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## Criminal Law and Procedure

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# CRIMINAL LAW AND PROCEDURE

*Aaron J. Campbell* \*

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## I. INTRODUCTION

During the past year, the Supreme Court of Virginia and the Court of Appeals of Virginia have continued to develop and refine the case law regarding a defendant's confrontation rights, the withdrawal of guilty pleas, and appellate procedure. The courts have also addressed important issues concerning search and seizure, firearm offenses, and sentencing. This article summarizes the holdings of these and other significant cases in criminal law and procedure. The article also briefly addresses recent legislation pertaining to criminal law.

## II. CRIMINAL PROCEDURE

### A. *Trial*

#### 1. Arrest on Outdated Capias

Virginia Code section 19.2-76.1 requires the Commonwealth's Attorney to petition the circuit court for the destruction of unexecuted felony warrants that have been retained for seven years from the date of issuance and "misdemeanor arrest warrants, summonses and capias and other criminal processes . . . that have not been executed within three years from the date of issuance."<sup>1</sup> In *Boone v. Commonwealth*, the Court of Appeals of Vir-

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1. VA. CODE ANN. § 19.2-76.1 (Cum. Supp. 2013).

ginia upheld the defendant's arrest on a *capias* for a probation violation issued four years earlier.<sup>2</sup> The court assumed without deciding that the *capias* should have been destroyed under Virginia Code section 19.2-76.1 because it was issued more than three years before, but since it had not been ordered destroyed, it remained valid.<sup>3</sup> The court concluded the statute prohibits arrests under warrants ordered destroyed by the circuit court but provides no remedy for a warrant "older than the specified age which has *not* been ordered destroyed by the circuit court."<sup>4</sup>

## 2. Attorney Conflict of Interest

The law is well established that a criminal defendant has the right to effective assistance of counsel at trial.<sup>5</sup> Where the defendant's attorney has "an actual conflict of interest [that] adversely affect[s]" his performance, a defendant's Sixth Amendment rights are violated.<sup>6</sup> However, the conflict must be more than "a mere theoretical division of loyalties."<sup>7</sup>

In *Spence v. Commonwealth*, the defendant argued the trial court should have granted his request to relieve the entire Public Defender's Office from handling his case after Spence threatened the senior assistant public defender originally assigned to represent him.<sup>8</sup> The Court of Appeals of Virginia disagreed, finding Spence raised nothing more than "a mere theoretical concern that another attorney's performance *might* be affected" by knowledge of the threat.<sup>9</sup>

The court stated it did not need to determine whether the conflict between Spence and his previous attorney should have been imputed to the entire office under Rule 1.10 of the Virginia Rules of Professional Conduct.<sup>10</sup> A violation of an ethical rule does not

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2. 60 Va. App. 419, 420–22, 728 S.E.2d 517, 518–19 (2012).

3. *Id.* at 423, 728 S.E.2d at 519–20.

4. *Id.* at 423–24, 728 S.E.2d at 520.

5. See U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970))).

6. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

7. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

8. 60 Va. App. 355, 359, 727 S.E.2d 786, 788 (2012).

9. *Id.* at 370–71, 727 S.E.2d at 793.

10. *Id.* at 371, 727 S.E.2d at 793. Rule 1.10 provides that no attorney in a law firm "shall knowingly represent a client" if another lawyer in the firm would be prohibited from

by itself require reversal of a criminal conviction.<sup>11</sup> The court of appeals determined an ethical conflict of interest should not be confused with a conflict under the Sixth Amendment.<sup>12</sup> Lastly, the court declined to address whether Virginia Code section 19.2-163.4 was violated because Spence's threat had not been directed to the entire office.<sup>13</sup>

### 3. Venue

In *Bay v. Commonwealth*, the Court of Appeals of Virginia addressed the issue of venue for cases involving terrorism.<sup>14</sup> The defendant in *Bay* was charged with several acts of terrorism after authorities thwarted his attempt to attack a Virginia Beach high school with various explosives and pipe bombs.<sup>15</sup> He made a pre-trial motion for a change of venue on the basis that all residents of Virginia Beach were per se disqualified to sit as jurors on his case because they were all potential victims of his crimes.<sup>16</sup> The trial court found the motion to be premature until voir dire was conducted.<sup>17</sup>

Bay argued on appeal that the trial court erred in declining to change venue.<sup>18</sup> The court of appeals held that status as a city resident did not necessarily mean every resident could not be fair and impartial.<sup>19</sup> Because venue for a crime of terrorism is set "in the county or city where such crime is alleged to have occurred or where any act in furtherance of a[] . . . prohibited [act] was committed," the court of appeals concluded that disqualifying per se all local jurors would adversely affect the efficient administration of justice, as it would require a change in venue for every trial involving charges of terrorism.<sup>20</sup> Insuring an impartial jury is re-

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doing so. VA. RULE OF PROF'L CONDUCT R. 1.10 (2004).

11. See *Spence*, 60 Va. App. at 371, 727 S.E.2d at 794.

12. *Id.*

13. *Id.* at 372 n.9, 727 S.E.2d at 794 n.9. The court of appeals reasoned that because "[t]he threat Spence made to his original attorney was personal to that attorney and was not directed to other attorneys in the Public Defender's Office" it was an imputed—rather than a direct—conflict of interest. *Id.*

14. 60 Va. App. 520, 525, 729 S.E.2d 768, 770 (2012).

15. *Id.* at 526, 729 S.E.2d at 770.

16. *Id.* at 529–31, 729 S.E.2d at 772–73.

17. *Id.* at 529, 729 S.E.2d at 772.

18. *Id.* at 528, 729 S.E.2d at 771.

19. *Id.* at 533, 729 S.E.2d at 774.

20. *Id.* (quoting VA. CODE ANN. § 18.2-46.8 (Repl. Vol. 2009)).

served for voir dire, which the trial court properly conducted in Bay's case.<sup>21</sup> Thus, the court of appeals concluded that denying the motion to change venue was not error.<sup>22</sup>

#### 4. Confrontation Rights

In *Robertson v. Commonwealth*, the Court of Appeals of Virginia, sitting en banc, held the Sixth Amendment right to confront witnesses did not require that "every single person involved in the joint preparation of an exhibit" be available for cross-examination at trial, or that "everyone whose testimony *might* be relevant" be called as a witness.<sup>23</sup> In *Robertson*, the defendant attempted to steal numerous items from a store before being apprehended by the manager.<sup>24</sup> Afterwards, the manager assisted another employee in scanning each item in order to determine the value of the recovered items.<sup>25</sup> The employee recorded the price of each item on a piece of paper, which was admitted into evidence at the defendant's trial for felony shoplifting.<sup>26</sup> Only the store manager testified at trial.<sup>27</sup>

On appeal, Robertson argued the employee who actually prepared the list should have testified instead of the manager.<sup>28</sup> The court of appeals determined that because the employee and the manager had collaborated in preparing the list and the manager was subject to cross-examination at trial, the employee's testimony was not necessary.<sup>29</sup> Distinguishing *Bullcoming v. New Mexico*<sup>30</sup> on its facts, the court determined no confrontation violation had occurred.<sup>31</sup> Any deficiencies in the manager's testimony went to its weight, but did not bar its admission into evidence.<sup>32</sup>

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21. *Id.*

22. *Id.* at 533-34, 729 S.E.2d at 774.

23. 61 Va. App. 554, 559, 563, 738 S.E.2d 531, 533, 535 (2013).

24. *Id.* at 557, 738 S.E.2d at 532-33.

25. *Id.*, 738 S.E.2d at 533.

26. *Id.* at 557-58, 738 S.E.2d at 533.

27. *See id.*

28. *See id.* at 558-59, 738 S.E.2d at 533.

29. *Id.* at 565, 738 S.E.2d at 636-37.

30. 564 U.S. \_\_\_, 131 S. Ct. 2705 (2011). In *Bullcoming*, the prosecution called as a witness a laboratory analyst familiar with testing procedures but who had not been involved in the analysis of evidence introduced at trial. *Id.* at \_\_\_, 131 S. Ct. at 2709.

31. *Robertson*, 61 Va. App. at 563-65, 738 S.E.2d at 535-37.

32. *Id.* at 565, 738 S.E.2d at 537.

The Sixth Amendment confrontation right applies only at trial, however.<sup>33</sup> In parole and probation revocation proceedings, a defendant's right to confront witnesses is limited to his due process rights under the Fourteenth Amendment.<sup>34</sup> In *Henderson v. Commonwealth*, the Supreme Court of Virginia addressed the standard to be applied in admitting hearsay evidence at a revocation hearing.<sup>35</sup> The Commonwealth presented testimony of a police detective who investigated an attempted robbery and a home invasion robbery in which Henderson had been involved, but was not prosecuted.<sup>36</sup> The detective testified that she contacted the victims in both cases, interviewed Henderson, and monitored telephone calls Henderson and his two co-defendants in the home invasion case made from jail after their arrests.<sup>37</sup> The detective's testimony established that telephone calls made by Henderson intimidated the victims.<sup>38</sup> The trial court overruled Henderson's objections to this testimony on hearsay and confrontation grounds, but stated no reasons for its ruling, and revoked Henderson's probation.<sup>39</sup>

Testimonial hearsay is admissible "only when the hearing officer specifically finds good cause for not allowing confrontation."<sup>40</sup> The Supreme Court of Virginia first observed that while the trial court should have stated for the record the specific grounds it relied upon for overruling Henderson's objections, the failure to do so had not been preserved for appeal.<sup>41</sup> The court independently reviewed the record to determine whether sufficient credible evidence supported a finding of "good cause for not allowing confrontation."<sup>42</sup> The court considered both the "reliability test," which allows testimonial hearsay to be admitted in revocation proceedings if it "possesses substantial guarantees of trustworthiness," and the "balancing test," which weighs the defendant's interests in

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33. See *Henderson v. Commonwealth*, 285 Va. 318, 325, 736 S.E.2d 901, 905 (2013).

34. *Id.* at 325–26, 736 S.E.2d at 905.

35. *Id.* at 321–22, 736 S.E.2d at 903.

36. *Id.* at 322–23, 736 S.E.2d at 903.

37. *Id.* at 322–24, 736 S.E.2d at 903–04.

38. *Id.* at 324, 736 S.E.2d at 904. The Commonwealth entered a nolle prosequi in the home invasion robbery case because the victim refused to testify. *Id.*

39. *Id.*

40. *Id.* at 326, 736 S.E.2d at 905 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)) (internal quotation marks omitted).

41. *Id.* at 326–27, 736 S.E.2d at 906.

42. *Id.* at 327, 736 S.E.2d at 906 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)) (internal quotation marks omitted).

cross-examining his accusers against the prosecution's interests in denying confrontation.<sup>43</sup> The court stated the tests were not mutually exclusive and either could be applied depending upon the circumstances.<sup>44</sup> The court concluded the reliability test was satisfied because the detective's hearsay testimony was "circumstantially corroborated by evidence emanating from [other] sources," and statements contained in the telephone calls were either not hearsay or came within its well-recognized exceptions.<sup>45</sup> The court also determined the balancing test was satisfied based upon evidence that Henderson intimidated the witnesses.<sup>46</sup> The court thus held that the evidence presented at the revocation hearing, taken as a whole, provided "good cause" for denying Henderson his Fourteenth Amendment confrontation rights.<sup>47</sup>

The Court of Appeals of Virginia declined to consider *Henderson's* balancing test in *Blunt v. Commonwealth*, a case involving the use of hearsay evidence at sentencing.<sup>48</sup> In *Blunt*, the court determined that *Henderson* applied only to revocation proceedings, instead holding that *Moses v. Commonwealth* controlled.<sup>49</sup> At *Blunt's* sentencing hearing on charges of possessing cocaine and driving as a habitual offender, the Commonwealth presented evidence that he had engaged in another drug transaction with a confidential informant following his conviction on the charges for which he was being sentenced.<sup>50</sup> The defendant objected on hearsay grounds because the informant was not in court and the police officer who testified about the drug sale had not seen it firsthand, but acquired second-hand knowledge of the sale after speaking with the informant and watching a video of the sale.<sup>51</sup> The court of appeals concluded the officer's testimony in *Blunt* was sufficiently reliable to be admissible.<sup>52</sup>

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43. *Id.* at 327–28, 736 S.E.2d at 906.

