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Annual Survey of Virginia Law: Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

*Steven D. Benjamin**

I. INTRODUCTION

During the past year, the Virginia Court of Appeals continued in its role as the most significant contributor to criminal case law. The court ruled on a myriad of issues; the recurring topics involved arrest and investigatory detention, self-defense, the execution of search warrants, double jeopardy, the admissibility of eye-witness identification, and the circumstances and admissibility of a police interrogation. Also, the court ruled on numerous trial and procedural questions regularly encountered by the circuit courts and criminal practitioners.

II. FOURTH AMENDMENT

A. *Resisting Arrest*

One of the more interesting criminal cases this past year involved a "Rambo-type" confrontation between an off-duty deputy in Wythe County, Virginia, and Ira Foote, an honorably-discharged veteran suffering post traumatic stress syndrome from his heavy combat experience in Vietnam.¹ The case involved a mountain-side chase, resulting in nine shots fired by the deputy through his own windshield. The Virginia Court of Appeals held that one has the right to resist an unlawful arrest, and is under no duty to retreat before asserting that right.²

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1. *Foote v. Commonwealth*, 11 Va. App. 61, 396 S.E.2d 851 (1990).

2. The Court relied upon § 19.2-82 of the Code of Virginia ("Code") to determine the legality of the warrantless arrest. Foote's arrest was unlawful for two reasons: 1) the deputy did not display a badge or uniform; and, 2) the radio transmission which prompted the deputy to make the detention did not contain enough information. The court held that a mere radio transmission that the driver is wanted is insufficient to establish probable cause for a warrantless arrest. An officer's good faith in such a situation is of no significance to the determination. *Id.* at 65-68, 396 S.E.2d at 854-55 (citing VA. CODE ANN. § 19.2-81 (Cum. Supp. 1987) (amended 1989)).

B. *Investigatory Detention*

In *Goodwin v. Commonwealth*,³ the defendant was walking from behind a group of apartments towards the street in a high crime area when he quickly placed his hand in his pocket after seeing police officers. The court found that this action did not create a reasonable suspicion permitting an investigatory detention.⁴ The circumstances were sufficiently more suspicious in *Dixon v. Commonwealth*.⁵ Police officers responded to a dispatch regarding "two black males and a group of subjects arguing over a drug transaction."⁶ The officers saw a group of men disburse from the front of the apartment building and observed several of the men entering the building. One of the officers entered the building, and saw the defendant walking down the stairs apparently stuffing a handful of money into his pocket. The officer stopped the defendant, frisked him, found a pistol, effected the arrest, and conducted an additional complete search of the individual. The court held that both the detention and the frisk were lawful.⁷

An earlier decision by the court of appeals concerning the lawful parameters of a warrantless search of a detainee's person was reversed by the Supreme Court of Virginia in *Harris v. Commonwealth*.⁸ In this case, officers investigating suspected drug activity stopped a car and arrested the driver. During a pat-down of Harris, who was a passenger in the car, an officer felt a film canister in his pocket. However, when asked by the officer what it contained, Harris replied "film." When the officer opened it, he found cocaine and arrested Harris.⁹

The supreme court discussed the law surrounding stop and frisk

3. 11 Va. App. 363, 398 S.E.2d 690 (1990).

4. *Id.*; see also *Zimmerman v. Commonwealth*, 234 Va. 609, 363 S.E.2d 708 (1988).

5. 11 Va. App. 554, 399 S.E.2d 831 (1991).

6. *Id.* at 555, 399 S.E.2d at 832.

7. The reasonableness of the detention was determined by consideration of several factors: the correlation of the build, age, sex, and race of the defendant with the "suspects" who had entered the same building; the fact that the officer was involved in a drug investigation; and, the defendant's act of stuffing money into his pocket. *Id.* at 556, 399 S.E.2d at 832-33.

The pat-down was permissible because of the circumstances of this case, and because "the suspicion of narcotics possession and distribution gives rise to an inference of dangerousness." *Id.* at 557, 399 S.E.2d at 833.

8. 241 Va. 146, 400 S.E.2d 191 (1991).

9. *Id.* at 148, 400 S.E.2d at 192-93.

encounters.¹⁰ The court held the officer was entitled to frisk Harris, but when his search provided assurances that there were no weapons, the search should have ceased.¹¹

The court discussed the "plain view" exception to the fourth amendment.¹² The officer did not have probable cause to believe that the film canister contained drugs. Although he knew that certain people kept drugs in film canisters, this knowledge provided him with only a hunch, for film canisters are also used on a daily basis to store film. The officer's hunch, even when coupled with the report from an informant,¹³ was insufficient to permit the officer to conduct a warrantless search.¹⁴

In evaluating the reliability of an anonymous tip, an important consideration is the anonymous informant's ability to provide information about the suspect that is unpredictable to a casual observer. *Hardy v. Commonwealth*¹⁵ involved an anonymous telephone tip provided to the Richmond police. The informant stated that the defendant, who was both described and named, was armed, in possession of cocaine, and walking down a specific street. Based on the tip, officers located, stopped, and frisked the defendant. They found no weapon, but then removed his hat and found the cocaine. The court of appeals characterized the detention as an arrest, and found that the officers lacked probable cause. The informant's tip provided no information beyond a description of innocent behavior which any casual observer could have detected. The tip was inadequate because it neither provided any predictive information, nor demonstrated that the informant had inner-knowledge of the defendant's activities.¹⁶

C. *Unlawful Entry for Search*

Three cases in the court of appeals this year discussed the law of "no-knock" entries to execute a search warrant.¹⁷ The rationale be-

10. *Id.* at 149-52, 400 S.E.2d at 193-95.

