–36, 704 S.E.2d at 415.

316. *Id.* at 236, 704 S.E.2d at 415.

317. *Id.* at 236–37, 704 S.E.2d at 416 (citing VA. CODE ANN. § 18.2-268.2(A)–(B) (Repl. Vol. 2009 & Cum. Supp. 2011)).

318. *See id.* at 238, 704 S.E.2d at 416.

319. *Id.* at 239, 704 S.E.2d at 417.

320. *Id.* at 238, 704 S.E.2d at 416–17 (citing VA. CODE ANN. § 19.2-81 (Cum. Supp. 2011)).

321. *Id.* (citing VA. CODE ANN. § 19.2-81 (Cum. Supp. 2011)).

322. *Id.* at 238–39, 704 S.E.2d at 417.

323. *Id.*

324. *Id.* at 239, 704 S.E.2d at 417 (quoting VA. CODE ANN. § 46.2-100 (Supp. 2011)) (internal quotation marks omitted).

325. *Id.*

valid arrest, “the implied consent law did not apply and its provisions permitting the certificate of analysis to be admitted into evidence were not triggered.”³²⁶

Finally, the supreme court rejected the rationale adopted by the court of appeals—that the defendant voluntarily took the sobriety test at the police station.³²⁷ Voluntariness, the supreme court concluded, was irrelevant to the issue of admitting the certificate into evidence.³²⁸ Admissibility, the court found, “depended entirely upon the applicability of the implied consent law.”³²⁹

In *Young v. Commonwealth*, the applicability of the implied consent law depended on the timing of the defendant’s arrest.³³⁰ Although the trooper informed the defendant that he was under arrest, the trooper never physically arrested the defendant.³³¹ Instead, because an accident left the defendant bleeding from the head, emergency workers took him to the hospital.³³² Test results showed an elevated blood alcohol level at the time of the accident.³³³ Even though the defendant went to the hospital and was not subjected to a traditional arrest, the Court of Appeals of Virginia concluded that several statutes modified the standard arrest analysis.³³⁴ Specifically, the court found that Virginia Code section 19.2-73(B) authorizes an officer “to issue a summons ‘in lieu of securing a warrant’ for a suspected drunk driver who has been taken to a medical facility.”³³⁵ The officer relied on this statute.³³⁶ The court of appeals concluded the trooper arrested the defendant by operation of this statute, and the summons released the defendant from arrest.³³⁷

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. 57 Va. App. 731, 733, 706 S.E.2d 53, 54 (2011), *petition for cert. filed*, (Va. Mar. 28, 2011) (No. 110587).

331. *See id.* at 734, 706 S.E.2d at 55.

332. *Id.* at 733–34, 706 S.E.2d at 54–55.

333. *See id.* at 734 & n.2, 706 S.E.2d at 55 & n.2.

334. *Id.* at 737–39, 706 S.E.2d at 56–57.

335. *Id.* at 737–38, 706 S.E.2d at 56–57 (quoting VA. CODE ANN. § 19.2-73(B) (Cum. Supp. 2011)).

336. *Id.* at 734, 739, 706 S.E.2d at 55, 57.

337. *Id.* at 734–40, 706 S.E.2d at 57.

Courts also face the issue of causation when dealing with driving under the influence. In *Davis v. Commonwealth*, a jury convicted Michael Rashe Davis of vehicular aggravated involuntary manslaughter in connection with the death of his cousin, a pedestrian who Davis struck and killed him with his car.³³⁸ The Court of Appeals of Virginia rejected Davis's challenge to the sufficiency of the evidence on causation and criminal negligence and affirmed his conviction.³³⁹ The summons served as a statutory maker confirming Young's ongoing submission to the officer's authority.

After consuming alcohol at a birthday party, an intoxicated Davis drove his car with his female cousin as the front seat passenger.³⁴⁰ As Davis drove on an unlit road in town, he sent text messages using his cellular telephone.³⁴¹ The passenger observed an object in the road and warned Davis.³⁴² Davis took no evasive action, ran over Ronald White, and crashed the car into a ditch.³⁴³ A blood alcohol test revealed an alcohol level of .15.³⁴⁴ At trial, an expert testified that Davis's alcohol level when driving was .19 to .21.³⁴⁵

On appeal, Davis argued the Commonwealth failed to prove his intoxicated driving caused the death because "sending text messages, rather than his driving under the influence of alcohol, caused him to strike and kill [the victim]."³⁴⁶ The court of appeals, however, found that the text messaging did not constitute an in-

The issuance of the summons under Code § 19.2-73(B), releasing Young from arrest, served as a statutory marker confirming Young's ongoing submission to the arresting officer's authority. By signing the summons, Young acknowledged his continuing submission to the arrest and his promise to appear in court as a condition for being released from arrest.

Id. at 740, 706 S.E.2d at 57–58 (citing VA. CODE ANN. § 19.2-73(B) (Cum. Supp. 2011)).

338. 57 Va. App. 446, 451–52, 703 S.E.2d 259, 261–62 (2011).

339. *Id.* at 452, 464–65, 703 S.E.2d at 262, 268. In *Davis*, the court of appeals also addressed and rejected a double jeopardy claim and a claim under Virginia Code section 19.2-294, based on the defendant's conviction of driving under the influence in the general district court and his conviction of the felony manslaughter offense in circuit court. *Id.* at 454–57, 703 S.E.2d at 263–64 (citing VA. CODE ANN. § 19.2-294 (Repl. Vol. 2008)).

340. *Id.* at 452, 703 S.E.2d at 262.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 453, 703 S.E.2d at 262.

345. *Id.* at 453–54, 703 S.E.2d at 262–63.

346. *Id.* at 462, 464, 703 S.E.2d at 267.

tervening cause of the incident.³⁴⁷ The court held that Davis's act of sending text messages "did not break the chain of events initiated by his driving while intoxicated. It merely aggravated his recklessness."³⁴⁸ The court also rejected Davis's claim that the Commonwealth had not proven criminal negligence because the high blood alcohol level alone established criminal negligence.³⁴⁹ In addition, the court of appeals noted other facts that supported a finding of criminal negligence, including Davis "sending text messages on a dark, rainy night," and his failure "to take any evasive action" when warned of something in the road.³⁵⁰

F. *Drugs*

In *Cordon v. Commonwealth*, a divided Supreme Court of Virginia reversed a conviction for possession of cocaine.³⁵¹ In September 2007, a burglary occurred at the home owned by Cordon's uncle.³⁵² During the investigation of that crime, Cordon told the police his uncle, the owner of the house, was away, and Cordon lived there.³⁵³ At that time he showed the officers a room he referred to as "his" room and told the police "nothing was missing" from that room.³⁵⁴ However, he later told investigators he noticed a lockbox missing from under "his bed."³⁵⁵ On November 18, 2007, during the burglary investigation, Detective Baer of the Hampton Police Department gave Cordon a business card.³⁵⁶

On November 20, 2007, when police officers executed a search warrant at the home, only the uncle was at the home.³⁵⁷ In the bedroom Cordon previously identified as "his," the officers found a

347. *Id.* at 462–63, 703 S.E.2d at 267. The court of appeals also noted Davis's own testimony that when the passenger alerted him he put the cell phone down, watched the road, and took evasive action contradicted his contention that using the cell phone caused the incident. *Id.* at 462, 703 S.E.2d at 267.

348. *Id.* at 463, 703 S.E.2d at 267.

349. *Id.* at 464, 703 S.E.2d at 267–68.

350. *Id.*, 703 S.E.2d at 268.

351. 280 Va. 691, 693, 696–97, 701 S.E.2d 803, 804, 806 (2010) (4-3 decision).

352. *Id.* at 693, 701 S.E.2d at 804–05.

353. *Id.*, 701 S.E.2d at 805.

354. *Id.*

355. *Id.*

356. *Id.*, 701 S.E.2d at 804–05.

357. *Id.*, 701 S.E.2d at 804.

cooler containing cocaine, baggies, and drug paraphernalia.³⁵⁸ The officers also found checks and papers bearing Cordon's name, a scale, and other drug-related items, as well as Detective Baer's business card in a nightstand drawer in the room.³⁵⁹ A week later, after officers told Cordon of the discovery of contraband, Cordon denied living at his uncle's home and terminated the interview.³⁶⁰ The circuit court convicted Cordon of possession of cocaine. The court of appeals affirmed his conviction.³⁶¹

In reversing the judgment, the Supreme Court of Virginia noted Cordon's absence from the house or bedroom when the police discovered the cooler of cocaine, the complete lack of other physical evidence to link Cordon to the cooler or contraband, and that two days had passed since Cordon "was known to be" at the house.³⁶² Although he stated during the investigation that the bedroom was his, he listed his address in Newport News, and the police found the drugs in a cooler, an easily portable item.³⁶³ The supreme court concluded that Cordon's denial that he lived in the home when told the police found drugs there "gave rise to an inference that he was lying to conceal his guilt . . . [but] that inference along with the remaining evidence [fell] short of . . . sufficient evidence . . . to support the conviction."³⁶⁴

In *Williams v. Commonwealth*, an appeal from a conviction for possessing a controlled drug without a valid prescription, the Court of Appeals of Virginia addressed the question of whether limiting language in a statute constitutes a negative element of the offense or an affirmative statutory defense.³⁶⁵

Christopher James Williams was charged with possession of a controlled substance, pills containing oxycodone and acetaminophen, without a valid prescription, in violation of Virginia Code section 18.2-250.³⁶⁶ Prior to trial, Williams moved to dismiss the charge on the ground that Virginia Code section 18.2-263 was un-

358. *Id.*, 701 S.E.2d at 804–05.

359. *Id.*

360. *Id.* at 694, 701 S.E.2d at 805.

361. *Id.*

362. *Id.* at 696, 701 S.E.2d at 806.

363. *Id.*

364. *Id.*

365. 57 Va. App. 341, 348, 702 S.E.2d 260, 263 (2010).

366. *Id.* at 345, 702 S.E.2d at 262 (citing VA. CODE ANN. § 18.2-250 (Repl. Vol. 2009 & Cum. Supp. 2011)).

constitutional, but the trial court denied the motion.³⁶⁷ At trial, the Commonwealth relied on Virginia Code section 18.2-263 and did not introduce evidence that Williams did not obtain a valid prescription for the drugs.³⁶⁸

Williams argued on appeal, as he did at trial, that Virginia Code section 18.2-263 violates the due process clauses of the state and federal constitutions because it shifts the burden to the defendant to prove his innocence.³⁶⁹ The court of appeals held that when determining if specific limiting language in a statute is an element or an affirmative defense, “a court should look both to the intent of the statute as a whole and the ability of the respective parties to assert the existence or absence of the underlying facts sustaining the applicability of the limitation.”³⁷⁰

The court of appeals found the General Assembly intended for the drug laws to “rigorously limit” possession of the drugs listed in Schedules I, II, and III.³⁷¹ The court also found the “‘valid prescription’ exemption of Code § 18.2-250 relates to a fact that would be solely within the knowledge of the accused.”³⁷² The court found “the exception language in Code § 18.2-250 [does] not [constitute] an element of the offense, but rather an affirmative de-

367. *Id.* at 345–46, 702 S.E.2d at 262 (citing VA. CODE ANN. § 18.2-263 (Repl. Vol. 2009 & Cum. Supp. 2011)). Virginia Code section 18.2-250(A) provides in pertinent part:

It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act

VA. CODE ANN. § 18.2-250(A) (Repl. Vol. 2009 & Cum. Supp. 2011). Virginia Code section 18.2-263 provides in pertinent part:

In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this article or of the Drug Control Act it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this article or in the Drug Control Act, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant.

Id. § 18.2-263 (Repl. Vol. 2009 & Cum. Supp. 2011).

368. *Williams*, 57 Va. App. at 346, 702 S.E.2d at 262 (citing VA. CODE ANN. § 18.2-263 (Repl. Vol. 2009 & Cum. Supp. 2011)).

369. *Id.* (citing VA. CODE ANN. § 18.2-263 (Repl. Vol. 2009 & Cum. Supp. 2011)). Williams also challenged the statute on vagueness grounds, but the court of appeals found that Williams waived that argument. *Id.* at 346–47, 702 S.E.2d at 262–63.

370. *Id.* at 349, 702 S.E.2d at 264 (quoting *Mayhew v. Commonwealth*, 20 Va. App. 484, 490, 458 S.E.2d 305, 307–08 (1995)) (internal quotation marks omitted).

371. *Id.* at 351, 702 S.E.2d at 264.

372. *Id.* (quoting VA. CODE ANN. § 18.2-250 (Repl. Vol. 2009 & Cum. Supp. 2011)).

fense,” which the defendant must support with evidence.³⁷³ The court concluded that due process permits requiring a defendant to produce evidence to contest an inferred fact, so Williams’s argument that Virginia Code section 18.2-263 violated his due process rights failed.³⁷⁴

G. *Failure To Reregister as a Sex Offender*

Virginia law makes it a crime to “knowingly” fail to reregister as a sex offender.³⁷⁵ However, the use of the word “knowingly” does not necessarily require that the defendant possess the specific intent not to register. The defendant in *Marshall v. Commonwealth* testified he failed to reregister because he accidentally became stranded in California when he accompanied his uncle on a trip.³⁷⁶ He contended he did not act with a “bad purpose” or “specific intent” and, therefore, did not meet the requirement of “knowingly” failing to register.³⁷⁷ In rejecting this argument, the Court of Appeals of Virginia first noted the absence of language denoting specific intent.³⁷⁸ Generally speaking, the court observed, “knowing” and “knowingly” “do not encompass specific intent or purpose to accomplish a result.”³⁷⁹ The court of appeals concluded that its construction of the term “knowingly” was consistent with the express purpose of the statute, which is “to assist the efforts of law-enforcement agencies and others to protect their communities and families from repeat offenders.”³⁸⁰ Requiring specific intent would thwart this purpose because a defendant could escape conviction by simply forgetting to register.³⁸¹ The court finally noted that every federal circuit that considered such

373. *Id.* at 354, 702 S.E.2d at 266 (citing VA. CODE ANN. § 18.2-250 (Repl. Vol. 2009 & Cum. Supp. 2011)).

374. *Id.* (citing VA. CODE ANN. § 18.2-263 (Repl. Vol. 2009 & Cum. Supp. 2011)).

375. VA. CODE ANN. § 18.2-472.1(B) (Cum. Supp. 2011).

376. 58 Va. App. 210, 213, 708 S.E.2d 253, 254 (2011), *petition for cert. filed*, (Va. June 2, 2010) (No. 111012).

377. *Id.* at 214, 708 S.E.2d at 255.

378. *Id.* at 215–16, 708 S.E.2d at 256.

379. *Id.* at 217, 708 S.E.2d at 256.

380. *Id.* at 217–18, 708 S.E.2d at 256–57 (quoting VA. CODE ANN. § 9.1-900 (Repl. Vol. 2006 & Cum. Supp. 2011)) (internal quotation marks omitted).

381. *Id.* at 218, 708 S.E.2d at 257.

an argument in the context of a nearly identical statute rejected the requirement of specific intent.³⁸²

H. *Firearm Offenses*

The question of specific intent also arises in the context of firearm offenses. In *Ellis v. Commonwealth*, Cordero Ellis challenged his conviction for unlawfully discharging a firearm at or against an occupied building.³⁸³ The evidence showed Ellis shot at a person known as "D.A.," but another man and his minor nephew, who just left an occupied convenience store, were in the line of fire.³⁸⁴ A bullet actually entered the occupied convenience store.³⁸⁵ An aerial photograph admitted at trial demonstrated that Ellis stood "only a short distance from the convenience store when he fired at 'D.A.,'" and also showed other buildings located in close proximity to the shooting.³⁸⁶ Other testimony established the neighborhood included a mix of business and residential buildings.³⁸⁷

The Supreme Court of Virginia determined Virginia Code section 18.2-279, which prohibits the malicious or unlawful shooting at an occupied building, does not require proof "that the [shooter] had the specific intent to shoot at or against a particular building."³⁸⁸ The court held the evidence "need only show that a defendant who unlawfully discharges a firearm knew or should have known that an occupied building or buildings were in his line of fire."³⁸⁹ The supreme court held it was reasonable to infer Ellis knew the neighborhood and knew the convenience store was occupied and open for business at the time he fired the gun.³⁹⁰

Convictions for firearm offenses sometimes hinge on the court's definition of a "firearm." In *Startin v. Commonwealth*, Duane

382. *Id.* at 218–19, 708 S.E.2d at 257.