44. *Id.* at 328, 736 S.E.2d at 906.

45. *Id.* at 330–31, 736 S.E.2d at 908.

46. *Id.* at 331, 736 S.E.2d at 908.

47. *Id.*

48. 62 Va. App. 1, 9–10, 741 S.E.2d 56, 60 (2013).

49. *Id.* at 3, 9, 741 S.E.2d at 57, 60 (citing *Henderson*, 285 Va. at 321, 736 S.E.2d at 903; *Moses v. Commonwealth*, 27 Va. App. 293, 498 S.E.2d 451 (1998)).

50. *Id.* at 3–4, 741 S.E.2d at 57.

51. *Id.* at 4, 7, 741 S.E.2d at 57–59.

52. *Id.* at 13, 741 S.E.2d at 62.

## 5. Hearsay

In *Godoy v. Commonwealth*, the Court of Appeals of Virginia held that records generated solely by computer fall outside the hearsay rule and are admissible if reliable.<sup>53</sup> In *Godoy*, the Commonwealth introduced the defendant's cell phone records to refute the defendant's claim that he engaged in consensual sex with the victim.<sup>54</sup> A telephone company representative testified he was the custodian of the records, but no human person had been involved in creating them.<sup>55</sup> The trial court overruled the defendant's objection that the Commonwealth had not established that the records came within the business records exception to the hearsay rule.<sup>56</sup> The court of appeals held that hearsay principles did not apply to records "generated without human input" and the admissibility of the records depended upon their reliability.<sup>57</sup> Finding the records to be sufficiently reliable, the court concluded that they were properly admitted into evidence.<sup>58</sup>

## 6. Expert Testimony

Recently, several cases concerning the use of expert testimony have made their way to the Court of Appeals of Virginia. In *Burnette v. Commonwealth*, the defendant was convicted of felony child abuse following the death of her eight-month-old daughter from severe head trauma.<sup>59</sup> Burnette's theory of defense was that her boyfriend injured the child while she was absent from the home.<sup>60</sup> On appeal, Burnette argued that the trial court should have allowed her attorney to cross-examine an expert witness about specific scientific literature that profiled an abusive head trauma perpetrator as a white male, the first person to call 911, and the last person with the victim—all characteristics that fit her boyfriend.<sup>61</sup> The court of appeals held the trial court properly disallowed this line of questioning because both pediatricians

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53. 62 Va. App. 113, 122, 742 S.E.2d 407, 412 (2013).

54. *Id.* at 117–18, 122–23, 742 S.E.2d at 409–10, 412.

55. *Id.* at 117, 742 S.E.2d at 409–10.

56. *Id.* at 118, 742 S.E.2d at 410.

57. *Id.* at 122, 742 S.E.2d at 412.

58. *Id.*

59. 60 Va. App. 462, 466–68, 729 S.E.2d 740, 742, 751 (2012).

60. *Id.* at 467, 469, 729 S.E.2d at 742–43.

61. *Id.* at 482, 729 S.E.2d at 749.

were experts only in pediatrics, not head trauma perpetrators, and thus lacked “sufficient knowledge, skill, or experience to render [them] competent” on the issue.<sup>62</sup>

In *Earnest v. Commonwealth*, the defendant was convicted of murdering his estranged wife, who died from a gunshot wound to the head.<sup>63</sup> A typewritten note found next to her body contained two latent fingerprints, which were identified as the defendant’s, but there were no fingerprints of the victim.<sup>64</sup> The defendant proffered a law school evidence professor to testify about academic evaluations of various studies on fingerprint analysis.<sup>65</sup> While the proffered witness was not a fingerprint examiner, she frequently published articles on the history and use of fingerprint identification.<sup>66</sup> If permitted to testify, she would have said there was no statistical or clinical basis for claiming a partial latent print can be matched to a known print using the methods described by the Commonwealth’s expert witnesses.<sup>67</sup> The trial court refused to allow this testimony and the defendant appealed.<sup>68</sup>

The court of appeals held that the proffered testimony would have been hearsay and would not have refuted the conclusions reached by the Commonwealth’s expert witness.<sup>69</sup> The court observed that Virginia Code section 8.01-401.1—“which permits an expert to base his opinion on facts made known or perceived by him at or before trial, whether admissible in themselves or not, provided they are facts of a type normally relied on by other experts in the field”—is limited to civil cases and has not been expanded to criminal prosecutions.<sup>70</sup>

In *Justiss v. Commonwealth*, the defendant was charged with entering a bank armed with a deadly weapon with the intent to commit larceny.<sup>71</sup> During trial, the prosecution called a police de-

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62. *Id.* at 483–84, 729 S.E.2d at 749–50 (quoting *Mohajer v. Commonwealth*, 40 Va. App. 312, 320, 579 S.E.2d 359, 363 (2003)).

63. 61 Va. App. 223, 224–25, 734 S.E.2d 680, 681 (2012).

64. *Id.* at 225, 734 S.E.2d at 681.

65. *Id.*

66. *Id.* at 225–26, 734 S.E.2d at 681–82.

67. *Id.* at 226, 734 S.E.2d at 682.

68. *Id.* at 226–27, 734 S.E.2d at 682.

69. *Id.* at 228–29, 734 S.E.2d at 683.

70. *Id.* at 229, 734 S.E.2d at 683 (quoting *Simpson v. Commonwealth*, 227 Va. 557, 566, 318 S.E.2d 386, 391 (1984)) (internal quotation marks omitted).

71. 61 Va. App. 261, 265, 734 S.E.2d 699, 701 (2012).

tective to testify as an expert in firearms.<sup>72</sup> When asked whether the BB gun carried by the defendant was “a deadly weapon,” the court sustained an objection made by the defense, but allowed the detective to testify that the gun had “the capacity to cause serious bodily injury or death.”<sup>73</sup> On appeal, the Court of Appeals of Virginia held the detective should not have been allowed to testify as a firearms expert because a BB gun is not a firearm, but found the error to be harmless given that the witness demonstrated sufficient knowledge of BB guns to have qualified him as an expert on that specific subject.<sup>74</sup> Despite this finding, the case was ultimately reversed and remanded because the detective’s testimony that the weapon had the capacity to cause serious bodily injury or death elicited an impermissible opinion on the ultimate issue in the case, which invaded the province of the jury.<sup>75</sup>

## 7. Proof of Multiple Convictions

In a prosecution for possession of a firearm by a person previously convicted of a violent felony, in violation of Virginia Code section 18.2-308.2(A), the Supreme Court of Virginia held in *Boone v. Commonwealth* that the Commonwealth was not limited to proving only one prior violent felony.<sup>76</sup> At Boone’s jury trial, the Commonwealth offered evidence of Boone’s five prior convictions—one for robbery and four for burglary—each of which qualified as a violent felony.<sup>77</sup> Boone objected, contending the statutory language limited the proof to only one prior conviction and that admitting more than one was cumulative and prejudicial.<sup>78</sup>

The supreme court concluded that while the article “a” in Virginia Code section 18.2-308.2(A) requires proof of one violent felony, it does not limit the evidence the Commonwealth may use as proof, as a jury might not be satisfied with the evidence upon which the Commonwealth relied.<sup>79</sup> Additionally, one or more of

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72. *Id.* at 267, 734 S.E.2d at 702.

73. *Id.* at 269–70, 734 S.E.2d at 703.

74. *Id.* at 271–72, 734 S.E.2d at 704.

75. *Id.* at 275, 734 S.E.2d at 706.

76. 285 Va. 597, 599, 603, 740 S.E.2d 11, 12, 14 (2013).

77. *Id.* at 599, 740 S.E.2d at 12.

78. *Id.*

79. *Id.* at 601, 740 S.E.2d at 13; see *Pittman v. Commonwealth*, 17 Va. App. 33, 35–36, 434 S.E.2d 694, 696 (1993) (finding that where proof of one or more prior convictions is necessary, “the Commonwealth [i]s not obliged to have faith that the jury would be satis-

the convictions used as evidence might be vacated later in an appellate or collateral proceeding, which would then affect “the integrity of the conviction being sought.”<sup>80</sup> The court noted, though, that the Commonwealth did not have “unfettered license to admit every relevant conviction of a serial criminal,” as the trial court maintains discretion to exclude repetitious and cumulative evidence.<sup>81</sup>

## 8. Withdrawal of Guilty Plea

The Court of Appeals of Virginia has continued to define the circumstances under which defendants may or may not withdraw their guilty pleas. In *Branch v. Commonwealth*, the defendant entered an *Alford* plea after being charged with the rape of a mentally incapacitated adult.<sup>82</sup> Under the terms of his plea agreement, Branch’s active sentence was not to exceed fifteen years of incarceration.<sup>83</sup> Although Branch told the trial court during the plea colloquy that it was in his “best interests” to plead guilty, he moved to withdraw the plea before he was sentenced.<sup>84</sup> During a hearing on this motion, Branch testified that he had a defense to the charge and that his trial attorneys told him he would get a forty-year sentence if he did not take the plea.<sup>85</sup> The trial court denied the motion, stating Branch “took a look at what the consequences might be after he pled guilty and had buyer’s remorse.”<sup>86</sup>

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fied with any particular one or more of the items of proof,” and is “entitled to utilize its entire arsenal”).

80. *Boone*, 285 Va. at 601, 740 S.E.2d at 13; see, e.g., *Conley v. Commonwealth*, 284 Va. 691, 692–94, 733 S.E.2d 927, 928–29 (2012) (invalidating a defendant’s third-offense driving under the influence (DUI) conviction because a previously pending habeas corpus petition resulted in the dismissal of his second DUI conviction); *Rushing v. Commonwealth*, 284 Va. 270, 279–81, 726 S.E.2d 333, 338–39 (2012) (dismissing a defendant’s conviction after the appellate court held evidence had been improperly admitted at trial and remaining evidence in the record was insufficient to sustain conviction).

81. *Boone*, 285 Va. at 602, 740 S.E.2d at 13.

82. 60 Va. App. 540, 542–43, 729 S.E.2d 777, 778–79 (2012). In entering an *Alford* plea, a defendant maintains his innocence, but acknowledges the Commonwealth’s evidence is sufficient to convict him and that pleading guilty is in his best interest. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); see *United States v. Alston*, 611 F.3d 219, 223 (4th Cir. 2010) (explaining what an *Alford* plea is and under what circumstances a defendant would take an *Alford* plea). An *Alford* plea has the same effect as a guilty plea. *Alford*, 400 U.S. at 37.

83. *Branch*, 60 Va. App. at 542–43, 729 S.E.2d at 778–79 (2012).

84. *Id.* at 543–44, 729 S.E.2d at 779 (internal quotation marks omitted).

85. *Id.* at 544, 729 S.E.2d at 779.