11. *Id.* at 152, 400 S.E.2d at 195.

12. *Id.* at 152-55, 400 S.E.2d at 195-96.

13. The record reflected nothing regarding the informant's reliability. *Id.* at 154, 400 S.E.2d at 196.

14. *Id.*; see also *Smith v. Ohio*, 494 U.S. 541 (1990).

15. 11 Va. App. 433, 399 S.E.2d 27 (1990).

16. *Id.* at 436, 399 S.E.2d at 28-29.

17. See *Gladden v. Commonwealth*, 11 Va. App. 595, 400 S.E.2d 791 (1991); *Delacruz v. Commonwealth*, 11 Va. App. 335, 398 S.E.2d 103 (1990); *Grover v. Commonwealth*, 11 Va. App. 143, 396 S.E.2d 863 (1990).

hind the rule generally prohibiting no-knock entries was well-illustrated in *Delacruz v. Commonwealth*.¹⁸ In *Grover v. Commonwealth*,¹⁹ the insertion of a pass-key into the lock of a hotel room door prior to the officer's knocking and announcing his presence was merely preparatory and did not amount to an "entry."²⁰ The officer's failure in *Gladden v. Commonwealth*²¹ was in not knocking on the door with his knuckles or fist, or ringing the doorbell, the "universally recognized signals to the occupants of a dwelling that someone is at the door wishing to gain entrance."²²

In *Lanier v. Commonwealth*,²³ the court of appeals recognized an exception to the "good faith" doctrine regarding information supplied to ascertain a search warrant. The court affirmed the denial of the defendant's motion to suppress evidence which was obtained pursuant to a search warrant. It held that the defendant failed to establish by a preponderance of the evidence that false information was provided to the magistrate who issued the search warrant.²⁴

III. DOUBLE JEOPARDY

Double jeopardy protects defendants against multiple punishments and multiple prosecutions for the same offense. For double jeopardy purposes, the supreme court held in *Grady v. Corbin*²⁵ that offenses are considered to be the "same" offense when the government prosecutes conduct in a subsequent trial which constitutes an offense for which the defendant has already been tried. However, where the convictions occur in a single trial, only the

18. 11 Va. App. 335, 398 S.E.2d 103 (1990).

19. 11 Va. App. 143, 396 S.E.2d 863 (1990).

20. *Id.* at 145, 396 S.E.2d at 865.

21. 11 Va. App. 595, 400 S.E.2d 791 (1991).

22. *Id.* at 600, 400 S.E.2d at 793. The officer had created some noise in unsuccessfully attempting to tap a hydraulic jack into place between the crack of the door and the door jamb. He treated the tapping as the equivalent of a knock, announced "Police Officer, search warrant," and then gained entrance with a sledge hammer. The court viewed the question as "not the amount of noise created by the officer, but rather what the noise communicates to the occupants within." *Id.*

23. 10 Va. App. 541, 394 S.E.2d 495 (1990).

24. *Id.* at 548, 394 S.E.2d at 500; *see also* *United States v. Leon*, 468 U.S. 897 (1984) (stating that suppression remains the appropriate remedy where the judge or magistrate who issued the search warrant was misled by false information intentionally or recklessly provided by the affiant); *Franks v. Delaware*, 438 U.S. 154 (1978) (establishing the procedure for challenging the veracity of an affiant's statements made in application of a search warrant).

25. 110 S. Ct. 2084 (1990).

prohibition against multiple punishments is applicable. In this respect, the test articulated in *Blockburger v. United States*²⁶ is determinative.

In *Low v. Commonwealth*,²⁷ the court of appeals discussed the law of double jeopardy and the *Grady* decision. The defendant in *Low*, who was previously convicted of assault, was tried and convicted of the robbery which occurred by virtue of the same assaultive conduct. This prosecution was held to have violated *Grady*, and thus it constituted double jeopardy. Consequently, the conviction was reversed and the indictment dismissed.²⁸

Similarly, the question in *Fitzgerald v. Commonwealth*,²⁹ was whether double jeopardy prohibited convictions both for destruction of private property under section 18.2-137 of the Code of Virginia ("Code") and breaking and entering under section 18.2-91 of the Code, where the destruction of private property occurred incidental to the breaking and entering. The court of appeals held that because each offense required proof of a fact not required by the other, both convictions were permissible.³⁰

IV. DUE PROCESS

An identification procedure that is so suggestive as to make the resulting identification unreliable violates due process.³¹ The procedures most susceptible to challenge for impermissible suggestiveness are single-photograph displays,³² and one-on-one confrontations.³³ Determining whether the identification is nevertheless reliable is governed by factors identified by the United States Su-

26. 284 U.S. 299 (1932). The traditional test is that the prosecution of two offenses arising from the same act is not barred if each offense requires the proof of an element which the other does not. Nevertheless, this is not the end of the inquiry, for even if the offenses are the same under *Blockburger*, the question remains whether the General Assembly intended cumulative punishments for the two offenses. *Blythe v. Commonwealth*, 222 Va. 722, 726, 284 S.E.2d 796, 798 (1981).

27. 11 Va. App. 48, 396 S.E.2d 383 (1990).

28. *Id.* at 52-53, 396 S.E.2d at 385-86.

29. 11 Va. App. 625, 401 S.E.2d 208 (1991).

30. *Id.*

31. *Smith v. Thompson*, 1 Va. App. 407, 339 S.E.2d 556 (1986).

32. See *Hudson v. Blackburn*, 601 F.2d 785 (5th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980); *Wise v. Commonwealth*, 6 Va. App. 178, 367 S.E.2d 197 (1988).

33. See *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *Smith v. Thompson*, 1 Va. App. 407, 339 S.E.2d 556 (1986). This is not a favored procedure, see *Stoval v. Denno*, 388 U.S. 293, 301-02 (1967), but the resulting identification may be admissible. *DeLong v. Commonwealth*, 234 Va. 357, 362 S.E.2d 669 (1987), *cert. denied*, 485 U.S. 929 (1988).

preme Court in *Neil v. Biggers*.³⁴

At issue in *Curtis v. Commonwealth*,³⁵ was the admissibility of out-of-court and in-court identifications of the defendant. The victim had been shot while attending a party. He was unable to identify the defendant when shown a single photograph at the hospital. However, he positively identified the defendant at the preliminary hearing and at trial.

Determining whether the identifications were admissible, the court of appeals applied the two-step test established by the United States Supreme Court in *Biggers*.³⁶ First, the court found that the single-photo display was unduly suggestive. The court considered whether the identification was nevertheless so reliable as to preclude any substantial likelihood of misidentification.³⁷ The court was unable to determine from the record the accuracy of the victim's description. A critical factor in the court's decision was the victim's inability to identify the defendant when he first viewed the photograph, notwithstanding the explanation offered by the prosecution. The court held that the out-of-court identification was unreliable.³⁸ The court then considered the admissibility of the in-court identification, which depended upon whether its origin was independent of the unduly suggestive out-of-court identification procedure.³⁹ In *Wise v. Commonwealth*,⁴⁰ the in-court identification was inadmissible because of the witnesses' uncertainty at trial and their reference to the photographs used in the out-of-court identification procedure. In *Curtis*, however, the witness made a positive, unequivocal identification of the defendant based entirely upon the witness's observation at the time of the crime, independent of the suggestive photographic display.⁴¹ Accordingly, the admission of his in-court identification of the defendant was not in error.

In *Bryant v. Commonwealth*,⁴² an eight-year-old victim was shown three color photographs of a man she knew had been arrested near the apartment building where her abduction had oc-

34. 409 U.S. 188 (1972).

35. 11 Va. App. 28, 396 S.E.2d 386 (1990).

36. 409 U.S. 188 (1972).

37. *Curtis*, 11 Va. App. at 31-32, 396 S.E.2d at 388.

38. *Id.* at 32, 396 S.E.2d at 388.

39. See *Hill v. Commonwealth*, 2 Va. App. 683, 693, 347 S.E.2d 913, 918 (1986).

40. 6 Va. App. 178, 186, 367 S.E.2d 197, 202 (1988).

41. *Curtis*, 11 Va. App. at 33, 396 S.E.2d at 389.

42. 10 Va. App. 421, 393 S.E.2d 216 (1990).

curred, and near the time of her abduction. Although the court reached the "inescapable conclusion" that the viewing occurred under unnecessarily suggestive conditions, other evidence sufficiently established the reliability of the child's out-of-court identification to permit admission.⁴³

The use of informants in law enforcement occasionally prompts motions for the disclosure of their identity. The court of appeals discussed the law pertaining to the "informer's privilege" in *Lanier v. Commonwealth*.⁴⁴ The defendant in *Lanier* argued that he was entitled to the informant's identity because the informant might have information relevant to a defense of entrapment or accommodation. The court affirmed the trial court's denial of his motion, holding that the defendant had presented only inadequate speculation. In *Roviaro v. United States*,⁴⁵ the case was distinguished by the absence of evidence in *Lanier* that the informant had participated in the crime alleged.⁴⁶

V. INTERROGATION

Whenever a person is in police custody, or otherwise deprived of his freedom in any significant way,⁴⁷ he must be advised of certain constitutional rights before he can be interrogated.⁴⁸ In *Shell v. Commonwealth*,⁴⁹ despite a change of circumstances between two

43. *Bryant*, 10 Va. App. at 426, 393 S.E.2d at 219.

44. 10 Va. App. 541, 551, 394 S.E.2d 495, 502 (1990). The privilege is described by the court as a "public policy right which protect[s] the identity of persons who furnish information relating to violations of the law from disclosure absent government consent to such disclosure." *Id.* at 550, 394 S.E.2d at 556; *see also* *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied*, 484 U.S. 873 (1987); *Keener v. Commonwealth*, 8 Va. App. 208, 380 S.E.2d 21 (1989).

45. 353 U.S. 53 (1957). The United States Supreme Court held that whether the identity of an informant must be disclosed depends upon whether the information "is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause." *Id.* at 60-61. In *Roviaro*, it was not possible for the Court to say that the informant *would* provide testimony establishing a defense. *Id.* at 60 n.8.

46. 10 Va. App. at 552-53, 394 S.E.2d at 503.

47. The determination of whether a person is in custody for purposes of *Miranda* depends on whether there exists, on an objective basis, a "'restraint of freedom of movement' of the degree associated with a formal arrest." *Wass v. Commonwealth*, 5 Va. App. 27, 32, 359 S.E.2d 836, 839 (1987) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 S.E.2d 492, 495 (1977))). The court of appeals has made this determination. *See Lanier*, 10 Va. App. at 554-56, 394 S.E.2d at 503-04. The court of appeals rejected the defendant's contention that he was in custody as he sat in the back of a marked police car. *Id.* at 556, 394 S.E.2d at 504.

48. *Miranda v. Arizona*, 384 U.S. 436 (1966).

49. 11 Va. App. 247, 397 S.E.2d 673 (1991). The circumstantial change was a ten minute

separate interrogations, the court held that the second set of detectives was not obligated to again advise the defendant of the *Miranda* warnings he had received and waived prior to the first interrogation.⁵⁰

In another case, the police ignored the defendant's two custodial requests for counsel and continued their interrogation until the defendant incriminated himself.⁵¹ The court of appeals, sitting en banc, held that the defendant's statement "was not obtained by physical coercion or other deliberate means calculated to break the suspect's will."⁵² Because the court of appeals held that the first statement was not coerced, it did not have to conclude that the subsequent statements were tainted by the *Miranda* violation.⁵³ The sole and determinative question was whether the subsequent statements were voluntary.⁵⁴

In *Williams v. Commonwealth*,⁵⁵ the defendant's entire tape-recorded confession was admitted to prove voluntariness, over his objection that it was inadmissible in its entirety because it contained admissions to at least sixteen robberies besides the two for which he was on trial. The court of appeals held that this procedure was not error. The initial determination of admissibility poses a question of voluntariness for the trial judge. If admitted, then the fact-finder is entitled to consider the circumstances surrounding the statement to determine the weight to be accorded the con-

lapse between interrogations; the second interrogation involved a different topic with no forewarning, and the detectives conducting the second interrogation were from another jurisdiction. *Id.* at 250-51, 397 S.E.2d at 677-78.

50. *Id.* at 256, 397 S.E.2d at 678.

51. When an accused, in police custody, invokes his right to counsel, interrogation must cease. *Miranda*, 384 U.S. at 444-45. Subsequent statements made in response to continued interrogation are not admissible. *Edwards v. Arizona*, 451 U.S. 477, 487 (1981). The only exception is where the accused initiates further communication. In such an instance, the burden is on the government "to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation," *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983), and to remain silent. *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352, *cert. denied*, 482 U.S. 931 (1987). In addition, the waiver must be shown to be a voluntary, knowing, and intelligent relinquishment of a known right or privilege. *Edwards*, 451 U.S. at 482. These determinations are made by evaluating the totality of the circumstances, including the conduct of the police. *Id.* The government must also show that the subsequent statements and waivers were not the tainted products of the earlier violation. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963).

52. *Mundy v. Commonwealth*, 11 Va. App. 461, 390 S.E.2d 525 (1990).

53. *Id.* at 473, 390 S.E.2d at 531. The court did not distinguish between a simple failure to give the *Miranda* warnings and an intentional violation of the defendant's rights.

54. *Id.*; see also *Cheng v. Commonwealth*, 240 Va. 26, 35-36, 393 S.E.2d 599, 604 (1991).

55. 11 Va. App. 149, 396 S.E.2d 860 (1990).

fession. In this case the evidence of other crimes was admissible because the promise not to prosecute these other charges was relevant to a determination of the weight and credibility.⁵⁶

Finally, the court of appeals held that cross-examination regarding post-arrest silence on a particular interrogation topic was permissible where the defendant gave a purportedly complete account of the shooting.⁵⁷

VI. GRAND JURIES

The decision of the court of appeals in *Vihko v. Commonwealth*,⁵⁸ established law on numerous issues arising from a Commonwealth's attorney's aggressive use of a special grand jury. The court approved the participation of investigators who attended sessions of the special grand jury while witnesses testified, joined in the interrogation of the witnesses, and testified regarding the results of their investigative efforts. The fact that one of the investigators gave an unsworn and unrecorded presentation of his findings to the special grand jury, despite the requirements of sections 19.2-208 and 19.2-212 of the Code, was of no significance.⁵⁹

The court held that the only purpose of requiring the presence of a court reporter was for the grand jury's convenience.⁶⁰ The special grand jury was authorized to release its tapes and records to a regular grand jury. The defendant was not entitled to relief for any unauthorized disclosure because he could not demonstrate prejudice.⁶¹

The court further held that the preparation of the special grand jury's report is a clerical task which the grand jury may properly delegate to the Commonwealth's attorney, so long as the special grand jury arrives at its conclusions through untrammelled deliberations.⁶²

Finally, the court determined that the omission of the name of the witness testifying before a grand jury in contravention of section 19.2-202 of the Code does not constitute grounds to quash the

56. *Id.* at 153, 396 S.E.2d at 863.

57. *Fain v. Commonwealth*, 10 Va. App. 450, 459, 393 S.E.2d 634, 639 (1990).

58. 10 Va. App. 498, 393 S.E.2d 413 (1990).

59. *Id.* at 503, 393 S.E.2d at 416-17.

60. *Id.* at 503, 393 S.E.2d at 416.

61. *Id.* at 504-05, 393 S.E.2d at 417.

62. *Id.* at 502, 393 S.E.2d at 416.

indictment.⁶³

VII. TRIALS

Many of the decisions from the court of appeals during this past year concerned issues which arise during trial. One less frequently encountered question was raised when the Commonwealth did not meet its burden of proving subject-matter jurisdiction. The court of appeals found no direct or circumstantial evidence in the record in *Owusu v. Commonwealth*⁶⁴ to prove that the alleged crime occurred within the Commonwealth. Because jurisdiction must be shown on the record,⁶⁵ the judgment was reversed and the case remanded.⁶⁶

A. Amendments

An amendment to an indictment which enhances the possible punishment, or alleges a different intent in conjunction with the same overt acts, does not change the general nature or character of the crime alleged.⁶⁷ Counsel should not assume that a day-of-trial amendment to an indictment will entitle the defendant to a continuance. Where the evidence belies a defendant's assertion of surprise, the trial court does not err in denying a motion for a continuance.⁶⁸

63. *Vihko*, 10 Va. App. at 505, 393 S.E.2d at 417-18.

64. 11 Va. App. 671, 401 S.E.2d 431 (1991).

65. *Shelton v. Sydnor*, 126 Va. 625, 630, 102 S.E. 83, 85 (1920).

66. *Owusu*, 11 Va. App. at 674, 401 S.E.2d at 432. In this case the court was not required to resolve the conflict between § 19.2-239 of the Code (circuit court has jurisdiction in criminal cases over "all presentments, indictments and informations for offenses committed within their respective circuits") and § 17-123 of the Code (circuit court has jurisdiction over all felonies committed within the Commonwealth). See also *Cheng v. Commonwealth*, 240 Va. 26, 36-38, 393 S.E.2d 599, 604 (1990) (considering sufficiency issues relating to venue). Compare VA. CODE ANN. § 19.2-239 (Repl. Vol. 1989) with *Id.* § 17-123 (Repl. Vol. 1988).

67. *Smith v. Commonwealth*, 10 Va. App. 592, 594, 394 S.E.2d 30, 31 (1990); see also *Willis v. Commonwealth*, 10 Va. App. 430, 438, 393 S.E.2d 405, 408 (1990) (an amendment which increases punishment and does not change conduct originally alleged does not change nature or character of the offense charged).

68. *Willis*, 10 Va. App. at 438-39, 393 S.E.2d at 406; see also VA. CODE ANN. § 19.2-231 (Repl. Vol. 1990).

B. *Assistance of Counsel*

A violation of a defendant's sixth amendment right to effective assistance of counsel can never be dismissed as harmless error, and the court will presume prejudice where counsel has an actual conflict of interest.⁶⁹ The possibility of a conflict creates a duty on the part of the trial court to make the appropriate inquiries,⁷⁰ or risk reversal based on a presumption that an apparent conflict resulted in ineffective assistance of counsel.⁷¹

In *Carter v. Commonwealth*,⁷² the prosecutor, during a pre-trial hearing, accused the defense counsel of professional misconduct. Counsel sought leave to withdraw, but the court denied the motion. The case went to trial and the defendant was convicted. While the court of appeals did not determine whether an actual conflict existed, the court viewed the situation as presenting at least a potential conflict of interest,⁷³ which the trial court should have acknowledged and considered. The judgment of conviction was vacated, and the case was remanded for a determination of the conflict issue.

C. *Separate Trials*

Relying on the holding of the Supreme Court of Virginia in *Cheng v. Commonwealth*,⁷⁴ the court of appeals has held that the determination of whether different charges should be tried separately should be left to the sound discretion of the trial court.⁷⁵ A circuit court has no discretion in accepting a guilty plea, if tendered to the indictment without a plea agreement, even if tendered mid-trial, unless it determines that the plea is constitutionally invalid.⁷⁶

69. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

70. *Dowell v. Commonwealth*, 3 Va. App. 555, 559, 351 S.E.2d 915, 917 (1987).

71. *Id.* at 561, 351 S.E.2d at 918.

72. 11 Va. App. 569, 400 S.E.2d 540 (1991).

73. The court found that "counsel were required to conduct an effective defense of the accused in an atmosphere where a potential defense witness possibly had been compromised, where the prosecutor had made allegations of misconduct and still held open the possibility of bringing ethical charges, and where the trial judge declared in open court that the prosecutor had the discretion to bring those charges." *Id.* at 574, 400 S.E.2d at 543.

74. 240 Va. 26, 393 S.E.2d 599 (1990).

75. *Ferrell v. Commonwealth*, 11 Va. App. 380, 399 S.E.2d 614 (1990).

76. *Graham v. Commonwealth*, 11 Va. App. 133, 397 S.E.2d 270 (1990).

D. Continuances

The defendant in *Bolden v. Commonwealth*⁷⁷ appealed his misdemeanor convictions from the circuit court. The defendant refused appointed counsel and successfully moved several times for continuances in order to retain counsel. When his last successful motion was granted, the trial court informed him that a subsequent appearance without counsel would be considered a waiver.

On appeal, the court's subsequent determination that the defendant waived his right to counsel when he again appeared unrepresented was affirmed.⁷⁸ The court contrasted this case with *Lemke v. Commonwealth*,⁷⁹ in which no continuances were granted to the defendant when she first appeared on appeal from the general district court.

Continuances must, when necessary, be granted. In *Cherricks v. Commonwealth*,⁸⁰ a continuance should have been granted because a subpoena sought by the defense had not been served on a witness. The circumstances indicated diligence, and belied any notion of delay or avoidance of prosecution.⁸¹ In contrast, the defendant in *Stewart v. Commonwealth*⁸² moved for a continuance mid-trial when unexpected testimony revealed the existence of a witness he wanted to question. The court of appeals affirmed the trial court's denial of the motion. It then characterized the value of the witness as speculative, and suggested, based on newly-discovered evidence, that the appropriate remedy was a motion for a new trial.⁸³

77. 11 Va. App. 187, 397 S.E.2d 534 (1990).

78. The court of appeals discussed the sixth amendment and Virginia's constitutional rights to representation by counsel. Furthermore, the court acknowledged a "countervailing state interest . . . in proceeding with prosecutions on an orderly and expeditious basis." *Id.* at 190, 397 S.E.2d at 536. Waiver may be found to exist by the trial court if the Commonwealth proves by clear, precise, and unequivocal evidence that after being offered counsel, the defendant made an intelligent and understanding waiver. *Id.* at 190-191, 397 S.E.2d at 536.

79. 218 Va. 870, 241 S.E.2d 789 (1978).

80. 11 Va. App. 96, 396 S.E.2d 397 (1990) (trial court abused discretion in not granting continuance where witness was not served with subpoena which had been issued).

81. Shortness of time before trial is a customary problem for counsel, and witnesses do not always receive much advance notice. In *Bellis v. Commonwealth*, 241 Va. 257, 402 S.E.2d 211 (1991), the Supreme Court of Virginia held that shortness of time in itself does not relieve a witness of his obligations under a subpoena.

82. 10 Va. App. 563, 394 S.E.2d 509 (1990).

83. *Id.* at 568-69, 394 S.E.2d at 513.

E. *Discovery*

In *Tickel v. Commonwealth*,⁸⁴ the court of appeals rejected a due process claim which arose out of the Commonwealth's relinquishment of stolen cars to insurance companies prior to trial. The defendant did not show bad faith on the part of the police in failing to preserve what was claimed to be potentially useful evidence. If, however, a defendant can show clearly that "had the evidence been properly preserved, it would . . . [form] a basis for exonerating the defendant, then absent a showing to the contrary" the court would assume that the police were not acting in good faith.⁸⁵

The detective in *Conway v. Commonwealth*,⁸⁶ recorded a conversation with the defendant. Despite a discovery order, and in violation of Rule 3A:11(b)(1) of the Supreme Court of Virginia, the recording was not disclosed to the defendant until after he had testified. This delay prejudiced the defendant, for the tape directly supported the detective's testimony and contradicted the testimony of the defendant. Furthermore, in *Cherricks v. Commonwealth*,⁸⁷ the court determined that Commonwealth was incorrect when it determined that a witness's statement was not exculpatory.⁸⁸

F. *Cross-Examination*

The general rule prohibiting cross-examination on irrelevant or collateral matters was recognized by the supreme court in *Seilheimer v. Melville*,⁸⁹ and applied this past year in *Maynard v. Commonwealth*.⁹⁰ The supreme court affirmed a trial court's limi-

84. 11 Va. App. 558, 400 S.E.2d 534 (1991).

85. *Id.* at 562, 400 S.E.2d at 537.

86. 11 Va. App. 103, 397 S.E.2d 263 (1990).

87. 11 Va. App. 96, 396 S.E.2d 397 (1990).

88. *Id.* at 101-02, 396 S.E.2d at 400-01. The witness' statement contradicted his first statement and supported the defendant's assertion of innocence. *Cf.* *Taitano v. Commonwealth*, 4 Va. App. 342, 358 S.E.2d 590 (1987).

89. 224 Va. 323, 326-27, 295 S.E.2d 896, 898 (1982). The question of whether a matter is material or collateral is answered by whether the examining party would be entitled to prove the fact in support of his case. *Allen v. Commonwealth*, 122 Va. 834, 842, 94 S.E. 783, 786 (1918), *cited in* *Maynard v. Commonwealth*, 11 Va. App. 437, 444, 399 S.E.2d 635, 640 (1990).

90. 11 Va. App. 437, 399 S.E.2d 635 (1990). "A witness cannot be impeached by evidence of a collateral fact which is not relevant to the issues of the trial, even though to some extent it has a bearing on the issue of credibility." *Id.* at 444, 399 S.E.2d at 639. As the dissent points out, however, the "collateral" fact in this case was the fact that the witness' answer on direct examination contradicted his testimony from the first trial of the charge.

tation of defense counsel's cross-examination of a witness in *Stewart v. Commonwealth*,⁹¹ and a trial court's refusal to permit questions proffered by counsel asking the investigator what he "figured" he would have felt "comfortable with," and what he would have "wanted."⁹²

G. Jury Selection

The court of appeals and the Supreme Court of Virginia ruled on numerous questions concerning jury selection and voir dire this year. In two cases, *Barrette v. Commonwealth*⁹³ and *Webb v. Commonwealth*,⁹⁴ the court discussed the *per se* disqualification of certain categories of prospective jurors. In *Stockton v. Commonwealth*,⁹⁵ the supreme court held that the trial court did not err when it refused to exclude a prospective juror for cause who seemed heavily biased against violent criminals.⁹⁶ It held, in *Size-more v. Commonwealth*,⁹⁷ that a cursory "rehabilitation" of a pro-

Id. at 456, 399 S.E.2d at 646.

91. 10 Va. App. 563, 394 S.E.2d 509 (1990). The court characterized the questioning as a "fishing expedition" for irrelevant evidence. *Id.* at 568, 394 S.E.2d at 512.

92. *Maynard*, 11 Va. App. at 445-46, 399 S.E.2d at 640-41.

93. 11 Va. App. 357, 398 S.E.2d 695 (1990). The prospective juror in this case was retired after 38 years of employment with Chevron. He was not disqualified by this fact, even though the alleged robbery was of an attendant at a Chevron station. The court held also that § 19.2-260 of the Code makes § 8.01-358 of the Code applicable to criminal procedure. *Id.* at 359, 398 S.E.2d at 696-97; see VA. CODE ANN. § 19.2-260 (Repl. Vol. 1990).

94. 11 Va. App. 220, 397 S.E.2d 539 (1990). The prospective juror in this rape case had been the victim of a rape within the past year, and her assailant had not been apprehended. Nevertheless, she answered that she could sit impartially. The trial court did not err in refusing to strike her for cause. The dissent in this case suggested that discretion should not be limited to whether or not the trial judge believed the juror's assurances. Rather, the judge should focus on whether the juror's presence would prevent the jury from being "as free from suspicion as possible." *Id.* at 224, 397 S.E.2d at 541 (Barrow, J. dissenting); see *Barker v. Commonwealth*, 230 Va. 370, 375, 337 S.E.2d 729, 733 (1985).

95. 241 Va. 192, 402 S.E.2d 196 (1991).

96. *Id.* at 199-200, 402 S.E.2d at 200. The prospective juror's grandson had been shot and killed two years earlier. The juror belonged to "Family and Friends Against Crime Today," and said that he would like to see his grandson's killers executed.

97. 11 Va. App. 208, 397 S.E.2d 408 (1991). Three potential jurors stated during voir dire that they would expect the defendant to produce evidence showing that he was not guilty. The only rehabilitative question was whether they could follow the instruction that the Commonwealth had the burden of proving guilt beyond a reasonable doubt.

The jurors' affirmation was not sufficient. The appropriate test and the law surrounding the issue were discussed. *Id.* at 212-13, 397 S.E.2d at 411. The problem with the attempted rehabilitation in this case was that the jurors were not told that an accused is not required to produce evidence and that the fact of not doing so could not be considered by them. They should have been examined as to their ability to follow this principle of law. Without the inclusion of this factor, their answers to the single rehabilitation question were meaning-

spective juror who has given a disqualifying answer may be insufficient.

Eyewitness identification is notoriously unreliable and a juror's evaluation of eyewitness testimony is susceptible to a number of mistaken beliefs.⁹⁸ A prospective juror's undue bias in favor of this type of testimony might seem to be an appropriate line of inquiry on voir dire. The court of appeals, however, affirmed a trial court's refusal to permit these questions.⁹⁹

In *Scott v. Commonwealth*,¹⁰⁰ the trial court erred in not granting the defendant a new trial where evidence was adduced before sentencing that the jury officer made improper comments to prospective jurors during an orientation session.¹⁰¹

H. *Shackled Defendants*

The supreme court and the court of appeals both considered cases involving gagged or shackled defendants. Under the circumstances in *Stockton v. Commonwealth*,¹⁰² a capital murder case, the supreme court held that it was permissible to shackle the defendant during a resentencing hearing, even though the question before the jury was whether the Commonwealth had proven "future dangerous[ness]."¹⁰³ The court of appeals, in *Martin v. Com-*

less. The matter was remanded for a new trial. *Id.*

98. See generally LOFTUS, EYEWITNESS TESTIMONY (1990).

99. *Barrett v. Commonwealth*, 11 Va. App. 357, 398 S.E.2d 695 (1990). Trial counsel sought to ask two questions: 1) whether any of the prospective jurors believed that eyewitness identifications were always accurate and correct, and 2) whether any jurors believed that an eyewitness who was confident of his identification was always accurate and correct. The court of appeals did not view these question as pertinent to the jurors' ability to "stand indifferent" and to weigh the evidence impartially. *Id.* at 359, 398 S.E.2d at 696.

Part of the failing identified by the court was that the questions did not relate to any evidence which was vouched to be forthcoming, nor did they appear in terms "relating to assessing credibility or weighing evidence or the law governing the function and duties of jurors." *Id.* at 361, 398 S.E.2d at 697.

100. 11 Va. App. 516, 399 S.E.2d 648 (1990).

101. The court of appeals, sitting en banc, stated: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id.* at 520, 399 S.E.2d at 650 (quoting *Mattox v. United States*, 146 U.S. 140, 150 (1892)). A heavy burden rests on the government to establish that the contact was harmless. *Remmer v. United States*, 347 U.S. 227, 229 (1954). The evidence was insufficient on the record to rebut the presumption of prejudicial harm, and the court of appeals reversed the denial of the motion and remanded the case for a new trial. *Scott*, 11 Va. App. at 523, 399 S.E.2d at 652.

102. 241 Va. 192, 402 S.E.2d 196 (1991).

103. *Id.* at 198-99, 402 S.E.2d at 199.

monwealth,¹⁰⁴ reversed and remanded a case because of the trial court's abuse of discretion in gagging the defendant. The court's decision discusses the considerations to be weighed in contemplation of such an action, outlines the burden on defense counsel to make specific objections, and mentions the duty of the trial court to make a record of specific findings.¹⁰⁵

I. *Instructions*

In *Bellfield v. Commonwealth*,¹⁰⁶ the court of appeals distinguished and interpreted *Sansone v. United States*¹⁰⁷ in holding that it is reversible error to fail to give a proffered instruction for which there is credible evidence.¹⁰⁸ The court read *Sansone* to mean that a lesser-included offense instruction is required whenever the charged offense requires proof of a fact not necessary for conviction of the lesser offense. Conflicting testimony as to the determinative factual issue is not necessary to the entitlement of the instruction.¹⁰⁹

Giving an instruction on concert of action need not be limited to cases involving allegations of felony murder. The instruction may be given where the purpose of the concerted action was to commit a wrongful act, and where the crime which results is "an incidental, probable consequence of the original enterprise, plan or purpose."¹¹⁰

J. *Sentencing*

A sentencing judge may impose conditions on a suspended sentence lasting longer than the maximum period for which the de-

104. 11 Va. App. 397, 399 S.E.2d 623 (1990).

105. *Id.* at 405-06, 399 S.E.2d at 627-28.

106. 11 Va. App. 310, 398 S.E.2d 90 (1990).

107. 380 U.S. 343 (1965).

108. In *Bellfield*, an undercover police officer had been approached earlier in the day by the defendant, who engaged the officer in conversation pertinent to a drug transaction. Later that day, during the execution of a search warrant, the defendant was arrested with two units of cocaine in his pocket, and two units on the ground near him. *Bellfield*, 11 Va. App. at 312, 398 S.E.2d at 91. On this set of facts, the trial court erred in not giving an instruction on simple possession, even though the defendant did not testify. *Id.* at 315, 398 S.E.2d at 92-93 (citing *Barrett v. Commonwealth*, 231 Va. 102, 341 S.E.2d 190 (1986); *Guss v. Commonwealth*, 217 Va. 13, 225 S.E.2d 196 (1976)).

109. *Id.* at 314, 398 S.E.2d at 93.

110. *Rollston v. Commonwealth*, 11 Va. App. 535, 544, 399 S.E.2d 823, 828 (1991).

fendant could have been sentenced.¹¹¹ The court's authority in this regard is not absolute, but must be exercised with "due regard to the gravity of the offense."¹¹² A trial court may revoke a suspended sentence because of a new crime committed while the execution of sentence was suspended pending appeal to the supreme court.¹¹³

K. *New Trials*

To be entitled to a new trial, the moving party must set out in an affidavit facts describing his efforts and explaining why he was unable to secure the evidence he proffers in support of his post-trial motion. The trial court may require the moving party to prove that the new evidence demonstrates the mistake or perjury alleged "beyond question" and not merely as a matter of belief or opinion.¹¹⁴

An illustrative case, and one in which the court of appeals held that a new trial should have been granted, is *Fisher v. Commonwealth*.¹¹⁵ The defendant was convicted of aggravated sexual battery based on the testimony of his six-year-old granddaughter, who drew a picture of a male with an erection. The defendant's son had been prohibited by his mother from talking to his father, who had been ordered by the court not to contact family members. When the son attended the trial, he realized the importance of many aspects of the six-year-old's habits and character.¹¹⁶ The court of appeals characterized the evidence later proffered by the son as material and highly probative. Because it "was not accessible prior to trial due to its nature, those who were privy to it, and the circumstances which precluded its disclosure,"¹¹⁷ the newly-discovered ev-

111. *Simmers v. Commonwealth*, 11 Va. App. 375, 378, 398 S.E.2d 693, 694 (1990).

112. *Id.* at 378, 398 S.E.2d at 694 (quoting VA. CODE ANN. § 19.2-303.1 (Repl. Vol. 1990)). The trial court had sentenced the defendant to five years for leaving the scene of an accident in which a death occurred. The incarceration was suspended on the condition that the defendant not drive for 20 years. Three years later the defendant moved to vacate this particular condition, and the instant appeal followed.

113. *Singleton v. Commonwealth*, 11 Va. App. 575, 400 S.E.2d 205 (1991).

114. *Carter v. Commonwealth*, 10 Va. App. 507, 513, 393 S.E.2d 639, 642 (1990) (citing *Powell v. Commonwealth*, 133 Va. 741, 755, 112 S.E. 657, 661 (1922)).

115. 11 Va. App. 302, 397 S.E.2d 901 (1990).

116. *Id.* at 304, 397 S.E.2d at 902. There was evidence that the child had been allowed to view hard-core pornography videos and look at pornographic magazines. She had drawn similar pictures before.

117. *Id.* at 305, 397 S.E.2d at 902.

idence presented sufficient cause for a new trial.¹¹⁸

L. *Miscellaneous*

The statutory requirement that an unrepresented defendant sign either a waiver or an affidavit of indigency is a procedural, not jurisdictional requirement.¹¹⁹ For the purposes of determining the time within which the defendant must be tried,¹²⁰ the period of time between a defendant's appearance before a trial court for appointment of counsel and docket call is not tolled.¹²¹

An *in camera* proceeding in a felony case may be an incident of trial which must be recorded verbatim.¹²² The test is whether the hearing was a stage of trial "where something could be done to affect the defendant's interests."¹²³

In *Arrington v. Commonwealth*,¹²⁴ the Commonwealth's attorney's good faith statement during his opening remarks, regarding evidence he was later unable to produce, did not require the granting of a motion for a mistrial where the defendant was not prejudiced.¹²⁵

Finally, the Supreme Court of Virginia and the court of appeals provided significant case law on evidentiary points common to criminal practice.¹²⁶

118. *Fisher*, 11 Va. App. at 305, 397 S.E.2d at 902; see also *Whittington v. Commonwealth*, 5 Va. App. 212, 361 S.E.2d 449 (1987).

119. *Bolden v. Commonwealth*, 11 Va. App. 187, 193, 397 S.E.2d 534, 537 (1990).

120. See VA. CODE ANN. § 19.2-243 (Repl. Vol. 1990).

121. *Nelms v. Commonwealth*, 11 Va. App. 639, 400 S.E.2d 799 (1991).

122. *Brittingham v. Commonwealth*, 10 Va. App. 530, 533, 394 S.E.2d 336, 339 (1990); see VA. CODE ANN. § 19.2-165 (Repl. Vol. 1990).

123. *Brittingham*, 10 Va. App. at 533, 394 S.E.2d at 339. A defendant's presence is not necessary for consideration of purely legal matters incidental to the resumption of the trial. *Williams v. Commonwealth*, 188 Va. 583, 593, 50 S.E.2d 407, 411-12 (1948). In *Brittingham*, testimony was received by the trial judge in order to determine whether an assistant Commonwealth's attorney had promised the defendant transactional immunity. Without a record, the court of appeals could not determine if the testimony was probative of the question; hence, the defendant was prejudiced.

124. 10 Va. App. 446, 392 S.E.2d 844 (1990).

125. *Id.* at 448, 392 S.E.2d at 845-46.

126. See *Stokes v. