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## CRIMINAL LAW AND PROCEDURE

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### INTRODUCTION

This Article surveys recent developments in criminal procedure and law in Virginia. Because of space limitations, the authors have limited their discussion to the most significant published appellate decisions and legislation.

### I. CRIMINAL PROCEDURE

#### A. *Finality of Orders*

In *Jefferson v. Commonwealth*, the Supreme Court of Virginia was asked to determine whether the trial court's amendment of its final order to correct a scrivener's error created a new final order date.<sup>1</sup> The trial court entered the sentencing order on August 28, 2017, but accidentally wrote "August 28, 2018."<sup>2</sup> On September 15,

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1. \_\_ Va. \_\_, \_\_, 840 S.E.2d 329, 331 (2020).  
2. *Id.* at \_\_, 840 S.E.2d at 330.

2017, the trial court amended the sentencing order to correct the date of entry to “August 28, 2017.”<sup>3</sup>

On October 3, 2017, Jefferson filed an appeal using the September 15, 2017 date as the date of the final order.<sup>4</sup> The supreme court dismissed the appeal as untimely because Jefferson filed his appeal more than thirty days after entry of the final order on August 28, 2017.<sup>5</sup> The court affirmed the Court of Appeals of Virginia’s judgment because the amendment to the sentencing order was merely a scrivener’s error and did not “modify, vacate, or suspend the judgment contained in the original order.”<sup>6</sup>

In *Akers v. Commonwealth*, the Supreme Court of Virginia considered the finality of a sentencing order.<sup>7</sup> In 2014, Akers pled guilty to a drug charge and received a partially suspended sentence.<sup>8</sup> In 2017, after being convicted of new offenses, the circuit court revoked the entirety of his previous suspended sentence.<sup>9</sup> Approximately four months later, Akers filed a motion for modification of sentence pursuant to Virginia Code section 19.2-303.<sup>10</sup> Five days prior to a hearing on the motion, Akers was transferred from a regional jail to the Department of Corrections.<sup>11</sup> The trial court determined that it did not have jurisdiction to consider Akers’ motion, and the court of appeals agreed.<sup>12</sup>

The supreme court determined that Akers’ sentencing order was final twenty-one days after its entry pursuant to Rule 1:1.<sup>13</sup> Virginia Code section 19.2-303 provides an exception to trial courts for the modification of final orders in situations where the defendant has not been transferred to the Department of Corrections.<sup>14</sup> Accordingly, because Akers had been transferred to the Department of Corrections, the trial court lacked jurisdiction to alter Akers’

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3. *Id.* at \_\_, 840 S.E.2d at 331.

4. *Id.* at \_\_, 840 S.E.2d at 331.

5. *Id.* at \_\_, 840 S.E.2d at 331.

6. *Id.* at \_\_, 840 S.E.2d at 333.

7. 298 Va. 448, 450, 839 S.E.2d 902, 904 (2020).

8. *Id.* at 451, 839 S.E.2d at 905.

9. *Id.* at 451, 839 S.E.2d at 905.

10. *Id.* at 451, 839 S.E.2d at 905.

11. *Id.* at 451, 839 S.E.2d at 905.

12. *Id.* at 451–52, 839 S.E.2d at 905.

13. *Id.* at 452, 839 S.E.2d at 905.

14. VA. CODE ANN. § 19.2-303 (Cum. Supp. 2020).

sentencing order.<sup>15</sup> The supreme court also determined that Akers' constitutional arguments were meritless.<sup>16</sup>

### B. Batson Challenges

In *Bethea v. Commonwealth*, the Supreme Court of Virginia considered whether the trial court violated the holding of *Batson v. Kentucky*.<sup>17</sup> The trial court had held that the prosecutor's strike of an African-American juror was not racially motivated.<sup>18</sup> During the *Batson* challenge, the prosecutor explained that "[s]he thought that she had seen an emotional juror who had failed to raise her hand to a specific voir dire question."<sup>19</sup> The defense conceded that the prosecutor had offered a facially race-neutral reason for the strike and told the trial court at the post-trial hearing that the prosecutor's stated reason for the strike was either a mistake because it was not supported by the transcript, or the prosecutor had deliberately misrepresented the facts to the court.<sup>20</sup> The supreme court ruled that the appellant's *Batson* challenge failed because a prosecutor's race-neutral reason to strike a juror cannot be both an unintentional mistake and a pre-textual, purposeful misrepresentation.<sup>21</sup>

In *Stevens v. Commonwealth*, the Court of Appeals of Virginia considered the trial court's denial of Stevens' challenge to the prosecution's use of peremptory strikes against African-American jurors, pursuant to *Batson v. Kentucky*.<sup>22</sup> Stevens was convicted of various robbery offenses.<sup>23</sup> During voir dire, the prosecution then challenged Stevens' use of peremptory strikes against white jurors, pursuant to *Georgia v. McCollum*.<sup>24</sup> On appeal, Stevens challenged the trial court's ruling as to one of the jurors challenged by the

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15. *Akers*, 298 Va. at 453, 839 S.E.2d at 906.

16. *Id.* at 454, 839 S.E.2d at 907.

17. *Bethea v. Commonwealth*, 297 Va. 730, 735, 831 S.E.2d 670, 672 (2019) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

18. *Id.* at 735, 831 S.E.2d at 672.

19. *Id.* at 751, 831 S.E.2d at 681.

20. *Id.* at 752, 831 S.E.2d at 681.

21. *Id.* at 754, 831 S.E.2d at 682.

22. *Stevens v. Commonwealth*, 70 Va. App. 280, 286–87, 826 S.E.2d 895, 898 (2019) (citing *Batson*, 476 U.S. 79).

23. *Id.* at 286, 826 S.E.2d at 898.

24. *Id.* at 299–305, 826 S.E.2d at 905–07 (citing *Georgia v. McCollum*, 505 U.S. 42 (1992)).

prosecution.<sup>25</sup> Defense counsel provided an explanation for the strike, which the court determined was improper, and the court restored the juror to the venire.<sup>26</sup>

Following a lengthy discussion of the history of jury selection and the development of *Batson* and *McCullum*, the court of appeals addressed Stevens' challenge to the trial court's *McCullum* ruling.<sup>27</sup> The court concluded that the Commonwealth made a valid *McCullum* challenge and that Stevens' reasons for striking the juror were pretextual.<sup>28</sup> Additionally, the court concluded that the trial court had not applied an incorrect legal standard.<sup>29</sup> Accordingly, the court affirmed Stevens' convictions.<sup>30</sup>

### C. Probation

In *Fazili v. Commonwealth*, the Court of Appeals of Virginia considered whether a condition of probation that the defendant "have no use of any device that can access internet unless approved by his Probation Officer" violated his right to freedom of speech.<sup>31</sup> The court of appeals held that circuit courts can impose, "as a condition of probation, a reasonable ban on internet access provided such ban is narrowly tailored to effectuate either a rehabilitative or public-safety purpose."<sup>32</sup> However, in this specific case, there was no evidence that the defendant used computers or the internet to commit object sexual penetration and the circuit court did not articulate a justification for how "imposing this restriction on [the defendant's] fundamental right to free speech would serve any rehabilitative or public safety purpose."<sup>33</sup> The court of appeals remanded the case so the trial court could explain its justification for the internet ban if it still chose to impose that restriction.<sup>34</sup>

In *Cilwa v. Commonwealth*, the Supreme Court of Virginia affirmed the revocation of Cilwa's suspended sentence.<sup>35</sup> Cilwa had

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25. *Id.* at 287, 826 S.E.2d at 898.

26. *Id.* at 287–88, 826 S.E.2d at 898–99.

27. *Id.* at 288–303, 826 S.E.2d at 899–906.

28. *Id.* at 303–05, 826 S.E.2d at 906–07.

29. *Id.* at 306, 826 S.E.2d at 908.

30. *Id.* at 306, 826 S.E.2d at 908.

31. 71 Va. App. 239, 248, 835 S.E.2d 87, 91 (2019).

32. *Id.* at 251, 835 S.E.2d at 93.

33. *Id.* at 253, 835 S.E.2d at 94.

34. *Id.* at 253, 835 S.E.2d at 94.

35. 298 Va. 259, 262, 836 S.E.2d 378, 379 (2019).

been originally sentenced in March 2008, and her sentence included one year of supervised probation.<sup>36</sup> Following a series of new arrests and revocation hearings, Cilwa agreed to voluntarily extend her probation indefinitely in order to complete substance abuse treatment.<sup>37</sup> Accordingly, in September 2009, the trial court entered an order extending Cilwa's period of probation indefinitely.<sup>38</sup> Cilwa failed to complete a substance abuse program and continued to commit new offenses.<sup>39</sup> At a revocation hearing in 2015, Cilwa argued for the first time that the September 2009 order was void ab initio.<sup>40</sup> She also contended that her period of suspension ended when she completed the first substance abuse treatment program.<sup>41</sup> The trial court and Court of Appeals of Virginia rejected these arguments.<sup>42</sup>

The supreme court also rejected these arguments, ruling that the September 2009 order was not void ab initio because the trial court had subject matter jurisdiction when it entered the order.<sup>43</sup> The trial court had the statutory authority to increase the period of probation pursuant to Virginia Code section 19.2-304, and the parties had agreed to extend the period of probation.<sup>44</sup> Moreover, the court ruled that probation is not a contract, and the parties had not conditioned the additional period of probation on any requirement, regardless.<sup>45</sup>

In *Garibaldi v. Commonwealth*, the Court of Appeals of Virginia considered whether a trial court abused its discretion when it ordered that the defendant could not drive a vehicle for ten years, even if eligible to be licensed as a condition of Garibaldi's suspended sentence, because the ten-year period was longer than any statutorily prescribed punishment.<sup>46</sup> Garibaldi had pled guilty to numerous driving offenses, including driving under the influence

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36. *Id.* at 263, 836 S.E.2d at 379.

37. *Id.* at 263, 836 S.E.2d at 379–80.

38. *Id.* at 263, 836 S.E.2d at 380.

39. *Id.* at 263–64, 836 S.E.2d at 380.

40. *Id.* at 264, 836 S.E.2d at 380.

41. *Id.* at 264, 836 S.E.2d at 380.

42. *Id.* at 264–65, 836 S.E.2d at 380–81.

43. *Id.* at 266, 268–71, 836 S.E.2d at 381, 383–84.

44. *Id.* at 267–70, 836 S.E.2d at 382–83.

45. *Id.* at 271–72, 836 S.E.2d at 384–85.

46. 71 Va. App. 64, 66–68, 833 S.E.2d 915, 917 (2019).

as a subsequent offense in violation of Virginia Code section 18.2-266 and section 18.2-270.<sup>47</sup>

The court of appeals noted that Virginia Code section 18.2-266 provides for the revocation of driving licenses upon conviction as provided for in Virginia Code section 46.2-391(B).<sup>48</sup> That section provides that once revoked, an individual may petition to have a license reinstated after a period of five years.<sup>49</sup> Garibaldi argued that the ten-year period of non-driving in his sentence conflicted with the statutes.<sup>50</sup> The court disagreed, holding that there is a difference between the right to drive and licensure to drive.<sup>51</sup> The court also pointed out that the sections Garibaldi referenced in his argument concerned sentences, not probation.<sup>52</sup>

#### D. *Appellate Procedure*

In *Watson v. Commonwealth*, the appellant argued that he had the proper standing to appeal not only his convictions, but also the convictions of defendants similarly situated to him, who were convicted of multiple offenses and whose sentences were shorter than statutorily prescribed.<sup>53</sup> The Supreme Court of Virginia ruled that standing is relevant when a judgment is challenged as being void ab initio and, as a result, Watson lacked the proper standing to challenge the sentences imposed for other felons.<sup>54</sup> And, although the court may sua sponte vacate a circuit court's order as void ab initio, it declined to do so here because of the "possible due process concerns that may arise if the 11 other felons' sentences [were] void[ed] and . . . need[ed] to be resentenced."<sup>55</sup>

In *Ducharme v. Commonwealth*, the appellant raised two arguments on appeal regarding the denial of his motion to suppress.<sup>56</sup> The Court of Appeals of Virginia did not address the substance of the appellant's argument because he failed to cite any authority for his argument, but rather only wrote "two paragraphs of conclusory

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47. *Id.* at 66, 833 S.E.2d at 916–17.