383. 281 Va. 499, 501–02, 706 S.E.2d 849, 849–50 (2011). The grand jury also indicted Ellis for maliciously discharging a firearm at an occupied building, but the trial court only found Ellis guilty of the lesser included charge. *Id.*

384. *Id.* at 502, 706 S.E.2d at 850.

385. *Id.*

386. *Id.* at 507, 706 S.E.2d at 853.

387. *Id.*

388. *Id.* at 506, 706 S.E.2d at 852 (citing VA. CODE ANN. § 18.2-279 (Repl. Vol. 2009)).

389. *Id.*

390. *Id.* at 507, 706 S.E.2d at 853.

Elmer Startin used a “John Wayne Replica” .45 caliber handgun to rob pharmacies.³⁹¹ The “commemorative replica” appeared to be a real firearm but, in fact, lacked “a firing pin or other mechanical device necessary to fire a projectile.”³⁹² Startin appealed his convictions for use of a firearm in the commission of a felony in violation of Virginia Code section 18.2-53.1, and the Supreme Court of Virginia affirmed his conviction.³⁹³

The supreme court stated many statutes defined the term “firearm” differently and noted Virginia Code section 18.2-308.2, which criminalizes possession of a firearm by a convicted felon, narrowly construes the definition of a firearm.³⁹⁴ The court held the definition of firearm under Virginia Code section 18.2-53.1 “warrants a ‘*broad*’ construction” and includes any instrument that “gives the *appearance* of being a firearm.”³⁹⁵ Thus, while the replica used by Startin would not support a conviction of possession of a firearm by a convicted felon, it was sufficient to sustain a conviction for use of a firearm in the commission of robbery.³⁹⁶

A court may convict a defendant for use of a firearm even if he never shows the weapon. In *Courtney v. Commonwealth*, the defendant approached the victim when she drove into her driveway.³⁹⁷ Courtney told the victim he had a gun and would shoot her; however, the victim did not see the gun or the item Courtney held under his shirt.³⁹⁸ The victim pressed the horn of her vehicle, and Courtney grabbed the victim’s two purses and cellular telephone and fled in a car driven by another.³⁹⁹ The police apprehended Courtney about five minutes later at a gasoline station three miles from the scene of the crime.⁴⁰⁰ At the gas station, the police found the victim’s phone in the restroom and discovered

391. 281 Va. 374, 376–77, 706 S.E.2d 873, 875–76 (2011).

392. *Id.* at 377, 706 S.E.2d at 876.

393. *Id.* at 378, 383, 706 S.E.2d at 876, 879 (citing VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 2009)).

394. *Id.* at 381, 706 S.E.2d at 878 (citing VA. CODE ANN. § 18.2-308.2 (Cum. Supp. 2011)).

395. *Id.* at 382, 706 S.E.2d at 878 (quoting *Armstrong v. Commonwealth*, 263 Va. 573, 582, 562 S.E.2d 139, 144 (2002)).

396. *Id.*

397. 281 Va. 363, 365, 706 S.E.2d 344, 345 (2011).

398. *Id.*

399. *Id.*

400. *Id.*

her purses in the street.⁴⁰¹ From the car in which Courtney was riding, officers recovered a cap gun, which was “obviously, a toy gun.”⁴⁰²

The supreme court stated that since the victim never saw the recovered toy gun, the issue in the case was not whether it resembled a real gun.⁴⁰³ The court noted the Commonwealth asserted at trial that Courtney’s statement that he had a gun and would use it, “combined with his opportunity to discard an actual firearm,” was sufficient to sustain the conviction.⁴⁰⁴ The supreme court agreed with this argument.⁴⁰⁵

In *Rowland v. Commonwealth*, the Supreme Court of Virginia reversed and dismissed the conviction for use of a firearm in the commission of a burglary.⁴⁰⁶ Rowland entered a restaurant at night, walked into the kitchen, pointed a firearm at an employee, and demanded money from the cash register.⁴⁰⁷

The supreme court held Virginia Code section 18-2-53.1 required the use, attempted use, or display of a firearm in the commission of the qualifying offense.⁴⁰⁸ The court found a person “uses” a firearm when he employs it.⁴⁰⁹ Furthermore, the supreme court found a display of a firearm involves making the weapon “manifest to any of a victim’s senses.”⁴¹⁰ The court held that while a defendant who commits burglary is responsible for events that occur after his entry, the burglary is complete upon entry made “with the requisite intent.”⁴¹¹ Thus, the court concluded the evidence was insufficient to prove use of a firearm in the commission of burglary.⁴¹²

In *Dezfuli v. Commonwealth*, the defendant, charged with use of a firearm in the commission of a felony in violation of Virginia

401. *Id.*

402. *Id.*

403. *Id.* at 366, 706 S.E.2d at 346.

404. *Id.* 368, 706 S.E.2d at 346–47.

405. *Id.*

406. 281 Va. 396, 402, 707 S.E.2d 331, 334 (2011).

407. *Id.* at 398, 707 S.E.2d at 332.

408. *Id.* at 401, 707 S.E.2d at 334 (citing VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 2009)).

409. *Id.* (citing BLACK’S LAW DICTIONARY 1681 (9th ed. 2009)).

410. *Id.* at 401–02, 707 S.E.2d at 334 (quoting *Cromite v. Commonwealth*, 3 Va. App. 64, 66, 348 S.E.2d 38, 39 (1986)) (internal quotation marks omitted).

411. *Id.* at 401, 707 S.E.2d at 334.

412. *Id.* at 402, 707 S.E.2d at 334.

Code section 18.2-53.1,⁴¹³ argued the trial court wrongly convicted him of brandishing a firearm under Virginia Code section 18.2-282⁴¹⁴ as a lesser included offense.⁴¹⁵ The Court of Appeals of Virginia applied the *Blockburger* test to determine whether brandishing a firearm requires proof of a fact that use of a firearm in the commission of a felony does not.⁴¹⁶ The court concluded that under this test brandishing a firearm was not a lesser included offense of use of a firearm because “the Commonwealth must submit proof, of completely different elements for a finding of guilt” on each offense.⁴¹⁷ To convict the defendant of use of a firearm in the commission of a felony, the court of appeals noted, “the prosecution is not required to prove a criminal defendant actually brandished his firearm.”⁴¹⁸ Although it is likely that the defendant would brandish the firearm while using it in the commission of a felony, it is not necessarily so.⁴¹⁹ The court noted that the elements of the two statutes must be viewed in the abstract, and “[the statute] is written in the disjunctive,” permitting conviction for using *or* displaying a firearm during the commission of a felony.⁴²⁰ In short, the court of appeals found that

the requirements of *Blockburger* [were] . . . not satisfied . . . because the Commonwealth can obtain a conviction for use of a firearm during the commission of a felony without proof that the defendant brandished the firearm, and it can obtain a conviction for brandishing without also proving use of the firearm in the commission of a felony.⁴²¹

413. VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 2009 & Cum. Supp. 2011) (making it “unlawful for any person to use or attempt to use any . . . firearm or display such weapon in a threatening manner while committing or attempting to commit” certain enumerated felonies).

414. *Id.* § 18.2-282 (Repl. Vol. 2009 & Cum. Supp. 2011).

415. 58 Va. App. 1, 3–4, 7, 707 S.E.2d 1, 2–4 (2011).

416. *Id.* at 7–8, 707 S.E.2d at 4 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). “[W]here the same act or transaction constitutes a violation of two district statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger*, 284 U.S. at 304.

417. *Dezfuli*, 58 Va. App. at 11–12, 707 S.E.2d at 6.

418. *Id.* at 11, 707 S.E.2d at 6.

419. *Id.* at 10–11, 707 S.E.2d at 5–6.

420. *Id.* at 9–10, 707 S.E.2d at 5 (quoting *Rose v. Commonwealth*, 53 Va. App. 505, 513–14, 673 S.E.2d 489, 493 (2009)) (internal quotation marks omitted).

421. *Id.* at 11–12, 707 S.E.2d at 6.

I. *Gang Crimes*

The law continues to develop in the area of criminal street gangs. A pair of decisions from the Court of Appeals of Virginia are worthy of note. First, in *Taybron v. Commonwealth*, a prosecution under Virginia Code section 18.2-46.2, the court of appeals examined whether the prosecution had satisfied the statutory requirement that “members” of a particular gang had committed “two or more *predicate criminal acts*.”⁴²² The prosecution presented evidence that two individuals, Arenzo King and Jumar Turner, committed predicate offenses.⁴²³ These individuals were members of a homegrown local gang that is loosely affiliated with the national Bloods gang.⁴²⁴ The defendant belonged to the “36th Street Bang Squad,” which used adopted “symbols and ideologies associated with the national Bloods gang.”⁴²⁵ Turner and King, however, never belonged to 36th Street Bang Squad.⁴²⁶ The gang expert testified for the Commonwealth that the 36th Street Bang Squad was “*affiliated with the Bloods*, not a nationally known Blood set, but a homegrown [set] using the same ideologies and . . . verbiage and symbols used to rep Blood.”⁴²⁷

The court of appeals concluded that since the evidence established that Turner and King were not members “of the same local or national ‘ongoing organization, association, or group’” that the defendant belonged to, the prosecution could not rely on predicate crimes committed by Turner and King to establish the 36th Street Bang Squad as a “criminal street gang.”⁴²⁸ Although the 36th Street Bang Squad was “affiliated” with the Bloods, affiliation, the court of appeals concluded, does not constitute membership.⁴²⁹ The court rejected the argument that by claiming to be

422. 57 Va. App. 470, 471, 476, 703 S.E.2d 270, 271, 273–74 (2011) (quoting VA. CODE ANN. § 18.2-46.2-416.2(A) (Repl. Vol. 2008 & Cum. Supp. 2011)) (internal quotation marks omitted).

423. *Id.* at 473–74, 703 S.E.2d at 272.

424. *Id.* at 474–75, 703 S.E.2d at 272–73.

425. *Id.* at 473, 703 S.E.2d at 272.

426. *Id.* at 474, 703 S.E.2d at 273.

427. *Id.* at 479, 703 S.E.2d at 275.

428. *Id.* at 481–82, 703 S.E.2d at 276–77 (quoting VA. CODE ANN. § 18.2-46.1 (Repl. Vol. 2009 & Cum. Supp. 2011)) (internal quotation marks omitted).

429. *Id.* at 481, 703 S.E.2d at 276.

Bloods these individuals satisfied the membership requirement of the statute.⁴³⁰

The court of appeals declined to “make any sort of blanket ruling determining whether the Bloods or any other national group which fits within the statutory definition of a criminal street gang includes among its members the members of any local subset or other local affiliate gang.”⁴³¹ Instead, the court merely concluded that “in this case, the evidence fail[ed] to establish that appellant, a member of the 36th Street Bang Squad, was a member of the national Bloods or some other gang organization to which Turner and King also belonged.”⁴³²

The second decision also dealt with predicate crimes. In *Phillips v. Commonwealth*, the defendant was charged with recruiting a juvenile into a criminal street gang.⁴³³ The Court of Appeals of Virginia first parsed the language of Virginia Code sections 18.2-46.1 and 18.2-46.2 and concluded that “the plain meaning of the statute necessarily requires that the criminal acts establishing the existence of the criminal street gang occur *before*, not *contemporaneously* with, the offense for which the existence of the criminal street gang is required.”⁴³⁴ Therefore, even if the defendant did recruit a juvenile into the gang, this act of recruitment could not serve as one of the predicate offenses to establish the existence of a criminal street gang.⁴³⁵

Furthermore, the Commonwealth was required to prove that the gang existed “*at the time*” the defendant recruited the juvenile into the gang.⁴³⁶ Consequently, evidence of gang crimes that occurred *after* the defendant recruited the juvenile failed to satisfy the statutory requirement for predicate acts.⁴³⁷

In addition, the Commonwealth introduced evidence of predicate crimes committed by M.W. and Kevin Mitchell, who were members of the Bloods, to establish the Bloods’ status as a crimi-

430. *Id.* at 481–82, 703 S.E.2d at 276.

431. *Id.* at 485 n.6, 703 S.E.2d at 278 n.6.

432. *Id.*

433. 56 Va. App. 526, 529–30, 694 S.E.2d 805, 806–07 (2010).

434. *Id.* at 536–37, 694 S.E.2d at 810 (citing VA. CODE ANN. §§ 18.2-46.1, -46.2 (Repl. Vol. 2009)).

435. *Id.* at 539–40, 694 S.E.2d at 811–12.

436. *Id.* at 538, 694 S.E.2d at 811.

437. *Id.* at 538–39, 694 S.E.2d at 811.

nal street gang.⁴³⁸ The problem with these particular predicate crimes, the court of appeals found, was that no evidence established *when* M.W. and Mitchell became gang members.⁴³⁹ To qualify as predicates under Virginia Code section 18.2-46.1, the crimes must be committed by persons who are members of the gang when the crimes are committed.⁴⁴⁰ Proof that persons who at some point joined the gang committed the criminal acts will not suffice.⁴⁴¹

Finally, the court of appeals agreed with the defendant's argument that when charging a defendant with recruiting into a gang that includes a juvenile member, the prosecution "cannot simultaneously use [defendant's] recruitment of [a juvenile] to support its position that [the defendant] attempted to recruit a juvenile into a gang having a juvenile member."⁴⁴²

J. *Identity Theft*

Virginia law is strict on the issue of venue. To establish venue, the prosecution must establish a strong presumption that the offense took place in a particular jurisdiction.⁴⁴³ In *Gheorghiu v. Commonwealth*, the Supreme Court of Virginia examined whether the prosecution tried the case on charges of identity theft in a proper venue.⁴⁴⁴ Police apprehended the defendant in Arlington County with a computer that contained the names and credit card information of about one hundred persons.⁴⁴⁵ By statute, venue in identity theft crimes can be established "in any locality where the person whose identifying information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in such locality."⁴⁴⁶ The

438. *Id.* at 532–33, 694 S.E.2d at 808.

439. *Id.* at 539–40, 694 S.E.2d at 811–12.

440. *Id.* (citing VA. CODE ANN. § 18.2-46.1 (Repl. Vol. 2009 & Cum. Supp. 2011)) (A gang includes an "ongoing organization, association, or group of three or more persons, whether formal or informal, . . . whose *members* . . . have engaged in the commission of . . . two or more predicate criminal acts.") (emphasis added).

441. *Id.* at 537–40, 694 S.E.2d at 810–12.

442. *Id.* at 541, 694 S.E.2d at 812.

443. *Cheng v. Commonwealth*, 240 Va. 26, 36, 393 S.E.2d 599, 604 (1990).

444. 280 Va. 678, 683, 701 S.E.2d 407, 410 (2010).

445. *Id.* at 681–82, 701 S.E.2d at 409.

446. VA. CODE ANN. § 18.2-186.3 (Repl. Vol. 2009 & Cum. Supp. 2011).

victims who testified did not reside in Arlington County.⁴⁴⁷ Therefore, the question was whether any part of the offense had occurred in Arlington County.⁴⁴⁸ The Court of Appeals of Virginia reasoned that identity theft was a “continuing offense” and, therefore, the Commonwealth could establish venue anywhere the defendant possessed “the victim’s identifying information with the intent to defraud.”⁴⁴⁹

The Supreme Court of Virginia rejected this rationale. The court observed that the crime of identity theft occurs when the perpetrator “obtain[s], record[s], or access[es]’ the owner’s identifying information without the owner’s permission and with the intent to defraud the owner.”⁴⁵⁰ The crime is complete “when any one of these acts occurs in conjunction with the intent to defraud.”⁴⁵¹ The continued possession of the information, once obtained, is not an element of the crime of identity theft.⁴⁵² Because the evidence failed to show a connection between any of the actions taken by the defendant and Arlington County, venue in Arlington County was not proper.⁴⁵³ *Gheorghiu* is consistent with a line of cases that restrict the idea of a “continuing offense” to the crime of larceny.⁴⁵⁴

K. *Indecent Exposure*

The defendant in *Simon v. Commonwealth* argued the trial court erred when it refused to grant him an instruction for the crime of indecent exposure.⁴⁵⁵ Simon was charged with indecent liberties, in violation of Virginia Code section 18.2-370, and argued indecent exposure was a lesser included offense of indecent

447. *Gheorghiu*, 280 Va. at 682, 684, 701 S.E.2d at 410.

448. *Id.* at 684, 701 S.E.2d at 410–11.

449. *Id.*, 701 S.E.2d at 411 (citations omitted) (internal quotation marks omitted).

450. *Id.* at 686, 701 S.E.2d at 412 (quoting VA. CODE ANN. § 18.2-186.3 (Repl. Vol. & Cum. Supp. 2011)).

451. *Id.*

452. *Id.*

453. *Id.* at 687, 701 S.E.2d at 412.

454. See, e.g., *Meeks v. Commonwealth*, 274 Va. 798, 803–04, 651 S.E.2d 637, 639–40 (2007) (holding that venue to prosecute a defendant for credit card theft was improper in the jurisdiction where defendant merely possessed stolen cards); *Commonwealth v. Montague*, 260 Va. 697, 702, 536 S.E.2d 910, 913 (2000) (rejecting the continuing offense doctrine for venue purposes with respect to felony-murder).

455. 58 Va. App. 194, 196, 708 S.E.2d 245, 246 (2011), *petition for cert. filed*, (Va. June 3, 2011) (No. 111030).

liberties.⁴⁵⁶ The Court of Appeals of Virginia recognized that the Supreme Court of Virginia previously stated in dicta that indecent liberties included the lesser offense of indecent exposure.⁴⁵⁷ The court then addressed “whether the elements of the greater offense necessarily include all elements of the lesser.”⁴⁵⁸ The court concluded that “[a] comparison of the elements of these crimes confirms that indecent exposure is not lesser included in the indecent liberties offense charged in the indictment.”⁴⁵⁹ First, the intent differs because indecent liberties, as charged here, requires the defendant expose himself “with lascivious intent.”⁴⁶⁰ In contrast, indecent exposure “requires an ‘intentionally’ ‘obscene’ ‘exposure.’”⁴⁶¹ Comparing these two terms, the court of appeals noted that “although every exposure made with lascivious intent . . . may also be an intentionally obscene exposure . . . the converse is not true because the obscenity element of indecent exposure is broader than the mere lascivious desire for ‘sexual indulgence.’”⁴⁶² In addition, the court observed that the two statutes differed on the “age-related elements.”⁴⁶³ Under the indecent liberties statute, the perpetrator must be eighteen or older, “whereas the indecent exposure statute permits a conviction upon proof that the perpetrator was [eighteen] or older or under [eighteen].”⁴⁶⁴ In addition, “the indecent liberties statute requires proof that the victim was under [fifteen] and not married to the perpetrator, whereas the indecent exposure statute does not require proof of any particular victim at all.”⁴⁶⁵ The only requirement is that the indecent exposure occur “in any public place, or in any place where others are present.”⁴⁶⁶ In light of these differences, the

456. *Id.* at 196, 200–01, 708 S.E.2d at 248 (citing VA. CODE ANN. § 18.2-370 (Repl. Vol. 2009 & Cum. Supp. 2011)).

457. *Id.* at 201–02, 708 S.E.2d at 249 (citing *Ashby v. Commonwealth*, 208 Va. 443, 445 n.3, 158 S.E.2d 657, 658 n.3 (1968)).

458. *Id.* at 202, 708 S.E.2d at 249 (quoting *Fontaine v. Commonwealth*, 25 Va. App. 156, 164, 487 S.E.2d 241, 245 (1997), *overruled on other grounds by* *Edwards v. Commonwealth*, 41 Va. App. 752, 765, 589 S.E.2d 444, 450 (2003)) (internal quotation marks omitted).

459. *Id.* at 204, 708 S.E.2d at 250.

460. *Id.* (quoting VA. CODE ANN. § 18.2-370(A) (Repl. Vol. 2009 & Cum. Supp. 2011)) (internal quotation marks omitted).

461. *Id.* (quoting VA. CODE ANN. § 18.2-387 (Repl. Vol. 2009 & Cum. Supp. 2011)).

462. *Id.* at 204–05, 708 S.E.2d at 250.

463. *Id.* at 205, 708 S.E.2d at 250.

464. *Id.*

465. *Id.*

466. *Id.*

court of appeals concluded that the trial court committed no error when it refused to give jury instructions on indecent exposure.⁴⁶⁷

L. *Knowingly Communicating a Written Threat*

Virginia Code section 18.2-60(A)(1) prohibits knowingly communicating a written threat.⁴⁶⁸ The defendant in *Holcomb v. Commonwealth* argued the statute did not apply to his MySpace posts, and, moreover, the evidence was insufficient for conviction.⁴⁶⁹ The defendant, who was in a custody battle with a woman named Miranda Rollman, posted a number of entries on his MySpace profile, addressed to the “[W]oodroll family.”⁴⁷⁰ The posts stated, for example, “B***h made me go mad I just had to stab her” and “Ain’t nobody playin’ b***h[,] slit your neck into a fountain drink.”⁴⁷¹ Rollman, whose maiden name was Woodroll, saw the posts and testified the posts made her afraid.⁴⁷² The defendant, who fancied himself a “lyricist of [rap] music,” defended the postings as art.⁴⁷³ Although he acknowledged that others, including Rollman and her family, might view the postings, the defendant argued that the postings were for everyone to view and were not directed specifically at Rollman.⁴⁷⁴ The Court of Appeals of Virginia rejected this argument, noting that communication of a threat to a wide audience does not alter the fact that a threat was communicated.⁴⁷⁵ The court concluded that the defendant’s postings constituted an “electronically transmitted communication” that produced a “visual or electronic message” as required under the statute.⁴⁷⁶ The defendant knowingly posted the messages that constituted threats, and the statute required “nothing more” for a conviction.⁴⁷⁷ The court of appeals also found the evi-

467. *Id.* at 205, 708 S.E.2d at 251.

468. VA. CODE ANN. § 18.2-60(A)(1) (Repl. Vol. 2009 & Cum. Supp. 2011).

469. 58 Va. App. 339, 342, 345–46, 709 S.E.2d 711, 712, 714 (2011).

470. *Id.* at 342–43, 709 S.E.2d at 712–13.

471. *Id.* at 343, 709 S.E.2d at 713.

472. *Id.* at 344, 709 S.E.2d at 713.

473. *Id.*

474. *Id.* at 345–46, 709 S.E.2d at 713–14.

475. *Id.* at 346–47, 709 S.E.2d at 714.

476. *Id.* at 347, 709 S.E.2d at 715 (quoting VA. CODE ANN. § 18.2-60(A)(1) (Repl. Vol. 2009 & Cum. Supp. 2011)) (internal quotation marks omitted).

477. *Id.*

dence sufficient to find the message was a threat, concluding that “the graphic and violent imagery used in the messages specifically referred to Rollman and her family.”⁴⁷⁸ The court further observed that “the specificity of the posts relating to [the defendant’s] tumultuous history with Rollman and her family makes clear that [the defendant’s] posts were directed towards Rollman and not meant to be mere expression.”⁴⁷⁹

M. *Larceny*

The Supreme Court of Virginia, in *Ali v. Commonwealth*, applied the ends of justice exception to the contemporaneous objection rule and reversed a conviction of grand larceny from the person.⁴⁸⁰ Ali entered a convenience store, asked for a cigar displayed behind the counter, and tendered a dollar to pay for the cigar.⁴⁸¹ When the cashier opened the cash register drawer, Ali reached across the counter and tried to grab a fistful of money.⁴⁸² As the cashier and Ali struggled over the cash, the cashier screamed for help from her mother, and Ali eventually took the money from the cashier and fled the store.⁴⁸³ A jury convicted Ali of robbery and grand larceny from the person and sentenced him to twelve years for the robbery and five years for the larceny.⁴⁸⁴ On appeal, the Court of Appeals of Virginia affirmed the convictions.⁴⁸⁵

The Supreme Court of Virginia found the evidence sufficient to support Ali’s robbery conviction.⁴⁸⁶ While acknowledging that “grand larceny from the person is not a lesser-included offense of robbery” under the *Blockburger* test, the court addressed Ali’s argument that the Commonwealth’s reliance on an inconsistency “at the core” of its case violated his due process rights.⁴⁸⁷ Ali admitted he failed to raise this argument at trial.⁴⁸⁸ The supreme

478. *Id.* at 349, 709 S.E.2d at 716.

