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## Criminal Law and Procedure

Rachel L. Yates

John I. Jones IV

Brittany Dunn-Pirio

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## CRIMINAL LAW AND PROCEDURE

*Rachel L. Yates* \*  
*John I. Jones, IV* \*\*  
*Brittany Dunn-Pirio* \*\*\*

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\* Assistant Attorney General, Criminal Appeals Section, Office of the Attorney General, Commonwealth of Virginia. J.D., 2013, University of Richmond School of Law; B.A., 2009, University of Virginia.

\*\* Assistant Attorney General, Criminal Appeals Section, Office of the Attorney General, Commonwealth of Virginia. J.D., 2015, Regent University School of Law; B.S., 2009, Central Christian College of Kansas.

\*\*\* Assistant Attorney General, Criminal Appeals Section, Office of the Attorney General, Commonwealth of Virginia. J.D., 2016, Washington & Lee University School of Law; B.A., 2013, University of Notre Dame.

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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 appellate decisions and legislation.

## I. CRIMINAL PROCEDURE

A. *Continuances*

In *Reyes v. Commonwealth*, the Supreme Court of Virginia was asked to determine whether a trial court erred in denying a defendant a continuance to prepare for sentencing with his new retained counsel pursuant to Virginia Code section 19.2-159.1.<sup>1</sup> At the defendant's second sentencing date, retained counsel explained that he needed time to prepare and to explore potentially withdrawing the defendant's guilty plea.<sup>2</sup>

The supreme court explained that the General Assembly enacted section 19.2-159.1 in order to minimize the burden on taxpayers to pay the cost of court-appointed counsel when a defendant could pay for his own attorney.<sup>3</sup> Although the statute provides that the trial court shall grant reasonable continuances to prepare for trial, the supreme court found that this was to aid the primary fiscal purpose of the act and not to confer "a new, statutory right for a criminal defendant."<sup>4</sup> Reyes made no argument that the trial court's decision impacted his constitutional right, and the supreme court otherwise determined that the defendant was not entitled to his requested remedy.<sup>5</sup>

B. *Jury Instructions*

In *Smith v. Commonwealth*, the Supreme Court of Virginia addressed whether the defendant waived her arguments challenging the agreed upon jury instructions, which determined the law

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1. 297 Va. 133, 135–36, 823 S.E.2d 243, 245–46 (2019).

2. *Id.* at 136–37, 823 S.E.2d at 246.

3. *Id.* at 140, 823 S.E.2d at 248.

4. *Id.* at 140–41, 823 S.E.2d at 248.

5. *Id.* at 141–42, 823 S.E.2d at 249.

of the case.<sup>6</sup> A jury found Smith guilty of voluntary manslaughter, and following her conviction, Smith argued that the evidence was insufficient to show any intentional killing or heat of passion.<sup>7</sup> In her motion to set aside, she argued for the first time that her dispute with the victim was “a minor verbal argument,” and that words alone are insufficient to qualify as heat of passion.<sup>8</sup>

The supreme court found that Smith raised the issue that words alone are insufficient too late.<sup>9</sup> Because Smith agreed to jury instructions that omitted the legal principles she relied upon on appeal, those jury instructions became the law of the case, and she accordingly waived that issue.<sup>10</sup> The supreme court concluded the evidence was sufficient to support Smith’s conviction and affirmed the judgment of the court of appeals under the doctrine of “right result for a different reason.”<sup>11</sup>

In *Lienau v. Commonwealth*, the Court of Appeals of Virginia, sitting en banc, reversed an involuntary manslaughter conviction for the trial court’s failure to provide a self-defense jury instruction.<sup>12</sup> The Commonwealth argued that the defendant, originally charged with first-degree murder, never testified that he was afraid, but instead said that he was “raging” and “saw red.”<sup>13</sup> The court found, however, that there was sufficient credible evidence in the record, viewed in the light most favorable to Lienau, to support his right to a self-defense jury instruction.<sup>14</sup> The court also held that even though Lienau was acquitted of murder when the jury found him guilty of involuntary manslaughter, the error could have affected the verdict and reversed his conviction.<sup>15</sup>

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6. 296 Va. 450, 459, 821 S.E.2d 543, 548 (2018).

7. *Id.* at 458, 821 S.E.2d at 547–48.

8. *Id.* at 458–59, 821 S.E.2d at 547–48.

9. *Id.* at 462, 821 S.E.2d at 549.

10. *Id.* at 462, 821 S.E.2d at 549.

11. *Id.* at 463, 821 S.E.2d at 549.

12. 69 Va. App. 780, 780–81, 823 S.E.2d 43, 44 (2019) (en banc); *Lienau v. Commonwealth*, 69 Va. App. 254, 260, 818 S.E.2d 58, 60–61 (2018).

13. *Lienau*, 69 Va. App. at 263, 268, 818 S.E.2d at 62, 64–65.

14. *Id.* at 268–69, 818 S.E.2d at 65.

15. *Id.* at 269–70, 273, 275, 818 S.E.2d at 65, 67–68.

### C. *Appellate Procedure and Jurisdiction*

In *Martinez v. Commonwealth*, the Supreme Court of Virginia considered an appeal from a deaf and mute inmate originally from El Salvador who was previously found incompetent to stand trial.<sup>16</sup> Martinez had been receiving inpatient treatment to restore his competency under Virginia Code section 19.2-169.2 in order to try him for two counts of capital murder.<sup>17</sup> Martinez appealed directly to the supreme court from the circuit court's denial of two motions to dismiss the indictments, on the theory that the denials were civil in nature.<sup>18</sup> The supreme court found it lacked subject matter jurisdiction to hear the appeal, holding that an appeal from a competency determination is criminal in nature, and thus may not be considered by the supreme court without first being considered by the court of appeals.<sup>19</sup> The supreme court also declined to transfer the case to the court of appeals, because no final order had been entered in the underlying prosecution, and the court of appeals was thus without jurisdiction to hear an appeal in the matter.<sup>20</sup> The court dismissed the appeal without prejudice because the court found there was no final conviction and no final order.<sup>21</sup>

Ordinarily, an appellant's failure to invoke the ends of justice exception to Supreme Court of Virginia Rule 5A:18's preservation requirement precludes the Court of Appeals of Virginia from reaching an issue under that exception.<sup>22</sup> The court held in *Merritt v. Commonwealth* that even where an appellant does not invoke the ends of justice exception to Rule 5A:18, the Commonwealth may successfully do so on her behalf.<sup>23</sup> Merritt missed a revocation proceeding and was convicted of failure to appear in violation of section 19.2-128(C); however, she did not challenge the section's applicability to revocation proceedings before either the trial court or the court of appeals (despite the latter court's

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16. 296 Va. 387, 387, 821 S.E.2d 529, 530 (2018).

17. *Id.* at 387, 821 S.E.2d at 530.

18. *Id.* at 388, 821 S.E.2d at 530.

19. *Id.* at 388–89, 821 S.E.2d at 530–31.

20. *Id.* at 390, 821 S.E.2d at 531.

21. *Id.* at 390, 821 S.E.2d at 531.

22. *See Merritt v. Commonwealth*, 69 Va. App. 452, 459–61, 820 S.E.2d 379, 382–83 (2018) (citing VA. SUP. CT. R. 5A:18 (Repl. Vol. 2019)).

23. *Id.* at 461, 820 S.E.2d at 383.

explicit direction to address the issue in its order granting Merritt's petition for appeal).<sup>24</sup> The Commonwealth, on brief and at oral argument, conceded that Merritt's conduct did not fall under her statute of conviction, and contended that though Merritt had not raised the argument, the court could still reach it under the ends of justice exception to Rule 5A:18.<sup>25</sup> The court agreed based on its independent analysis that the Commonwealth's concession was appropriate, applied the ends of justice exception, and reversed Merritt's conviction.<sup>26</sup>

#### D. *Withdrawal of Guilty Pleas*

In *Brown v. Commonwealth*, the Supreme Court of Virginia determined that the defendant failed to demonstrate a sufficient basis to allow her to withdraw a guilty plea under Virginia Code section 19.2-296.<sup>27</sup> The court found that although the defendant raised her motion to withdraw before the trial court entered the written sentencing order, the trial court had pronounced the sentence from the bench.<sup>28</sup> Consequently, the defendant needed to show that there was a "manifest injustice" in order to withdraw her guilty plea.<sup>29</sup> The court determined there was insufficient cause because her defense was not viable.<sup>30</sup> The court also found that her failure to understand the collateral consequences of her conviction did not provide a basis for setting aside a guilty plea.<sup>31</sup>

In *Thomason v. Commonwealth*, the Court of Appeals of Virginia reviewed a circuit court's denial of a defendant's pre-sentencing motion to withdraw his guilty pleas to second-degree murder, possession of a firearm by a convicted felon, and use of a firearm in the commission of a felony.<sup>32</sup> Thomason argued in his motion

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24. *Id.* at 455–56, 820 S.E.2d at 380–81 (citing *Lawson v. Commonwealth*, 38 Va. App. 93, 561 S.E.2d 775 (2002)).

25. *Id.* at 456–57, 461, 820 S.E.2d at 381, 383.

26. *Id.* at 461–62, 820 S.E.2d at 383–84.

27. 826 S.E.2d 883, 886, 888 (2019).

28. *Id.* at 886.

29. *Id.*

30. *Id.* at 887.

31. *Id.* at 887–88.

32. 69 Va. App. 89, 92, 815 S.E.2d 816, 817 (2018). The Court also considered whether Thomason's sentencing was an abuse of discretion and held there was no abuse of discretion because the sentence was within the statutory limitations. *Id.* at 98–99, 815 S.E.2d at 820.

that he learned of the existence of an exculpatory witness, whose testimony would impeach another witness, after he accepted the plea agreement, and that this discovery constituted a material mistake of fact.<sup>33</sup> The court of appeals affirmed Thomason's conviction because "potential impeachment of witness testimony does not satisfy the *Parris*<sup>34</sup> standard."<sup>35</sup> The court explained that a mere discovery of a conflict of testimony does not establish a "reasonable defense" sufficient to withdraw a guilty plea.<sup>36</sup>

#### E. *Venue*

In *McGuire v. Commonwealth*, the Court of Appeals of Virginia clarified that venue for the prosecution of making a false report regarding the commission of a crime is proper in either the jurisdiction where the report was made or where it was received.<sup>37</sup> McGuire made a false police report from an unknown location to the Loudoun County Sheriff's Department, and was subsequently prosecuted for the report in Loudoun County.<sup>38</sup> The court of appeals held that (1) venue is proper in either the sending or receiving jurisdiction; (2) a report must both be sent by the defendant and received by an officer to complete the offense; and (3) once completed, the offense has "occurred" in part in both locations.<sup>39</sup>

#### F. *Sentencing*

In *Hall v. Commonwealth*, the Supreme Court of Virginia clarified that a defendant's disclosure supporting his motion for relief under the "safety valve" provision of Virginia Code section 18.2-248(C) is considered timely if it is provided at any time before the commencement of the sentencing hearing.<sup>40</sup> Under the "safety valve" provision, the mandatory minimum sentences provided in section 18.2-248 do not apply if the defendant meets five statuto-

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33. *Id.* at 93, 815 S.E.2d at 817–18.