48. *Id.* at 68, 833 S.E.2d at 917.

49. VA. CODE ANN. § 46.2-391(C)(1) (Cum. Supp. 2020).

50. *Garibaldi*, 71 Va. App. at 68–69, 833 S.E.2d at 918.

51. *Id.* at 68–69, 833 S.E.2d at 918.

52. *Id.* at 69, 833 S.E.2d at 918.

53. 297 Va. 347, 349–50, 827 S.E.2d 782, 783 (2019).

54. *Id.* at 352–53, 827 S.E.2d at 785.

55. *Id.* at 353–54, 827 S.E.2d at 785–86.

56. 70 Va. App. 668, 672–73, 830 S.E.2d 924, 927 (2019).

statements” and “only reference[d] . . . the Fourth Amendment . . . in two quotations from cases stating the applicable standard of review.”<sup>57</sup> Therefore, the court of appeals affirmed the trial court’s denial of his motion to suppress.<sup>58</sup>

The court of appeals considered appellant’s third argument challenging a jury instruction provided by the trial court for use of a communication device to solicit a minor for the production of child pornography, in violation of Virginia Code section 18.2-374.3(B).<sup>59</sup> The appellant proposed a jury instruction that required him to know the victim was less than eighteen years old, while the Commonwealth’s instruction required him to know or have reason to believe the victim was a minor.<sup>60</sup> In considering the legislature’s intent, the court of appeals held that “proof the defendant ‘has reason to believe’ the subject of the solicitation is a child is an alternative finding that the trier of fact may make to sustain a conviction.”<sup>61</sup> As a result, the court of appeals found that the trial court did not err in refusing the appellant’s jury instruction and providing the instruction offered by the Commonwealth.<sup>62</sup>

In *Trevathan v. Commonwealth*, the Supreme Court of Virginia found that the court of appeals erred by dismissing rather than denying a defendant’s petition for appeal after finding that he “waived his ‘right to appeal.’”<sup>63</sup> The defendant had entered pleas of guilty to multiple offenses for which the trial court ultimately found him guilty, and the trial court found the defendant’s pleas were entered knowingly, intelligently, and voluntarily.<sup>64</sup> In reversing the court of appeals, the supreme court explained that although a defendant who pleads guilty has very limited grounds upon which he may appeal, he “still retains the statutory right to file a notice of appeal and present a petition for appeal to the Court of Appeals of Virginia.”<sup>65</sup>

In *Reed v. Commonwealth*, the Court of Appeals of Virginia considered the appellant’s argument that the Commonwealth was

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57. *Id.* at 673–74, 830 S.E.2d at 927.

58. *Id.* at 674, 830 S.E.2d at 928.

59. *Id.* at 670, 675, 830 S.E.2d at 925, 928.

60. *Id.* at 675, 830 S.E.2d at 928.

61. *Id.* at 677–79, 830 S.E.2d at 929–30.

62. *Id.* at 679, 830 S.E.2d at 930.

63. 297 Va. 697, 697–98, 831 S.E.2d 725, 726 (2019).

64. *Id.* at 697, 831 S.E.2d at 726.

65. *Id.* at 697–98, 831 S.E.2d at 726.

barred from presenting a new argument after remand from the Supreme Court of the United States and Supreme Court of Virginia.<sup>66</sup>

Reed was convicted in circuit court and appealed to the Court of Appeals of Virginia, which affirmed.<sup>67</sup> Reed's subsequent petition to the Supreme Court of Virginia was refused.<sup>68</sup> Reed then filed a petition for a writ of certiorari in the Supreme Court of the United States, which was held in abeyance pending the result of another similar case, *Carpenter v. United States*.<sup>69</sup> After the Supreme Court decided *Carpenter*, it granted Reed's petition, vacated the judgment below, and remanded to the Supreme Court of Virginia, which remanded the case further to the court of appeals for consideration in light of *Carpenter*.<sup>70</sup>

In a supplemental brief, the Commonwealth argued for the first time that the good-faith exception to the exclusionary rule applied.<sup>71</sup> Reed then filed a motion to strike the Commonwealth's good-faith argument, arguing that the Commonwealth was barred from presenting it due to the Commonwealth's failure to raise it during the first argument.<sup>72</sup> The court of appeals then found in favor of the Commonwealth, denying Reed's motion to strike in a footnote.<sup>73</sup> Reed appealed again to the Supreme Court of Virginia, which vacated the court of appeals' order and remanded the case back for Reed to be presented with an opportunity to be heard on the good-faith argument.<sup>74</sup>

On second remand, the court denied Reed's waiver argument.<sup>75</sup> Looking to *Collins v. Commonwealth*, the court held that permitting the Commonwealth to raise a new argument after remand was merely an extension of the right-result-different-reason doctrine.<sup>76</sup>

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66. 71 Va. App. 164, 171–74, 834 S.E.2d 505, 509–10 (2019). This case is also addressed under the subheading “*Fourth Amendment Issues*.” See *infra* section I.H.

67. *Id.* at 167, 834 S.E.2d at 507.

68. *Id.* at 167, 834 S.E.2d at 507.

69. *Id.* at 167–68, 834 S.E.2d at 507 (citing *Carpenter v. United States*, 138 S. Ct. 2206 (2018)).

70. *Id.* at 168, 834 S.E.2d at 507.

71. *Id.* at 168, 834 S.E.2d at 507.

72. *Id.* at 168, 834 S.E.2d at 507–08.

73. *Id.* at 168, 834 S.E.2d at 508.

74. *Id.* at 168–69, 834 S.E.2d at 508.

75. *Id.* at 171–73, 834 S.E.2d at 509–10.

76. *Id.* at 171–73, 834 S.E.2d at 509–10 (citing *Collins v. Commonwealth*, 297 Va. 207, 824 S.E.2d 485 (2019)).

Thus, the Commonwealth was permitted to raise the good-faith argument, as it was based on a purely legal ground.<sup>77</sup>

### E. *Expert Witnesses*

In *Wakeman v. Commonwealth*, the Supreme Court of Virginia upheld the court of appeals' opinion affirming that the trial court did not err in qualifying a forensic nurse as an expert witness.<sup>78</sup> Wakeman argued that the court of appeals erred in affirming the trial court's decision to qualify the forensic nurse as "an expert Sexual Assault Nurse Examiner" ("SANE") because she never took the certification exam to be certified as a SANE.<sup>79</sup>

In determining there was no error, the supreme court focused on the fact that Wakeman conceded that the nurse "possessed more knowledge on the topic of sexual assault forensic examination than the average person," and that Rule 2:702(a) "does not require that an expert carry a certification in order to qualify as expert and that the General Assembly has not enacted a statutory bar to uncertified SANEs testifying as experts in the area of sexual assault forensic examinations."<sup>80</sup>

In *Watson v. Commonwealth*, the appellant argued the trial court erred in limiting the scope of his expert witness' testimony as it related to eyewitness confidence in perpetrator selection and unconscious transference.<sup>81</sup> The Supreme Court of Virginia found the trial court did not abuse its discretion in excluding portions of the expert's intended eyewitness identification testimony because the trial court had the discretion to permit or exclude testimony—particularly here, where the trial court questioned the expert at length outside the jury's presence, evincing its consideration of those topics for which the appellate courts had previously deemed expert testimony useful.<sup>82</sup> Furthermore, the trial court determined por-

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77. *Id.* at 172, 834 S.E.2d at 509.

78. 298 Va. 412, 413, 838 S.E.2d 732, 733 (2020).

79. *Id.* at 412, 838 S.E.2d at 733.

80. *Id.* at 413, 838 S.E.2d at 733.

81. 298 Va. 197, 204, 835 S.E.2d 906, 909 (2019).

82. *Id.* at 206–07, 835 S.E.2d at 910–11.

tions of the expert's testimony were irrelevant given the unsuggestive manner in which law enforcement presented photos to the victim for possible identification.<sup>83</sup>

The supreme court also held that the trial court did not abuse its discretion in refusing to give a proffered jury instruction, which Watson claimed was "essential [to his] defense theory that [the victim's] eyewitness testimony lacked credibility," because the trial court instructed the jury on "its role as the judges of the facts, the credibility of the witnesses, and the weight of evidence."<sup>84</sup> The trial court also instructed the jury as to the defendant's presumption of innocence and the Commonwealth's beyond a reasonable doubt burden of proof, and Watson had an opportunity to thoroughly cross-examine the victim on his identification confidence and highlight his concerns to the jury in closing arguments.<sup>85</sup>

#### F. *Juvenile Procedure*

The Court of Appeals of Virginia held that the trial court in *Bardales v. Commonwealth* did not err in its interpretation of a juvenile defendant's plea agreement.<sup>86</sup> The agreement specifically contemplated that the defendant was to receive "a blended sentence that would allow him to serve *the* portion of *any* active sentence in the custody of the Department of Juvenile Justice to the extent that he is eligible for such placement."<sup>87</sup>

Because the plain language stated that the defendant would receive a blended sentence and be put in the Department of Juvenile Justice ("DJJ") *to the extent eligible*, and did not limit the circuit court's ability to sentence the defendant to life, logically the court must be able to place him somewhere other than DJJ after he turned twenty-one.<sup>88</sup> Thus, defendant's arguments that the agreement prevented any incarceration in Department of Corrections custody ignored the plain language of the agreement and would lead to an absurd result.<sup>89</sup>

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83. *Id.* at 204, 206, 835 S.E.2d at 909–11.

84. *Id.* at 210, 835 S.E.2d at 912.

85. *Id.* at 210, 835 S.E.2d at 912–13.

86. 71 Va. App. 737, 746, 840 S.E.2d 14, 19 (2020).

87. *Id.* at 743–44, 840 S.E.2d at 17–18.

88. *Id.* at 744, 840 S.E.2d at 18.

89. *Id.* at 744–45, 840 S.E.2d at 18.

### G. *Juror Selection*

In *Keepers v. Commonwealth*, the Court of Appeals of Virginia considered whether the trial court erred when it determined that two jurors could impartially sit.<sup>90</sup> On appeal, the defendant claimed that the trial court should have struck two jurors.<sup>91</sup> While the first juror’s Facebook account “liked” a news story about the defendant being denied bond and commented that the defendant should receive capital punishment, the juror’s explanation that the Facebook account was jointly shared with her husband, that she had not “like[d]” the story or written the comment, and that her views differed from that of her husband, combined with the trial court’s opportunity to observe the juror, supported the trial court’s finding that she could sit fairly and impartially.<sup>92</sup> Similarly, the court deferred to the trial court in its resolution of the second juror’s conflicting and equivocal statements because of the trial court’s ability to observe the juror’s tone, demeanor, and emphasis placed on words not captured by the record.<sup>93</sup> In the full context of the record taken as a whole, the trial court’s determination that the second juror could sit impartially was supported.<sup>94</sup>

### H. *Fourth Amendment Issues*

In *Reed v. Commonwealth*, the Court of Appeals of Virginia held, after remand from the Supreme Court of the United States and the Supreme Court of Virginia in light of *Carpenter v. United States*, that the good-faith exception to the exclusionary rule applied.<sup>95</sup> Reed was convicted after the Commonwealth obtained cell site location information (“CSLI”) without a warrant through an ex-parte court order pursuant to the Stored Communications Act, and the Virginia equivalent.<sup>96</sup>

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90. 72 Va. App. 17, 42–43, 840 S.E.2d 575, 588 (2020).

91. *Id.* at 42, 840 S.E.2d 587.

92. *Id.* at 43–44, 840 S.E.2d at 588.

93. *Id.* at 44–47, 840 S.E.2d at 588–90.

94. *See id.* at 44–45, 840 S.E.2d at 589.

95. *Reed v. Commonwealth*, 71 Va. App. 164, 168–69, 177, 834 S.E.2d 505, 507–08, 512 (2019) (citing *Carpenter v. United States*, 138 S. Ct. 2206 (2018)).