86. *Id.*

The court of appeals reiterated the two-part test to be applied when the withdrawal motion is made before sentencing: the motion is made in good faith, and the proffered defense is reasonable, rather than dilatory or formal.<sup>87</sup> In affirming the judgment below, the court concluded the trial court did not err in finding that Branch failed to act in good faith and found it unnecessary to address whether he presented a reasonable defense in support of the motion.<sup>88</sup>

In *Booker v. Commonwealth*, another case in which the defendant moved to withdraw his guilty plea before he was sentenced, the Court of Appeals of Virginia rejected the defendant's claim that he had been under duress when he entered his plea and had a reasonable defense because the evidence against him was circumstantial.<sup>89</sup> As part of a plea agreement, the Commonwealth agreed to reduce Booker's drug distribution charge from a third offense to a first offense and nolle prosequi two firearm offenses.<sup>90</sup> The court of appeals concluded the record did not show Booker entered his plea unadvisedly or under duress, reasoning that counsel's advice was an appropriate resolution of the case, sparing Booker a lengthy mandatory minimum sentence.<sup>91</sup>

The court of appeals also determined Booker's proffered defense was "merely formal" in that it lacked substance.<sup>92</sup> Whether a defense is adequate is fact specific.<sup>93</sup> Booker's defense was not supported by any facts other than that the drugs found by police were not on his person and the apartment where they were found had been leased by another person; however, Booker admitted staying at the apartment and investigators later recovered his DNA from a gun seized in the bedroom.<sup>94</sup> Neither the fact that the evidence of guilt was circumstantial nor the "bare possibility" a

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87. *Id.* at 546, 729 S.E.2d at 780 (citing *Bottoms v. Commonwealth*, 281 Va. 23, 32–33, 704 S.E.2d 406, 412 (2011); *Justus v. Commonwealth*, 274 Va. 143, 153, 645 S.E.2d 284, 288 (2007); *Parris v. Commonwealth*, 189 Va. 321, 324–25, 52 S.E.2d 872, 874 (1949)).

88. *Id.* at 549, 729 S.E.2d at 782.

89. 61 Va. App. 323, 335–37, 734 S.E.2d 729, 735–36 (2012).

90. *Id.* at 327, 734 S.E.2d at 731.

91. *Id.* at 333, 336–37, 734 S.E.2d at 734–36.

92. *Id.* at 334, 734 S.E.2d at 734 (internal quotation marks omitted).

93. *Id.*

94. *Id.* at 328, 335, 734 S.E.2d at 731, 735.

juror or jury would decide to acquit Booker were valid grounds for allowing Booker to withdraw his plea.<sup>95</sup>

When a defendant moves to withdraw his guilty plea after sentencing, however, the manifest injustice standard, set forth in Virginia Code section 19.2-296, applies, as the Court of Appeals of Virginia held in *Howell v. Commonwealth*.<sup>96</sup> Howell, who was convicted of grand larceny, asserted that the trial court abused its discretion in denying the motion to withdraw his *Alford* plea because he had an affirmative defense and he was not mentally stable when he entered the plea.<sup>97</sup>

The court of appeals rejected Howell's first assertion, holding that the existence of an affirmative defense only applied prior to sentencing and that a post-sentencing motion to withdraw was governed by the "more stringent manifest injustice standard."<sup>98</sup> The court of appeals further held that the record, including the extensive original plea colloquy and testimony provided by Howell and his trial attorney at the hearing on the motion to withdraw, did not support Howell's claim of mental instability.<sup>99</sup> Finally, the court noted the Commonwealth would have been prejudiced if Howell had been allowed to withdraw his plea because a material witness would not have been available to testify at a new trial.<sup>100</sup> Finding Howell did not establish the requisite manifest injustice, the court of appeals affirmed the denial of Howell's motion to withdraw his guilty plea.<sup>101</sup>

In *Pritchett v. Commonwealth*, the Court of Appeals of Virginia addressed withdrawal of a plea made pursuant to Supreme Court of Virginia Rule 3A:8(c)(1)(B).<sup>102</sup> The defendant was charged with

95. *Id.* at 336–37, 734 S.E.2d at 735.

96. 60 Va. App. 737, 745–46, 732 S.E.2d 722, 726 (2012). Section § 19.2-296 provides in pertinent part that the trial court may allow a criminal defendant to withdraw his guilty plea within twenty-one days after entry of a final order "to correct manifest injustice." VA. CODE ANN. § 19.2-296 (Repl. Vol. 2008 & Cum. Supp. 2013). See *Johnson v. Anis*, 284 Va. 462, 465–66, 731 S.E.2d 914, 915–16 (2012) (holding that where a habeas corpus petitioner alleges his trial counsel was ineffective in seeking withdrawal of his guilty plea, the correct standard to apply is "manifest injustice" under section 19.1-296, rather than the more lenient standard set forth in *Justus v. Commonwealth*, 274 Va. 143, 153, 645 S.E.2d 284, 288 (2007), which applies only before the sentence has been imposed).

97. *Howell*, 60 Va. App. at 747–48, 732 S.E.2d at 727.

98. *Id.* (internal quotation marks omitted).

99. *Id.* at 748–49, 732 S.E.2d at 727–28.

100. *Id.* at 749, 732 S.E.2d at 728.

101. *Id.*

102. 61 Va. App. 777, 780, 739 S.E.2d 922, 924 (2013); see VA. SUP. CT. R. 3A:8(c) (Repl.

statutory rape, forcible sodomy, and aggravated sexual battery against a minor child; if convicted, he faced multiple life sentences plus twenty years in prison.<sup>103</sup> He accepted the Commonwealth's offer to recommend an eight-year sentence if he pled guilty to the offenses.<sup>104</sup> The plea agreement provided that the recommendation was not binding on the trial court and that, if the court did not accept it, the defendant had no right to withdraw his guilty plea.<sup>105</sup> During the plea colloquy, the trial court advised the defendant it could impose a greater sentence.<sup>106</sup> After hearing a summary of the evidence, the court informed Pritchett his crimes warranted a more severe sentence.<sup>107</sup> Four months later, Pritchett moved to withdraw his guilty plea, asserting he had entered his plea inadvisedly and had a reasonable defense that the victim was not a credible witness.<sup>108</sup>

The court of appeals determined that because the defendant's plea was entered under Rule 3A:8(c)(1)(B), the statements he made during the colloquy were factors the trial court could consider in determining whether the plea had been entered inadvisedly.<sup>109</sup> Thus, considering the totality of the record, the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.<sup>110</sup>

## B. Sentencing

### 1. Concurrent Mandatory Minimum

In *Brown v. Commonwealth*, the Supreme Court of Virginia held that a trial court has discretion to sentence a defendant convicted on three charges of use or display of a firearm in the com-

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Vol. 2013) (allowing the Commonwealth and the defendant to enter into a plea agreement, following which, the attorney for the Commonwealth may make a recommendation for a particular sentence, but such recommendation is not binding on the court).

103. *Pritchett*, 61 Va. App. at 780–81, 739 S.E.2d at 924.

104. *Id.* at 780, 739 S.E.2d at 924.

105. *Id.* at 781–82, 739 S.E.2d at 924.

106. *Id.* at 782–83, 739 S.E.2d at 925.

107. *Id.* at 783, 739 S.E.2d at 925.

108. *Id.* at 780, 784, 739 S.E.2d at 924, 925–26.

109. *Id.* at 791–92, 739 S.E.2d at 929; *cf.* *Justus v. Commonwealth*, 274 Va. 143, 154, 645 S.E.2d 284, 289 (2007) (holding that in determining whether a defendant should be allowed to withdraw his guilty plea before sentencing pursuant to Virginia Code section 19.2-296, admissions made by the defendant during plea colloquy are not relevant factors).

110. *Pritchett*, 61 Va. App. at 793, 739 S.E.2d at 930.

mission of a felony to concurrent mandatory minimum sentences.<sup>111</sup> The court noted that although Virginia Code section 18.2-53.1 provides that the prescribed mandatory minimum punishment for the offense of use or display of a firearm in the commission of a felony is “separate and apart from, and . . . made to run consecutively with, any punishment received for the commission of the primary felony,” the statute “does not specifically prohibit multiple sentences for use or display of a firearm from being run concurrently with each other.”<sup>112</sup> The supreme court further determined that nothing in the language of Virginia Code section 18.2-12.1, which defines “mandatory minimum” punishment, precluded imposing concurrent sentences.<sup>113</sup>

Similarly, in *Commonwealth v. Jefferson*, the Court of Appeals of Virginia held the mandatory minimum sentences imposed for the defendant’s six convictions for production of child pornography, in violation of Virginia Code section 18.2-374.1(C)(1), could run concurrently.<sup>114</sup> The court concluded the plain language of sections 18.2-12.1 and 18.2-374.1(C)(1) did not require that the mandatory minimum sentences be served consecutively, as the General Assembly, if it had so intended, could have explicitly provided that, as it had in other criminal statutes.<sup>115</sup>

## 2. Exceeding Statutory Maximum

In *Gordon v. Commonwealth*, the Court of Appeals of Virginia made clear that when a trial court imposes a sentence exceeding the statutory maximum, the proper remedy on appeal is to remand the case for resentencing.<sup>116</sup> The court rejected the defendant’s contention that he was entitled to a new trial, and also found unpersuasive the Commonwealth’s argument that the appellate court could void the excess sentence under the theory that the trial court had intended to impose the maximum sentence al-

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111. 284 Va. 538, 541, 545, 733 S.E.2d 638, 639, 641 (2012). The supreme court’s holding expressly overruled a portion of the decision rendered in *Bullock v. Commonwealth*, 48 Va. App. 359, 631 S.E.2d 334 (2006). *Brown*, 284 Va. at 545, 733 S.E.2d at 641–42.

112. *Id.* at 543, 733 S.E.2d at 640.

113. *Id.* at 543–44, 733 S.E.2d at 640–41.

114. 60 Va. App. 749, 753, 759, 732 S.E.2d 728, 730, 733 (2012).

115. *Id.* at 757–59, 732 S.E.2d at 732–33.

116. 61 Va. App. 682, 686, 690, 739 S.E.2d 276, 278, 280 (2013); see *Rawls v. Commonwealth*, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009) (stating a sentence in violation of the prescribed statutory range is void ab initio).

lowed for the offense, but had been mistaken in what that sentence was.<sup>117</sup> As the trial court was not required to impose the maximum sentence, the appellate court could not speculate as to what sentence the trial court intended.<sup>118</sup>

### 3. Deferred Disposition

In *Kelley v. Stamos*, the Supreme Court of Virginia held that although a Chief Deputy Commonwealth's Attorney had standing to file a mandamus petition in circuit court to compel a general district court judge to sentence an individual on a charge of driving while intoxicated ("DWI"), the relief requested was not available.<sup>119</sup> The defendant in the underlying criminal case, whom the supreme court held was not a necessary party to the appeal, pled guilty in 2009 to driving while intoxicated.<sup>120</sup> The general district court judge continued the case until August 2, 2011, when he found the defendant guilty of reckless driving.<sup>121</sup>

The supreme court stated the record did not show the judge had accepted a guilty plea to the DWI charge and thus he retained authority to amend the warrant.<sup>122</sup> The 2011 order was not void ab initio because the judge had the power to render his judgment.<sup>123</sup> However, the order became final twenty-one days after the district court issued it and could not be modified later because the court no longer had jurisdiction over the case.<sup>124</sup> The supreme court further held that mandamus is a prospective remedy and cannot be used "to undo an act already done."<sup>125</sup>

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117. *Gordon*, 61 Va. App. at 686–88, 739 S.E.2d at 278–79. The trial court sentenced the defendant to ten years in prison for unlawful wounding, but the statutory maximum is five years. *Id.* at 686, 739 S.E.2d at 278.

118. *Id.* at 689–90, 739 S.E.2d at 279–80. The court distinguished *Hines v. Commonwealth*, 59 Va. App. 567, 721 S.E.2d 792 (2012), which held no new sentencing hearing was necessary where the only punishment provided was a mandatory sentence. *Gordon*, 61 Va. App. at 688–89, 739 S.E.2d at 279.

119. 285 Va. 68, 71–72, 80, 737 S.E.2d 218, 219–20, 224 (2013).

120. *Id.* at 71, 79, 737 S.E.2d at 219, 224.

121. *Id.* at 71, 737 S.E.2d at 219.

122. *Id.* at 79, 737 S.E.2d at 223–24.

123. *Id.* at 77–78, 737 S.E.2d at 223.

124. *Id.* at 79, 737 S.E.2d at 224.

125. *Id.* (quoting *In re Commonwealth*, 278 Va. 1, 9, 677 S.E.2d 236, 239 (2009)) (internal quotation marks omitted).

#### 4. Expungement

A person charged with committing a crime may later have the charge expunged from the police and court records if he is “acquitted, . . . [a] nolle prosequi is taken or the charge is otherwise dismissed.”<sup>126</sup> In *Dressner v. Commonwealth*, the Supreme Court of Virginia held that a charge for possession of marijuana, which the Commonwealth amended to reckless driving prior to a hearing in general district court, was “otherwise dismissed” for purposes of expungement.<sup>127</sup> Relying on *Necaise v. Commonwealth*,<sup>128</sup> the circuit court denied the expungement petition on the basis that it would “distort” the record by also expunging the record of the reckless driving conviction.<sup>129</sup> The supreme court disagreed, stating that distortion of the record “is not a statutory basis that makes a petitioner ineligible to seek expungement of records.”<sup>130</sup> The court further distinguished *Necaise*, noting that the defendant pled guilty to charges that were lesser-included offenses of the original charges.<sup>131</sup> Consequently, the charges of which Necaise was convicted came within the felony charges for which he was arrested, and therefore he was not an “innocent citizen” entitled to expungement.<sup>132</sup> Dressner, however, was convicted of a “completely separate and unrelated charge,” and thus was innocent of the possession charge and eligible for expungement.<sup>133</sup>

#### C. Appeal

##### 1. Decision by Equally Divided Appellate Court

In *Conley v. Commonwealth*, the Supreme Court of Virginia held that the Court of Appeals of Virginia, sitting en banc, could not reverse a three-judge panel decision of that court by an equal-

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126. VA. CODE ANN. § 19.2-392.2 (Cum. Supp. 2013).

127. 285 Va. 1, 3–4, 736 S.E.2d 735, 735–36 (2013) (internal quotation marks omitted).

128. 281 Va. 666, 669, 708 S.E.2d 864, 866 (2011).

129. *Dressner*, 285 Va. at 4, 736 S.E.2d at 736 (internal quotation marks omitted).

130. *Id.* at 7, 736 S.E.2d at 738 (citing VA. CODE ANN. § 19.2-392.2(A) (Cum. Supp. 2013)).

131. *Id.* at 5–6, 736 S.E.2d at 737.

132. *Id.* at 6, 736 S.E.2d at 737 (quoting *Necaise*, 281 Va. at 670, 708 S.E.2d at 866) (internal quotation marks omitted).

133. *Id.* at 6–7, 736 S.E.2d at 737–38.

ly divided vote.<sup>134</sup> The three-judge panel, with one judge dissenting, granted Conley's petition for a writ of actual innocence, and the court of appeals then granted the Commonwealth's petition for en banc review.<sup>135</sup> Upon rehearing, five judges of the court of appeals voted to grant the writ and five voted to refuse it.<sup>136</sup> The court then entered an order dismissing the writ without any further opinion.<sup>137</sup> Citing Virginia Code section 17.1-402(E), the supreme court held that in all cases decided by the court of appeals en banc, "the concurrence of at least a majority of the judges sitting" is required to reverse a judgment.<sup>138</sup> The court concluded the en banc decision was of no effect and reinstated the panel decision.<sup>139</sup>

## 2. Notice of Appeal

In *Evans v. Commonwealth*, the Court of Appeals of Virginia dismissed the defendant's appeal because his notice of appeal did not sufficiently identify the conviction being appealed.<sup>140</sup> Evans was indicted separately for felony failure to appear and perjury, which were unrelated crimes that occurred on different dates.<sup>141</sup> The offenses were consolidated for trial but retained separate case numbers.<sup>142</sup> Evans intended to appeal the perjury conviction, but the notice of appeal referenced only the failure to appear conviction and contained no information regarding the perjury case.<sup>143</sup> The court of appeals held a procedural defect in the notice was not necessarily a fatal error and could be waived, but the notice must "adequately identif[y] the case to be appealed."<sup>144</sup> The court concluded the error in Evans's notice was a substantive de-

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134. 284 Va. 691, 693–94, 733 S.E.2d 927, 928–29 (2012) (citing VA. CODE ANN. § 17.1-402(E) (Repl. Vol. 2010 & Cum. Supp. 2013)).

135. *Id.* at 693, 733 S.E.2d at 928.

136. *Id.*

137. *Id.*

138. *Id.* at 694, 733 S.E.2d at 928 (quoting VA. CODE ANN. § 17.1-402(E) (Repl. Vol. 2010 & Cum. Supp. 2013)).

139. *Id.*, 733 S.E.2d at 929.

140. 61 Va. App. 339, 345, 735 S.E.2d 252, 255 (2012).

141. *Id.* at 341, 735 S.E.2d at 253.

142. *Id.*

143. *Id.*

144. *Id.* at 345, 735 S.E.2d at 254–55 (alteration in original) (quoting *Roberson v. Commonwealth*, 279 Va. 396, 407, 689 S.E.2d 706, 712–13 (2010)) (internal quotation marks omitted).

fect that deprived the court of active jurisdiction over the appeal.<sup>146</sup>

### 3. Virginia Supreme Court Rule 5A:12

Rule 5A:12(c)(1) requires that a petition for appeal contain “Assignments of Error’ th[at] . . . list, clearly and concisely . . . the specific errors in the rulings below upon which the party intends to rely.”<sup>146</sup> In addition, each assignment of error must include an “exact reference to the pages of the transcript, written statement of facts, or record where the alleged error has been preserved.”<sup>147</sup> The rule’s purpose is to give the appellate court notice that the party has adequately preserved the alleged error.<sup>148</sup> Rule 5A:12(c)(1)(ii) further provides that the petition shall be dismissed if the assignments of error are “insufficient or otherwise fail to comply with the [rule’s] requirements.”<sup>149</sup>

In cases addressing Rule 5A:12(c)(1), the Court of Appeals of Virginia, sitting en banc, declined to find that automatic dismissal was the appropriate remedy for failure to comply with the rule.<sup>150</sup> In *Brooks v. Commonwealth*, the court determined the plain text of Rule 5A:12(c)(1) did not require dismissal because the language regarding dismissal for noncompliance applied only to assignments of error and not to referencing where the error was preserved at trial.<sup>151</sup> The court further stated automatic dismissal would unfairly harm litigants and disrupt “the timely, efficient adjudication of justice.”<sup>152</sup>

Accordingly, in *Chatman v. Commonwealth*, the court of appeals allowed Chatman to amend his petition for appeal, even

145. *Id.*, 735 S.E.2d at 255.

146. VA. SUP. CT. R. 5A:12(c)(1) (Repl. Vol. 2013).

147. *Id.*

148. *See Brooks v. Commonwealth*, 61 Va. App. 576, 580–81, 739 S.E.2d 224, 226 (2013).

149. VA. SUP. CT. R. 5A:12(c)(1)(ii) (Repl. Vol. 2013).

150. *Brooks*, 61 Va. App. at 583, 739 S.E.2d at 227.

151. *See id.* at 583–84, 739 S.E.2d at 227–28. The court of appeals dismissed Brooks’ appeal, however, because he failed to correct the defect despite being given several opportunities to do so. *Id.* at 586, 739 S.E.2d at 229. He also did not move to amend his petition. *Id.* Brooks’ first petition had no references to the record, and his second petition referenced the entire transcript, including many pages that were irrelevant to the issues presented. *Id.* at 582, 586, 739 S.E.2d at 227, 229.

152. *Id.* at 583, 739 S.E.2d at 227.

though the deadline for filing had passed.<sup>153</sup> The court stated that “[n]either Code § 17.1-408 nor Rule 5A:12(a) specifies that the petition for appeal must be free of all defects in order to be timely filed.”<sup>154</sup> The court further opined that neither the rule nor the statute precluded it from allowing an appellant to correct his defective petition by designating where in the record the alleged error was preserved.<sup>155</sup> The court held *Davis v. Commonwealth* was not controlling because *Davis* concerned a defective assignment of error, not the separate requirement to identify portions of the record.<sup>156</sup> The court thus held it was not deprived of “active jurisdiction” over the appeal and affirmed Chatman’s convictions for abduction and aggravated malicious wounding.<sup>157</sup>

In *Whitt v. Commonwealth*, the Court of Appeals of Virginia allowed the appellant to amend his assignment of error to comply with Rule 5A:12(c)(1)(ii) because the amendment did not broaden the scope of the original assignment of error, was consistent with the arguments appellant made at trial, and did not prejudice the Commonwealth.<sup>158</sup> The court of appeals held that its authority derived from the common law allowed it to consider amendments to timely filed, but defective, pleadings.<sup>159</sup> The court distinguished *Davis* on the ground that *Davis* did not hold an appellate court had no remedy but to dismiss a defective petition, and the case had not addressed whether a court had authority to permit an amendment to an assignment of error because *Davis* had not moved to amend.<sup>160</sup>

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153. 61 Va. App. 618, 628–29, 739 S.E.2d 245, 250 (2013). Chatman’s initial petition contained no references to the record; he did not comply with the clerk’s request to correctly amend the petition, but he did comply with the court’s order to do so. *Id.* at 624–25, 739 S.E.2d at 248.

154. *Id.* at 627, 739 S.E.2d at 249.

155. *Id.*

156. *Id.* at 627–28, 739 S.E.2d at 249 (citing *Davis v. Commonwealth*, 282 Va. 339, 717 S.E.2d 796 (2011) (per curiam)).

157. *Id.* at 628, 631, 739 S.E.2d at 250–51.

158. 61 Va. App. 637, 659, 739 S.E.2d 254, 265 (2013). *But see* *Coleman v. Commonwealth*, 60 Va. App. 618, 621, 731 S.E.2d 22, 23 (2012) (following *Davis v. Commonwealth*, 282 Va. 339, 717 S.E.2d 796 (2011) and dismissing an appeal in a panel decision because the defendant’s assignment of error did not challenge the trial court’s actual ruling).

159. *Whitt*, 61 Va. App. at 647–48, 739 S.E.2d at 259.

160. *Id.* at 652–53, 739 S.E.2d at 261–62.

#### 4. Virginia Supreme Court Rule 5A:20

Rule 5A:20(e) states that an appellant's opening brief must contain "argument (including principles of law and authorities) relating to each assignment of error."<sup>161</sup> In *Mitchell v. Commonwealth*, the Court of Appeals of Virginia held the defendant, who had been convicted of using a firearm in the commission of robbery, waived appellate review of his challenge to the sufficiency of the evidence because he failed to cite sufficient legal authority in his brief to support his argument.<sup>162</sup> The defendant's two-page argument cited only two authorities—a case stating the standard of review and the statute pertaining to the offense at issue—and failed to cite or discuss any of the several cases relevant to his argument, which "[e]ven the most cursory research" would have identified.<sup>163</sup> Moreover, defense counsel waived oral argument, "precluding an opportunity . . . to supplement the glaring deficiencies of the brief."<sup>164</sup> The court noted that although failing to comply with Rule 5A:20(e) is not jurisdictional, the absence of any pertinent authority in *Mitchell's* case was so significant, the court was "compelled" to find that *Mitchell* waived his right to appellate review and to affirm his conviction.<sup>165</sup>

Rule 5A:20(e) also provides that if the assignment of error was not preserved in the trial court, the brief "shall state why the good cause and/or ends of justice exceptions to Rule 5A:18 are applicable."<sup>166</sup> In *Stokes v. Commonwealth*, the Court of Appeals of Virginia refused to consider the defendant's argument that the ends of justice exception should be applied to his due process claim because the argument was presented for the first time at oral argument.<sup>167</sup> *Stokes* was mistakenly transferred from the local jail to the Department of Corrections before the trial court ruled on *Stokes's* motion to modify his sentence pursuant to Virginia Code section 19.2-303.<sup>168</sup> On appeal, *Stokes* argued for the

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161. VA. SUP. CT. R. 5A:20(e) (Repl. Vol. 2013).

162. 60 Va. App. 349, 351, 354–55, 727 S.E.2d 783, 784, 786 (2012).

163. *Id.* at 353–54, 727 S.E.2d at 785.

164. *Id.*

165. *Id.* at 354–55, 727 S.E.2d at 785–86 (citing *Jay v. Commonwealth*, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008); *Fadness v. Fadness*, 52 Va. App. 833, 851, 667 S.E.2d 857, 866 (2008)).

166. R. 5A:20(e) (Repl. Vol. 2013).

167. 61 Va. App. 388, 397, 736 S.E.2d 330, 335 (2013).

168. *Id.* at 391–92, 736 S.E.2d at 332. *Stokes's* transfer to the Department of Correc-

first time his due process rights had been violated.<sup>169</sup> The court of appeals held Stokes's argument was waived because he could have made it in his opening brief or reply brief, pursuant to Rule 5A:20(e), but had not.<sup>170</sup>

### III. CRIMINAL LAW

#### A. *Constitutional Issues*

##### 1. Search and Seizure

A fresh issue in criminal law is whether warrantless use of global positioning system ("GPS") tracking devices by law enforcement violates the Fourth Amendment's prohibition against unreasonable search and seizures. In *Foltz v. Commonwealth*, police identified Foltz as a registered sex offender who lived and worked in the vicinity of a series of sexual assaults.<sup>171</sup> After discovering that Foltz's prior crimes were similar to the assaults under investigation, police attached a GPS tracking device to the bumper of Foltz's work van while it was parked on a public street outside his house.<sup>172</sup> Days later, data retrieved from the GPS showed the van in close proximity to the location of a recent assault.<sup>173</sup>

The next day, police began shadowing Foltz.<sup>174</sup> Not long into their surveillance, officers saw Foltz get out of his vehicle and follow a woman walking down a sidewalk.<sup>175</sup> Foltz grabbed the woman and quickly pulled her under a nearby tree.<sup>176</sup> The officers rescued the woman and arrested Foltz.<sup>177</sup> Foltz was convicted of abduction with intent to defile and commission of a subsequent violent sexual assault.<sup>178</sup> At trial, the victim testified that once

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tions contravened an order of the trial court to keep him in the Norfolk City jail until the court ruled on his motion. *Id.* at 391, 736 S.E.2d at 332.

169. *Id.* at 396, 736 S.E.2d at 334–35.

170. *Id.* at 397, 736 S.E.2d at 335.

171. 284 Va. 467, 469, 732 S.E.2d 4, 5–6 (2012).

172. *Id.*

173. *Id.* at 470, 732 S.E.2d at 6.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 470–71, 732 S.E.2d at 6–7 (citing VA. CODE ANN. § 18.2-48 (Repl. Vol. 2009

Foltz grabbed her, he covered her mouth with one of his hands and tried to unbutton her pants with his other hand.<sup>179</sup>

Prior to trial and on appeal, Foltz argued that the police—without first obtaining a search warrant—unlawfully installed the GPS device on his vehicle in violation of the Fourth Amendment.<sup>180</sup> As a consequence of this illegal search, Foltz argued that the officers' testimony was inadmissible.<sup>181</sup> As Foltz's appeal was pending, the Supreme Court of the United States decided *United States v. Jones*, holding that "the government's placement of a GPS tracking device on the bumper of a vehicle and its use of that device to monitor the vehicle's movements is a 'classic trespassory search' which, in the absence of a valid search warrant, is a violation of the Fourth Amendment."<sup>182</sup> Applying *Jones*, the Supreme Court of Virginia agreed that the warrantless use of the GPS in Foltz's case constituted an unconstitutional search.<sup>183</sup> The supreme court found, however, that the admission of the officers' testimony was harmless error since their testimony regarding the assault was cumulative of the victim's own testimony.<sup>184</sup>

In *Washington v. Commonwealth*, the Court of Appeals of Virginia considered whether exigent circumstances justified an officer's warrantless entry into the defendant's home.<sup>185</sup> During the investigation of a residential break-in, officers noticed a single set of footprints with a distinct checkered pattern in the fresh snow.<sup>186</sup> The officers then followed the footprints across the street to the front door of a mobile home.<sup>187</sup> After knocking on the trailer's front door and finding it to be ajar, officers feared the trailer was being burglarized and immediately announced their pres-

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& Cum. Supp. 2013); *id.* § 18.2-67.5:3 (Repl. Vol. 2009 & Cum. Supp. 2013)).

179. *Id.* at 471, 732 S.E.2d at 6.

180. *Id.* at 470–72, 732 S.E.2d at 6–7.

181. *Id.* at 470, 732 S.E.2d at 6.

182. *Id.* at 472, 732 S.E.2d at 7 (citing *United States v. Jones*, 565 U.S. \_\_\_, \_\_\_, 132 S. Ct. 945, 954 (2012)).

183. *Id.* The 2012 Virginia General Assembly codified a procedure by which law enforcement officers may obtain a search warrant to install a tracking device on a suspect's vehicle. See Act of Apr. 5, 2012, ch. 636, 2012 Va. Acts 1338 (codified at VA. CODE ANN. § 19.2-56.2 (Cum. Supp. 2013)); Act of Apr. 6, 2012, ch. 679, 2012 Va. Acts 1399 (codified at VA. CODE ANN. § 19.2-56.2 (Cum. Supp. 2013)).

184. *Foltz*, 284 Va. at 473, 732 S.E.2d at 8.

185. 60 Va. App. 427, 434, 437, 728 S.E.2d 521, 525–26 (2012).

186. *Id.* at 432–33, 728 S.E.2d at 524.

187. *Id.* at 433, 728 S.E.2d at 524.

ence.<sup>188</sup> Hearing no answer, the officers entered the trailer and saw a stolen toolbox and shoes matching the footprints in the snow.<sup>189</sup> The officers then obtained and executed a search warrant, finding several stolen items from the burglarized home.<sup>190</sup> Following the search, Washington arrived and acknowledged he lived alone at the residence.<sup>191</sup>

On appeal, Washington argued that the initial entry into his trailer violated the Fourth Amendment.<sup>192</sup> Ordinarily, police cannot enter a home without first securing a search warrant.<sup>193</sup> However, when coupled with a showing of probable cause, there are “several exigencies that may justify a warrantless search of a home.”<sup>194</sup> One of these exigencies is triggered when officers “reasonably believe that the premises have recently been or are being burglarized.”<sup>195</sup> In *Washington*, the court of appeals held that the information known by the officers supported a finding of probable cause and exigent circumstances.<sup>196</sup> Among the circumstances supporting the officers’ suspicions of a burglary in progress were the recent burglary across the street, the fresh footprints in the snow leading from the burglarized home to the trailer, the open trailer door, and the possibility that the reason no one responded to the officers’ announcement was because the burglar had incapacitated its residents.<sup>197</sup> Thus, the court found that the initial warrantless entry did not violate the Fourth Amendment.<sup>198</sup>

In contrast to *Washington*, the Court of Appeals of Virginia found a Fourth Amendment violation following the warrantless

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188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* Washington also implicated himself in the burglary when, without knowing the reason for the officers’ presence, he volunteered that he “hadn’t done anything. He hadn’t broken into anybody’s house.” *Id.* at 434, 728 S.E.2d at 524 (internal quotation marks omitted).

192. *Id.* at 434, 728 S.E.2d at 525.

193. *Id.* at 436, 728 S.E.2d at 526 (citing *Kentucky v. King*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1849, 1856 (2011)) (stating the general rule that “searches and seizures inside a home without a warrant are presumptively unreasonable”).

194. *Id.* at 437, 728 S.E.2d at 526 (quoting *Kentucky v. King*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1849, 1856 (2011)) (internal quotation marks omitted).

195. *Id.* (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 6.6(b), at 470–72 (4th ed. 2004)) (internal quotation marks omitted).

196. *Id.* at 438, 728 S.E.2d at 526.

197. *Id.*, 728 S.E.2d at 526–27.

198. *Id.* at 439, 728 S.E.2d at 527.

search of a home in *Ross v. Commonwealth*.<sup>199</sup> Ross filed a petition in a juvenile and domestic relations court seeking additional visitation with his daughter.<sup>200</sup> That court ordered the local Department of Social Services (“DSS”) “to conduct a ‘home study’ of Ross and to report its findings to the court.”<sup>201</sup> The court’s order “authorized an unannounced visit, but did not authorize the DSS social worker to enter Ross’s residence against his will.”<sup>202</sup>

On the day of the visit, the social worker spoke with Ross in the front yard because Ross would not allow the social worker in his home.<sup>203</sup> During this time, “[a] police officer, viewing the situation from an unmarked police car, saw Ross ‘getting upset and somewhat agitated’ and ‘flaring his arms around.’”<sup>204</sup> The officer called for backup, which arrived at the front of the home shortly thereafter and caused Ross to immediately return to his residence.<sup>205</sup> Officers pursued Ross, and “with weapons drawn, entered Ross’s residence and placed him in handcuffs.”<sup>206</sup> During a protective sweep of the home, officers discovered marijuana and various firearms in plain view.<sup>207</sup>

The court of appeals addressed whether an exception to the warrant requirement existed in Ross’s case.<sup>208</sup> The Commonwealth argued for the application of the emergency exception, based upon “the danger to anybody in the house *once* [the social worker] entered.”<sup>209</sup> The court rejected this argument, finding nothing in the record to support the assumption that the social worker would have entered the house and triggered an emergency situation.<sup>210</sup> The court also rejected the Commonwealth’s assertion of the community-caretaker doctrine, based upon “the officers’ duty to protect both the social worker and any of Ross’s

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199. 61 Va. App. 752, 764, 739 S.E.2d 910, 916 (2013).

200. *Id.* at 757, 739 S.E.2d at 912.

201. *Id.*

202. *Id.*

203. *Id.*, 739 S.E.2d at 913.

204. *Id.* at 758, 739 S.E.2d at 913 (internal citations omitted).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 759, 739 S.E.2d at 913.

209. *Id.* at 762, 739 S.E.2d at 915 (alteration in original) (internal quotation marks omitted).

210. *Id.* at 762–63, 739 S.E.2d at 915.

children within the residence.”<sup>211</sup> The court found no evidence that the social worker needed protection given that he remained outside the home.<sup>212</sup> Additionally, there was no evidence that Ross’s children were in the residence, nor that Ross intended to harm them.<sup>213</sup> Finding that the entry into Ross’s home violated the Fourth Amendment, the court reversed the trial court’s denial of the motion to suppress and remanded to determine the scope of a suppression order.<sup>214</sup>

In another ruling addressing the community-caretaker doctrine, the Court of Appeals of Virginia in *Knight v. Commonwealth* found a Fourth Amendment violation in the warrantless search of a closed container.<sup>215</sup> The item in question was a black backpack Knight carried when he entered a mall security office.<sup>216</sup> Knight told the security officer on duty that he had gotten into a fight with his girlfriend, and that the security guard needed to accompany him to the parking lot to help calm her down.<sup>217</sup> When the two reached the mall exit, they saw that police had arrived.<sup>218</sup> Leaving Knight with the police, the security guard returned to the security office where she noticed Knight’s backpack beside the door.<sup>219</sup> After locking the office door, the security guard walked back to the parking lot and told one of the police officers about the backpack.<sup>220</sup> The officer went to the security office, picked up the backpack, opened it, and saw a firearm.<sup>221</sup>

In denying Knight’s motion to suppress, the trial court found that the officer’s warrantless search of the backpack was a “valid exercise of his ‘community caretaker’ function.”<sup>222</sup> The court of appeals reversed, explaining that “[t]he community caretaker exception requires that an officer have an objectively reasonable belief that his conduct in searching a closed container, such as the backpack here, is necessary to provide aid or to protect members

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211. *Id.* at 763, 739 S.E.2d at 915–16.

212. *Id.* at 764, 739 S.E.2d at 916.

213. *Id.*

214. *Id.* at 764 n.7, 739 S.E.2d at 916 n.7.

215. 61 Va. App. 297, 302, 734 S.E.2d 716, 718–19 (2012).

216. *Id.* at 302–03, 734 S.E.2d at 719.

217. *Id.*

218. *Id.* at 303, 734 S.E.2d at 719.

219. *Id.*

220. *Id.*

221. *Id.* at 304, 734 S.E.2d at 719.

222. *Id.* at 304–05, 734 S.E.2d at 720.

of the public from physical harm.”<sup>223</sup> The court provided three circumstances where the community-caretaker exception would justify an officer’s search: “(1) the protection of the owner’s property while it remained in police custody; (2) the protection of police against claims or disputes concerning lost or stolen property; or (3) protection of the public and the police from physical danger.”<sup>224</sup> The court found no evidence to suggest that a search would have protected the backpack or its contents from theft or damage, protected against claims of stolen property, or protected the police or public from danger.<sup>225</sup> The court therefore held that the trial court erred in denying Knight’s motion to suppress the handgun found in his backpack.<sup>226</sup>

## 2. Stop and Frisk

In *Otey v. Commonwealth*, the Court of Appeals of Virginia addressed whether a partially burned out brake light provided the officer with reasonable, articulable suspicion to stop the defendant’s vehicle for driving with a defective brake light.<sup>227</sup> After the officer stopped Otey’s vehicle based on one-half of the vehicle’s high mount brake light being out, the officer smelled marijuana.<sup>228</sup> When the officer asked about the smell, Otey admitted to possessing marijuana.<sup>229</sup> Prior to trial, Otey moved to suppress the marijuana, arguing it was the fruit of an improper stop.<sup>230</sup>

In order for a traffic stop to be considered reasonable under the Fourth Amendment, “the officer [must] possess[] at least articulable and reasonable suspicion that the vehicle is in violation of a statute or regulation governing the vehicle’s equipment.”<sup>231</sup> The pivotal issue in Otey’s case was whether his brake light was “de-

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223. *Id.* at 306, 315, 734 S.E.2d at 720, 725.

224. *Id.* at 306, 734 S.E.2d at 721.

225. *Id.* at 307, 734 S.E.2d at 721. The court declined to reach the Commonwealth’s argument that Knight abandoned any privacy interest in the backpack. *See id.* at 309–10, 734 S.E.2d at 722–23. Additionally, the court rejected the Commonwealth’s argument that the evidence should not have been suppressed, notwithstanding a Fourth Amendment violation. *See id.* at 313–15, 734 S.E.2d at 724–25.

226. *Id.* at 315, 734 S.E.2d at 725.

227. 61 Va. App. 346, 347–49, 735 S.E.2d 255, 256 (2012).

228. *Id.* at 347–48, 735 S.E.2d at 256.

229. *Id.* at 348, 735 S.E.2d at 256.

230. *Id.*

231. *Id.* at 348–49, 735 S.E.2d at 256 (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).

fective” as that term is defined in Virginia Code section 46.2-1003.<sup>232</sup> Applying its plain meaning, the court determined that “defective” means “faulty, deficient.”<sup>233</sup> As the court explained, “[a] brake light that lights up by only half is faulty and deficient, just as an engine that sputters and lurches is defective, even if it works well enough to enable the driver to reach his destination.”<sup>234</sup> Based upon this reasoning, the court concluded that the officer’s stop of Otey’s vehicle was “based on a reasonable, articulable suspicion that appellant’s vehicle had defective equipment.”<sup>235</sup>

### 3. *Miranda* Rights

In *Kuhne v. Commonwealth*, the Court of Appeals of Virginia considered whether the defendant’s confession “should have been excluded as the fruit of an illegal interrogation under *Miranda v. Arizona* . . . and *Missouri v. Seibert*.”<sup>236</sup> Kuhne entered a police station and announced he “need[ed] to be arrested for [his] actions.”<sup>237</sup> Kuhne then began to weep and presented an unsigned note.<sup>238</sup> The note took responsibility for the death of a woman.<sup>239</sup> After officers escorted Kuhne to an interview room, another officer interviewed Kuhne.<sup>240</sup> Near the beginning of the interview, the officer asked Kuhne if he wrote the note.<sup>241</sup> After Kuhne acknowledged he did, the officer read Kuhne his *Miranda* rights.<sup>242</sup> Kuhne waived his Fifth Amendment rights and confessed to killing his wife.<sup>243</sup>

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232. *Id.* at 349, 735 S.E.2d at 257 (internal quotation marks omitted). Section 46.2-1003 states that “[i]t shall be unlawful for any person to use or have as equipment on a motor vehicle operated on a highway any device or equipment mentioned in § 46.2-1002 which is *defective* or in unsafe condition.” VA. CODE ANN. § 46.2-1003 (Repl. Vol. 2010 & Cum. Supp. 2013) (emphasis added).

233. *Otey*, 61 Va. App. at 350, 735 S.E.2d at 257 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 591 (1981)) (internal quotation marks omitted).

234. *Id.*

235. *Id.* at 352, 735 S.E.2d at 258.

236. 61 Va. App. 79, 82, 733 S.E.2d 667, 668 (2012) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966); *Missouri v. Seibert*, 542 U.S. 600 (2004)).

237. *Id.* (alteration in original) (internal quotation marks omitted).

238. *Id.* at 82–33, 733 S.E.2d at 668–69.

239. *Id.* at 83, 733 S.E.2d at 669.

240. *Id.* at 83–84, 733 S.E.2d at 669.

241. *Id.* at 84, 733 S.E.2d at 669.

242. *Id.*

243. *Id.* at 84–85, 733 S.E.2d at 669–70.

Prior to trial, Kuhne moved to suppress his confession, "arguing that it was obtained in violation of his *Miranda* rights."<sup>244</sup> The trial court denied the motion, finding that Kuhne was not in custody for *Miranda* purposes, and even if he was, the actions of the police did not implicate *Seibert*.<sup>245</sup> On appeal, the court of appeals assumed Kuhne was in custody and should have been issued *Miranda* warnings at the outset of the interrogation.<sup>246</sup> The dispositive issue for the court of appeals was whether the statements Kuhne made after *Miranda* warnings were admissible under *Seibert*.<sup>247</sup> In order to resolve this issue, the court first had to determine the scope of the *Seibert* decision.<sup>248</sup>

*Seibert* involved a deliberate "question first" or "two step" interrogation technique, where police would purposefully withhold *Miranda* warnings, obtain a confession, and then provide the suspect with full warnings and get him to reconfess.<sup>249</sup> "Although five Justices concluded that the suspect's second statement could not be admitted as evidence, no single opinion spoke for the Court."<sup>250</sup> In *Kuhne*, the court of appeals explained that "Justice Kennedy's opinion would apply a form of heightened scrutiny only to those two-step cases in which law enforcement officers deliberately employed a two-step procedure designed to weaken *Miranda*'s protections."<sup>251</sup> Joining a majority of federal<sup>252</sup> and state<sup>253</sup> courts, the court found that Justice Kennedy's concurring opinion represented the holding in *Seibert*.<sup>254</sup>

The court held that "unless police deliberately employ the 'question first' strategy, the admissibility of postwarning state-

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244. *Id.* at 85, 733 S.E.2d at 670.

245. *Id.* at 86, 733 S.E.2d at 670 (citing *Missouri v. Seibert*, 542 U.S. 600 (2004)).

246. *Id.*

247. *Id.*

248. *Id.* at 90, 733 S.E.2d at 672.

249. *See id.* at 88, 733 S.E.2d at 671 (citing *Missouri v. Seibert*, 542 U.S. 600, 609–10 (2004)) (internal quotation marks omitted).

250. *Id.*

251. *Id.* at 91, 733 S.E.2d at 673 (citing *Missouri v. Seibert*, 542 U.S. 600, 621–22 (2004)) (Kennedy, J., concurring)).

252. *Id.* at 90 n.5, 733 S.E.2d at 672 n.5.

253. *Id.* at 90 n.6, 733 S.E.2d at 672 n.6.

254. *Id.* at 91, 733 S.E.2d at 673. ("[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977) (citations omitted) (internal quotation marks omitted))).

ments is governed by *Elstad*.<sup>255</sup> Under *Elstad*, “The relevant inquiry is whether, in fact, the second statement was also voluntarily made.”<sup>256</sup> Applying *Elstad*, the court of appeals found that the statement Kuhne made after *Miranda* was clearly voluntary.<sup>257</sup>

#### 4. *Brady* Material

In *Commonwealth v. Tuma*, the Supreme Court of Virginia wrestled with whether the Commonwealth violated the due process protections of *Brady v. Maryland* “by suppressing evidence in the form of an audio tape recording of an investigative interview with the victim.”<sup>258</sup> The victim, a seven-year-old girl, claimed she was sexually assaulted by Tuma, her stepfather.<sup>259</sup> A police investigator and a child protective services worker with the Department of Social Services (“DSS”) interviewed the victim.<sup>260</sup> As required by DSS regulations, the child protective services worker recorded the interview.<sup>261</sup> A written summary of the interview, but not the recording, was disclosed to defense counsel prior to trial.<sup>262</sup>

At trial, after the child protective services worker confirmed that she recorded the interview and had the audio tape with her in the court room, Tuma’s counsel moved to admit the entire tape into evidence.<sup>263</sup> Since none of the parties nor the trial judge had listened to the tape, the trial judge refused to admit it into evidence.<sup>264</sup> The trial judge nonetheless told defense counsel that he

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255. *Id.* In *Oregon v. Elstad*, the Supreme Court of the United States concluded that “[a] subsequent administration of *Miranda* warnings to a suspect . . . ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.” 470 U.S. 298, 314 (1985).

256. *Kuhne*, 61 Va. App. at 93, 733 S.E.2d at 674 (alteration in original) (quoting *Elstad*, 470 U.S. at 318) (internal quotation marks omitted).

257. *Id.*

258. 285 Va. 629, 631–32, 740 S.E.2d 14, 16 (2013) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

259. *Id.* at 632, 740 S.E.2d at 16.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 632–33, 740 S.E.2d at 16.

264. *Id.* at 633, 740 S.E.2d at 16.

could listen to the tape.<sup>265</sup> Defense counsel, however, never asked to listen to the tape outside of the jury's presence.<sup>266</sup>

In considering whether a *Brady* violation occurred, the supreme court observed that "*Brady* is not violated, as a matter of law, when impeachment evidence is made available to [a] defendant[] during trial if the defendant has sufficient time to make use of [it] at trial."<sup>267</sup> The court concluded that "Tuma failed, as a matter of law, to show he was denied access to the tape recording in sufficient time to effectively use it at trial."<sup>268</sup> Upon learning about the tape, defense counsel could have asked for a recess and listened to it, but chose not to do so.<sup>269</sup>

## B. *Specific Crimes*

### 1. Contempt

In *Amos v. Commonwealth*, the Court of Appeals of Virginia considered whether the defendant, who was held in summary contempt, preserved her arguments for appeal, and whether the trial court erred in exercising its power of summary contempt.<sup>270</sup> The case arose after Mrs. Amos made allegations that her estranged husband violated the restraining order she had previously obtained.<sup>271</sup> In a letter to the Commonwealth's Attorney for Arlington County, Mrs. Amos alleged that "during a custody exchange of their son at a McDonald's restaurant, Mr. Amos engaged in actions designed 'to intimidate, harass and threaten' her."<sup>272</sup> Based upon these allegations, "the court issued a rule to

265. *Id.*

266. *Id.*

267. *Id.* at 635, 740 S.E.2d at 18 (alteration in original) (quoting *Read v. Va. State Bar*, 233 Va. 560, 564–65, 357 S.E.2d 544, 546–47 (1987)) (internal quotation marks omitted).