34. *Parris v. Commonwealth*, 189 Va. 321, 52 S.E.2d 872 (1949).

35. *Thomason*, 69 Va. App. at 96, 99, 815 S.E.2d at 819, 820–21.

36. *Id.* at 96, 815 S.E.2d at 819 (discussing *Williams v. Commonwealth*, 59 Va. App. 238, 717 S.E.2d 837 (2011)).

37. 68 Va. App. 736, 740–41, 813 S.E.2d 552, 554 (2018).

38. *Id.* at 738–39, 813 S.E.2d at 553–54.

39. *Id.* at 741–45, 813 S.E.2d at 555–57.

40. 296 Va. 577, 580, 583, 586, 821 S.E.2d 921, 923–24, 926 (2018).



ry criteria.<sup>41</sup> The fifth requirement provides that “[n]ot later than the time of the sentencing hearing, the person has truthfully provided to the Commonwealth all information and evidence the person has concerning the offense.”<sup>42</sup> Hall was convicted of three offenses subject to mandatory minimum sentences, and provided a disclosure pursuant to this requirement just before his sentencing hearing commenced.<sup>43</sup>

The trial court held that the disclosure was untimely, but the supreme court reversed, holding that the statute unambiguously provided a deadline of the sentencing hearing’s commencement, and that last-minute disclosures are thus timely.<sup>44</sup>

In *Stone v. Commonwealth*, the Supreme Court of Virginia clarified a different component of eligibility for the “safety valve” provision of Virginia Code section 18.2-248(C)—the requirement that “[t]he person did not . . . possess a firearm . . . in connection with the offense.”<sup>45</sup> Stone sold cocaine four times during a one-month period to a confidential informant; when police executed a search warrant following the fourth controlled buy, they discovered a loaded AK-47 along with cocaine in Stone’s bedroom.<sup>46</sup> Stone argued that he obtained the firearm for personal protection following an earlier robbery, and that he thus did not own it “in connection” with his drug distribution offenses for “safety valve” purposes.<sup>47</sup>

The supreme court rejected Stone’s arguments, noting that he bore the burdens of production and persuasion to show entitlement to relief under the “safety valve” provision.<sup>48</sup> The court held that the evidence showed Stone constructively possessed the firearm while conducting four drug sales to the confidential informant “at that location,” and that by failing to present any evidence to the contrary, Stone “plainly failed to carry his burden of estab-

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41. *Id.* at 580, 821 S.E.2d at 923.

42. *Id.* at 580, 821 S.E.2d at 923 (emphasis omitted).

43. *Id.* at 580–81, 821 S.E.2d at 923.

44. *Id.* at 583, 586–88, 821 S.E.2d at 924, 926–27. The court cautioned, however, that trial courts may consider a disclosure’s last-minute nature as an indication that it is not truthful or complete. *Id.* at 586–88, 821 S.E.2d at 926–27.

45. 297 Va. 100, 100–01, 823 S.E.2d 241, 241–42 (2019).

46. *Id.* at 102, 823 S.E.2d at 243.

47. *Id.* at 102–03, 823 S.E.2d at 243.

48. *Id.* at 101–03, 823 S.E.2d at 242–43.

lishing that he did not possess the firearm in connection with these four . . . offenses.”<sup>49</sup> The court further held that the evidence supported “the affirmative inference . . . that Stone in fact possessed the firearm for the protection of his illegal drug operation being conducted out of his residence.”<sup>50</sup>

In *Botkin v. Commonwealth*, the Supreme Court of Virginia (1) addressed whether the Court of Appeals of Virginia erred by holding that multiple mandatory minimum terms of imprisonment, imposed for multiple convictions of possession of a firearm within ten years of being convicted as a felon under Virginia Code section 18.2-308.2(A), were required to be served consecutively; and (2) remanded to the circuit court to impose two consecutive sentences.<sup>51</sup> The supreme court explained that section 18.2-308.2(A) specifically states that “[t]he mandatory minimum terms of imprisonment prescribed for violations of this section shall be served consecutively with any other sentence,” and thus Botkin’s sentences must be run consecutively.<sup>52</sup>

In *Thomas v. Commonwealth*, the Supreme Court of Virginia found that a trial court erred by adding three years, all suspended, after imposing the entire jury sentence as active incarceration.<sup>53</sup> The supreme court explained that the trial court had an obligation under Virginia Code section 19.2-295.2 to impose a term up to three years of post-release supervision under the review of the Parole Board, and was required under “[section] 18.2-10 to impose a linked suspended term of incarceration.”<sup>54</sup> Thomas’s sentencing order “as written” was unlawful, however, because it did not specify that the additional three years of suspended incarceration was imposed pursuant to sections 18.2-10 and 19.2-295.2, nor did it specify that the supervision was subject to the review of the Virginia Parole Board.<sup>55</sup>

In *Robinson v. Commonwealth*, the Court of Appeals of Virginia found no error in a trial court’s decision not to redact a defend-

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49. *Id.* at 103, 823 S.E.2d at 243.

50. *Id.* at 103, 823 S.E.2d at 243.

51. 296 Va. 309, 311–13, 318, 819 S.E.2d 652, 653, 656 (2018).

52. *Id.* at 314–16, 819 S.E.2d at 654–55 (emphasis omitted).

53. 296 Va. 301, 303, 819 S.E.2d 437, 438 (2018).

54. *Id.* at 306–07, 819 S.E.2d at 439–40.

55. *Id.* at 307, 819 S.E.2d at 440.

ant's prior conviction order during the sentencing phase of a jury trial, even though it "included information about a charge for which Mr. Robinson was not convicted."<sup>56</sup> The court found that the plain language of Virginia Code section 19.2-295.1 allows the Commonwealth to introduce conviction orders in their entirety.<sup>57</sup> The court noted that the General Assembly amended the statute in 2007 to allow presentation of a defendant's prior criminal history, thus broadening what may be shown to the jury.<sup>58</sup> The court found that the statute did not require that the jury be shielded from such information, and that it was admissible regardless as part of the defendant's criminal history.<sup>59</sup> As a result, the trial court did not abuse its discretion in admitting the unredacted conviction order.<sup>60</sup>

### G. Restitution

In *Fleisher v. Commonwealth*, Fleisher was ordered to pay restitution for lost cash, to replace the keys and locks on a Hyundai, and to replace the keys and reset the computer system on a Toyota after she stole the victim's keys and drove the victim's Hyundai, which contained the victim's purse.<sup>61</sup> The Hyundai was recovered unlocked but the keys to the Hyundai and the victim's purse, which had contained cash and keys to the Toyota, were never recovered.<sup>62</sup> In affirming the judgment, the Court of Appeals of Virginia found that the trial court ordered Fleisher "to pay restitution for a loss directly caused by the offense."<sup>63</sup> The court explained that the new lock and key systems in both cars were not security upgrades, but rather "made the victim whole by returning her to [her] pre-crime status when she controlled access to her cars."<sup>64</sup>

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56. 68 Va. App. 602, 604–05, 811 S.E.2d 861, 862–63.

57. *Id.* at 607, 811 S.E.2d at 864.

58. *Id.* at 608, 811 S.E.2d at 864.

59. *Id.* at 609, 811 S.E.2d at 865.

60. *Id.* at 609, 811 S.E.2d at 865.

61. 69 Va. App. 685, 687–88, 822 S.E.2d 679, 680–81 (2019).

62. *Id.* at 687, 822 S.E.2d at 680–81.

63. *Id.* at 690, 822 S.E.2d at 682.

64. *Id.* at 691, 822 S.E.2d at 682–83.

In *Ellis v. Commonwealth*, the Court of Appeals of Virginia reversed a trial court's restitution award.<sup>65</sup> Ellis was initially charged with burglary, grand larceny, larceny of a firearm, and possession of a firearm by a convicted felon.<sup>66</sup> Ellis entered an *Alford* plea to receiving stolen property, which had been reduced from grand larceny, and the remaining charges were *nolle prosequid*.<sup>67</sup> The police had only recovered a \$450 television from Ellis.<sup>68</sup> The court found the \$1500 award improper because "Ellis's conviction for receiving stolen property preclude[d] him from being deemed the thief," and the only loss attributable to Ellis was valued at \$450, the value of the property he was convicted of receiving.<sup>69</sup>

#### H. *Victim Impact Evidence*

In *Baldwin v. Commonwealth*, the Court of Appeals of Virginia affirmed a trial court's admission at sentencing of victim impact testimony referencing the defendant's prior criminal offenses.<sup>70</sup> In 2012, Baldwin was sentenced to five years, with four years suspended, for making a written threat to kill his victim, M.T.; he later violated a protective order preventing him from being near her, and had his suspended sentence revoked.<sup>71</sup> Angry about his revocation, Baldwin wrote numerous new letters threatening to kill M.T., and pled guilty in 2016 to a new charge of making a written threat to kill M.T.<sup>72</sup> At his sentencing, M.T. testified regarding Baldwin's criminal conduct toward her, past and present, explaining the impact of his threats at sentencing.<sup>73</sup> The court of appeals rejected Baldwin's argument that M.T.'s testimony regarding his past crimes was inadmissible, holding that it was relevant to understanding the impact of his present crime, and that

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65. 68 Va. App. 706, 708, 813 S.E.2d 16, 17 (2018).

66. *Id.* at 708, 813 S.E.2d at 17.

67. *Id.* at 708, 813 S.E.2d at 17.

68. *Id.* at 709, 710 n.2, 813 S.E.2d at 18, 18 n.2.

69. *Id.* at 715–16, 813 S.E.2d at 21.

70. 69 Va. App. 75, 78–79, 815 S.E.2d 809, 810–11 (2018).

71. *Id.* at 78, 815 S.E.2d at 810.

72. *Id.* at 79–80, 815 S.E.2d at 810–11.