96. *Id.* at 167, 170, 834 S.E.2d at 507–09 (first citing 18 U.S.C. § 2703; and then citing VA. CODE ANN. § 19.2-70.3 (Cum. Supp. 2020)).

Reconsidering in light of *Carpenter*, which held that obtaining CSLI was a search under the Fourth Amendment, the court did not decide whether the search was unconstitutional, but held that, in any event, the good-faith exception to the exclusionary rule applied.<sup>97</sup> As objectively reasonable good faith includes searches conducted in reasonable reliance on subsequently-invalidated statutes, the Commonwealth's conduct in relying on the statutes in this case, which were not clearly unconstitutional, was reasonable.<sup>98</sup> The court declined to order exclusion of the CSLI and affirmed Reed's conviction.<sup>99</sup>

The trial court in *Jones v. Commonwealth* erred by denying the defendant's motion to suppress where an officer initiated a traffic stop after the defendant, approaching an intersection, "activated his turn signal and changed lanes, crossing over a single, solid white line immediately before the intersection."<sup>100</sup> Cocaine and marijuana were discovered inside the vehicle.<sup>101</sup>

At the suppression hearing, the Commonwealth conceded that a traffic violation had not occurred, but argued that the officer's mistake of law was reasonable.<sup>102</sup> On appeal, the Court of Appeals of Virginia reversed, holding that, as there was no statutory ambiguity, the officer's mistake of law was not reasonable.<sup>103</sup> The court further held that the exclusionary rule applied, as the only explanation for the mistake was inadequate study of the law, which should not be rewarded by permitting the Commonwealth to proceed.<sup>104</sup>

In *Hill v. Commonwealth*, the Supreme Court of Virginia held that the trial court did not err in refusing to suppress drugs found as a result of a seizure, where, as officers approached the defendant seated in a car in a high-crime area, the defendant turned his back to them and began digging and reaching for something out of sight of the officers, and did not cease such conduct when the officers yelled seven to ten times for him to show his hands.<sup>105</sup> Applying

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97. *Id.* at 173–75, 834 S.E.2d at 510–11.

98. *Id.* at 174–75, 834 S.E.2d at 510–11.

99. *Id.* at 175, 834 S.E.2d at 511.

100. 71 Va. App. 375, 379, 836 S.E.2d 710, 712 (2019).

101. *Id.* at 379, 836 S.E.2d at 712.

102. *Id.* at 379, 836 S.E.2d at 712.

103. *Id.* at 382–83, 836 S.E.2d at 714.

104. *Id.* at 383–84, 836 S.E.2d at 714–15.

105. 297 Va. 804, 816–17, 832 S.E.2d 33, 40 (2019).

the reasonable suspicion test from *Terry v. Ohio*, the totality of the circumstances here showed that the officers, “at the time of the seizure, could reasonably have suspected” that defendant was reaching for a weapon inside the car and thus understandably feared for their safety.<sup>106</sup> The officers’ seizure of defendant to determine if he had a weapon was not unreasonable, thus the trial court correctly denied the motion to suppress.<sup>107</sup>

In *Merid v. Commonwealth*, the Court of Appeals of Virginia upheld a search under the community caretaker exception to the Fourth Amendment.<sup>108</sup> After receiving concerning text messages about joining their dead mother and being unable to contact Merid, Merid’s brother contacted police for a welfare check.<sup>109</sup> When police arrived with Merid’s brother, they observed the car Merid drove—which was registered to another person—in the parking lot of the apartment building.<sup>110</sup> Police knocked on the door and heard a male voice answer, saying he needed to get dressed.<sup>111</sup> As officers continued knocking, they heard an “alarming” garbling noise, as well as moans.<sup>112</sup> Police forced open the door and observed Merid on the couch, stabbing himself repeatedly in the throat.<sup>113</sup> Police wrestled the knife away from Merid and called paramedics.<sup>114</sup> When the paramedics arrived, police conducted a security sweep of the bedroom, the only other room of the apartment they had not seen, and discovered a woman’s body tied to a chair.<sup>115</sup> Merid was tried and convicted for the abduction and murder of the woman.<sup>116</sup>

Merid moved to suppress the evidence recovered as a result of the entry and sweep of the apartment.<sup>117</sup> The Court of Appeals of Virginia determined that the initial entry into the apartment complied with the community caretaker exception to the Fourth Amendment.<sup>118</sup> Moreover, the sweep of the bedroom was no more

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106. *Id.* at 812–13, 821–22, 832 S.E.2d at 38, 43 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

107. *Id.* at 822, 832 S.E.2d at 43.

108. 72 Va. App. 104, 111–12, 841 S.E.2d 873, 876–77 (2020), *appeal docketed*, No. 200799 (Va., Nov. 4, 2020).

109. *Id.* at, 109, 841 S.E.2d at 875–76.

110. *Id.* at 109–10, 841 S.E.2d at 876.

111. *Id.* at 110, 841 S.E.2d at 876.

112. *Id.* at 110, 841 S.E.2d at 876.

113. *Id.* at 110, 841 S.E.2d at 876.

114. *Id.* at 110, 841 S.E.2d at 876.

115. *Id.* at 110–11, 841 S.E.2d at 876.

116. *Id.* at 111, 841 S.E.2d at 876–77.

117. *Id.* at 111, 841 S.E.2d at 876.

118. *Id.* at 111–12, n.3, 841 S.E.2d at 876–77, n.3.

intrusive than necessary to ensure the safety of the paramedics and to check to see if anyone else in the apartment needed assistance.<sup>119</sup> The court of appeals concluded that once officers have entered pursuant to the community caretaker exception to the Fourth Amendment, they may conduct a reasonable cursory sweep of the premises.<sup>120</sup> In this case, the officers reasonably believed that Merid may have been trying to commit suicide, and once inside, they acted reasonably.<sup>121</sup>

### I. Miranda Issues

In *Knight v. Commonwealth*, police initiated a traffic stop for failure to have front and rear license plates.<sup>122</sup> Knight, the driver, explained that he had just bought the car at an auction, and the temporary paper tag must have fallen off; Knight was unable to provide the car's registration.<sup>123</sup> The police officers returned to their vehicle and discussed ways to search Knight's car.<sup>124</sup> Dispatch advised that Knight had an outstanding warrant for unpaid court costs, and the officers believed they could search the whole car as a search incident to arrest.<sup>125</sup> Police ordered Knight out of the car and began searching the entire car.<sup>126</sup> Throughout this search, one officer searched the car—not documenting the items or calling them out to his partner—while the other officer remained with Knight at the rear of the vehicle.<sup>127</sup> In searching the contents of Knight's backpack, police recovered a gun, which was not documented on the PD Form 924, "Vehicle Tow/Impound Record."<sup>128</sup> Knight moved to suppress the evidence recovered as a result of the search and entered a conditional guilty plea to felon in possession of a firearm and carrying a concealed weapon following the trial court's denial of the motion to suppress.<sup>129</sup>

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119. *Id.* at 118, 841 S.E.2d at 880.

120. *Id.* at 118–19, 841 S.E.2d at 880.

121. *Id.* at 116–17, 841 S.E.2d at 879.

122. 71 Va. App. 771, 778, 839 S.E.2d 911, 914 (2020).

123. *Id.* at 778, 839 S.E.2d at 914.

124. *Id.* at 778, 839 S.E.2d at 914–15.

125. *Id.* at 778–79, 839 S.E.2d at 914–15.

126. *Id.* at 779–80, 839 S.E.2d at 915.

127. *Id.* at 779–80, 839 S.E.2d at 915.

128. *Id.* at 780, 839 S.E.2d at 915.

129. *Id.* at 777, 782, 839 S.E.2d at 914, 916.

The trial court concluded that officers had not engaged in a valid inventory search because police had a pretextual motive in conducting the inventory, and police compliance with inventory procedures was “slipshod” at best.<sup>130</sup> The Court of Appeals of Virginia agreed, concluding that officers had not engaged in a valid inventory of the car because they were motivated by an investigatory purpose, rather than the community caretaker exception.<sup>131</sup> The court went on to conclude that the gun would not have been inevitably discovered because that exception requires an independent lawful source of discovery, which was not present.<sup>132</sup> The only search was the police’s unlawful one, and there would not have been a separate inventory of the vehicle later because police removed the contraband.<sup>133</sup> Accordingly, the court reversed the suppression court, ordered the contents of the unlawful search suppressed, and remanded to permit Knight to withdraw his guilty plea.<sup>134</sup>

In *Keepers v. Commonwealth*, the Court of Appeals of Virginia held that the trial court did not err in denying defendant’s motion to suppress statements defendant made on two separate days to police.<sup>135</sup> Although the defendant was questioned at police headquarters on the first day, she was not in custody, as she accompanied police there willingly, was not restrained, was not locked in the questioning room, and was not “booked” or engaged in any of the other formal incidents of arrest.<sup>136</sup> Further, the officers did not exert any force upon or restrain her, questioned her in a conversational manner, advised her that she was not in trouble, told her she was free to leave, did not search her, and provided her with food and water.<sup>137</sup> Thus, the trial court’s determination that she was not in custody, as a reasonable person would have felt free to leave, was not error.<sup>138</sup>

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130. *Id.* at 783–86, 839 S.E.2d at 917–19.

131. *Id.* at 786–87, 839 S.E.2d at 918–19.

132. *Id.* at 788–89, 839 S.E.2d at 919–20.

133. *Id.* at 789, 839 S.E.2d at 920.

134. *Id.* at 791–92, 839 S.E.2d at 921.

135. 72 Va. App. 17, 47, 840 S.E.2d 575, 590 (2020).

136. *Id.* at 33–36, 840 S.E.2d at 583–85.

137. *Id.* at 36, 840 S.E.2d at 584–85.

138. *Id.* at 36, 840 S.E.2d at 584–85.

On the second day, the officers' remarks that their duty to advise defendant of her *Miranda* rights was a "procedural issue" that "really doesn't change anything" did not dilute her *Miranda* rights and invalidate her waiver.<sup>139</sup> The defendant, an intelligent and articulate college student, was also told that she was free to refuse to answer any questions and could stop talking at any time she chose.<sup>140</sup> She did not express confusion or hesitation and declined to terminate her conversations with the police when she was told that there was an attorney waiting for her at the jail.<sup>141</sup> Thus, the record supported the trial court's determination that she voluntarily and intelligently waived her rights and that her statements were voluntary.<sup>142</sup>

### J. *Speedy Trial*

In *Young v. Commonwealth*, the Supreme Court of Virginia held that the defendant had waived his speedy trial defense, as he had failed to object to a continuance that was initiated by the trial court after a late disclosure of evidence by the Commonwealth.<sup>143</sup> The defendant's statements that he would not be ready for trial and did not want the continuance counted against him for speedy trial were not sufficient to amount to an affirmative objection as required by Virginia Code section 19.2-243.<sup>144</sup> While *Young* did not agree to or request the continuance, he also did not affirmatively object on the record, which amounted to acquiescence.<sup>145</sup>

### K. *Right to Counsel*

In *Weatherholt v. Commonwealth*, the Supreme Court of Virginia held that a defendant's right to counsel was not violated when he appeared before the circuit court without counsel to indicate whether or not he wished to have new counsel appointed due to his current attorney's license being temporarily suspended.<sup>146</sup> The supreme court found that the hearing was not a critical stage

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139. *Id.* at 36–37, 840 S.E.2d at 585.

140. *Id.* at 37, 840 S.E.2d at 585.

141. *Id.* at 37, 840 S.E.2d at 585.

142. *Id.* at 37–38, 840 S.E.2d at 585.

143. 297 Va. 443, 452–53, 829 S.E.2d 548, 553 (2019).

144. *Id.* at 452–53, 829 S.E.2d at 553.

145. *Id.* at 452–53, 829 S.E.2d at 553.

146. 298 Va. 438, 447, 839 S.E.2d 492, 497 (2020).

of the proceedings at which counsel's absence would give rise to a presumption of prejudice.<sup>147</sup> Since the purpose of the hearing was to advise the defendant of the status of his case and to determine his wishes regarding the appointment of counsel, a decision unrepresented defendants are frequently required to make as a matter of course in criminal proceedings, the defendant did not require the assistance of a trained attorney to formulate a response.<sup>148</sup>

#### L. *Evidence*

In *Jenkins v. Commonwealth*, the Court of Appeals of Virginia considered the admissibility standard for hearsay in a revocation proceeding.<sup>149</sup> Jenkins had been convicted in 2003 of fraud offenses and sentenced to twenty years in prison with fourteen years suspended.<sup>150</sup> Jenkins violated probation in 2010, 2014, and 2018.<sup>151</sup> At the 2010 revocation proceeding, Jenkins pled guilty to violating the terms of probation, and the revocation court received evidence in the form of a report from a probation officer as to the violations ("the 2010 report").<sup>152</sup> At the 2018 revocation proceeding, Jenkins conceded violating probation, and the Commonwealth introduced the 2010 report as to sentencing.<sup>153</sup> Jenkins objected, contending that the 2010 report was inadmissible hearsay.<sup>154</sup> The court admitted the report, and Jenkins appealed.<sup>155</sup>

The court of appeals noted that there are different standards for the admissibility of hearsay evidence, depending on whether the proceeding is the guilt phase or the sentencing phase.<sup>156</sup> The court reasoned that revocation proceedings operate like criminal trials: generally, there is a guilt phase and a sentencing phase.<sup>157</sup> Accordingly, because the Commonwealth introduced the 2010 report in the sentencing phase of the revocation proceeding, there had to be

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147. *Id.* at 446–47, 839 S.E.2d at 496–97.

148. *Id.* at 446, 839 S.E.2d at 496–97.

149. 71 Va. App. 334, 342, 835 S.E.2d 918, 922 (2019).

150. *Id.* at 339, 835 S.E.2d at 921.

151. *Id.* at 339–40, 835 S.E.2d at 921.

152. *Id.* at 340, 835 S.E.2d at 921–22.

153. *Id.* at 341, 835 S.E.2d at 922.

154. *Id.* at 341, 835 S.E.2d at 922.

155. *Id.* at 341, 835 S.E.2d at 922.

156. *Id.* at 343, 835 S.E.2d at 923.

157. *Id.* at 345, 835 S.E.2d at 924.

“some indicia of reliability” to the report.<sup>158</sup> The court concluded that there was some indicia of reliability to the report and affirmed the revocation of Jenkins’ suspension.<sup>159</sup>

In *Mooney v. Commonwealth*, the Supreme Court of Virginia assumed without deciding that the trial court erred when it allowed a prosecutor to proffer quoted testimony from a newspaper article that was not admitted into evidence during a probation revocation hearing because it violated the defendant’s due process rights, and held that this error was harmless.<sup>160</sup>

During the probation revocation hearing, the defendant acknowledged that he was convicted of new felonies.<sup>161</sup> The prosecutor read a newspaper article that quoted the victim’s testimony from the trial of the new convictions.<sup>162</sup> The supreme court explained that any error was harmless beyond a reasonable doubt because the defendant conceded he was convicted of additional felonies and the judge revoked less than the prosecutor’s recommendations.<sup>163</sup>

### M. *Jury Instructions*

A jury convicted the defendant in *Davison v. Commonwealth* of various offenses, including forcible sodomy and aggravated sexual battery.<sup>164</sup> On appeal, Davison argued that the trial court erred in providing jury instructions that combined the alternative theories of force, the victim’s mental incapacity, or the victim’s physical helplessness as the means by which Davison committed the sexual acts against the victim’s will.<sup>165</sup>

The Court of Appeals of Virginia determined that the elements of both crimes were the same; that is, “(1) that Davison committed the . . . sexual acts against the victim and (2) that those acts were committed without [the victim’s] consent and against her will.”<sup>166</sup>

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158. *Id.* at 347–48, 835 S.E.2d at 925 (quoting *Blunt v. Commonwealth*, 62 Va. App. 1, 9, 741 S.E.2d 56, 60 (2013)).

159. *Id.* at 349–52, 835 S.E.2d at 926–27.

160. 297 Va. 434, 435–36, 828 S.E.2d 795, 795 (2019).

161. *Id.* at 435–36, 828 S.E.2d at 795.

162. *Id.* at 436–37, 828 S.E.2d at 796.

163. *Id.* at 437–39, 828 S.E.2d at 796–97.

164. 298 Va. 177, 177, 836 S.E.2d 390, 390 (2019).

165. *Id.* at 177, 836 S.E.2d at 390.

166. *Id.* at 178, 836 S.E.2d at 391.

The court of appeals determined that jury unanimity was not required as to the means for committing the offense.<sup>167</sup> Accordingly, it is immaterial if some jurors determined that Davison committed the acts by force, while others believed Davison exploited the victim's mental incapacity.<sup>168</sup> The Supreme Court of Virginia adopted this reasoning.<sup>169</sup> Accordingly, the court affirmed Davison's convictions, determining that the trial court properly instructed the jury.<sup>170</sup>

#### N. Sentencing

In *Burnham v. Commonwealth*, the Supreme Court of Virginia held that a trial court may revoke a defendant's suspended sentence based on his failure to maintain good behavior, even if the preceding sentencing order pronouncing the suspension does not contain an express condition of good behavior.<sup>171</sup> Virginia Code section 19.2-306(A) provides, in pertinent part, "[i]f neither a probation period nor a period of suspension was fixed by the court, then the court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned."<sup>172</sup> Accordingly, because the sentencing order challenged by the defendant did not pronounce a specific period of suspension or period of probation, the trial court was permitted to revoke the defendant's suspended sentence for any cause it deemed sufficient, as long as the new crime occurred within the maximum time for which the defendant could have originally been sentenced.<sup>173</sup> Given that, the defendant's felony suspended sentence revocation was upheld, while his revocation for the misdemeanor was overturned because the one-year sentence that was pronounced by order in 2008 had long expired by the time the trial court attempted to revoke the balance in 2016.<sup>174</sup>

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167. *Id.* at 178, 836 S.E.2d at 391.

168. *Id.* at 178, 836 S.E.2d at 391.

169. *Id.* at 179, 836 S.E.2d at 391.

170. *Id.* at 179, 836 S.E.2d at 391.

171. 298 Va. 109, 114–15, 833 S.E.2d 872, 874 (2019).

172. *Id.* at 115–16, 833 S.E.2d at 874–75 (quoting VA. CODE ANN. § 19.2-306(A) (Repl. Vol. 2015)).

173. *Id.* at 114–16, 833 S.E.2d at 874–75.

174. *Id.* at 118, 833 S.E.2d at 876.

The supreme court also rejected the defendant's contention that his requirement of good behavior ended with the expiration of his supervised probation.<sup>175</sup> The court distinguished probation from good behavior, holding that they "constitute distinct, if complementary, requirements."<sup>176</sup> The court maintained that "[o]nce the period of probation ended, the requirement of good behavior remained alongside the suspended sentence. To hold otherwise would transform a suspended sentence, meant to incentivize reform and rehabilitation, into a purposeless act."<sup>177</sup>

In *Commonwealth v. Watson*, the Commonwealth appealed, arguing that the trial court erred when it determined the appellant's sentences were void ab initio because he was sentenced on each of his four convictions for use of a firearm during the commission of a felony, in violation of Virginia Code section 18.2-53.1, to three years' imprisonment, instead of five years for his second or subsequent convictions as the code requires.<sup>178</sup> The Supreme Court of Virginia held that a sentence lower than that prescribed by statute for an offense is erroneous, but it is "merely voidable, not void," and therefore not void ab initio.<sup>179</sup> Further, as a result of Rule 1:1, which provides that the trial court retains jurisdiction for twenty-one days after entry of judgment, the trial court here lacked the jurisdiction to correct the appellant's sentences a decade post-sentencing.<sup>180</sup>

### O. *Inconsistent Verdicts*

The rationale behind permitting inconsistent verdicts was reiterated in *McQuinn v. Commonwealth*.<sup>181</sup> In that case, the Supreme Court of Virginia refused to find that the Court of Appeals of Virginia erred in affirming the defendant's conviction for the use of a firearm in the commission of a robbery when a jury acquitted him of the predicate robbery.<sup>182</sup>

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175. *Id.* at 117–18, 833 S.E.2d at 876.

176. *Id.* at 116, 833 S.E.2d at 875.

177. *Id.* at 116, 833 S.E.2d at 875.

178. 297 Va. 355, 357, 827 S.E.2d 778, 779 (2019).

179. *Id.* at 361, 827 S.E.2d at 781.

180. *Id.* at 357, 361–62, 827 S.E.2d at 779, 781.

181. \_\_\_ Va. \_\_\_, \_\_\_, 839 S.E.2d 907, 908 (2020).

182. *Id.* at \_\_\_, 839 S.E.2d at 909, 911.

The supreme court noted that a similar argument had been rejected in *Reed v. Commonwealth*.<sup>183</sup> As a reviewing court cannot determine if the jury erred in failing to convict the defendant of the predicate offense, erred in convicting the defendant of the compound offense, or may have decided to be lenient and only convict him of one offense, “it is unclear whose ox has been gored.”<sup>184</sup> Given the respect Virginia law gives to jury secrecy and deliberations, it is unlikely that a reviewing court can discover which “error” occurred, and, as the Commonwealth cannot challenge an acquittal, a new trial as a matter of course is “hardly satisfactory.”<sup>185</sup>

## II. CRIMINAL LAW

### A. *Murder and Crimes of Violence*

In *Watson-Scott v. Commonwealth*, the Supreme Court of Virginia affirmed the appellant’s second-degree murder conviction when the appellant intentionally fired multiple shots from a handgun down a city street, resulting in the homicide of a woman in the passenger seat of a car.<sup>186</sup> There was no evidence that Watson-Scott had intentionally shot at a specific person.<sup>187</sup> The supreme court considered “whether the legal standard for establishing malice requires proof that the defendant’s actions were targeted at a particular individual or group of individuals.”<sup>188</sup>

The supreme court held that malice does not require proof that the defendant’s actions were targeted at a particular individual due to the doctrine of implied malice.<sup>189</sup> Implied malice is when a “defendant intentionally acts, even though he knows his actions are wrong and so inherently dangerous that they could result in death.”<sup>190</sup> The court explained that it is “patently obvious that firing multiple shots from a handgun in the middle of a populous city” is the definition of implied malice.<sup>191</sup>

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183. *Id.* at \_\_ 839 S.E.2d at 910 (citing *Reed v. Commonwealth*, 239 Va. 594, 596–98, 391 S.E.2d 75, 76–77 (1990)).

184. *Id.* at \_\_, 839 S.E.2d at 910 (quoting *Reed*, 239 Va. at 597–98, 391 S.E.2d at 77).

185. *Id.* at \_\_, 839 S.E.2d at 910 (quoting *Reed*, 239 Va. at 597–98, 391 S.E.2d at 77).

186. 298 Va. 251, 253–55, 835 S.E.2d 902, 903–04 (2019).

187. *Id.* at 255, 835 S.E.2d at 903–04.

188. *Id.* at 255, 835 S.E.2d at 904.

189. *Id.* at 256–58, 835 S.E.2d at 904–06.

190. *Id.* at 256, 835 S.E.2d at 904–05.

191. *Id.* at 258, 835 S.E.2d at 905.

In *Flanders v. Commonwealth*, the Supreme Court of Virginia was asked to determine whether felony hit and run, in violation of Virginia Code section 46.2-894, could serve as a predicate offense for a felony homicide conviction, in violation of Virginia Code section 18.2-33.<sup>192</sup> At common law, felony murder only occurs “when an actor unintentionally kill[s] another person during the commission of a dangerous or violent felony,”<sup>193</sup> but, “the plain language of the felony-homicide statute goes beyond the common-law understanding of felony murder by permitting murder convictions based on nonviolent predicate felonies.”<sup>194</sup>

In holding felony hit and run may serve as the predicate offense for felony murder, the supreme court explained that those offenses previously determined to include the requisite imputed malice necessary for a felony murder conviction “involve some intentional course of wrongful conduct dangerous to human life.”<sup>195</sup> Furthermore, the doctrine of *res gestae* requires that there be a “time, place, and causal connection” between the felony committed and the killing, which should be determined on a case-by-case basis.<sup>196</sup>

The evidence was sufficient to convict the defendant of both aggravated malicious wounding and murder in *Ellis v. Commonwealth*, as multiple pieces of evidence showed that the victim survived the defendant’s initial attack for some temporal period, even though she later died, and death is certainly a “permanent” injury as required by the statute.<sup>197</sup>

### B. *Identity Theft*

In *Taylor v. Commonwealth*, the Supreme Court of Virginia considered whether a person “can commit attempted identity theft under Code § 18.2-186.3 when using his or her own identifying information to obtain money.”<sup>198</sup> The defendant in *Taylor* “stole a check, made it payable to herself of a certain amount, forged the account

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192. 298 Va. 345, 350, 838 S.E.2d 51, 54 (2020).

193. *Id.* at 354, 838 S.E.2d at 56 (citing JOHN L. COSTELLO, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.4[3] (4th ed. 2008)).

194. *Id.* at 355, 838 S.E.2d at 57.

195. *Id.* at 357–59, 838 S.E.2d at 58–59, 63.

196. *Id.* at 359–60, 838 S.E.2d at 59–60.

197. 70 Va. App. 385, 392–93, 827 S.E.2d 786, 789–90 (2019).

198. 298 Va. 336, 338, 837 S.E.2d 674, 675 (2020).

owner's signature and, using her own driver's license as identification, presented it to a bank teller for cash, but left the bank before completing the transaction."<sup>199</sup> Under the plain language of the statute, Taylor's actions constitute identity theft because she used the victim's identifying information—the victim's name and bank account number—with the intent to defraud in an attempt to obtain money.<sup>200</sup>

### C. *Possession of a Cellular Device by a Prisoner*

In *Jordan v. Commonwealth*, the Court of Appeals of Virginia held that the evidence was sufficient to convict the defendant of possession of a cellular telephone by a prisoner, in violation of Virginia Code section 18.2-431.1(B).<sup>201</sup> Appellant argued that the evidence was insufficient because the Commonwealth only offered evidence that the device appeared to be a cell phone and failed to prove the character of the device.<sup>202</sup> Multiple officers testified that the item recovered in the prison was a cell phone but none of them actually activated the device.<sup>203</sup>

The court of appeals explained that the statute does not require proof of operability or actual functionality.<sup>204</sup> It further held that courts can rely on the testimony of officers identifying the device as a cell phone without expert testimony.<sup>205</sup>

### D. *Obstruction of Justice*

In *Maldonado v. Commonwealth*, the defendant's conviction for obstruction of justice was reversed where he lied to police during a consensual encounter that a subject the police were looking for was not in his home and refused entry of the officers into the home.<sup>206</sup> As the officers did not have a warrant, did not seize Maldonado, and never gave Maldonado a lawful command, Maldonado's conduct did not "oppose, impede, or resist" the officer's investigative

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199. *Id.* at 338, 837 S.E.2d at 675.

200. *Id.* at 341–43, 837 S.E.2d at 677.

201. 72 Va. App. 1, 8, 840 S.E.2d 568, 571 (2020).

202. *Id.* at 6, 840 S.E.2d at 570.

203. *Id.* at 4, 840 S.E.2d at 569.

204. *Id.* at 6, 8, 840 S.E.2d at 570–71.

205. *Id.* at 8, 840 S.E.2d at 571.

206. 70 Va. App. 554, 560, 569–70, 829 S.E.2d 570, 572–73, 577–78 (2019).

efforts, but instead merely resulted in a forty-minute delay in the officers locating the subject.<sup>207</sup>

### E. *Sexual Offenders*

In *Young v. Commonwealth*, the Court of Appeals of Virginia held that the evidence was sufficient to establish that the defendant was required to register under the Crimes Against Minors Registry Act, Virginia Code sections 9.1-900 through -923 (“the Act”).<sup>208</sup> The Act requires that people convicted of one or more specific offenses on or after July 1, 1994 register and reregister. It also requires people who were convicted before July 1, 1994, who are serving a sentence of confinement or under community supervision on or after July 1, 1994, to register and reregister.<sup>209</sup> The evidence established that Young pled guilty in 2014 for failing to reregister, the Virginia Criminal Information Network reflected that he was incarcerated for committing a sex crime, and he made statements and admissions in his reregistration form that constituted additional circumstantial evidence that he was required to reregister under the Act and failed to do so.<sup>210</sup>

### F. *Sexual Crimes*

In *Robinson v. Commonwealth*, the appellant challenged the sufficiency of the evidence to prove he committed sexual battery, in violation of Virginia Code section 18.2-67.4—specifically that he used the requisite “force sufficient to overcome the victim’s will.”<sup>211</sup> The Court of Appeals of Virginia initially reversed Robinson’s conviction, but upon a rehearing en banc, found that the trial court did not err in finding sufficient evidence and affirmed Robinson’s conviction.<sup>212</sup> The court determined that Robinson used the requisite force because he twisted the victim’s breasts “as hard as he could” for approximately a minute.<sup>213</sup> With this decision, the court of ap-

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207. *Id.* at 569–70, 829 S.E.2d at 577 (quoting *Ruckman v. Commonwealth*, 28 Va. App. 428, 431, 505 S.E.2d 388, 390 (1998)).

208. 70 Va. App. 646, 650, 830 S.E.2d 68, 70 (2019).

209. *Id.* at 654, 830 S.E.2d at 72.

210. *Id.* at 659–62, 830 S.E.2d at 74–76.

211. 70 Va. App. 509, 513, 828 S.E.2d 269, 271 (2019).

212. *Id.* at 511, 828 S.E.2d at 270.

213. *Id.* at 517, 828 S.E.2d at 273.

peals pronounced that it was overruling *Johnson v. Commonwealth*.<sup>214</sup> In “wrongly decid[ing]” *Johnson*, the court declared that it had “misinterpreted the plain language of the statute, failed to apply the appropriate appellate standard of review giving due deference to the fact finder, and incorrectly found on appeal a lack of force.”<sup>215</sup>

In *Stoltz v. Commonwealth*, Stoltz was convicted of using a computer to solicit a minor, in violation of Virginia Code section 18.2-374.3(C).<sup>216</sup> He had engaged in e-mail conversations with an undercover police officer posing as a thirteen-year-old girl.<sup>217</sup> The statute prohibits adults from using a computer to solicit “any person he knows or has reason to believe is a child younger than 15 years of age” to engage in various sex acts.<sup>218</sup> On appeal, he argued that the phrase “reason to believe” in the statute was unconstitutionally vague, and that the statute was overbroad in violation of the First Amendment.<sup>219</sup>

The Supreme Court of Virginia disagreed.<sup>220</sup> As to the vagueness challenge, the court determined that the phrase “knows or has reason to believe” is not ambiguous.<sup>221</sup> The supreme court reasoned that a person of ordinary intelligence would understand the phrase and noted the phrase’s presence in other statutes.<sup>222</sup> Moreover, the evidence clearly demonstrated that Stoltz had reason to believe that he was communicating with someone he believed to be under the age of fifteen.<sup>223</sup> The undercover officer stated that she was thirteen and corrected Stoltz when he said she was twenty-three.<sup>224</sup> Additionally, the supreme court rejected Stoltz’s overbreadth challenge, ruling that the statute did not sweep in substantial amounts

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214. *Id.* at 516, 828 S.E.2d at 272 (citing *Johnson v. Commonwealth*, 5 Va. App. 529, 365 S.E.2d 237 (1988)).

215. *Id.* at 517, 828 S.E.2d at 273.

216. 297 Va. 529, 529, 831 S.E.2d 164, 166 (2019).

217. *Id.* at 529–32, 831 S.E.2d at 166–68.

218. VA CODE ANN. § 18.2-374.3(C) (Repl. Vol. 2014).

219. *Stoltz*, 297 Va. at 533, 831 S.E.2d at 168 (quoting VA. CODE ANN. § 18.2-374.3(C) (Repl. Vol. 2014)).

220. *Id.* at 534, 831 S.E.2d at 169.

221. *Id.* at 535, 831 S.E.2d at 170.

222. *Id.* at 535–36 & nn.3–4, 831 S.E.2d at 170 & nn.3–4.

223. *Id.* at 536–37, 831 S.E.2d at 170–71.

224. *Id.* at 536, 831 S.E.2d at 170.

of protected speech.<sup>225</sup> Indeed, the statute punishes conduct, not speech.<sup>226</sup> Accordingly, the court affirmed Stoltz's conviction.<sup>227</sup>

In *Ele v. Commonwealth*, the Court of Appeals of Virginia considered whether the evidence was sufficient to convict Ele of two counts of producing child pornography, aggravated sexual battery, and taking indecent liberties with a child following the seizure of pictures and videos from his home.<sup>228</sup> Ele took pictures and videos of himself masturbating near a sleeping nine-year-old girl, a friend of his daughter's.<sup>229</sup> Ele filmed himself placing his penis on the girl's face and foot and ejaculating onto her hair and leg.<sup>230</sup> Ele challenged two of his convictions on appeal: one of the production of child pornography convictions and taking indecent liberties with a child.<sup>231</sup>

Ele argued that he could not be convicted of one count of the production of child pornography because in one set of images, he did not film a nude child, which he believed the statute required.<sup>232</sup> Virginia Code section 18.2-374.1(B)(2) prohibits the production of child pornography, which is defined as "sexually explicit visual material which utilizes or has as a subject an identifiable minor."<sup>233</sup> The statute further defines "sexually explicit visual material" as "a picture, photograph . . . motion picture film, digital image . . . or [other] similar representation which depicts . . . a lewd exhibition of nudity . . . or sexual excitement, sexual conduct, or sadomasochistic abuse. . . ." <sup>234</sup> The court of appeals noted that the girl was clothed in one set of images, but the court concluded that the statute does not require the child to be nude.<sup>235</sup> The images clearly depicted Ele's nude genitals as he filmed himself masturbating and ejaculating onto the child, which satisfied the statute.<sup>236</sup>

Additionally, Ele argued that the evidence was insufficient to convict him of indecent liberties because the child was asleep and

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225. *Id.* at 538, 831 S.E.2d at 171.

226. *Id.* at 538, 831 S.E.2d at 171.

227. *Id.* at 538, 831 S.E.2d at 171.

228. 70 Va. App. 543, 546–47, 829 S.E.2d 564, 566 (2019).

229. *Id.* at 547, 829 S.E.2d at 566.

230. *Id.* at 547, 829 S.E.2d at 566.

231. *Id.* at 546, 829 S.E.2d at 566.

232. *Id.* at 548–49, 829 S.E.2d at 566–67.

233. VA. CODE ANN. § 18.2-374.1(A)–(B)(2) (Cum. Supp. 2020).

234. *Id.* § 18.2-374.1(A) (Cum. Supp. 2020).

235. *Ele*, 70 Va. App. at 549–51, 829 S.E.2d at 567–68.

236. *Id.* at 550–52, 829 S.E.2d at 568–69.

never saw Ele's genitals.<sup>237</sup> The court distinguished between indecent exposure and indecent liberties and noted that there was a reasonable probability that the child could have awoken to see Ele's genitals.<sup>238</sup> As such, the court of appeals affirmed Ele's convictions.<sup>239</sup>

### G. *Fraud*

In *Caldwell v. Commonwealth*, the Supreme Court of Virginia considered whether Virginia Code section 18.2-188 requires specific intent.<sup>240</sup> The defendant may or may not have been specifically invited to breakfast at a hotel by a guest of the hotel who received a complimentary breakfast.<sup>241</sup> After breakfast, a member of the hotel staff approached Caldwell and asked that she pay eight dollars for the breakfast; she refused and argued with the hotel staff before leaving without paying.<sup>242</sup> She was indicted and convicted of violating Virginia Code section 18.2-188(2), which makes it unlawful for anyone to obtain food with the intent to defraud the owner.<sup>243</sup>

On appeal, Caldwell argued that Virginia Code section 18.2-188 is a specific intent statute and requires evidence showing that she had the intent to defraud the innkeeper at the time she obtained the food.<sup>244</sup> The supreme court agreed, determining that the statute was unambiguous.<sup>245</sup> The court reasoned that the statute criminalizes an act combined with the intent to defraud—in this case obtaining food combined with the intent to defraud.<sup>246</sup> The court reversed Caldwell's conviction, ruling that there was a reasonable doubt as to her intent to defraud when she obtained the food.<sup>247</sup>

In *Jefferson v. Commonwealth*, Jefferson was indicted for two counts of felony welfare fraud.<sup>248</sup> In applying for Supplemental Nutrition Assistance Program ("SNAP") benefits, Jefferson neglected

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237. *Id.* at 552, 829 S.E.2d at 569.

238. *Id.* at 552–54, 829 S.E.2d at 569.

239. *Id.* at 554, 829 S.E.2d at 570.

240. \_\_\_ Va. \_\_\_, \_\_\_, 840 S.E.2d 343, 346–47 (2020).

241. *Id.* at \_\_\_, 840 S.E.2d at 345.

242. *Id.* at \_\_\_, 840 S.E.2d at 345.

243. *Id.* at \_\_\_, 840 S.E.2d at 344.

244. *Id.* at \_\_\_, 840 S.E.2d at 346–47.

245. *Id.* at \_\_\_, 840 S.E.2d at 348.

246. *Id.* at \_\_\_, 840 S.E.2d at 348.

247. *Id.* at \_\_\_, 840 S.E.2d at 348.

248. 298 Va. 1, 4, 833 S.E.2d 462, 463 (2019).

to include income she earned from a part-time job.<sup>249</sup> Jefferson admitted to working at the part-time job, stating that she did not include the income in the application because she did not know how long she would work there, and that she thought she did not need to report the income if it was below a certain amount.<sup>250</sup> The county Department of Social Services (the “Department”) calculated that Jefferson received some \$3400 in SNAP benefits that she should not have received.<sup>251</sup> The Department admitted, however, that this calculation was not based on the difference between what Jefferson actually received and what she would have received had she reported the part-time income.<sup>252</sup>

The Supreme Court of Virginia determined that there was sufficient evidence that Jefferson had received SNAP benefits in excess of \$200 for each period in the indictment, meaning that there was sufficient evidence of felony welfare fraud.<sup>253</sup> The court, however, disagreed with the Department’s calculation as to the amount of benefits Jefferson fraudulently received.<sup>254</sup> The court determined that the Department should calculate the amount as the difference between what she actually received and the amount she should have received had she reported the part-time income.<sup>255</sup> Additionally, the court stated that the Department should have included the deductions that Jefferson was entitled to, like a housing deduction that was not included in certain months.<sup>256</sup> Furthermore, the court determined that any error in limiting Jefferson’s cross examination of a Department expert was harmless because the evidence admitted clearly demonstrated that Jefferson met the threshold for felony welfare fraud.<sup>257</sup>

#### H. *Destruction of Property*

To meet the \$1000 value threshold for felony destruction of property, the Supreme Court of Virginia held in *Spratley v. Commonwealth* that the Commonwealth is not required to show the “fair

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249. *Id.* at 4–5, 833 S.E.2d at 463–64.

250. *Id.* at 5, 833 S.E.2d at 464.

251. *Id.* at 5–6, 833 S.E.2d at 464–65.

252. *Id.* at 7–9, 833 S.E.2d at 465–66.

253. *Id.* at 12–13, 833 S.E.2d at 467–68.

254. *Id.* at 13, 833 S.E.2d at 468.

255. *Id.* at 12, 833 S.E.2d at 467–68.

256. *Id.* at 12, 833 S.E.2d at 468.

257. *Id.* at 12–13, 833 S.E.2d at 468.

market value” of the destroyed property right before its destruction as evidenced by its original purchase price, age, or depreciation, but rather, as the statute states, the “fair market replacement value” of the property.<sup>258</sup>

Thus, the circuit court did not err in determining that the evidence was sufficient to show that the “fair market replacement value” of the destroyed property, a grocery counter scale, was over \$1000 when the evidence showed that the model of the destroyed scale was no longer being manufactured and the scale that replaced the destroyed scale cost upwards of \$3000, performed the same functions, and had the same design and layout.<sup>259</sup>

### I. *Failure to Stop at the Scene of an Accident*

In *Butcher v. Commonwealth*, the Supreme Court of Virginia affirmed Butcher’s conviction for misdemeanor failure to stop at the scene of an accident, a violation of the “hit-and-run” statute.<sup>260</sup> In a published opinion, the Court of Appeals of Virginia had affirmed the conviction, determining that there was sufficient evidence that Butcher failed to satisfy either of the two post-accident reporting requirements in the statute.<sup>261</sup> The court of appeals then went on to hold sua sponte that a driver needed to satisfy either of the post-accident reporting requirements, even though Butcher and the Commonwealth agreed that he had to satisfy both requirements.<sup>262</sup>

The supreme court agreed with the court of appeals as to the sufficiency of the evidence.<sup>263</sup> The supreme court, however, vacated the portion of the holding concerning the post-accident reporting requirements pursuant to the logic of judicial restraint.<sup>264</sup> Neither party had sought an answer from the court of appeals as to whether the post-accident reporting requirements were conjunctive or disjunctive.<sup>265</sup> The supreme court determined that Butcher had failed

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258. 298 Va. 187, 194–96, 836 S.E.2d 385, 389–90 (2019).

259. *Id.* at 195–96, 836 S.E.2d at 389–90.

260. \_\_ Va. \_\_, \_\_, 838 S.E.2d 538, 539 (2020) (citing VA. CODE ANN. § 46.2-894 (Repl. Vol. 2017)).

261. *Id.* at \_\_, 838 S.E.2d at 539.

262. *Id.* at \_\_, 838 S.E.2d at 539.

263. *Id.* at \_\_, 838 S.E.2d at 539.

264. *Id.* at \_\_, 838 S.E.2d at 539–40.

265. *Id.* at \_\_, 838 S.E.2d at 539.

to present the issue to the court, and also that it was “logically unnecessary” for that court to resolve an undisputed issue.<sup>266</sup>

### J. *Driving on a Revoked License*

The Supreme Court of Virginia held in *Yoder v. Commonwealth* that the evidence was sufficient to prove that the defendant had actual notice that her license was revoked as required by Virginia Code section 18.2-272(A), as she had been present in court for two prior guilty pleas for driving on a revoked license.<sup>267</sup> Further, she made no excuse for not having a driver’s license during arrest and possessed instead an ID card which could not be simultaneously possessed with a driver’s license.<sup>268</sup> Virginia Code section 18.2-272(A) does not mandate any particular form or degree of specificity for actual notice; accordingly, the notice shown here was sufficient.<sup>269</sup>

The supreme court further stated that this case is distinguishable from a suspension under Virginia Code section 46.2-301(B), where, after a suspension period ends, the driver is in an “odd legal purgatory” where he is neither driving on a revoked license nor driving on a valid license, but rather is merely driving without a valid license.<sup>270</sup> As Yoder’s revocation period was still in effect when she was arrested, she was not in this “purgatory,” thus the trial court did not err in finding the evidence sufficient.<sup>271</sup>

### K. *Conspiracy*

In *Smallwood v. Commonwealth*, the defendant appealed his conviction of three counts of conspiracy to obtain money by false pretenses and argued on appeal (1) that convicting him of multiple conspiracies violated his Fifth Amendment rights and (2) that the court erred in convicting him of multiple conspiracies.<sup>272</sup> The Court

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266. *Id.* at \_\_\_, 838 S.E.2d at 539–40.

267. 298 Va. 180, 183–84, 835 S.E.2d 897, 900 (2019).

268. *Id.* at 183–84, 835 S.E.2d at 900.

269. *Id.* at 182–83, 835 S.E.2d at 899–900.

270. *Id.* at 184–85, 835 S.E.2d at 900–01.

271. *Id.* at 184–85, 835 S.E.2d at 900–01.

272. 72 Va. App. 119, 122–23, 841 S.E.2d 881, 882 (2020).

of Appeals of Virginia determined that Smallwood had failed to preserve his first argument.<sup>273</sup>

As to his second argument, the court of appeals agreed that the evidence demonstrated that Smallwood was involved in one conspiracy to defraud three people—a Ponzi scheme.<sup>274</sup> The court of appeals distinguished this case from *Cartwright v. Commonwealth*, in which Cartwright was convicted of multiple conspiracies for attempting to commit multiple, different crimes.<sup>275</sup> The court reversed Smallwood’s convictions and concluded that the number of convictions should depend on the number of agreements, which was one in this case.<sup>276</sup>

### III. LEGISLATION

#### A. Venue

The General Assembly expanded the potential venues for a prosecution of a violation of a protective order to the jurisdiction where the protective order was issued or in any county or city where any act constituting the violation of the protective order occurred.<sup>277</sup>

Previously, venue for child pornography offenses lay where the act occurred or where any material associated with the violation was “produced, reproduced, found, stored, or possessed.”<sup>278</sup> The General Assembly added where the defendant resides to that list.<sup>279</sup>

The 2020 General Assembly established default venue in the City of Richmond for a perpetrator charged with threatening or harassing by computer certain government officials, including but not limited to the Governor, Attorney General, member of the General Assembly, any justice of the Supreme Court of Virginia, or any

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273. *Id.* at 127, 841 S.E.2d at 884–85.

274. *Id.* at 130, 841 S.E.2d at 886.

275. *Id.* at 130, 841 S.E.2d at 886 (citing *Cartwright v. Commonwealth*, 223 Va. 368, 288 S.E.2d 491 (1982)).

276. *Id.* at 130–31, 841 S.E.2d at 886.

277. Act of Mar. 27, 2020, ch. 487, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 16.1-253.2, 18.2-60.4 (Cum. Supp. 2020)).

278. VA. CODE ANN. §§ 18.2-374.1(E), -374.1:1(G) (Repl. Vol. 2014).

279. Act of Mar. 27, 2020, ch. 489, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-374.1, -374.1:1 (Cum. Supp. 2020)).

judge of the Court of Appeals of Virginia, when the venue cannot be otherwise established.<sup>280</sup>

The General Assembly also established default venue in the City of Richmond for a perpetrator charged with threatening to bomb or damage a building or means of transportation owned by the Commonwealth and located within the Capitol District, when venue cannot be otherwise established.<sup>281</sup> The General Assembly clarified that any person who is under fifteen years old, not just persons the age of fifteen, is guilty of a Class 1 misdemeanor should they threaten to bomb or damage a building or means of transportation.<sup>282</sup>

### B. *Sex Offenses*

The legislature repealed the crime of fornication—sexual intercourse by an unmarried person.<sup>283</sup>

The General Assembly added the act of touching the unclothed genitals or anus of another with the intent to sexually arouse or gratify for money or other equivalent to the definition of prostitution.<sup>284</sup>

The legislature added to the definition of sexual battery.<sup>285</sup> Anyone who is or purports to be a massage therapist, healer, or physical therapist, who sexually abuses another and commits an act not recognized as a form of treatment in the profession and without the express consent of the patient, commits a sexual battery.<sup>286</sup>

### C. *Bail*

The General Assembly eliminated the provision prohibiting a judicial officer from admitting to bail any person who is charged with

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280. Act of Apr. 9, 2020, ch. 1002, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-60, -60.1, -152.7:1, -430 (Cum. Supp. 2020)).

281. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 18.2-83 (Cum. Supp. 2020)).

282. *Id.* at \_\_.

283. Act of Mar. 4, 2020, ch. 122, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 4.1-225, 15.2-907, -1724, 17.1-275.13, 18.2-67.5:2, -67.9, -346, -366 (Cum. Supp. 2020)).

284. Act of Apr. 2, 2020, ch. 595, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-346, -348, -356 (Cum. Supp. 2020)).