268. *Id.* at 637, 740 S.E.2d at 19.

269. *Id.* In his concurrence, Justice Lemons explained that he would further hold that the statements at issue were not material. *Id.* at 642, 740 S.E.2d at 22 (Lemons, J., concurring). Two dissenting Justices would have found all the requirements of a *Brady* violation. *Id.* at 643, 740 S.E.2d at 22 (Millette, J., dissenting).

270. 61 Va. App. 730, 733, 740 S.E.2d 43, 45 (2013), *appeal granted*, No. 130757 (Va. Sept. 24, 2013).

271. *Id.* at 733–34, 740 S.E.2d at 45.

272. *Id.*, 740 S.E.2d at 45.

show cause to determine whether Mr. Amos had violated the terms of his probation.<sup>273</sup>

At the hearing, Mrs. Amos testified that, during the exchange at the McDonald's, her husband insulted her and made threats against her.<sup>274</sup> An eyewitness, however, testified that once Mrs. Amos arrived, there was no communication between her and Mr. Amos.<sup>275</sup> Mr. Amos's tape-recording of the exchange was also consistent with this account and inconsistent with Mrs. Amos's testimony.<sup>276</sup> At the conclusion of the hearing, the trial court chastised Mrs. Amos for lying and for her vindictiveness toward her husband.<sup>277</sup> After holding her in contempt, the trial court ordered the sheriff's deputy to remove Mrs. Amos from the courtroom and directed the clerk to call the next case.<sup>278</sup>

The Court of Appeals of Virginia, sitting en banc, first held that by operation of Virginia Code section 8.01-384(A), Mrs. Amos did not have an opportunity to object at the time of the ruling or order and, therefore, the arguments she made on appeal were not procedurally defaulted under Rule 5A:18.<sup>279</sup> Second, the court found that "[t]he truth or falsity of Mrs. Amos's testimony and whether she was a victim or a vindictive person 'depend[ed] upon statements made by others.'<sup>280</sup> Therefore, the court of appeals found that summary contempt was not available and reversed the judgment of the trial court holding Mrs. Amos in summary contempt.<sup>281</sup>

273. *Id.* at 734, 740 S.E.2d at 45.

274. *Id.*

275. *Id.*

276. *Id.* at 734–35, 740 S.E.2d at 45.

277. *Id.* at 735, 740 S.E.2d at 46.

278. *Id.* at 736, 740 S.E.2d at 46.

279. *Id.* at 733, 736, 740 S.E.2d at 45–46 (citing VA. CODE ANN. § 8.01-384(A) (Repl. Vol. 2009 & Cum. Supp. 2013)). Five judges dissented on this ground. *Id.* at 743–52, 740 S.E.2d at 50–54 (Felton, J., dissenting).

280. *Id.* at 743, 740 S.E.2d at 50 (second alteration in original) (quoting *In re Oliver*, 333 U.S. 257, 275 (1948)).

281. *Id.* In contrast to *Amos*, the court of appeals held in *Parham v. Commonwealth* that the defendant could be held in summary contempt when she "balled up" a summons in front of the trial court. 60 Va. App. 450, 459–60, 729 S.E.2d 734, 738 (2012).

## 2. Embezzlement

*Leftwich v. Commonwealth* involved an attorney's embezzlement of funds from her law firm.<sup>282</sup> Leftwich's law practice focused on social security disability law.<sup>283</sup> Her employment agreement with the firm "stated that all legal fees or similar forms of compensation earned by [her] in the capacity of her employment were the exclusive property of [the firm]."<sup>284</sup> In order to compensate Leftwich for her representation of social security claimants, "the United States Department of the Treasury mailed checks payable to her (and not the firm) at the firm's business address."<sup>285</sup> During the summer of 2010, "the law firm became aware of a discrepancy in its accounting records."<sup>286</sup> Upon further investigation, the firm's records indicated that social security disability checks received by Leftwich had not been deposited into the firm's account.<sup>287</sup> Leftwich eventually confessed to taking the money, which she claimed amounted to approximately \$50,000.<sup>288</sup> However, "[a] subsequent investigation by the firm revealed the amount to be nearly half a million dollars."<sup>289</sup>

Virginia's embezzlement statute "provides three separate and distinct scenarios in which a person may be convicted of embezzlement: when a person misappropriates property 1) 'received for another or for [her] employer' or 2) 'by virtue of [her] office, trust, or employment' or 3) 'which shall have been entrusted or delivered to [her] by another.'"<sup>290</sup> The thrust of Leftwich's argument on appeal was that "the Social Security Administration did not entrust the checks to her for the benefit of the firm."<sup>291</sup> The Court of Appeals of Virginia held that her argument failed because it ignored the first part of the embezzlement statute.<sup>292</sup> The evidence showed that Leftwich "wrongfully and fraudulently used or dis-

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282. 61 Va. App. 422, 424, 737 S.E.2d 42, 43 (2013).

283. *Id.*

284. *Id.*

285. *Id.* at 424–25, 737 S.E.2d at 43–44.

286. *Id.* at 425, 737 S.E.2d at 44.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 428, 737 S.E.2d at 45 (alteration in original) (quoting VA. CODE ANN. § 18.2-111 (Repl. Vol. 2009 & Cum. Supp. 2013)).

291. *Id.*

292. *Id.*

posed of the firm's property (checks)" that she received on behalf of the firm.<sup>293</sup> The court of appeals held "[t]hat evidence, in itself, [was] sufficient for a conviction."<sup>294</sup>

### 3. Felony Murder

The Court of Appeals of Virginia reversed a felony murder conviction in *Woodard v. Commonwealth*.<sup>295</sup> At approximately 7:00 p.m., Woodard sold the victim ecstasy pills.<sup>296</sup> Later that evening at an apartment, the victim took the pills and eventually died from taking a lethal dose of ecstasy.<sup>297</sup> At the conclusion of Woodard's trial, the trial court ruled that "there was a sufficient 'causal connection' and 'temporal connection' between the sale of the ecstasy and [the victim]'s killing to constitute felony murder."<sup>298</sup>

In order to convict a defendant of felony murder under Virginia law, "the killing must be committed 'while in the prosecution' of the underlying offense, or as it is often said, within the *res gestae* of the underlying offense."<sup>299</sup> The killing must be "so closely related to the felony in time, place, and causal connection as to make it a part of the same criminal enterprise."<sup>300</sup> Woodard argued on appeal "that the underlying felony, the sale of ecstasy, was completed before the homicide, and therefore, the homicide did not occur within the *res gestae* of the predicate offense."<sup>301</sup> The court of appeals agreed, finding "two of the felony-murder rule elements were missing: time and place."<sup>302</sup> The time element was not established because the killing occurred over two hours after the sale of ecstasy.<sup>303</sup> And the place element was not established because

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293. *Id.*

294. *Id.*

295. 61 Va. App. 567, 569, 739 S.E.2d 220, 221 (2013), *appeal granted*, No. 130854 (Va. Sept. 12, 2013).

296. *Id.*

297. *Id.* at 570–71, 739 S.E.2d at 221.

298. *Id.* at 571, 739 S.E.2d at 221–22.

299. *Id.* at 572, 739 S.E.2d at 222.

300. *Id.* (quoting *Commonwealth v. Montague*, 260 Va. 697, 701, 536 S.E.2d 910, 913 (2000)) (internal quotation marks omitted).

301. *Id.* 569, 739 S.E.2d at 221.

302. *Id.* at 569, 572, 739 S.E.2d at 221–22.

303. *Id.* at 573, 739 S.E.2d at 223.

the underlying felony took place in the store parking lot, and not the apartment where the pills were taken.<sup>304</sup>

#### 4. Firearm Offenses

The Virginia courts decided a number of significant cases involving firearms. In *Baker v. Commonwealth*, the Supreme Court of Virginia grappled with “whether evidence of the possession of one firearm on three separate occasions can constitute three separate charges for possession of a firearm by a convicted felon.”<sup>305</sup> The firearm in question was first stolen by Baker and displayed to his friend on the same day.<sup>306</sup> Several weeks later, Baker attempted to sell the firearm to another individual.<sup>307</sup> The following day, Baker sold the firearm to that individual during a controlled exchange setup by the police.<sup>308</sup> Based on these three incidents, Baker was convicted of three counts of possession of a firearm by a convicted felon in violation of Virginia Code section 18.2-308.2(A).<sup>309</sup>

On appeal to the Supreme Court of Virginia, Baker argued he should have been charged with one continuous possession of a firearm.<sup>310</sup> Finding Virginia Code section 18.2-308.2(A) ambiguous as to when one offense ends and the next begins, the supreme court looked to the “gravamen of the offense to determine the legislature’s intent.”<sup>311</sup> The court pointed out that the language of the statute includes specific prohibitions against transporting a firearm.<sup>312</sup> The court found that the “inclusion of these specific references expresses the General Assembly’s intent that separate instances of possession, and therefore of heightened danger to the

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304. *Id.* at 573–74, 739 S.E.2d at 223. In a case decided the same day as *Woodard*, the court of appeals affirmed a defendant’s felony murder conviction when his drunk driving was “inextricably linked and integral to the victim’s death.” See *Montano v. Commonwealth*, 61 Va. App. 610, 617, 739 S.E.2d 241, 244 (2013).

305. 284 Va. 572, 574, 733 S.E.2d 642, 643 (2012).

306. *Id.*

307. *Id.*

308. *Id.* at 574–75, 733 S.E.2d at 643.

309. *Id.* at 575, 733 S.E.2d at 643–44 (citing VA. CODE ANN. § 18.2-308.2(A) (Repl. Vol. 2009)).

310. *Id.*, 733 S.E.2d at 644.

311. *Id.* at 576, 733 S.E.2d at 644–45.

312. *Id.* at 577, 733 S.E.2d at 645 (citing VA. CODE ANN. § 18.2-308.2(A) (Repl. Vol. 2009)).

community, be punished separately.”<sup>313</sup> The court reasoned that “[i]f the statute was meant to restrict the offense only to the receipt, initial possession, or even extended possession of the weapon, such a specific reference to the transporting or carrying of that weapon would be a frivolous and unnecessary addition to the statutory language.”<sup>314</sup> Thus, the supreme court held that additional counts of possession of firearm by a convicted felon can be established with each separate act or occurrence that can be proven by the government.<sup>315</sup>

The sole issue considered by the Court of Appeals of Virginia in *Doulgerakis v. Commonwealth* was “whether a firearm in an unlocked, but latched, glove box of a private vehicle is ‘secured in a container or compartment’ within the meaning of Code § 18.2-308(B)(10),” Virginia’s concealed weapon statute.<sup>316</sup> During a traffic stop, a police officer asked Doulgerakis “if he had anything in his glove box to cause him concern.”<sup>317</sup> Doulgerakis stated that there was a handgun in the glove compartment.<sup>318</sup> Since the glovebox was closed but unlocked during the traffic stop, the Commonwealth argued that the firearm was not “secured” within the meaning of the concealed weapon statute because it was readily accessible for the defendant’s prompt and immediate use.<sup>319</sup> The trial court agreed and convicted Doulgerakis of possession of a concealed weapon.<sup>320</sup>

Virginia Code section 18.2-308(C)(10) creates an exception to the concealed weapon prohibition for any person carrying a handgun while in a personal, private vehicle, when “such handgun is secured in a container or compartment in the vehicle.”<sup>321</sup> The court of appeals agreed with the Commonwealth’s concession on

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313. *Id.*

314. *Id.*

315. *Id.* at 578, 733 S.E.2d at 645. The dissent would have applied the rule of lenity and construed the statute in the defendant’s favor. *Id.* at 579, 733 S.E.2d at 646 (Powell, J., dissenting).