479. *Id.*

480. 280 Va. 665, 670–71, 701 S.E.2d 64, 67–68 (2010).

481. *Id.* at 667, 701 S.E.2d at 66.

482. *Id.*

483. *Id.*

484. *Id.* at 668, 701 S.E.2d at 66.

485. *Id.*

486. *Id.* at 669, 701 S.E.2d at 66.

487. *Id.* at 669–70, 701 S.E.2d at 67 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

488. *Id.* at 670, 701 S.E.2d at 68.

court, however, concluded that asportation, an element of grand larceny from the person, never occurred, so the court of appeals erroneously failed to apply the ends of justice exception of Rule 5A:18.⁴⁸⁹ The supreme court, therefore, affirmed the robbery conviction and reversed the conviction for grand larceny from the person.⁴⁹⁰

Larceny convictions often depend on the defendant's intent at the time he committed the offense. In *Marsh v. Commonwealth*, a judge convicted the defendant of larceny after he pawned his girlfriend's jewelry and other items without her permission and later failed to redeem them.⁴⁹¹ The defendant contended that he planned to redeem the items and, therefore, lacked the intent to permanently deprive his girlfriend of the jewelry.⁴⁹² In analyzing the sufficiency of the evidence of criminal intent, the Court of Appeals of Virginia noted that "the . . . intent to steal must exist at the time the seized goods are moved,"⁴⁹³ but that intent may "be inferred from the facts and circumstances of the case, including the actions of the defendant and any statements made by him."⁴⁹⁴ "[O]ne who takes another's property intending at the time he takes it to use it temporarily and then to return it unconditionally within a reasonable time—and having a substantial ability to do so—lacks the intent to steal required for larceny."⁴⁹⁵ Specifically, the court of appeals reasoned that "an intent to pawn the property, accompanied by an intent later to redeem the property and return it to its owner, is a defense only if the taker's financial situation is such that he has an ability to redeem it."⁴⁹⁶

Applying these principles, the court concluded the evidence was sufficient to establish an intent to permanently deprive the

489. *Id.* at 670–71, 701 S.E.2d at 67–68 (citing VA. SUP. CT. R. pt. 5A, R. 5A:18 (Repl. Vol. 2011)).

490. *Id.* at 671, 701 S.E.2d at 68.

491. 57 Va. App. 645, 648–50, 704 S.E.2d 624, 625–27 (2010).

492. *Id.* at 650, 704 S.E.2d at 626.

493. *Id.* at 651, 704 S.E.2d at 627 (quoting *Carter v. Commonwealth*, 280 Va. 100, 105, 694 S.E.2d 590, 593–94 (2010)) (internal quotation marks omitted).

494. *Id.* (quoting *Tarpley v. Commonwealth*, 261 Va. 251, 256, 542 S.E.2d 761, 764 (2001)) (internal quotation marks omitted).

495. *Id.* (quoting *Carter*, 280 Va. at 107, 694 S.E.2d at 595) (internal quotation marks omitted).

496. *Id.* at 652, 704 S.E.2d at 628 (quoting 3 WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 19.5(b), at 91 (2d ed. 2003)) (internal quotation marks omitted).

owner of her property.⁴⁹⁷ In light of the defendant's financial situation, there simply was no way he would be able to redeem the items.⁴⁹⁸ The defendant testified he pawned the property because of his financial problems.⁴⁹⁹ To redeem the items, he needed \$3,272.50.⁵⁰⁰ However, his only job paid him \$2000, and he also owed money on other bills.⁵⁰¹ The court of appeals concluded the defendant "had neither the present ability nor the prospective ability at the time he took the items because of his financial situation to return the property. Thus, he did not have the substantial ability [to repay], and his stated intent to return the property [was] not a defense to larceny."⁵⁰²

In *Williams v. Commonwealth*, the Court of Appeals of Virginia examined whether the defendant's actions made him guilty of larceny of an automobile when the evidence showed that he neither drove nor stole the car.⁵⁰³ Another individual drove the stolen jeep, in which the defendant was a passenger, to pick up one of the defendant's friends.⁵⁰⁴ The defendant, however, told his friend the vehicle was stolen, and a witness heard the defendant state that "so far today we haven't gotten arrested."⁵⁰⁵ On the way to a store, the trio stopped to talk to the defendant's cousin, then walked to the defendant's house, and later returned to the stolen vehicle.⁵⁰⁶ In assessing the sufficiency of the evidence, the court noted that "[b]ecause larceny is a continuing offense, anyone who knows that personal property is stolen and assists in its transportation or disposition is guilty of larceny."⁵⁰⁷ A principal in the second degree can be held criminally liable for committing an overt act such as "encouraging, advising, or assisting in the commission of the crime."⁵⁰⁸ Simply being a passenger in a stolen automobile

497. *Id.* at 656, 704 S.E.2d at 629.

498. *Id.* at 655, 704 S.E.2d at 629.

499. *Id.*

500. *Id.*

501. *Id.*

502. *Id.*

503. 56 Va. App. 638, 642, 696 S.E.2d 233, 235 (2010).

504. *Id.* at 641, 696 S.E.2d at 234.

505. *Id.*, 696 S.E.2d at 234–35.

506. *Id.*

507. *Id.* at 643, 696 S.E.2d at 285 (quoting *Hampton v. Commonwealth*, 32 Va. App. 644, 650–51, 529 S.E.2d 843, 846) (2006)) (internal quotation marks omitted).

508. *Id.* at 644, 696 S.E.2d at 236 (quoting *Moehring v. Commonwealth*, 223 Va. 564, 567, 290 S.E.2d 891, 892 (1982)) (internal quotation marks omitted).

“do[es] not constitute sufficient evidence to convict a person as a principal in the second degree.”⁵⁰⁹ However, a conviction does not require the principal in the second degree to actually drive the vehicle.⁵¹⁰ Here, the court of appeals reasoned, the defendant acted as more than a passenger.⁵¹¹ The defendant showed his guilty mind through his statement to his companions that they had not been arrested and his acknowledgment that they stole the [j]eep.⁵¹² The court found that “using the [j]eep to accommodate a friend, meet a family member, and ride to his own home” showed that the defendant “exercised some control over the movement and destination of the stolen [j]eep.”⁵¹³ Based on this evidence the fact-finder reasonably concluded that these steps occurred at the request of the defendant.⁵¹⁴ The defendant’s joint control and, therefore, joint possession of the stolen property established his guilt as a principal in the second degree.⁵¹⁵

N. *Malicious Wounding and Wounding by Mob*

Following an altercation in a fast food restaurant parking lot, the defendant in *Johnson v. Commonwealth* was convicted of both malicious wounding and maiming by mob.⁵¹⁶ He argued his convictions under both statutes violated the prohibition against double jeopardy but the Court of Appeals of Virginia rejected this argument.⁵¹⁷ Analyzing the elements of the two offenses in the abstract, the court noted the malicious wounding by mob statute⁵¹⁸ contained the element of “the existence of a mob” that the malicious wounding statute⁵¹⁹ lacked.⁵²⁰ In addition, malicious wounding by mob does not require malice.⁵²¹ Instead, the prosecu-

509. *Id.* (quoting *Moehring*, 223 Va. at 567, 290 S.E.2d at 892)) (internal quotation marks omitted).

510. *See id.* at 645, 696 S.E.2d at 236.