285. Act of Apr. 9, 2020, ch. 1003, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-67.3 (Cum. Supp. 2020)).

286. *Id.* at \_\_.

an offense giving rise to a rebuttable presumption against bail without the concurrence of the Commonwealth.<sup>287</sup> Notice is no longer required to be provided to the attorney for the Commonwealth.<sup>288</sup>

#### D. *Protective Orders*

The General Assembly authorized a court to issue a protective order upon convicting a defendant for an act of violence and after the request of the victim or the Commonwealth on behalf of the victim.<sup>289</sup> The General Assembly provided that the duration of such protective order can be for any reasonable period of time, including the lifetime of the defendant, that the court deems necessary to protect the health and safety of the victim.<sup>290</sup> The bill provides that a violation of a protective order issued upon a conviction for an act of violence is punishable as a Class 1 misdemeanor.<sup>291</sup>

#### E. *Traffic Offenses/Licensure*

The General Assembly repealed Virginia Code sections 18.2-259.1, 46.2-320.2, 46.2-390.1, 46.2-416.1, and 53.1-127.4, which provide for the suspension of drivers' licenses upon conviction for a drug offense, for non-payment of court or jail fees, or for theft of motor fuel.<sup>292</sup>

The legislature removed portions of the Virginia Code allowing for the suspension of drivers' licenses for the failure to pay court costs or fines.<sup>293</sup> Additionally, the legislature added a new section, 46.2-808.2, which provides for a fine of no more than \$500 for any

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287. Act of Apr. 9, 2020, ch. 999, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-120 (Cum. Supp. 2020)).

288. *Id.* at \_\_.

289. Act of Apr. 9, 2020, ch. 1005, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-152.10 (Cum. Supp. 2020)).

290. *Id.* at \_\_.

291. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 18.2-60.4 (Cum. Supp. 2020)).

292. Act of Apr. 6, 2020, ch. 740, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-259.1, 46.2-320.2, -390.1, -416.1, 53.1-127.4 (Cum. Supp. 2020)).

293. Act of Apr. 9, 2020, ch. 964, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 19.2-258.1, 19.2-354, 33.2-503, 46.2-203.1, -301, -361, -383, -391.1, -416, -808.2, -819.1, -819.3, -819.3:1, -819.5, -940, -1200.1 (Cum. Supp. 2020)).

moving violation within a designated highway safety corridor if the offense is a traffic violation, or \$200 for a criminal offense.<sup>294</sup>

The legislature added a new section to Virginia Code section 18.2-268.3.<sup>295</sup> For a first offense for refusal to provide a breath test where a person's license has been suspended, thirty days after the date of conviction, the defendant may petition the court for a restricted license.<sup>296</sup> The new code section requires, among other things, that if the court grants the defendant a restricted license, the defendant must install an ignition interlock system on any vehicle owned or registered by him or her and also complete an alcohol safety action program.<sup>297</sup> Furthermore, such a restricted license will not entitle the defendant to operate a commercial vehicle.<sup>298</sup>

The General Assembly prohibited the use of any handheld personal communications device while driving, with exceptions for emergency vehicles, parked or stopped vehicles, reporting an emergency, amateur radios, or a Department of Transportation vehicle during traffic management services.<sup>299</sup> This legislation will be effective January 1, 2021.<sup>300</sup>

The General Assembly retained one definition of reckless driving as twenty miles per hour over the posted speed limit.<sup>301</sup> The other definition of reckless driving—over eighty miles per hour—is amended to over eighty-five.<sup>302</sup> The legislation also includes an additional \$100 fine for anyone who drives over eighty miles per hour but under eighty-six on any highway with a posted speed limit of sixty-five miles per hour.<sup>303</sup>

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294. *Id.* at \_\_ (codified at VA. CODE ANN. § 46.2-808.2 (Cum. Supp. 2020)).

295. Act of Mar. 12, 2020, ch. 341, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-268.3, 46.2-391.2 (Cum. Supp. 2020)).

296. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 18.2-268.3 (Cum. Supp. 2020)).

297. *Id.* at \_\_.

298. *Id.* at \_\_.

299. Act of Mar. 10, 2020, ch. 250, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 46.2-868 (Cum. Supp. 2020)).

300. *Id.* at \_\_.

301. Act of Mar. 25, 2020, ch. 444, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 46.2-862, -878.3 (Cum. Supp. 2020)).

302. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 46.2-862 (Cum. Supp. 2020)).

303. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 46.2-878.3 (Cum. Supp. 2020)).

### F. *Drug and Alcohol Offenses*

The General Assembly prohibited the sale to persons under age twenty-one of hemp products intended for smoking.<sup>304</sup>

The General Assembly decriminalized simple marijuana possession and provided a civil penalty of no more than \$25.<sup>305</sup> The previous law imposed a maximum fine of \$500 and a maximum thirty-day jail sentence for a first offense, and subsequent offenses were a Class 1 misdemeanor.<sup>306</sup> The law now provides that any violation of simple possession of marijuana may be charged by a summons in the same form as the uniform summons for motor vehicle law violations and that no court costs shall be assessed for such violations.<sup>307</sup>

The law also provides that a person's criminal history record information shall not include records of any charges or judgments for such violations and records of such charges or judgments shall not be reported to the Central Criminal Records Exchange.<sup>308</sup>

Also, the law states that the procedure for appeal and trial of any violation of simple possession of marijuana shall be the same as provided by law for misdemeanors, and that if requested by either party on appeal to the circuit court, trial by jury shall be provided and the Commonwealth shall be required to prove its case beyond a reasonable doubt.<sup>309</sup>

Additionally, the law provides that the suspended sentence/substance abuse screening provisions and driver's license suspension provisions apply only to criminal violations or to civil violations by a juvenile.<sup>310</sup>

The law defines "marijuana" to include hashish oil and creates a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.<sup>311</sup>

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304. Act of Mar. 23, 2020, ch. 406, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-371.2 (Cum. Supp. 2020)).

305. Act of May 21, 2020, ch. 1285, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-250.1 (Cum. Supp. 2020)).

306. VA. CODE ANN. § 18.2-250.1 (Cum. Supp. 2019).

307. Ch. 1285, 2020 Va. Acts at \_\_.

308. *Id.* at \_\_.

309. *Id.* at \_\_.

310. *Id.* at \_\_.

311. *Id.* at \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-247 to -248.1. (Cum. Supp.

The law also (1) makes records relating to the arrest, criminal charge, or conviction of possession of marijuana not open to public inspection and disclosure, except in certain circumstances; (2) prohibits employers and educational institutions from requiring an applicant for employment or admission to disclose information related to such arrest, criminal charge, or conviction; and (3) prohibits agencies, officials, and employees of the state and local governments from requiring an applicant for a license, permit, registration, or governmental service to disclose information concerning such arrest, criminal charge, or conviction.<sup>312</sup>

Also, the law allows a person charged with a civil offense who is acquitted, a nolle prosequi is taken, or the charge is otherwise dismissed to file a petition requesting expungement of the police records and court records related to the charge.<sup>313</sup>

Finally, the law requires the Secretaries of Agriculture and Forestry, Finance, Health and Human Resources, and Public Safety and Homeland Security to convene a work group to study the impact on the Commonwealth of legalizing the sale and personal use of marijuana and report the recommendations of the work group to the General Assembly and the Governor by November 30, 2020.<sup>314</sup>

The Board of Pharmacy added a list of chemicals to Schedule I of the Drug Control Act in an expedited regulatory process.<sup>315</sup> A substance added via this process is removed from the schedule after eighteen months unless a general law is enacted adding the substance to the schedule.<sup>316</sup>

The General Assembly provided that no individual shall be subject to arrest or prosecution for the unlawful purchase, possession, or consumption of alcohol, possession of a controlled substance, possession of marijuana, intoxication in public, or possession of controlled paraphernalia if (1) such individual (a) seeks or obtains emergency medical attention for himself, if he is experiencing an overdose, or for another individual, if such other individual is ex-

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312. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 19.2-389.3 (Cum. Supp. 2020)).

313. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 19.2-392.2 (Cum. Supp. 2020)).

314. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 54.1-3446 (Cum. Supp. 2020)).

315. Act of Mar. 3, 2020, ch. 101, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 54.1-3440 (Cum. Supp. 2020)).

316. VA. CODE ANN. § 54.1-3443 (Repl. Vol. 2019).

periencing an overdose, or (b) is experiencing an overdose and another individual seeks or obtains emergency medical attention for him; (2) such individual remains at the scene of the overdose or at any location to which he or the individual requiring emergency medical attention has been transported; (3) such individual identifies himself to the law-enforcement officer who responds; and (4) the evidence for a prosecution of one of the enumerated offenses would have been obtained only as a result of an individual seeking or obtaining emergency medical attention.<sup>317</sup> The law also provides that no law-enforcement officer acting in a good faith shall be found liable for false arrest if it is later determined that the person arrested was immune from prosecution.<sup>318</sup>

Previously the law provided an affirmative defense to such offenses only when an individual sought or obtained emergency medical attention for himself, if he was experiencing an overdose, or for another individual, if such other individual was experiencing an overdose.<sup>319</sup>

### G. *Forfeiture*

The General Assembly required that any action for the forfeiture of property used in connection with the commission of a crime be stayed until the person whose property is the subject of the forfeiture action has been found guilty of the crime which authorized the forfeiture.<sup>320</sup> However, the property may be forfeited even if no finding of guilt is made if the forfeiture is ordered by a court pursuant to a plea agreement or the owner has not submitted a written demand for the return of the property within twenty-one days from the date the stay terminates.<sup>321</sup>

### H. *Firearms*

The General Assembly now requires a background check for any firearm sale and has directed the Department of State Police (“the

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317. Act of Apr. 9, 2020, ch. 1016, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-251.03 (Cum. Supp. 2020)).

318. *Id.* at \_\_.

319. VA CODE ANN. § 18.2-251.03 (Repl. Vol. 2014).

320. Act of Apr. 9, 2020, ch. 1000, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-386.1. (Cum. Supp. 2020)).

321. *Id.* at \_\_.

Department”) to establish a process for transferors to obtain such a background check from licensed firearms dealers.<sup>322</sup> A person who sells a firearm to another person without obtaining the required background check is guilty of a Class 1 misdemeanor.<sup>323</sup> The law also provides that a purchaser who receives a firearm from another person without obtaining the required background check is guilty of a Class 1 misdemeanor.<sup>324</sup> The law further removes the provision that makes background checks of prospective purchasers or transferees at firearms shows voluntary.<sup>325</sup> The law also provides that the Department shall have three business days to complete a background check before a firearm may be transferred.<sup>326</sup>

The legislature enacted a new law, which provides that any person who recklessly leaves a loaded, unsecured firearm in such a manner as to endanger the life or limb of any person under the age of fourteen is guilty of a Class 1 misdemeanor.<sup>327</sup> Previously, the law provided that any person who recklessly left a loaded, unsecured firearm in such a manner as to endanger the life or limb of any child under the age of fourteen was guilty of a Class 3 misdemeanor.<sup>328</sup>

### I. *Hate Crimes*

The legislature added the following to the list of crimes that a multi-jurisdictional grand jury may investigate: (1) simple assault or assault and battery where the victim was intentionally selected because of his race, religious conviction, gender, disability, gender identity, sexual orientation, color, or national origin; (2) entering the property of another for purposes of damaging such property or its contents or interfering with the rights of the owner, user, or occupant where such property was intentionally selected because of the race, religious conviction, gender, disability, gender identity,

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322. Act of Apr. 10, 2020, ch. 1112, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-308.2:5 (Cum. Supp. 2020)).

323. *Id.* at \_\_.

324. *Id.* at \_\_.

325. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 54.1-4201.2 (Cum. Supp. 2020)).

326. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 18.2-308.2:2 (Cum. Supp. 2020)).

327. Act of Apr. 6, 2020, ch. 742, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-56.2. (Cum. Supp. 2020)).

328. VA. CODE ANN. § 18.2-56.2 (Repl. Vol. 2014).

sexual orientation, color, or national origin of the owner, user, or occupant; and (3) various offenses that tend to cause violence.<sup>329</sup>

The 2020 General Assembly expanded those groups which qualify as the target of a “hate crime,” as it relates to assault, assault and battery (Virginia Code section 18.2-57), and unlawful entry (Virginia Code section 18.2-121), to include gender, disability, gender identity, sexual orientation, and national origin.<sup>330</sup> Those groups previously were limited to individuals targeted due to their race, religion, or ethnic origin.<sup>331</sup> A definition of “disability” was added to the statute, defining it as “a physical or mental impairment that substantially limits one or more of a person’s major life activities.”<sup>332</sup>

The mandatory minimum sentence was increased from thirty days to six months for any violation of Virginia Code sections 18.2-57 or 18.2-121, where the victim of the offense belongs to any of those eight protected groups.<sup>333</sup>

The General Assembly added gender, disability, gender identity, sexual orientation, and national origin as qualifying protected groups, and required that all hate crimes be reported to the Department of State Police by all state, county, and municipal law enforcement agencies.<sup>334</sup>

### J. *Juveniles*

The General Assembly enacted a law now requiring that prior to the custodial interrogation of a child who has been arrested by a law-enforcement officer for a criminal violation, the child’s parent, guardian, or legal custodian be notified of the child’s arrest, and

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329. Act of Apr. 6, 2020, ch. 747, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-215.1 (Cum. Supp. 2020)).