316. 61 Va. App. 417, 419, 737 S.E.2d 40, 41 (2013). The 2013 General Assembly amended Virginia Code section 18.2-308(B)(10) to section 18.2-308(C)(10). Act of Apr. 3, 2013, ch. 746, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-308(C)(10) (Cum. Supp. 2013)).

317. *Id.* at 418, 737 S.E.2d at 41.

318. *Id.*

319. *Id.* at 419, 737 S.E.2d at 41 (internal quotation marks omitted).

320. *Id.* at 418–19, 737 S.E.2d at 40–41.

321. VA. CODE ANN. § 18.2-308(C)(10) (Cum. Supp. 2013)).

appeal that a handgun need not be in a locked glove compartment to be exempt from the statute.<sup>322</sup> Interpreting the legislative history of the exception, the court determined that the legislature made clear that “secured” does not mean “locked” when it adopted the Governor’s recommendation in 2010 to replace the word “locked” with “secured.”<sup>323</sup> The court went on to define “secured” as “in safekeeping or custody” or “well-fastened.”<sup>324</sup> Applying this definition, the court of appeals found Doulgerakis’s handgun in compliance with the exception to the concealed weapon statute since it was in a closed, latched and “well-fastened” glove compartment.<sup>325</sup>

In *Smith v. Commonwealth*, the Court of Appeals of Virginia addressed use of a firearm in the commission of a burglary.<sup>326</sup> Two years ago in *Rowland v. Commonwealth*, the Supreme Court of Virginia reversed a conviction for use of a firearm in the commission of a burglary.<sup>327</sup> There, Rowland entered a restaurant at night, walked into the kitchen, pointed a firearm at an employee, and demanded money from the cash register.<sup>328</sup> The supreme court concluded that the elements of statutory burglary were complete before Rowland used or displayed a firearm.<sup>329</sup>

Relying on *Rowland*, Smith argued the burglary was complete before he used or displayed the gun and, thus, that the evidence failed to support his conviction for using a firearm in the commission of burglary.<sup>330</sup> The court of appeals disagreed and distinguished *Rowland* on its facts.<sup>331</sup> In Smith’s case, the victim saw Smith and his companions enter without invitation.<sup>332</sup> As soon as Smith entered, the victim noticed he was holding a firearm “down at his side.”<sup>333</sup> The court held that “the way [Smith] used the gun

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322. *Doulgerakis*, 61 Va. App. at 419, 737 S.E.2d at 41.

323. *Id.* at 420–21, 737 S.E.2d at 42 (internal quotation marks omitted).

324. *Id.* at 422, 737 S.E.2d at 42 (internal quotation marks omitted) (citing WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 1641 (2d ed. 1983); THE AMERICAN HERITAGE DICTIONARY 1109 (2d College ed. 1982)).

325. *Id.* (internal quotation marks omitted).

326. 61 Va. App. 690, 692, 739 S.E.2d 280, 281 (2013).

327. 281 Va. 396, 402, 707 S.E.2d 331, 334 (2011).

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

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

330. *Smith*, 61 Va. App. at 693, 739 S.E.2d at 281.

331. *Id.* at 694, 739 S.E.2d at 282.

332. *Id.*

333. *Id.* (internal quotation marks omitted).

*after* entering supports the jury's finding, implicit in its verdict, that he used the gun *during* the entry for the same purpose, in order to be ready to subdue [the victim] as necessary."<sup>334</sup>

## 5. Indecent Exposure

The charges in *Barnes v. Commonwealth* stemmed from an incident in which Barnes, while in his jail cell, masturbated in front of a visiting female pretrial services employee.<sup>335</sup> Barnes was charged with indecent exposure and sexual display under Virginia Code sections 18.2-387 and 18.2-387.1.<sup>336</sup> Both statutes have a "public place" component.<sup>337</sup> Barnes argued that the evidence was insufficient to support his convictions because he was not "in public" or "in any public place" at the time of the alleged offenses, and that the jail was essentially his home.<sup>338</sup>

The Court of Appeals of Virginia held that "public place," as used in Virginia Code sections 18.2-387 and 18.2-387.1, "comprises places and circumstances where the offender does not have a reasonable expectation of privacy, because of the foreseeability of a non-consenting public witness."<sup>339</sup> When standing at the front of his cell in first floor lockup, Barnes "was in open view to staff, other inmates, and to members of the public with authorized access."<sup>340</sup> Therefore, the court held that Barnes "did not have a reasonable expectation of privacy and the facts were sufficient to support the finding that his behavior occurred in a public place."<sup>341</sup>

334. *Id.*

335. 61 Va. App. 495, 496–97, 737 S.E.2d 919, 920 (2013).

336. *Id.* at 496–97, 737 S.E.2d at 920.

337. VA. CODE ANN. § 18.2-387 (Repl. Vol. 2009 & Cum. Supp. 2013) ("Every person who intentionally makes an obscene display or exposure of his person . . . in any public place . . . shall be guilty of a Class 1 misdemeanor."); *id.* § 18.2-387.1 (Repl. Vol. 2009 & Cum. Supp. 2013) ("Any person who, while in any public place . . . engages in actual or explicitly simulated acts of masturbation, is guilty of a Class 1 misdemeanor.").

338. *Barnes*, 61 Va. App. at 497, 737 S.E.2d at 920.

339. *Id.* at 500, 737 S.E.2d at 921.

340. *Id.*, 737 S.E.2d at 922.

341. *Id.*

## IV. LEGISLATION

A. *Actual Innocence*

The 2013 Virginia General Assembly made two significant changes to the actual innocence statutes. First, the actual innocence statutes were amended to allow juveniles, adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult, to petition for a writ of actual innocence under the same circumstances as an adult seeking relief from a felony conviction.<sup>342</sup> Second, the petitioner's burden of proof in actual innocence cases was changed from "no rational trier of fact *could* have found proof of guilt beyond a reasonable doubt" to "no rational trier of fact *would* have found proof of guilt beyond a reasonable doubt."<sup>343</sup> In an actual innocence proceeding, the Court of Appeals of Virginia or Supreme Court of Virginia is the fact finder,<sup>344</sup> so the change recognizes that the relevant inquiry in actual innocence is not appellate review of the sufficiency of the trial evidence, but the impact of the new evidence for the court with original jurisdiction.<sup>345</sup>

B. *Appeals of Bail Decisions*

The 2013 Virginia General Assembly also refined the process for appealing a bail decision. A court granting or denying bail, ordering any increase in the amount of a bond, ordering new or additional sureties, or revoking such bail may, upon appeal and with a showing of good cause, stay execution of such order for so long as reasonably practicable for the party to obtain an expedited hearing before the next higher court.<sup>346</sup> However, no stay may

342. Act of Mar. 12, 2013, ch. 170, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. §§ 19.2-327. to -327.3, -327.5, -327.10 to -327.13 (Cum. Supp. 2013)).

343. Act of Mar. 12, 2013, ch. 180, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. §§ 19.2-327.3, -327.5, -327.11, -327.13 (Cum. Supp. 2013)).

344. See VA. CODE ANN. §§ 19.2-327.2, -327.10 (Cum. Supp. 2013); see also *Haynesworth v. Commonwealth*, 59 Va. App. 197, 215, 717 S.E.2d 817, 826 (2011) (Humphreys, J., dissenting) (discussing jurisdiction in actual innocence cases).

345. See ch. 180, 2013 Va. Acts at \_\_\_; see also *Haynesworth*, 59 Va. App. at 223, 717 S.E.2d at 830 (Humphreys, J., dissenting) (discussing the demanding standard for actual innocence cases).

346. Act of Mar. 16, 2013, ch. 408, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. §§ 19.2-124, -132 (Cum. Supp. 2013)).

be granted after any person who has been granted bail has been released from custody on such bail.<sup>347</sup>

### C. *Consecutive Sentences for Certain Crimes*

In a pair of cases recently decided by the Supreme Court of Virginia and Court of Appeals of Virginia, the courts held a trial court has discretion to sentence a defendant to concurrent mandatory minimum sentences.<sup>348</sup> Shortly thereafter, the General Assembly introduced a bill that would have required all individuals convicted under mandatory minimum sentences to serve that time consecutively with any other sentence.<sup>349</sup> However, the bill did not pass in that form.<sup>350</sup> Instead, the adopted legislation requires only certain crimes with mandatory minimum sentences to be served consecutively with any other sentence.<sup>351</sup>

### D. *Erroneously Admitted Evidence on Appeal*

In *Rushing v. Commonwealth*, the Supreme Court of Virginia held that erroneously admitted evidence could not be considered in reviewing the sufficiency of the evidence and, if the remaining record is not sufficient to support the conviction, the appellate court must reverse and enter final judgment.<sup>352</sup> In response to *Rushing*, the 2013 Virginia General Assembly created Virginia Code section 19.2-324.1.<sup>353</sup> From now on, in appeals to the court of appeals or supreme court, “when a challenge to a conviction rests on a claim that the evidence was insufficient because the trial

347. VA. CODE ANN. § 19.2-124 (Cum. Supp. 2013).

348. See *supra* Part II(B)(1).

349. H.B. 2269, Va. Gen. Assembly (Reg. Sess. 2013).

350. Act of Apr. 3, 2013, ch. 761, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. §§ 16.1-253.2, 18.2-46.3:3, 18.2-60.4, 18.2-61, 18.2-67.1, 18.2-67.2, 18.2-154, 18.2-308.2:2, 18.2-374.1, 18.2-374.1:1 (Cum. Supp. 2013)).

351. The crimes are found in Virginia Code sections 16.1-253.2 (violation of protective orders), 18.2-46.3:3 (gang activity in gang-free zones), 18.2-60.4 (violation of protective orders), 18.2-61 (rape), 18.2-67.1 (forcible sodomy), 18.2-67.2 (object sexual penetration), 18.2-154 (shooting or throwing missiles at law-enforcement or emergency vehicles), 18.2-308.2:2 (purchasing firearm with intent to resell or provide to a person ineligible to purchase or receive a firearm or soliciting employing, or assisting such a purchase), 18.2-374.1 (production of child pornography), and 18.2-374.1:1 (possession or distribution of child pornography). *Id.*

352. 284 Va. 270, 279–80, 726 S.E.2d 333, 338–39 (2012).

353. Act of Mar. 21, 2013, ch. 675, 2013 Va. Acts \_\_\_, \_\_\_ (codified at VA. CODE ANN. § 19.2-324.1 (Cum. Supp. 2013)).

court improperly admitted evidence, the reviewing court shall consider all evidence admitted at trial to determine whether there is sufficient evidence to sustain the conviction.”<sup>354</sup> Additionally, “[i]f the reviewing court determines that evidence was erroneously admitted and that such error was not harmless, the case shall be remanded for a new trial if the Commonwealth elects to have a new trial.”<sup>355</sup>

### E. *Texting While Driving*

Texting while driving was elevated from a secondary offense—one that can only be charged when the offender is stopped for another, separate offense—to a primary offense.<sup>356</sup> Texting while driving “is a traffic infraction punishable, for a first offense, by a fine of \$125 and, for a second or subsequent offense, by a fine of \$250.”<sup>357</sup>

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354. VA. CODE ANN. § 19.2-324.1 (Cum. Supp. 2013).

355. *Id.*

356. Act of Apr. 3, 2013, ch. 752, 2013 Va. Acts \_\_\_, \_\_\_ (codified as amended at VA. CODE ANN. §§ 46.2-868, -1078.1 (Cum. Supp. 2013)).

357. VA. CODE ANN. § 46.2-1078.1 (Cum. Supp. 2013).