511. *Id.*

512. *Id.*

513. *Id.* at 645–46, 696 S.E.2d at 236–37.

514. *Id.* at 645, 696 S.E.2d at 237.

515. *Id.* at 644–45, 696 S.E.2d at 236.

516. 58 Va. App. 303, 311, 319, 709 S.E.2d 175, 180, 183 (2011).

517. *Id.* at 322, 709 S.E.2d at 185.

518. VA. CODE ANN. § 18.2-41 (Repl. Vol. 2009 & Cum. Supp. 2011).

519. *Id.* § 18.2-51 (Repl. Vol. 2009 & Cum. Supp. 2011).

520. *Johnson*, 58 Va. App. at 323, 709 S.E.2d at 185.

521. *Id.* at 327, 709 S.E.2d at 187.

tion need only prove the unlawfulness of the wounding.⁵²² Even though the malicious wounding statute creates two crimes, malicious wounding and unlawful wounding, malicious wounding remains a distinct crime with distinct elements.⁵²³

O. *Sexual Battery*

In *Nicholson v. Commonwealth*, the Court of Appeals of Virginia affirmed Woodrow Wilson Nicholson's conviction "of aggravated sexual battery, through the use of an adult victim's mental incapacity, in violation of Code § 18.2-67.3."⁵²⁴ The victim in the case was "severely mentally retarded" and lacked an understanding of sexual matters.⁵²⁵ An employee observed the defendant speaking with the victim near the training facility, where the victim was a client.⁵²⁶ When the concerned employee later went looking for the victim, she found him standing near the defendant in an alley and noticed the defendant's pants were open, exposing his penis.⁵²⁷ The trial court, as fact finder, expressly rejected the defendant's testimony that the victim offered to touch the defendant's penis for money.⁵²⁸ The defendant argued the Commonwealth must prove the use of force by the defendant.⁵²⁹ The trial court concluded the Commonwealth satisfied the proof of constructive force and convicted Nicholson of aggravated sexual battery.⁵³⁰

In affirming the trial court's judgment, the Court of Appeals of Virginia held that a person deemed mentally incapacitated under Virginia Code section 18.2-67.10(3)⁵³¹ "is incapable of consenting to sexual touching, on the grounds that 'consent without under-

522. *Id.* at 324, 709 S.E.2d at 186 (quoting *Paiz v. Commonwealth*, 54 Va. App. 688, 698, 682 S.E.2d 71, 76 (2009)) (internal quotation marks omitted).

523. *Id.* at 326, 709 S.E.2d at 187 ("[M]alicious wounding and unlawful wounding must be treated as distinct offenses codified together in the same statute.").

524. 56 Va. App. 491, 493, 694 S.E.2d 788, 789 (2010) (citing VA. CODE ANN. § 18.2-67.3 (Repl. Vol. 2009)).

525. *Id.* at 495, 497, 694 S.E.2d at 790–91.

526. *Id.* at 493–94, 694 S.E.2d at 789.

527. *Id.* at 494, 694 S.E.2d at 789.

528. *Id.* at 498, 694 S.E.2d at 791.

529. *Id.*

530. *Id.* (stating that the victim's mental incapacity prevented him from legally consenting, therefore proving the defendant constructively forced the victim to touch him).

531. VA. CODE ANN. § 18.2-67.10(3) (Repl. Vol. 2009 & Cum. Supp. 2011).

standing is no consent at all.”⁵³² The court of appeals concluded that Virginia Code section 18.2-67.3 does not require use of actual force when the victim is mentally incapacitated.⁵³³

V. SENTENCING AND PROBATION

A. *Allocution at Sentencing*

In *Montgomery v. Commonwealth*, Jonathan Christopher Montgomery argued on appeal that he should receive a new sentencing hearing on his convictions for forcible sodomy, aggravated sexual battery, and object sexual penetration because the trial court failed to afford him his right to allocution at his sentencing proceeding.⁵³⁴ The Court of Appeals of Virginia rejected this argument.⁵³⁵

Following a bench trial, a judge convicted Montgomery of three sex offenses.⁵³⁶ At his sentencing hearing, although the trial court asked Montgomery if he had any questions before the court announced its sentence, the trial court never gave him an opportunity to make a statement.⁵³⁷ Montgomery made no objection at the sentencing hearing to the trial court’s oversight, but at a bail hearing held immediately after the sentencing hearing Montgomery’s counsel brought the error to the trial court’s attention.⁵³⁸ The trial court acknowledged it failed to provide for allocution and offered the defendant the chance to make a statement at that time, for the record, but noted the sentence would not change.⁵³⁹ The defendant chose not to proffer a statement.⁵⁴⁰

The court of appeals noted that, pursuant to Virginia Code section 19.2-298, a court must inquire if a defendant desires to make a statement or desires to “advance any reason why judgment should not be pronounced against him” before pronouncing the

532. *Nicholson*, 56 Va. App. at 510, 694 S.E.2d at 797 (quoting *Motina v. Commonwealth*, 47 Va. App. 338, 358, 624 S.E.2d 83, 92 (2006)).

533. *See id.* (citing VA. CODE ANN. § 18.2-67.3 (Repl. Vol. 2009)).

534. 56 Va. App. 695, 699, 696 S.E.2d 261, 262–63 (2010).

535. *Id.*, 696 S.E.2d at 262.

536. *Id.*

537. *Id.*, 696 S.E.2d at 263.

538. *Id.*

539. *Id.* at 699–700, 696 S.E.2d at 263.

540. *Id.* at 700, 696 S.E.2d at 263.

sentence.⁵⁴¹ The court held, however, the right of allocation is purely a statutory right; thus, a failure to comply does not constitute structural error, and harmless error analysis is appropriate.⁵⁴² The court concluded Montgomery's failure to proffer his desired allocution statement was fatal to his claim.⁵⁴³ The court held that without a proffer it could only "speculate as to the contents" of any statement in allocution and, therefore, was unable to determine whether the error was prejudicial.⁵⁴⁴ As a result, the court of appeals concluded the error was harmless.⁵⁴⁵

B. *Juvenile Sentencing*

In *Angel v. Commonwealth*, the Supreme Court of Virginia addressed a claim based on *Graham v. Florida*.⁵⁴⁶ In *Graham*, the Supreme Court of the United States held that imposing a life sentence without any possibility of early release on a juvenile defendant for a nonhomicide offense violated the Eighth Amendment's proscription against cruel and unusual punishment.⁵⁴⁷

In *Angel*, the defendant, a juvenile at the time of the offenses, was sentenced to three consecutive life sentences plus a term of years for nonhomicide felonies.⁵⁴⁸ In his direct appeal in the supreme court, Angel alleged that because Virginia, like Florida, had eliminated parole under *Graham*, the court should vacate his life sentences.⁵⁴⁹ The supreme court unanimously rejected Angel's claim.⁵⁵⁰ The court noted the Supreme Court of the United States left it to the states "to devise methods of allowing juvenile offenders an opportunity for release based on maturity and rehabilitation" and "did not require that states provide the opportunity for

541. *Id.* (quoting VA. CODE ANN. § 19.2-298 (Cum. Supp. 2011)) (internal quotation marks omitted).

542. *Id.* at 700-02, 696 S.E.2d at 263-64.

543. *Id.* at 704-05, 696 S.E.2d at 265.

544. *Id.* at 704, 696 S.E.2d at 265.

545. *Id.* at 706, 696 S.E.2d at 266.

546. 281 Va. 248, 274, 704 S.E.2d 386, 401 (2011), *cert. denied*, ___ U.S. ___, 2011 U.S. LEXIS 7091 (Oct. 3, 2011) (citing *Graham v. Florida*, 560 U.S. ___, ___, 130 S. Ct. 2011, 2034 (2010)).

547. 560 U.S. at ___, 130 S. Ct. at 2030.

548. *Angel*, 281 Va. at 257, 260, 273, 704 S.E.2d at 391, 393, 401.

549. *Id.* at 274, 704 S.E.2d at 401.

550. *Id.*

release at any particular time related to either the offender's age or length of incarceration."⁵⁵¹

The court then recited Virginia Code section 53.1-40.01, which provides that anyone serving a sentence, other than for capital murder, who has reached age sixty-five and has served five years, or has reached age sixty and has served ten years, "may petition the Parole Board for conditional release."⁵⁵² The court concluded that although the statute "has an age qualifier," it provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" required by the Eighth Amendment."⁵⁵³

C. Violation of the Terms of Probation

The defendant in *Carroll v. Commonwealth* contended that refusing to admit his guilt during a treatment course ordered by the trial court did not violate the terms of his probation.⁵⁵⁴ Pursuant to a plea agreement, the defendant entered an *Alford* plea⁵⁵⁵ to a charge of raping a child under the age of thirteen.⁵⁵⁶ The trial court imposed a suspended sentence and ordered the defendant to participate in any treatment prescribed by the probation officer.⁵⁵⁷ Carroll's probation officer instructed him to attend sex offender therapy.⁵⁵⁸ When he refused to admit his guilt during two months of treatment, the trial court revoked his probation.⁵⁵⁹ Carroll argued that a defendant who entered an *Alford* plea cannot be made to admit his guilt, particularly when the trial court never informed the defendant that he may have to admit his guilt.⁵⁶⁰

551. *Id.* at 275, 704 S.E.2d at 402.

552. *Id.* (quoting VA. CODE ANN. § 53.1-40.01 (Repl. Vol. 2009 & Cum. Supp. 2011)) (internal quotation marks omitted).

553. *Id.* (quoting *Graham v. Florida*, 560 U.S. ___, ___, 130 S. Ct. 2011, 2030 (2010)).

554. 280 Va. 641, 644, 701 S.E.2d 414, 415 (2010).

555. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). In *Alford*, the Court held that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.*

556. *Carroll*, 280 Va. at 645-46, 701 S.E.2d at 416.

557. *Id.* at 646, 701 S.E.2d at 416.

558. *Id.* at 647, 701 S.E.2d at 417.

559. *Id.*

560. *Id.* at 650, 701 S.E.2d at 418.

The Supreme Court of Virginia, after examining both relevant Virginia precedent and persuasive precedent from other state and federal courts, concluded that the trial court did not err in finding the defendant in violation of the terms of his probation.⁵⁶¹ Furthermore, a trial court must inform the defendant only “of the direct consequences” of his plea, not collateral consequences.⁵⁶² The failure of the trial court to warn the defendant that he may have to admit guilt was a collateral consequence and, therefore, “d[id] not render the revocation improper.”⁵⁶³

Finally, the supreme court rejected the defendant’s argument that, under the circumstances, the trial court should have offered “an alternative treatment modality” rather than revoke his probation.⁵⁶⁴ The failure to successfully complete the treatment did not stem from “some inability resulting from an unforeseen condition that arose.”⁵⁶⁵ Instead, the defendant’s inability to complete the conditions of probation stemmed from to his “willful failure . . . to comply with the requirements’ of his probation officer.”⁵⁶⁶

VI. LEGISLATION

With respect to pretrial criminal procedure, the General Assembly clearly established that, despite the change that *Melen-dez-Diaz* necessitates for trials, the prosecution may rely on signed affidavits of a competent government official in preliminary hearings to prove a diligent search failed to produce any official record.⁵⁶⁷ In addition, with respect to certificates of analysis for driving under the influence, the General Assembly amended the law to allow the prosecution to file a copy with the clerk within three days of providing the copy to the accused, rather than on the same day.⁵⁶⁸

561. See *id.* at 650–53, 701 S.E.2d at 418–20.

562. *Id.* at 653, 701 S.E.2d at 420 (quoting *State ex rel. Warren v. Schwartz*, 579 N.W.2d 698, 708 (Wis. 1998)) (internal quotation marks omitted).

563. *Id.*

564. *Id.* at 653–54, 701 S.E.2d at 420–21.

565. *Id.* at 654, 701 S.E.2d at 421.

566. *Id.* (quoting *Peyton v. Commonwealth*, 268 Va. 503, 511, 604 S.E.2d 17, 21 (2004)).

567. Act of Mar. 18, 2011, ch. 285, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 19.2-188.3 (Cum. Supp. 2011)).

568. Act of Mar. 10, 2011, ch. 32, 2011 Va. Acts ____ (codified as amended VA. CODE ANN. § 19.2-187.1 (Cum. Supp. 2011)).

Prior law permitted placing the affidavit for certain search warrants temporarily under seal.⁵⁶⁹ An amendment explicitly states that, in addition to the affidavit, the search warrant itself, the return made on the warrant, and the order sealing the affidavit can be sealed for a period of time.⁵⁷⁰ Furthermore, when ordering the disclosure of records involving electronic communication services or remote computing services, courts may, upon a showing of good cause, seal the order and application or statement of facts for ninety days.⁵⁷¹ Finally, certain unexecuted warrants can be destroyed or dismissed.⁵⁷²

Furthermore, the General Assembly imposed new conditions for release on and payment of bonds. Courts can now order GPS tracking for persons released on a secured bond or as a condition of probation for a suspended sentence.⁵⁷³ Additionally, defendants must pay “[b]onds in recognizances in criminal or juvenile cases” to the jurisdiction where the recognizance was taken, regardless of whether the crime violated the laws of the commonwealth or the locality.⁵⁷⁴

The General Assembly also passed amendments for crimes involving sexual assault, alcohol, and drugs. For sodomy and unlawful intercourse with a minor, a more flexible venue is now possible in the jurisdiction where the crime allegedly occurred, or, with the consent of the Commonwealth’s Attorney, either in the jurisdiction where the defendant committed the crime or where the defendant transported the victim prior to committing the offense.⁵⁷⁵ The General Assembly expanded the definition of law-enforcement officers by adding agents of the Alcohol Beverage Control Board to the list of law-enforcement personnel against whom an assault rises to a Class 6 felony, which carries a manda-

569. VA. CODE ANN. § 19.2-54 (Cum. Supp. 2008).

570. Act of Mar. 16, 2011, ch. 219, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 19.2-54 (Cum. Supp. 2011)).

571. VA. CODE ANN. § 19.2-70.3(B) (Cum. Supp. 2011).

572. *Id.* § 19.2-76.1 (Cum. Supp. 2011).

573. *Id.* §§ 19.2-123, -303 (Cum. Supp. 2011).

574. *Id.* §§ 19.2-136, -143 (Cum. Supp. 2011).

575. *Id.* § 18.2-359(D) (Cum. Supp. 2011).

tory minimum sentence of six months.⁵⁷⁶ This legislation effectively overturned the decision in *Cline v. Commonwealth*.⁵⁷⁷

A new amendment explicitly allows prosecutors to enforce the civil offense of refusing to submit to a blood alcohol test.⁵⁷⁸ In addition, driving after consuming alcohol while under the age of twenty-one now qualifies as a Class 1 misdemeanor.⁵⁷⁹ Under prior law, the punishment only involved suspension of the driver's license and a possible fine.⁵⁸⁰ Finally, after widespread press reports concerning the availability of "synthetic marijuana," the General Assembly banned such substances.⁵⁸¹

576. Act of Mar. 18, 2011, ch. 230, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 18.2-57(C), (F) (Cum. Supp. 2011)).

577. 53 Va. App. 765, 770, 675 S.E.2d 223, 235 (2009) (holding that the legislature never intended for the statute to include Alcohol and Beverage Control agents as law enforcement officers).

578. Act of Mar. 16, 2011, ch. 210, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 15.2-1627(B) (Cum. Supp. 2011)). This change effectively codifies the holding in *Kozmina v. Commonwealth*, which found that Commonwealth Attorneys had the authority to prosecute civil refusals. 281 Va. 347, 352, 706 S.E.2d 860, 863 (2011).

579. VA. CODE ANN. § 18.2-266.1(B) (Cum. Supp. 2011).

580. *Id.* § 18.2-266.1 (Repl. Vol. 2009).

581. Act of Mar. 23, 2011, ch. 410, 2011 Va. Acts ____ (codified at VA. CODE ANN. § 18.2-248.1:1 (Cum. Supp. 2011)); VA. STATE CRIME COMM'N, ANNUAL REPORT, at 68-69 (June 23, 2011).