73. *Id.* at 80–81, 815 S.E.2d at 811–12.

he had no right to sanitize the evidence of his “ongoing pattern of threatening and psychologically tormenting this particular victim.”<sup>74</sup>

### I. *Batson Challenges*

In *Hamilton v. Commonwealth*, the Court of Appeals of Virginia held that the trial court did not err in denying Hamilton’s *Batson*<sup>75</sup> motion.<sup>76</sup> At trial, Hamilton asserted that the prosecutor struck three jury pool members because they were black.<sup>77</sup> The court rejected Hamilton’s argument that the prosecutor’s reasoning for striking a juror for not answering any questions was pretextual, because Hamilton did not identify any non-African American jurors who did not answer any questions.<sup>78</sup>

### J. *Fourth Amendment Issues*

In *Curley v. Commonwealth*, the Supreme Court of Virginia rejected the defendant’s challenge to the trial court’s denial of a suppression motion.<sup>79</sup> There, an officer conducted a lawful traffic stop and observed the defendant, the sole occupant of the vehicle, nervously hunched over a backpack, “shaking,” and “breathing heavily.”<sup>80</sup> The officer asked Curley to step out of the vehicle and obtained permission from him to search his person.<sup>81</sup> Officers found a digital scale with “white residue” that was “very consistent” with drug distribution based on the officers’ training, leading them to search his vehicle and find additional evidence.<sup>82</sup>

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74. *Id.* at 84–89, 815 S.E.2d at 813–16.

75. *Batson v. Kentucky*, 476 U.S. 79 (1986).

76. 69 Va. App. 176, 181, 197–98, 817 S.E.2d 343, 345–46, 354 (2018). The court also considered whether the evidence was sufficient to convict Hamilton of obstruction of justice and whether the trial court erred in issuing a jury instruction. The court held the evidence was sufficient and Hamilton invited error when he requested the jury instruction. *Id.* at 198, 817 S.E.2d at 354.

77. *Id.* at 182, 817 S.E.2d at 346.

78. *Id.* at 190, 817 S.E.2d at 350.

79. 295 Va. 616, 618, 816 S.E.2d 587, 588 (2018).

80. *Id.* at 619, 816 S.E.2d at 588.

81. *Id.* at 619, 816 S.E.2d at 588.

82. *Id.* at 619–20, 816 S.E.2d at 588–89.

The supreme court found that the officers had probable cause to conduct a warrantless search of the vehicle.<sup>83</sup> The court held that Curley's furtive movements, his overly nervous demeanor, and his possession of a digital scale provided sufficient justification for the vehicle's search.<sup>84</sup>

In *Collins v. Commonwealth*, on remand from the Supreme Court of the United States, the Supreme Court of Virginia considered whether any exception to the Fourth Amendment's warrant requirement, other than the automobile exception, justified a search of a motorcycle located within the curtilage of a residence.<sup>85</sup> The court found that the good-faith exception applied, noting that a reasonably well-trained officer at the time of the search could have believed that *Scher v. United States*<sup>86</sup> authorized his search of the motorcycle.<sup>87</sup> The court moreover held that "a considerable body of caselaw had developed that applied the automobile exception to driveways without considering whether, and if so where, the curtilage boundary might intersect with the driveway," thereby supporting the search's reasonableness.<sup>88</sup>

In *Brown v. Commonwealth*, the Court of Appeals of Virginia held that a trial court did not err by refusing to suppress evidence obtained by warrant, rejecting the appellant's claim that the affidavit supporting the search warrant did not establish probable cause.<sup>89</sup> Brown was arrested while attempting to purchase more than five pounds of marijuana from his wife's vehicle, with more than \$5000 on his person.<sup>90</sup> Police applied for a warrant to search Brown's home, representing that information from various sources (including the circumstances of Brown's arrest) indicated that Brown was using his home as a base of operation for drug distribution activities.<sup>91</sup> A magistrate issued the warrant, and police found 394.55 grams of cocaine and roughly \$4500 at Brown's

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83. *Id.* at 623, 816 S.E.2d at 591.

84. *Id.* at 623, 816 S.E.2d at 590–91.

85. 297 Va. 207, 211, 824 S.E.2d 485, 487 (2019) (citing *Collins v. Virginia*, 138 S. Ct. 1663, 1668 (2018)).

86. 305 U.S. 251 (1938).

87. *Collins*, 297 Va. at 219–20, 224–25, 824 S.E.2d at 491–92, 494–95.

88. *Id.* at 225, 824 S.E.2d at 495.

89. 68 Va. App. 517, 520, 810 S.E.2d 905, 907 (2018).

90. *Id.* at 521, 810 S.E.2d at 907.

91. *Id.* at 520–22, 810 S.E.2d at 907–08.

home.<sup>92</sup> Brown moved to suppress the fruits of the warrant, arguing that the information in the affidavit did not establish a nexus between Brown's alleged activities and his home.<sup>93</sup> The court of appeals affirmed, finding that the affidavit established probable cause to support a search of Brown's home.<sup>94</sup>

The Court of Appeals of Virginia reversed the trial court's denial of a suppression motion on Fourth Amendment grounds in *Carlson v. Commonwealth*.<sup>95</sup> Uniformed police officers smelled marijuana in a trailer park and walked around individual trailers, sniffing at their doors and windows, until they isolated Carlson's residence as the probable source of the odor.<sup>96</sup> A detective walked up to the main entrance of the residence, confirmed the odor emanating from the door, and obtained a warrant on the basis of his observations.<sup>97</sup> Carlson was arrested, and police discovered, among other things, a marijuana grow site, a large quantity of harvested marijuana, and a police scanner.<sup>98</sup> Carlson moved to suppress the fruits of the search, alleging that the detective's presence on his property, and the resulting warrant, were the direct result of the uniformed officers' illegal initial entry onto his property.<sup>99</sup> Carlson did not challenge the warrant.<sup>100</sup> The court of appeals found the search unlawful, holding that (1) the detective's search was not an independent source since his presence was a direct result of the uniformed officers' unlawful entry; (2) nothing occurred to remove the taint of the original illegality of the uniformed officers' search; and (3) the record lacked any evidence justifying a finding of inevitable discovery.<sup>101</sup>

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92. *Id.* at 520–21, 810 S.E.2d at 907.

93. *Id.* at 520, 810 S.E.2d at 907.

94. *Id.* at 528–29, 810 S.E.2d at 911. The court of appeals did not make a finding as to whether the good faith exception applied, which was the rationale used by the lower court. *Id.* at 528–29, 810 S.E.2d at 911.

95. 69 Va. App. 749, 753, 823 S.E.2d 28, 30–31 (2019).

96. *Id.* at 754, 823 S.E.2d at 31.

97. *Id.* at 754–55, 823 S.E.2d at 31.

98. *Id.* at 755, 823 S.E.2d at 31.

99. *Id.* at 755–56, 823 S.E.2d at 31–32.

100. *Id.* at 755, 823 S.E.2d at 31–32.

101. *Id.* at 760–65, 823 S.E.2d at 34–36. The court also held that the evidence presented at trial was sufficient to support Carlson's conviction, and that he was thus entitled to remand for a new trial without the tainted evidence rather than a final judgment of acquittal. *Id.* at 765–67, 823 S.E.2d at 36–37.

In *Daniels v. Commonwealth*, the Court of Appeals of Virginia affirmed the trial court's denial of suppression motions.<sup>102</sup> Police investigating a heroin overdose found heroin packaged in wax paper bags stamped with the word "Miracle" in red ink.<sup>103</sup> After obtaining a search warrant, police found marijuana, a digital scale, and approximately \$1000 in cash in Daniels's residence.<sup>104</sup> Officers saw a bundle of wax paper bags with red stamps, bound together with a rubber band, in Daniels's vehicle (which was not covered by the warrant); an investigator believed the bundle to contain heroin, and conducted a search which bore out his suspicion.<sup>105</sup> The court of appeals rejected Daniels's arguments that (1) the affidavit supporting the search warrant was not filed with the circuit court by the issuing magistrate as required by Virginia Code section 19.2-54; and (2) the search of the vehicle was not a valid plain view search, finding instead that the "notice-based purpose of [section] 19.2-54 was achieved" by the officer's filing of the affidavit with the circuit court and that the plain view exception supported the vehicle search because the officer had probable cause based on his training and experience.<sup>106</sup>

In *Moore v. Commonwealth*, Moore refused to comply with a traffic stop by continuing to drive, jumping out of the car while it was still in motion, causing the car to crash into two parked cars, and fleeing the scene.<sup>107</sup> Two officers pursued Moore on foot while a crowd gathered near the crash.<sup>108</sup> Moore had left the driver's side door open, and a third officer found a firearm near the gas pedal in plain view.<sup>109</sup> He seized the firearm and placed it in his car for safekeeping.<sup>110</sup> The Court of Appeals of Virginia held that the seizure of the firearm did not violate Moore's Fourth Amendment rights because exigent circumstances allowed the officer to seize the easily accessible firearm to protect officer safety and to protect the safety of officers and the gathered crowd.<sup>111</sup>

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102. 69 Va. App. 422, 437, 819 S.E.2d 870, 877 (2018).

103. *Id.* at 426–27, 819 S.E.2d at 872.

104. *Id.* at 427, 819 S.E.2d at 872.

105. *Id.* at 427–28, 819 S.E.2d at 872–73.

106. *Id.* at 431–36, 819 S.E.2d at 874–77.

107. 69 Va. App. 30, 34, 813 S.E.2d 916, 917–18 (2018).

108. *Id.* at 34, 813 S.E.2d at 918.

109. *Id.* at 34, 813 S.E.2d at 918.

110. *Id.* at 35, 813 S.E.2d at 918.

111. *Id.* at 42, 813 S.E.2d at 921–22.



### K. Miranda Issues

In *Secret v. Commonwealth*, the Supreme Court of Virginia affirmed the appellant's convictions of arson of an occupied dwelling and nine counts of attempted first-degree murder stemming from the appellant's burning of the "main dormitory" of a communal living facility.<sup>112</sup> Secret argued that admission of evidence related to his confession violated *Miranda v. Arizona*,<sup>113</sup> as refined by *Missouri v. Seibert*<sup>114</sup> and *Oregon v. Elstad*,<sup>115</sup> and further that the evidence was insufficient to show he acted with a specific intent to commit murder.<sup>116</sup> Secret attempted to burn down the occupied building after being informed he was not welcome to remain in the community.<sup>117</sup> Secret confessed to starting the fire in an interview conducted without a *Miranda* warning, then continued providing inculpatory details after waiving his *Miranda* rights.<sup>118</sup>

The supreme court affirmed the trial court's finding that police did not violate *Seibert*, based on (1) the investigator's testimony that he did not administer *Miranda* warnings at first because he did not believe Secret to be in custody until Secret inculpated himself; (2) the lack of coercion in the pre-warning phase of the interview; and (3) the investigator's unfamiliarity with the two-step interrogation technique.<sup>119</sup> The supreme court likewise rejected Secret's *Elstad*-based attack, finding that the totality of the evidence demonstrated that Secret's inculpatory statements were knowing and voluntary.<sup>120</sup> Finally, the court held that the evidence was sufficient to support the jury's finding that Secret intended to kill the building's occupants.<sup>121</sup>

In *Tirado v. Commonwealth*, the Supreme Court of Virginia considered whether an audiovisual recording of the defendant's

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112. 296 Va. 204, 208–09, 819 S.E.2d 234, 237 (2018).

113. 384 U.S. 436 (1966).

114. 542 U.S. 600 (2004).