330. *Id.* at \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-57, -121 (Cum. Supp. 2020)).

331. VA. CODE ANN. §§ 18.2-57, -121 (Repl. Vol. 2014).

332. Act of Apr. 6, 2020, ch. 746, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-57, -121 (Cum. Supp. 2020)); Act of Apr. 11, 2020, ch. 1171, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-57, -121 (Cum. Supp. 2020)).

333. Ch. 746, 2020 Va. Acts at \_\_; Ch. 1171, 2020 Va. Acts at \_\_.

334. Act of Mar. 4, 2020, ch. 124, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 52-8.5 (Cum. Supp. 2020)).

the child must have contact with his parent, guardian, or legal custodian.<sup>335</sup> Such notification and contact “may be in person, electronically, by telephone, or by video conference.”<sup>336</sup> However, notification and contact prior to a custodial interrogation is not required if the “parent, guardian, or legal custodian is a codefendant in the alleged offense;” the “parent, guardian, or legal custodian has been arrested for, has been charged with, or is being investigated for a crime against the child;” the person cannot reasonably be located or refuses contact with the child; or “the law-enforcement officer conducting the custodial interrogation reasonably believes the information sought is necessary to protect life, limb, or property from an imminent danger and the law-enforcement officer’s questions are limited to those that are reasonably necessary to obtain that information.”<sup>337</sup>

The legislature increased the statute of limitations for certain misdemeanor violations against children from one year after the child victim reaches majority to five years after majority where the offender is an adult and more than three years older than the victim.<sup>338</sup>

The General Assembly altered the procedure for bringing murder charges against defendants between the ages of fourteen and sixteen. Before July 1, 2020, if a juvenile fourteen years of age or older was charged with murder, the juvenile court conducted a preliminary hearing.<sup>339</sup> The legislation amends Virginia Code section 16.1-269.1 so that if the juvenile is charged with murder and is between fourteen and sixteen years of age, the juvenile court may hold a transfer hearing upon motion of the Commonwealth.<sup>340</sup> For juveniles sixteen years of age or older, the juvenile court conducts a preliminary hearing.<sup>341</sup> The legislation also requires the attorney for the Commonwealth to submit a request to the director of court services to complete a report described in Virginia Code section

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335. Act of Mar. 27, 2020, ch. 480, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 16.1-247.1 (Cum. Supp. 2020)).

336. *Id.* at \_\_.

337. *Id.* at \_\_.

338. Act of Apr. 10, 2020, ch. 1122, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-8 (Cum. Supp. 2020)).

339. VA. CODE ANN. § 16.1-269.1 (Repl. Vol. 2015).

340. Act of Apr. 9, 2020, ch. 987, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 16.1-269.1 (Cum. Supp. 2020)).

341. *Id.* at \_\_.

16.1-269.2.<sup>342</sup> Once the report is complete, the attorney for the Commonwealth must then provide notice of intent to proceed with a preliminary hearing.<sup>343</sup>

Previously, it was illegal to smoke in a vehicle containing a child younger than eight years of age.<sup>344</sup> The legislature raised the age of the child to fifteen.<sup>345</sup>

The General Assembly provided courts with the discretion to depart from any mandatory minimum sentence if a juvenile is convicted of a felony.<sup>346</sup> Additionally, the court may “suspend any portion of an otherwise applicable sentence.”<sup>347</sup> Furthermore, where a juvenile is sentenced as an adult, in addition to other factors, the court shall consider “(i) the juvenile’s exposure to adverse childhood experiences, early childhood trauma, or any child welfare agency and (ii) the differences between juvenile and adult offenders.”<sup>348</sup>

### K. *Sentencing*

The General Assembly amended Virginia Code section 19.2-303.01 by providing sentencing courts with the discretion to reduce the sentence of a defendant who provided “assistance in investigating or prosecuting another person” for grand larceny of a firearm.<sup>349</sup>

The General Assembly also amended sentencing procedures for defendants convicted of drug offenses.<sup>350</sup>

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342. *Id.* at \_\_.

343. *Id.* at \_\_.

344. VA. CODE ANN. § 46.2-810.1 (Repl. Vol. 2017).

345. Act of Apr. 9, 2020, ch. 972, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 46.2-810.1 (Cum. Supp. 2020)).

346. Act of Mar. 23, 2020, ch. 396, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 16.1-272 (Cum. Supp. 2020)).

347. *Id.* at \_\_.

348. *Id.* at \_\_.

349. Act of Apr. 6, 2020, ch. 765, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-303.01 (Cum. Supp. 2020)).

350. Act of Apr. 6, 2020, ch. 740, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-251 (Cum. Supp. 2020)).

### L. *Voir Dire*

The 2020 General Assembly passed a law allowing the court and counsel to ask potential jurors questions about whether they “can sit impartially in either the guilt or sentencing phase” and inform potential jurors of the potential sentencing range.<sup>351</sup>

### M. *Custodial Interrogations*

The General Assembly enacted a new provision, which requires that any law-enforcement officer shall, if practicable, make an audiovisual recording of the entirety of any custodial interrogation of a person conducted in a place of detention.<sup>352</sup> The law provides that if an audiovisual recording is unable to be made, the law-enforcement officer shall make an audio recording of the entirety of the custodial interrogation.<sup>353</sup> The law also provides that the failure of a law-enforcement officer to make such a recording shall not affect the admissibility of the statements made during the custodial interrogation, but the court or jury may consider such failure in determining the weight given to such evidence.<sup>354</sup>

### N. *Discovery*

The 2020 General Assembly passed several laws altering discovery practice in criminal matters.<sup>355</sup> It established new requirements and procedures for discovery: a party requesting discovery must request that the other party voluntarily comply with the discovery request before filing a motion with the court; if the party receives an unsatisfactory response, the requesting party may file a motion for discovery with the court.<sup>356</sup> The law details the timing

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351. Act of Mar. 4, 2020, ch. 157, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-262.01 (Cum. Supp. 2020)).

352. Act of Apr. 10, 2020, ch. 1126, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-390.04 (Cum. Supp. 2020)).

353. *Id.* at \_\_.

354. *Id.* at \_\_.

355. Act of Apr. 11, 2020, ch. 1167, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 19.2-389, -264.6 to -264.14 (Cum. Supp. 2020)).

356. *Id.* at \_\_ (codified as amended at VA. CODE ANN. § 19.2-264.7 (Cum. Supp. 2020)).

requirements for discovery production and mechanisms for redacting personal identifying information and creates a procedure for either party to move the court to enter a protection order.<sup>357</sup>

Additionally, all criminal attorneys who are active members of the Virginia State Bar may issue subpoenas duces tecum.<sup>358</sup>

#### O. *Journalist Privilege*

The General Assembly enacted legislation protecting journalists from being forced by the Commonwealth to disclose protected information unless the court finds the protected information is necessary to prove a material issue, the “information is not obtainable from any alternative source,” the Commonwealth exhausted all reasonable methods for obtaining the information, and “there is an overriding public interest in the disclosure of the protected information.”<sup>359</sup> Any information obtained in violation of this statute is inadmissible.<sup>360</sup>

#### P. *Service*

Clerk’s offices must accept a copy of the original proof of service as if it were an original proof of service if the proponent provides a statement that the copy is a true copy of the original.<sup>361</sup>

#### Q. *Appeal of Right in General District Court*

The General Assembly enacted a law providing for an appeal of right to a court of record from a district court of any order entered that alters, amends, overturns, or vacates a prior final order.<sup>362</sup>

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357. *Id.* at \_\_ (codified as amended at VA. CODE ANN. §§ 19.2-264.7, -264.9, -264.12 (Cum. Supp. 2020)).

358. Act of Apr. 7, 2020, ch. 771, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-10.4 (Cum. Supp. 2020)).

359. Act of Apr. 6, 2020, ch. 650, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-271.5 (Cum. Supp. 2020)).

360. *Id.* at \_\_.

361. Act of Mar. 4, 2020, ch. 158, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 8.01-325 (Cum. Supp. 2020)).

362. Act of Apr. 10, 2020, ch. 1048, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 16.1-106 (Cum. Supp. 2020)).

### R. *Ex Parte Requests for Expert Assistance*

The General Assembly enacted legislation providing that indigent defendants charged with felonies or Class 1 misdemeanors may move the court “to designate another judge in the same circuit to hear an *ex parte* request for appointment of a qualified expert to assist” the defense.<sup>363</sup> The court is required to authorize the defense to obtain expert assistance if the defense shows that the assistance would materially assist the defendant and that the denial of such services would result in a fundamentally unfair trial.<sup>364</sup>

### S. *Miscellaneous Crimes*

Under new legislation, it is a Class 1 misdemeanor to maliciously send an electronically transmitted communication containing a false representation, with the intent to cause another person to spend money, causing the person to spend money.<sup>365</sup>

The 2020 General Assembly increased the threshold amount from \$500 to \$1000 for money taken or the value of goods taken sufficient for a grand larceny.<sup>366</sup> The General Assembly also increased the threshold by the same amount for a host of other larceny and property crimes, including but not limited to conspiracy to commit larceny, burning or destroying a building or personal property, petit larceny, unauthorized use of a vehicle, concealment, and credit card fraud.<sup>367</sup>

The 2020 General Assembly enhanced the penalty for unauthorized use of an electronic tracking device, increasing its classification from a Class 3 misdemeanor to a Class 1 misdemeanor.<sup>368</sup>

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363. Act of Apr. 10, 2020, ch. 1124, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-266.4 (Cum. Supp. 2020)).

364. *Id.* at \_\_.

365. Act of Apr. 11, 2020, ch. 1178, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-152.7:2 (Cum. Supp. 2020)).

366. Act of Mar. 3, 2020, ch. 89, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-95 (Cum. Supp. 2020)).

367. *Id.* at \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-23, -80, -81, -96, -96.1, -97, -102, -103, -108.01, -145.1, -150, -152.3, -162, -181, -181.1, -182, -186, -186.3, -187.1, -188, -195, -195.2, -197, -340.37, 19.2-289, -386.16 (Cum. Supp. 2020)).

368. Act of Mar. 4, 2020, ch. 140, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-60.5 (Cum. Supp. 2020)).

The 2020 General Assembly repealed the crime of profane swearing in public, which was punishable as a Class 4 misdemeanor.<sup>369</sup>

The 2020 General Assembly enacted legislation making brandishing a firearm, air- or gas-operated weapon or object similar in appearance, pursuant to Virginia Code section 18.2-282, a prohibited paramilitary activity, if the action is committed while assembled with one or more persons and for the purpose of intimidating any person or group.<sup>370</sup> The General Assembly criminalizes this conduct as a Class 5 felony.<sup>371</sup>

The 2020 General Assembly expanded the crime of computer trespass, such that it is unlawful for any person, with malicious intent, or now “through intentionally deceptive means and without authority,” to commit the crime. The General Assembly also specified that a computer hardware or software provider, an interactive computer service, or a telecommunications or cable operator does not have to provide notice of its activities to a computer user that a reasonable computer user should expect may occur.<sup>372</sup>

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369. Act of Mar. 4, 2020, ch. 160, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-388 (Cum. Supp. 2020)).

370. Act of Apr. 2, 2020, ch. 601, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-433.2 (Cum. Supp. 2020)).

371. *Id.* at \_\_.

372. Act of Apr. 7, 2020, ch. 821, 2020 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-152.4 (Cum. Supp. 2020)).