115. 470 U.S. 298 (1985).

116. *Secret*, 296 Va. at 208–09, 810 S.E.2d at 237.

117. *Id.* at 209–12, 810 S.E.2d at 237–39.

118. *Id.* at 212, 810 S.E.2d at 238–39.

119. *Id.* at 224, 810 S.E.2d at 245–46.

120. *Id.* at 225–27, 810 S.E.2d at 246–47.

121. *Id.* at 227–31, 810 S.E.2d at 247–50.

statements made to police officers through an interpreter was properly admitted into evidence, and whether the defendant's waiver of rights under *Miranda* was knowingly and voluntarily made.<sup>122</sup> On appeal, Tirado asserted the evidence was insufficient to establish his waiver was knowing and voluntary because it was not in his native language, Mam, and his Spanish comprehension was limited.<sup>123</sup>

The supreme court held that there was an adequate foundation to admit the recording.<sup>124</sup> The supreme court found that the interrogator testified that the recording accurately depicted her interview and that, in and of itself, satisfied Supreme Court of Virginia Rule 2:901.<sup>125</sup> The court also found that Tirado's waiver was voluntary because it was not the product of "intimidation, coercion, or deception."<sup>126</sup> The supreme court focused on the fact that Tirado chose to communicate in Spanish, never spoke in Mam, said "Spanish 'would be fine'" to discuss *Miranda*, chose to write an apology letter in Spanish, said he understood each *Miranda* right in Spanish after it was read in Spanish, and responded appropriately in Spanish to the officer's questions.<sup>127</sup>

In *Spinner v. Commonwealth*, the Supreme Court of Virginia considered whether the trial court erred when it held that Spinner was effectively advised under *Miranda*.<sup>128</sup> Police officers approached Spinner in an open carport near a sidewalk the day after a murder to execute a search warrant to obtain a DNA sample.<sup>129</sup> An officer read Spinner his *Miranda* warnings and included, "And I always caveat that with: 'If you're charged with a crime.' You can decide at any time to exercise any of these rights and stop answering questions."<sup>130</sup> Later, after his arrest, Spinner was questioned after being read the same *Miranda* warnings and made incriminating statements.<sup>131</sup>

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122. 296 Va. 15, 18, 817 S.E.2d 309, 310–11 (2018).

123. *Id.* at 20, 27, 817 S.E.2d at 312, 316.

124. *Id.* at 27, 817 S.E.2d at 316.

125. *Id.* at 27, 817 S.E.2d at 315.

126. *Id.* at 28–30, 817 S.E.2d at 317.

127. *Id.* at 29–30, 817 S.E.2d at 317.

128. 827 S.E.2d 772, 775 (2019).

129. *Id.* at 774.

130. *Id.*

131. *Id.*

The supreme court affirmed Spinner's convictions, holding that Spinner was not in custody the day after the murder, so *Miranda* warnings were not constitutionally required.<sup>132</sup> The court also held that the warnings read to Spinner on both days met the requirements under *Miranda* because "*Miranda* requires 'only that the suspect be informed . . . that he has a right to an attorney before and during questioning and that an attorney would be appointed for him if he could not afford one.'"<sup>133</sup>

#### L. *Double Jeopardy*

In *Severance v. Commonwealth*, the Supreme Court of Virginia affirmed Severance's two convictions for capital murder.<sup>134</sup> Severance killed Ronald Kirby in 2013, then Ruthanne Lodato in 2014; he was convicted under Virginia Code section 18.2-31(8), which classifies the "killing of more than one person within a three-year period," as capital murder, by killing Kirby within three years of killing Lodato, and by killing Lodato within three years of killing Kirby.<sup>135</sup> On appeal, Severance contended his two life sentences violated the multiple punishment prohibition under *Blockburger v. United States*.<sup>136</sup>

The supreme court affirmed Severance's convictions, holding that *Blockburger* protections are limited to cases where "*the same act* or transaction constitutes a violation of two distinct statutory provisions."<sup>137</sup> The court reasoned that the General Assembly set the appropriate unit of prosecution as one murder, and it did not set a temporal restriction on the second murder "within three years" as being before or after the murder that is the subject of a given charge; accordingly, Severance's two punishments for two murders were permissible.<sup>138</sup>

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132. *Id.* at 776.

133. *Id.* at 777 (quoting *Duckworth v. Eagan*, 492 U.S. 195, 204 (1989)).

134. 295 Va. 564, 567, 816 S.E.2d 277, 278 (2018).

135. *Id.* at 567–68, 816 S.E.2d at 278.

136. 284 U.S. 299, 304 (1932); *Severance*, 295 Va. at 568, 816 S.E.2d at 278–79.

137. *Severance*, 295 Va. at 567, 570–71, 816 S.E.2d at 278, 280.

138. *Id.* at 568, 576, 816 S.E.2d at 279, 283.

## II. CRIMINAL LAW

### A. *Assault and Battery*

In *Marshall v. Commonwealth*, the Court of Appeals of Virginia examined whether all violations of Virginia Code section 18.2-57.2, assault and battery on a family or household member, must be disclosed on mandatory firearm purchase forms.<sup>139</sup> The trial court convicted Marshall of making a false statement on ATF Form 4473 in violation of section 18.2-308.2:2 when Marshall did not disclose that he had been convicted of a “misdemeanor crime of domestic violence,” despite his prior conviction for assault and battery against a family member.<sup>140</sup> The court of appeals found that any conviction under section 18.2-57.2 qualifies as a “misdemeanor crime of domestic violence,” and there was accordingly sufficient evidence to affirm Marshall’s conviction.<sup>141</sup> The court reasoned that domestic violence, as listed in the federal form in question, is defined by federal law, and a recent United States Supreme Court decision held that “the requirement of ‘physical force’ is satisfied . . . by ‘the degree of force that supports a common-law battery conviction.’”<sup>142</sup>

In *Kelley v. Commonwealth*, the defendant appealed his conviction for misdemeanor assault and battery in violation of Virginia Code section 18.2-57 to the Court of Appeals of Virginia.<sup>143</sup> Kelley contested whether there was sufficient evidence to prove that the appellant committed an assault and battery against his coworker in violation of section 18.2-57.<sup>144</sup> Although Kelley argued that the evidence did not show that he touched his victim or that he intended to do so in a rude manner, the factfinder found the victim’s testimony credible and found that Kelley attempted to kiss his co-worker when he knew she was uncomfortable and tried to pull away.<sup>145</sup> The court held that under the appropriate standard

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139. 69 Va. App. 648, 650, 822 S.E.2d 389, 391 (2019).

140. *Id.* at 650–51, 822 S.E.2d at 391.

141. *Id.* at 658, 822 S.E.2d at 394–95.

142. *Id.* at 656–57, 822 S.E.2d at 393–94 (quoting *United States v. Castleman*, 572 U.S. 157, 168 (2014)).

143. 69 Va. App. 617, 621, 822 S.E.2d 375, 377 (2019).

144. *Id.* at 621, 822 S.E.2d at 377.

145. *Id.* at 623, 627, 822 S.E.2d at 378–80.

of review, the evidence was sufficient to uphold his conviction and rejected his argument that he had implied consent to touch his victim.<sup>146</sup> The court of appeals found that there was no legal basis to find that holding “the victim’s face against her will, while trying to kiss her, was justified or excused.”<sup>147</sup>

In *Lewis v. Commonwealth*, the Supreme Court of Virginia clarified the statutory requirements for a felony conviction of assault and battery against a family or household member under Virginia Code section 18.2-57.2(B).<sup>148</sup> Under this section, a defendant is guilty of a Class 6 felony if he or she commits two specified offenses within twenty years.<sup>149</sup> In *Lewis*, the court made clear that the statute did not require the defendant to have been convicted of the two predicate offenses at the time of this offense; instead, the defendant must have been convicted as of the indictment.<sup>150</sup>

#### B. *Firearms*

In *Barney v. Commonwealth*, Barney appealed her use of a firearm conviction to the Court of Appeals of Virginia, arguing that the evidence was insufficient and that the trial court erred when it instructed the jury on the definition of a firearm.<sup>151</sup> The court found that a rational trier of fact could have found that Barney had an actual firearm or possessed an object “that gave the appearance of being one” because Barney made statements and gestures to imply she had a firearm.<sup>152</sup> The court of appeals reversed Barney’s conviction and remanded because the jury instruction given did not require proof that Barney possessed either an actual firearm or an object that gave the appearance of an actual firearm.<sup>153</sup> Instead, the trial court incorrectly instructed the jury that it was not necessary for the Commonwealth to prove the

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146. *Id.* at 626, 631–32, 822 S.E.2d at 379–82.

147. *Id.* at 631, 822 S.E.2d at 381.

148. 295 Va. 454, 458, 813 S.E.2d 732, 733 (2018).

149. VA. CODE ANN. § 18.2-57.2(B) (Repl. Vol. 2014).

150. *Lewis*, 295 Va. at 461, 831 S.E.2d at 735.

151. 69 Va. App. 604, 606, 822 S.E.2d 368, 369 (2019).

152. *Id.* at 613–15, 822 S.E.2d at 373–74.

153. *Id.* at 613, 822 S.E.2d at 373.

item was a firearm so long as the victim reasonably perceived a threat or intimidation by a firearm.<sup>154</sup>

### C. *Failure to Appear*

In *Chavez v. Commonwealth*, the Court of Appeals of Virginia found that timely notice is not an element of felony failure to appear under the plain language of Virginia Code section 19.2-128.<sup>155</sup> The court explained that proof that a defendant failed to appear after receiving timely notice of his or her court date is simply one way to prove that the conduct was willful.<sup>156</sup> The court also found the evidence sufficient to sustain Chavez's conviction because a reasonable factfinder could have determined that when his case was continued, the continuance date was clearly communicated to both Chavez and his attorney, who was present at the next court date.<sup>157</sup> Because there was a sufficient basis to show that Chavez received actual notice and notice through his attorney, the Commonwealth proved that his conduct was willful and the court upheld the conviction.<sup>158</sup>

### D. *Property Crimes*

In *McGinnis v. Commonwealth*, the Supreme Court of Virginia reviewed whether the evidence was sufficient to convict McGinnis of three counts of larceny by worthless check.<sup>159</sup> The supreme court held that "larceny by worthless check is not limited to checks passed as present consideration for goods and services" because the General Assembly's 1978 amendment was intended to expand the reach of the statute to include the use of a worthless check in payment as present consideration for goods and services, rather than to limit its application.<sup>160</sup> The evidence was sufficient because McGinnis knew he did not have enough funds

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154. *Id.* at 613, 822 S.E.2d at 373.

155. 69 Va. App. 149, 156–57, 817 S.E.2d 330, 334 (2018).

156. *Id.* at 159, 817 S.E.2d at 335 (relying on *Thomas v. Commonwealth*, 48 Va. App. 605, 609, 633 S.E.2d 229, 231 (2006); *Edmonds v. Commonwealth*, 43 Va. App. 197, 200, 597 S.E.2d 210, 211 (2004); *Hunter v. Commonwealth*, 15 Va. App. 717, 721–22, 427 S.E.2d 197, 200 (1993) (en banc)).

157. *Id.* at 165–66, 817 S.E.2d at 338.

158. *Id.* at 166, 817 S.E.2d at 338–39.

159. 296 Va. 489, 493–94, 821 S.E.2d 700, 702 (2018).

160. *Id.* at 507, 821 S.E.2d at 709.

when he issued the checks in hopes of obtaining more credit for his failing business.<sup>161</sup>

In *Pittman v. Commonwealth*, the Court of Appeals of Virginia rejected the appellant's arguments that the Commonwealth must prove (1) a fiduciary relationship between the defendant and victim; and (2) the victim's personal ownership of the allegedly embezzled property.<sup>162</sup> The victim, an acquaintance of Pittman, allowed Pittman to borrow a rental car; Pittman ignored repeated requests that she return the car to the rental company, and the car was eventually towed to a body shop in New York with over \$6600 of estimated damage.<sup>163</sup> The court of appeals found the evidence sufficient and reiterated that the Commonwealth need not prove a formal fiduciary relationship, but could rather show that the defendant was "entrusted with the property in question and that the defendant had the specific intent to deprive the rightful owner of said property."<sup>164</sup> Moreover, the embezzlement statute reaches property "entrusted or delivered" to the defendant, and the car was "delivered" to Pittman regardless of whether it was also "entrusted."<sup>165</sup> Because the evidence established that Pittman misappropriated the rental car with the requisite intent, the court affirmed Pittman's conviction.<sup>166</sup>

#### E. *Forfeiture by Wrongdoing*

In *Cody v. Commonwealth*, the Court of Appeals of Virginia considered whether the trial court violated Cody's Sixth Amendment confrontation right when it granted the Commonwealth's motion to admit out-of-court statements of the strangulation victim under the doctrine of forfeiture by wrongdoing.<sup>167</sup> The strangulation victim asserted her Fifth Amendment right against self-incrimination at trial, after Cody violated the protective order five times by calling the victim to ask her to drop the charges.<sup>168</sup>

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161. *Id.* at 507–08, 821 S.E.2d at 709–10.

162. 69 Va. App. 632, 635–36, 638–39, 822 S.E.2d 382, 384–85 (2019).

163. *Id.* at 633–34, 822 S.E.2d at 383.

164. *Id.* at 635–36, 638, 822 S.E.2d at 384–85 (citing *Rooney v. Commonwealth*, 27 Va. App. 634, 644, 500 S.E.2d 830 (1998)).

165. *Id.* at 636–37, 822 S.E.2d at 384–85 (emphasis omitted).

166. *Id.* at 638, 822 S.E.2d at 385.

167. 68 Va. App. 638, 644, 812 S.E.2d 466, 469 (2018).

168. *Id.* at 647–51, 812 S.E.2d at 470–72.

The court of appeals held that the Confrontation Clause did not apply to the nontestimonial statements made to the 911 dispatcher and nurse, because their primary purpose was not for prosecution.<sup>169</sup> Although the statements made to the police *were* testimonial, the court found that the forfeiture by wrongdoing exception applied.<sup>170</sup> The court held that “the doctrine of forfeiture by wrongdoing properly applies where a defendant unlawfully contacts a witness with the successful intent to procure that witness’ unavailability, whether such unavailability is the witness’ physical absence from the court or through a witness’ refusal to testify by invoking the Fifth Amendment.”<sup>171</sup>

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

In *Commonwealth v. Perkins*, the Supreme Court of Virginia reversed the Court of Appeals of Virginia’s decision, which found insufficient evidence to support Perkins’s malicious wounding conviction.<sup>172</sup> Perkins hit the victim in the back of the head with a handgun while an accomplice punched the victim simultaneously.<sup>173</sup> The combined blows knocked the victim out and left him with multiple head injuries.<sup>174</sup> The supreme court held that the evidence supported the trial court’s determination that Perkins acted with malice, given Perkins’s unprovoked attack of the back of the defenseless victim’s head, and the fact that the force used was sufficient to render the victim unconscious and to inflict numerous injuries.<sup>175</sup>

In *Jones v. Commonwealth*, the Supreme Court of Virginia affirmed a conviction for shooting at an occupied vehicle where the appellant and his victim occupied the same vehicle.<sup>176</sup> Jones argued that the statute criminalizes “shooting *into* an occupied vehicle,” and that it was thus impossible to violate unless the defendant was located outside of the vehicle while shooting in its

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169. *Id.* at 657–62, 812 S.E.2d at 475–78.

170. *Id.* at 665–72, 812 S.E.2d at 479–83.

171. *Id.* at 671, 812 S.E.2d at 482.

172. 295 Va. 323, 323, 812 S.E.2d 212, 214 (2018) (per curiam).

173. *Id.* at 325, 812 S.E.2d at 215.

174. *Id.* at 325, 812 S.E.2d at 215.

175. *Id.* at 330–33, 812 S.E.2d at 218–19.

176. 296 Va. 412, 414, 821 S.E.2d 540, 541 (2018).



direction.<sup>177</sup> The court held that the plain language of the statute contains no such requirement, and that the location of the shooter is immaterial to the inquiry directed by the statute.<sup>178</sup>

### G. *Driving-Related Crimes*

In *Chapman v. Commonwealth*, the Supreme Court of Virginia summarily affirmed the Court of Appeals of Virginia's earlier decision, which found no error in Chapman's conviction of felony reckless driving.<sup>179</sup> Chapman was convicted under Virginia Code sections 46.2-852 and 46.2-868(B), the latter of which requires proof that "as the sole and proximate result of [the defendant's] reckless driving, [the defendant] caused the death of another."<sup>180</sup> The court of appeals had held that the victim-passenger's failure to wear a seatbelt was not a proximate cause of his death, and that Chapman's reckless driving was the "sole and proximate" cause of the victim's death within the meaning of the statute.<sup>181</sup>

In *Lambert v. Commonwealth*, the Court of Appeals of Virginia considered whether the evidence was sufficient to support Lambert's convictions of driving while intoxicated, in violation of Virginia Code section 18.2-266, and aggravated involuntary manslaughter, in violation of section 18.2-36.1.<sup>182</sup> Lambert was driving a pickup truck shortly after leaving a methadone clinic when he collided with a car driving in the other direction, resulting in the passenger's death.<sup>183</sup> Forensic evidence showed Lambert was under the influence of methadone, alprazolam (Xanax), and nordiazepam.<sup>184</sup> Lambert claimed on appeal that the Commonwealth failed to prove that (1) the drugs in his blood were "self-administered," relying on *Jackson v. Commonwealth*,<sup>185</sup> and (2) he had not consumed the drugs after the time of the accident.<sup>186</sup> The court found that Lambert's admission that he had

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177. *Id.* at 415, 821 S.E.2d at 542.

178. *Id.* at 415–17, 821 S.E.2d at 542–43.

179. 296 Va. 386, 386, 820 S.E.2d 611, 611 (2018).

180. *Chapman v. Commonwealth*, 68 Va. App. 131, 133–34, 804 S.E.2d 326, 327–38 (2017).

181. *Id.* at 145, 804 S.E.2d at 333.

182. 70 Va. App. 54, 57, 824 S.E.2d 18, 20 (2019).

183. *Id.* at 57–59, 824 S.E.2d at 20–21.

184. *Id.* at 59, 824 S.E.2d at 21.

185. 274 Va. 630, 652 S.E.2d 111 (2007).

186. *Lambert*, 70 Va. App. at 63, 65, 824 S.E.2d at 24.

visited a methadone clinic shortly before the accident, after he initially denied taking any drugs before driving, entitled the factfinder to conclude that Lambert “had taken the drugs and initially lied about not consuming them to conceal his guilt.”<sup>187</sup> The court further found that circumstantial evidence excluded the possibility that Lambert ingested the drugs found in his blood after the time of the accident, since Lambert was not left unattended from shortly after the accident until his blood was drawn, and since his symptoms throughout that time corresponded with the depressant effects of the drugs in his system.<sup>188</sup>

#### H. *Probation Violations*

In *Green v. Commonwealth*, the Court of Appeals of Virginia reviewed whether the circuit court had jurisdiction to revoke the appellant’s suspended sentence.<sup>189</sup> In 1993, Green pled guilty to felony arson and was sentenced to ten years of incarceration with nine years suspended in addition to a period of active supervised probation.<sup>190</sup> Green later moved to dismiss a show cause issued for conduct in 2015 on the grounds that his period of suspension had already expired, even though he was in custody for the majority of the time in question due to serving an active sentence for an unrelated crime until his release in 2014.<sup>191</sup>

The court of appeals reversed Green’s violation, finding that the period of suspension was not tolled by his incarceration.<sup>192</sup> The court additionally noted that even though the order provided that supervised probation would not commence until Green’s release from custody, there was no authority to revoke his suspended sentence because the period of probation cannot exceed the period of suspension.<sup>193</sup>

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187. *Id.* at 64, 824 S.E.2d at 24.

188. *Id.* at 65–67, 824 S.E.2d at 24. The court also rejected Lambert’s argument that the trial court erred by excluding impeachment evidence regarding a police witness’s unspecified criminal charge and suspension from the Virginia State Police (he was subsequently convicted of soliciting a prostitute and dismissed from the force), on the grounds that the proffered evidence was expressly prohibited by Virginia Supreme Court Rule 2:608(b). *Id.* at 60–62, 824 S.E.2d at 21–22.

189. 69 Va. App. 99, 101, 815 S.E.2d 821, 822 (2018).

190. *Id.* at 102, 815 S.E.2d at 822.

191. *Id.* at 101–02, 815 S.E.2d at 822.

192. *Id.* at 104–05, 815 S.E.2d at 823.

193. *Id.* at 104–05, 815 S.E.2d at 823.

In *Johnson v. Commonwealth*, the Supreme Court of Virginia was asked to apply the tests outlined in *Henderson v. Commonwealth*<sup>194</sup> for the admissibility of hearsay in revocation proceedings.<sup>195</sup> The trial court admitted hearsay testimony from two young women who reported that Johnson, who was a sex offender, made inappropriate contact with them.<sup>196</sup> The defendant challenged the veracity of the girls' allegations, asserting that his Confrontation Clause and Due Process rights were violated.<sup>197</sup>

The supreme court noted that defendants are generally entitled to cross-examine adverse witnesses at revocation proceedings unless there is good cause for not allowing confrontation.<sup>198</sup> Courts are to consider two overlapping tests in order to find the requisite good cause: a reliability test and a balancing test.<sup>199</sup> The supreme court held that the challenged statements were admissible in *Johnson* because there was sufficient corroboration—there were text messages to and from the defendant, Johnson worked where the girls indicated he did, and he matched their descriptions.<sup>200</sup>

### I. *Perjury*

In *Gerald v. Commonwealth*, the Supreme Court of Virginia determined that the evidence was sufficient to support the defendants' perjury convictions and that Albemarle County Circuit Court was a proper venue.<sup>201</sup> At trial before the general district court, the Commonwealth proved that one co-defendant drove the vehicle when it got into an accident, and the other drove from the scene of the crime.<sup>202</sup> The Commonwealth also proved that shortly after the accident, they told a police officer that one had been driving on a suspended license.<sup>203</sup> However, under oath in their defense, both defendants testified that neither drove the car nor

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194. 285 Va. 318, 327–28, 736 S.E.2d 901, 906 (2013).

195. 296 Va. 266, 270, 274, 819 S.E.2d 425, 427, 429 (2018).

196. *Id.* at 269–70, 819 S.E.2d at 426–27.

197. *Id.* at 270, 819 S.E.2d at 427.

198. *Id.* at 275, 819 S.E.2d at 430 (citing *Black v. Romano*, 471 U.S. 606, 612 (1985)).

199. *Id.* at 275–76, 819 S.E.2d at 430 (citing *Henderson*, 285 Va. at 327–28, 736 S.E.2d at 906).

200. *Id.* at 279, 819 S.E.2d at 432.

201. 295 Va. 469, 486, 813 S.E.2d 722, 731–32 (2018).

202. *Id.* at 480, 813 S.E.2d at 727.

203. *Id.* at 480, 813 S.E.2d at 727–28.

told the police officer that they had been driving or had suspended licenses.<sup>204</sup>

The court affirmed their convictions because

[i]n light of the detailed nature of the evidence of [the defendants'] driving with reference to the accident, it would be unreasonable to conclude that the Gerald's denials of driving were in response to ambiguous questioning or an inquiry into their driving at a time or place other than what the Commonwealth actually sought to prove.<sup>205</sup>

The court also held that venue was proper because the City of Charlottesville and Albemarle County have joint jurisdiction over county property located within the City of Charlottesville, which is where the crime of perjury was committed.<sup>206</sup>

#### J. *Sex Offenders*

In *Turner v. Commonwealth*, the Supreme Court of Virginia issued an order clarifying who must register as a sexually violent offender based on an out-of-state conviction.<sup>207</sup> Virginia Code section 9.1-902(F)(ii) classifies an individual as sexually violent for "any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted."<sup>208</sup> Despite Turner's argument that the legislature did not intend to classify all out-of-state offenders as "violent," the court found the statutory language clear and unambiguous.<sup>209</sup> The court affirmed his conviction and made clear that all persons convicted of such offenses out-of-state are properly classified as sexually violent within the meaning of the statute.<sup>210</sup>

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204. *Id.* at 480, 813 S.E.2d at 727–28.

205. *Id.* at 481–82, 813 S.E.2d at 728.

206. *Id.* at 483–85, 813 S.E.2d at 729–31.

207. 826 S.E.2d 307, 308 (2019).

208. VA. CODE ANN. § 9.1-902(F)(ii) (Cum. Supp. 2019).

209. *Turner*, 826 S.E.2d at 309.

210. *Id.* at 310.

### K. *Sex Crimes*

In *Commonwealth v. Murgia*, the Supreme Court of Virginia explained Virginia Code section 18.2-374.3(D) requires the intent to use a communications device “for ‘the purpose of soliciting, with lascivious intent, any child [the defendant] knows or has reason to believe is at least’” fifteen, but less than eighteen, years old “‘to knowingly and intentionally’ commit one of the proscribed acts.”<sup>211</sup> The victim and her track coach, Murgia, communicated via text message on three different occasions.<sup>212</sup> During two of the texting conversations, the victim requested assistance from Murgia to improve her high jump, and Murgia responded with sexual references.<sup>213</sup> In the last conversation, Murgia texted her about a graphic dream he had involving her in great detail.<sup>214</sup> The supreme court found the evidence sufficient to show Murgia used a communications device for the purpose of soliciting the victim under those facts.<sup>215</sup>

In *Hillman v. Commonwealth*, the Court of Appeals of Virginia affirmed Hillman’s conviction for taking indecent liberties with a child.<sup>216</sup> Hillman, a twenty-two-year-old youth pastor, asked A.F., a fourteen-year-old youth group member, to send him a photo of her nude upper body via Snapchat, an “image messaging mobile phone application,” which automatically deletes messages shortly after they are viewed by the recipient.<sup>217</sup> A.F. sent Hillman the requested photo, and in return, Hillman sent A.F. photos of his erect penis via Snapchat.<sup>218</sup> The trial court admitted photographs taken from Hillman’s iPad of male genitalia after A.F. authenticated them as being “similar” to the photos she had received from Hillman via Snapchat.<sup>219</sup> Hillman challenged his indecent liberties conviction, arguing that the trial court abused its discretion

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211. 827 S.E.2d 377, 383 (2019) (quoting VA. CODE ANN. § 18.2-374.3(D) (Repl. Vol. 2014)).

212. *Id.* at 380.

213. *Id.*

214. *Id.* at 380–81.

215. *Id.* at 384.

216. 68 Va. App. 585, 589, 811 S.E.2d 853, 855 (2018).

217. *Id.* at 589–91 & 589 n.1, 811 S.E.2d at 855–56 & 855 n.1 (quoting *State v. Bariteau*, 884 N.W.2d 169, 172 n.1 (S.D. 2016)).

218. *Id.* at 590, 811 S.E.2d at 856. Hillman and A.F. exchanged additional photos and videos showing both persons nude. *Id.* at 590, 811 S.E.2d at 856.

219. *Id.* at 590–91, 811 S.E.2d at 856.

by admitting the photographs, and that the evidence did not support a finding that he had exposed himself to A.F. (1) in her physical presence; and (2) contemporaneous (or “live and in real time”) with such physical presence.<sup>220</sup> The court rejected these arguments, finding that the law did not require either physical presence or a contemporaneous exposure, and held that any error in admitting the photos was harmless given A.F.’s testimony, Hillman’s confession, and the properly admitted text messages corroborating the Snapchat conversation.<sup>221</sup>

In *Carr v. Commonwealth*, Carr challenged the sufficiency of the evidence for his convictions of sex trafficking, conspiracy to commit trafficking, abduction, conspiracy to commit abduction, and the use of a firearm in the commission of an abduction.<sup>222</sup> The Court of Appeals of Virginia held that Carr was a principal in the second degree to abduction because the crime was complete when Carr and his co-conspirators forced the human trafficking victim to return under duress to the hotel.<sup>223</sup> Carr participated in abduction by confronting the victim and encouraging another co-conspirator to threaten her.<sup>224</sup> The court held that the evidence was sufficient to convict Carr of sex trafficking because he benefited from prostitution by knowingly staying in a room paid for by the proceeds of prostitution.<sup>225</sup>

Carr’s convictions for conspiracy to commit abduction and sex trafficking were affirmed because the evidence established that three men, including Carr, went to the hotel room armed with a handgun, confronted and castigated the victim, and forced her to return to the house.<sup>226</sup> The evidence also supported Carr’s conspiracy to commit sex trafficking conviction when he stayed with the group in the hotel room rented with the prostitution earnings, the men told her that “she couldn’t live for free,” the co-conspirators set up the prostitution advertisement, and Carr confronted the victim when she left prostitution and told a co-conspirator to threaten to pistol-whip her.<sup>227</sup> Finally, in affirming

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220. *Id.* at 594, 600, 811 S.E.2d at 857, 861.

221. *Id.* at 594–99, 601–02, 811 S.E.2d at 858–61.

222. 69 Va. App. 106, 110, 816 S.E.2d 591, 593–94 (2018).

223. *Id.* at 115, 816 S.E.2d at 596.

224. *Id.* at 114–15, 816 S.E.2d at 596.

225. *Id.* at 117, 816 S.E.2d at 597.

226. *Id.* at 117–19, 816 S.E.2d at 597–98.

227. *Id.* at 119–20, 816 S.E.2d at 598.

the use of a firearm in the commission of an abduction conviction, the court of appeals noted that “it is not necessary for a defendant to physically possess a firearm to be convicted . . . if the defendant was acting in concert with the gunman to commit the underlying felony.”<sup>228</sup>

In *Cabral v. Commonwealth*, the Court of Appeals of Virginia considered whether a Taser constituted a dangerous weapon under Virginia Code section 18.2-67.3.<sup>229</sup> Cabral used a Taser three times to attack and sexually assault a female jogger causing her injuries.<sup>230</sup> Relying on the plain language of the statute, the court of appeals held that the Taser was a dangerous weapon under the statute and rejected Cabral’s argument that the Commonwealth had to prove the Taser was a deadly weapon.<sup>231</sup>

#### L. *Felony Child Neglect and Endangerment*

In *Camp v. Commonwealth*, the Court of Appeals of Virginia held that a mother’s decision to drive with her children in her vehicle while she had a blood alcohol content in excess of .25 was sufficient to support a finding that she had “committed a ‘willful act or omission in the care of [her children that] was so gross, wanton, and culpable as to show a reckless disregard for human life,’” supporting her convictions for felony child neglect under Virginia Code section 18.2-371.1(B).<sup>232</sup>

#### M. *Attempts*

In *Jones v. Commonwealth*, the Court of Appeals of Virginia reversed an attempted robbery conviction for insufficient evi-

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228. *Id.* at 120–21, 816 S.E.2d at 599.

229. 69 Va. App. 67, 69–70, 815 S.E.2d 805, 806 (2018).

230. *Id.* at 69–70, 815 S.E.2d at 806.

231. *Id.* at 72–74, 815 S.E.2d at 808–09.

232. 68 Va. App. 694, 701–02, 705–06, 813 S.E.2d 10, 14, 16 (2018) (quoting VA. CODE ANN. § 18.2-371.1(B)(1) (Cum. Supp. 2016)). The court distinguished Camp’s conduct from the result in *Coomer v. Commonwealth*, finding that while Coomer’s blood alcohol content level (between .09 and .11) did not support conviction standing alone, “[Camp’s] level of intoxication was more than three times the legal limit . . . and approximately two and a half times the level in *Coomer*” and therefore “sufficient to support [Camp]’s convictions.” *Id.* at 704–06, 813 S.E.2d at 15–16 (referencing *Coomer v. Commonwealth*, 67 Va. App. 537, 797 S.E.2d 787 (2017)).

dence.<sup>233</sup> Police observed an individual leave a car parked in a housing complex, and then observed two other men exit the car a few minutes later.<sup>234</sup> The individuals fled when the police identified themselves, but were ultimately apprehended.<sup>235</sup> Police recovered a ski mask in the car and another in a street Jones had traveled before being stopped.<sup>236</sup> Police also found a sawed-off shotgun where they saw Jones running.<sup>237</sup> Jones admitted going to the housing complex to make sure that the co-defendant “didn’t get hurt” while he “rob[bed] a known drug dealer.”<sup>238</sup>

The court found that the Commonwealth failed to prove an act in furtherance of criminal intent.<sup>239</sup> The Commonwealth must prove “a direct, but ineffectual, act to accomplish the crime.”<sup>240</sup> Such an act must reach “far enough toward the accomplishment of the desired result to amount to the commencement of the consummation,” or, in other words, an “action that begins (commences) the execution (consummation) of one or more elements of a crime but does not complete all of them.”<sup>241</sup> The court rejected the Commonwealth’s argument that any slight act done in furtherance of a defendant’s criminal intent would be sufficient.<sup>242</sup> The majority found that the overt act, however slight, must still implicate one or more elements of the offense in order to sustain an attempt conviction.<sup>243</sup>

#### N. *Evidence*

In *Melick v. Commonwealth*, the Court of Appeals of Virginia delineated who may authenticate business records as a hearsay

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233. 70 Va. App. 307, 334, 826 S.E.2d 908, 922 (2019) (en banc).

234. *Id.* at 312, 826 S.E.2d at 911.

235. *Id.* at 312, 826 S.E.2d at 911.

236. *Id.* at 312–13, 826 S.E.2d at 911.

237. *Id.* at 313, 826 S.E.2d at 911.

238. *Id.* at 313, 826 S.E.2d at 911.

239. *Id.* at 331, 826 S.E.2d at 920.

240. *Id.* at 318, 826 S.E.2d at 914 (quoting *Pitt v. Commonwealth*, 260 Va. 692, 695, 539 S.E.2d 77, 79 (2000)).

241. *Id.* at 319, 826 S.E.2d at 914 (quoting *Jay v. Commonwealth*, 275 Va. 510, 526, 659 S.E.2d 311, 320 (2008)).

242. *Id.* at 325, 826 S.E.2d at 917.

243. *Id.* at 326, 826 S.E.2d at 917–18. While the concurrence would also have found the evidence insufficient, it disagreed with the overt act definition provided by the majority, asserting it runs counter to Supreme Court of Virginia precedent. *Id.* at 335–36, 826 S.E.2d at 922–23.



exception.<sup>244</sup> Melick argued that records stored on an online database were improperly admitted.<sup>245</sup> The court found that information stored by an entity other than the one which created it does not alter the “nature of the records.”<sup>246</sup> The character of the information does not change simply because the business records in question were uploaded onto a database, so the creator of the record could still authenticate it.<sup>247</sup> Although the record did not show precisely who uploaded the information or when, the court concluded that there was sufficient evidence that the information came from the clerk who conducted the transaction and there were guarantees of trustworthiness surrounding the information to satisfy the contemporaneousness requirement of the hearsay exception.<sup>248</sup> The court also explained that a custodian of records was not needed for authentication so long as the supporting witness was “qualified.”<sup>249</sup>

#### O. *Miscellaneous*

In *Brown v. Commonwealth*, the Court of Appeals of Virginia reviewed a defendant’s convictions for use of a firearm, attempted murder, capital murder, and attempted capital murder.<sup>250</sup> Although Brown argued that the trial court erred in denying him access to preceding years’ grand jury lists, the court of appeals determined any error was harmless because a finding of guilt renders harmless any defect in the composition of a grand jury, absent structural constitutional errors.<sup>251</sup> The court explained that no authoritative tribunal has yet held that a defendant may make a Sixth Amendment fair-cross-section challenge against a state’s grand jury procedures, and he otherwise had no right to the information.<sup>252</sup> Moreover, Brown made no attempt to limit or tailor his request to his indictment year, given the valid privacy

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244. 69 Va. App. 122, 135, 816 S.E.2d 599, 605 (2018). The Court also rejected Melick’s sufficiency argument, finding that the victim’s testimony that the stolen items were valued at more than \$200 was sufficient. *Id.* at 147, 816 S.E.2d at 611.

245. *Id.* at 133, 816 S.E.2d at 605.

246. *Id.* at 135, 816 S.E.2d at 606.

247. *Id.* at 135–36, 816 S.E.2d at 606.

248. *Id.* at 137–39, 816 S.E.2d at 607.

249. *Id.* at 141–42, 816 S.E.2d at 609.

250. 68 Va. App. 746, 757, 813 S.E.2d 557, 562 (2018).

251. *Id.* at 770, 813 S.E.2d at 568.

252. *Id.* at 774–75, 813 S.E.2d at 570–71.

concerns at play.<sup>253</sup> As a result, given that Brown had no right to receive the information and the relevant issues at trial, the court reasoned that the trial court did not abuse its discretion in denying Brown's motion.<sup>254</sup>

The court of appeals also affirmed the trial court's denial of Brown's motion to change venue, finding that the defendant did not overcome the presumption that he would receive a fair trial in the county he was tried in.<sup>255</sup> The trial court also did not err in denying Brown's motion to strike prospective jurors for cause because any tentative opinions formed by the jurors were that the appellant shot the victim—which was not a fact in controversy.<sup>256</sup> The court additionally rejected Brown's argument that the evidence was insufficient to determine that the appellant murdered his victim, a law enforcement officer, with the purpose of interfering with the performance of his official duties.<sup>257</sup> The court further found that there was no error in the denial of Brown's proffered instruction on second-degree murder because “no evidence . . . support[ed] a finding that appellant acted without willfulness, deliberation, or premeditation.”<sup>258</sup> The court also made clear that criminal discovery requires disclosure of volunteered statements or confessions made to law enforcement only in response to police questions, and not those to a police officer made in open court that the officer only happens to hear.<sup>259</sup>

#### P. *Affirmative Defenses*

In *Davis v. Commonwealth*, the Court of Appeals of Virginia decided whether a juvenile and domestic relations judge's statement could give rise to an affirmative defense of reasonable reliance.<sup>260</sup> Davis was the subject of a protective order, which he and his wife believed had been dismissed based on an order dismiss-

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253. *Id.* at 775, 813 S.E.2d at 571.

254. *Id.* at 776, 813 S.E.2d at 571.

255. *Id.* at 776, 813 S.E.2d at 571.

256. *Id.* at 783–86, 813 S.E.2d at 575–76.

257. *Id.* at 786, 813 S.E.2d at 576.

258. *Id.* at 789, 791, 813 S.E.2d at 578.

259. *Id.* at 792–93, 813 S.E.2d at 579–80. The court also found there was no error in the trial court's denial of Brown's motion to set aside because the jury was entitled to disbelieve the defense's expert testimony that he was legally insane at the time of the offense. *Id.* at 794–95, 813 S.E.2d at 580.

260. 68 Va. App. 725, 728, 813 S.E.2d 547, 548 (2018).

ing “all petitions.”<sup>261</sup> Later, Davis was stopped while transporting a firearm and was charged with possessing a firearm while subject to a protective order in violation of Virginia Code section 18.2-308.1:4(B).<sup>262</sup> The court reversed the trial court’s decision not to provide a reasonable reliance jury instruction, finding that judges qualify as government officials and have a “duty to interpret and apply the law and therefore their statements can implicate the reasonable reliance defense.”<sup>263</sup>

### III. LEGISLATION

#### A. *Venue*

The 2019 General Assembly expanded venue for the prosecution of certain credit card offenses in Virginia Code section 18.2-198.1 to include the jurisdiction where the cardholder victim resides.<sup>264</sup> The General Assembly also expanded venue for forgery prosecutions to include “any county or city . . . where an issuer, acquirer, or account holder sustained a financial loss.”<sup>265</sup>

The General Assembly additionally modified the transferability of juvenile delinquency cases to the juvenile’s home jurisdiction to allow courts to transfer cases after a finding of “facts sufficient” for a finding of delinquency.<sup>266</sup>

#### B. *Sex Offenses*

The General Assembly passed legislation creating a Class 1 misdemeanor for a travel agent to knowingly promote travel services for the purposes of prostitution or certain sexually violent offenses.<sup>267</sup>

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261. *Id.* at 728–29, 813 S.E.2d at 548–49 (emphasis omitted).

262. *Id.* at 728–29, 813 S.E.2d at 548–49.

263. *Id.* at 733–34, 813 S.E.2d at 551.

264. Act of Feb. 27, 2019, ch. 177, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-198.1 (Cum. Supp. 2019)). Previously, venue only lay where any act in furtherance of the crime occurred or where an issuer, acquirer, or an agent sustained a financial loss. VA. CODE ANN. § 18.2-198.1 (Repl. Vol. 2017).

265. Act of Feb. 19, 2019, ch. 46, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-245.1 (Cum. Supp. 2019)).

266. Act of Mar. 5, 2019, ch. 235, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 16.1-243 (Cum. Supp. 2019)).

267. Act of Mar. 18, 2019, ch. 458, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA.

### C. *Expungement*

The 2019 General Assembly passed new legislation providing for automatic expungement when someone is absolutely pardoned for a crime that he or she has been found to be actually innocent of.<sup>268</sup> The Secretary of the Commonwealth is required to forward a copy of any such absolute pardon to the circuit court where the person was originally convicted.<sup>269</sup>

### D. *Bail*

The General Assembly passed a bill to address bail determinations on appeal.<sup>270</sup> If a higher court decides bail, the bail determination is to be remanded to the court in which the case is pending for any subsequent enforcement and modification.<sup>271</sup> The lower court, upon remand, may not modify the bail decision of the higher court absent a change in circumstances.<sup>272</sup> Further, if the matter is pending in a court not of record, bond modifications should first be heard in that court unless: (i) the bail decision is on appeal; (ii) the charge has been transferred to a circuit court; or (iii) such charge has been certified by a district court.<sup>273</sup>

### E. *Grand Juries*

The 2019 General Assembly made clear that any person granted permission to make notes or copy evidence in a multi-jurisdiction grand jury “shall maintain the secrecy of all information obtained” from it, except for necessary disclosures for use in a criminal investigation or proceeding.<sup>274</sup> Prosecutors must no-

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CODE ANN. § 18.2-348.1 (Cum. Supp. 2019)).

268. Act of Feb. 27, 2019, ch. 181, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 2.2-402, 19.2-392.2 (Cum. Supp. 2019)). Previously, an individual had to petition for expungement. VA. CODE ANN. § 2.2-402 (Repl. Vol. 2017); *id.* § 19.2-392.2 (Cum. Supp. 2016).

269. Ch. 181, 2019 Va. Acts at \_\_.

270. Act of Mar. 19, 2019, ch. 616, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 19.2-124, -130, -132 (Cum. Supp. 2019)).

271. *Id.* ch. 616, 2019 Va. Acts at \_\_.

272. *Id.* ch. 616, 2019 Va. Acts at \_\_.

273. *Id.* ch. 616, 2019 Va. Acts at \_\_.

274. Act of Mar. 18, 2019, ch. 522, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-215.9 (Cum. Supp. 2019)).

tify a defendant indicted by the multi-jurisdiction grand jury that it was used to obtain evidence.<sup>275</sup>

#### F. *Protective Orders*

The 2019 General Assembly created an “acts of god” exception to the requirement that preliminary protective orders be heard within fifteen days of the issuance of the preliminary order, providing that the order shall remain in effect until another protective order is entered.<sup>276</sup> The General Assembly also created a requirement for courts to state the basis for the issuance of preliminary protective orders arising out of ex parte hearings in certain circumstances.<sup>277</sup>

#### G. *Homicide*

The General Assembly created new legislation requiring that anyone who was an adult on their offense date who commits capital murder of a law enforcement officer or certain other public safety officials shall be sentenced to a mandatory minimum term of imprisonment for life.<sup>278</sup>

#### H. *Traffic Offenses and Driving Under the Influence*

The 2019 General Assembly created another class of felony, a Class 6 felony, for when a defendant is guilty of maiming while driving under the influence, and it results in “serious bodily inju-

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275. *Id.* ch. 522, 2019 Va. Acts at \_\_.

276. Act of Mar. 5, 2019, ch. 197, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 16.1-253.1, 19.2-152.9 (Cum. Supp. 2019)).

277. Act of Mar. 21, 2019, ch. 718, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 16.1-112, -253.1, -296, 19.2-152.9 (Cum. Supp. 2019)). If the petition is filed without an affidavit or a form completed by a law enforcement officer which includes the basis for the order, and is instead based upon sworn testimony, the order must state the basis on which it was entered, including a summary of the allegations made and the court’s findings. *Id.* ch. 718, 2019 Va. Acts at \_\_. The bill further provides that an appeal of a permanent protective order must be docketed within two business days of receipt of such an appeal. *Id.* ch. 718, 2019 Va. Acts at \_\_.

278. Act of Mar. 21, 2019, ch. 717, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-31 (Cum. Supp. 2019)). This legislation modified the law following the Supreme Court of Virginia’s holding in *Jones v. Commonwealth*, which found that courts had the discretion to suspend any or all of the life sentence referenced in Virginia Code section 18.2-31. *See* 293 Va. 29, 795 S.E.2d 705 (2017).

ry.”<sup>279</sup> The act provides that if the driver acts in a manner which is “so gross, wanton, and culpable as to show a reckless disregard for human life,” the individual is guilty even if he or she does not intentionally cause the injury.<sup>280</sup> Serious bodily injury is defined as “bodily injury that involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”<sup>281</sup>

New legislation makes it unlawful to use a personal communications device when a driver holds such a device in his hand while driving in a highway work zone.<sup>282</sup> A new law also makes a driver’s failure to yield the closest lane to, or slow down for, a stationary vehicle on a shoulder either a traffic infraction or a criminal reckless driving offense.<sup>283</sup>

### I. *Drug Offenses*

The 2019 General Assembly repealed the requirement that an individual “substantially cooperate” in a criminal investigation in order to be eligible for the affirmative defense for possession crimes under Virginia Code section 18.2-251.03.<sup>284</sup>

The General Assembly also amended several laws governing the minimum age to purchase, possess, or sell tobacco products, nicotine vapor products, and alternative nicotine products, raising the minimum age from eighteen to twenty-one.<sup>285</sup> The

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279. Act of Mar. 18, 2019, ch. 465, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-51.4 to -51.5 (Cum. Supp. 2019)).

280. *Id.* ch. 465, 2019 Va. Acts at \_\_.

281. *Id.* ch. 465, 2019 Va. Acts at \_\_.

282. Act of Apr. 29, 2019, ch. 849, 2019 Va. Acts. \_\_, \_\_ (codified as amended at VA. CODE ANN. § 46.2-1078.1 (Cum. Supp. 2019)).

283. Act of Apr. 29, 2019, ch. 850, 2019 Va. Acts. \_\_, \_\_ (codified at VA. CODE ANN. § 46.2-861.1 (Cum. Supp. 2019)).

284. Act of Mar. 19, 2019, ch. 626, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-251.03 (Cum. Supp. 2019)). The statute provides an affirmative defense for individuals whose possession crimes were only discovered as a result of the individual seeking or obtaining emergency medical attention under certain conditions. *Id.* § 18.2-251.03 (Cum. Supp. 2019).

285. Act of Feb. 21, 2019, ch. 90, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 18.2-246.8, -246.10, -371.2 (Cum. Supp. 2019)).

amendments exempt active duty military personnel who are eighteen or older from the increased minimum age.<sup>286</sup>

### J. *Drones*

The 2019 General Assembly added a new subpart to the statute criminalizing drone trespass, making it a Class 1 misdemeanor to take off or land in violation of federal regulations.<sup>287</sup>

The General Assembly also amended the law governing when police officers must obtain a warrant to use a drone, allowing police to use drones without a warrant to (a) aeriually survey the primary residence of the subject of an arrest warrant to formulate a plan to execute an existing arrest warrant or *capias*; or (b) locate a person sought for arrest when law enforcement remains in hot pursuit of the person following their flight.<sup>288</sup>

### K. *Animal Cruelty and Related Legislation*

The 2019 General Assembly passed several laws protecting animals. It expanded the Class 6 felony for animal abuse to include abuse of a companion animal when the animal is seriously injured but does not die.<sup>289</sup> Additionally, animal control officers are now allowed to confiscate any tethered cock or any other animal that they determine has been used in animal fighting.<sup>290</sup>

### L. *Miscellaneous Crimes*

The 2019 General Assembly created a misdemeanor for any person who, with the intent to defraud, intimidate, or harass, causes a telephone to ring and engages in conduct resulting in the display of false caller identification information.<sup>291</sup>

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286. *Id.* ch. 90, 2019 Va. Acts at \_\_.

287. Act of Mar. 19, 2019, ch. 612, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-121.3 (Cum. Supp. 2019)).

288. Act of Mar. 22, 2019, ch. 781, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-60.1 (Cum. Supp. 2019)).

289. Act. of Mar. 18, 2019, ch. 537, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 3.2-6570 (Cum. Supp. 2019)).

290. Act. of Mar. 12, 2019, ch. 345, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 3.2-6571 (Cum. Supp. 2019)).

291. Act of Mar. 18, 2019, ch. 476, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA.

The General Assembly added health care workers to the class of victims outlined in Virginia Code section 18.2-60.<sup>292</sup> That section provides that where a person makes an oral threat to kill or cause bodily injury to both school employees and health care workers engaged in the course of their official duties, he or she is guilty of a Class 1 misdemeanor.<sup>293</sup>

The General Assembly also modified the definition of gambling outlined in section 18.2-325.<sup>294</sup> Illegal gambling now includes betting or wagering of any “consideration” made in exchange for a “chance to win a prize, stake, or other consideration or thing of value” by operating a gambling device “regardless of whether the chance to win such prize, stake, or other consideration or thing of value may be offered in the absence of a purchase.”<sup>295</sup>

Under new legislation, it is a Class 1 misdemeanor to simulate a crime in public, with the intent to mislead police, causing someone who is unaware the crime is fake to call in a report to police.<sup>296</sup>

A new law specifies that failure to appear to court for a criminal offense is punishable under section 18.2-456 and is not punishable under section 16.1-69.24.<sup>297</sup>

### M. *Sex Offenders and Registration*

The 2019 General Assembly passed a statute prohibiting any person required to register on the Sex Offender and Crimes Against Minors Registry (or its federal equivalent) from operating a taxicab for the transportation of passengers for hire.<sup>298</sup>

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CODE ANN. § 18.2-429.1 (Cum. Supp. 2019)).

292. Act of Mar. 18, 2019, ch. 506, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-6-60 (Cum. Supp. 2019)).

293. VA. CODE ANN. § 18.2-6-60 (Cum. Supp. 2019).

294. Act of Mar. 21, 2019, ch. 761, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-325) (Cum. Supp. 2019)).

295. *Id.* ch. 761, 2019 Va. Acts at \_\_.

296. Act of Mar. 18, 2019, ch. 471, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-461 (Cum. Supp. 2019)).

297. Act of Mar. 31, 2019, ch. 708, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 16.1-69.24, 18.2-456 (Cum. Supp. 2019)).

298. Act of Mar. 18, 2019, ch. 480, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 46.2-2011.33 (Cum. Supp. 2019)).



The General Assembly also changed the timeframe for the re-registration of sex offenders, requiring offenders to re-register according to categories assigned by their birth month and last name.<sup>299</sup>

#### N. *Sex Crimes*

Virginia Code section 18.2-386.2, criminalizing the dissemination of certain nude videos or pictures of another with the intent to coerce, harass, or intimidate, now includes people who modify photos and videos with the intent to depict the subject of the image.<sup>300</sup>

#### O. *Child Victims and Abuse*

The legislature passed a law adding ministers, priests, rabbis, imam, and other clergy members to the list of people required to report suspected child abuse or neglect, unless the clergy member is required by the doctrine of the religious organization to keep that information confidential, or the information would be subject to certain evidentiary exemptions.<sup>301</sup>

The General Assembly also confirmed child victims of commercial sex trafficking or prostitution will be allowed to testify by a two-way, closed-circuit television.<sup>302</sup>

#### P. *Elder Abuse*

The 2019 General Assembly clarified that the informed consent exemption to elder abuse requires that the incapacitated adult must have given the consent when the adult had capacity.<sup>303</sup>

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299. Act of Mar. 19, 2019, ch. 613, 2019 Va. Acts \_\_, \_\_ (codified at VA. CODE ANN. § 9.1-904 (Cum. Supp. 2019)). Previously, offenders registered a specified number of days following their initial registration. VA. CODE ANN. § 9.1-904 (2018). This is scheduled to go into effect on July 1, 2020. Ch. 613, 2019 Va. Acts at \_\_.

300. Act of Mar. 18, 2019, ch. 490, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-386.2 (Cum. Supp. 2019)).

301. Act. of Mar. 18, 2019, ch. 414, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 63.2-1509 (Cum. Supp. 2019)).

302. Act. of Feb. 22, 2019, ch. 146, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-67.9 (Cum. Supp. 2019)).

303. Act. of Mar. 5, 2019, ch. 234, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 18.2-369 (Cum. Supp. 2019)).

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*Q. Testing*

Finally, the 2019 General Assembly created a tracking system for Physical Evidence Recovery Kits (“PERK”).<sup>304</sup> Health care providers are required to inform sexual assault victims of their unique identification numbers and to provide them with information regarding the system, which is otherwise confidential and not subject to disclosure under the Freedom of Information Act.<sup>305</sup>

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304. Act of Mar. 18, 2019, ch. 473, 2019 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. § 19.2-11.13 (Cum. Supp. 2019)).

305. *Id.* ch. 473, 2019 Va. Acts at \_\_.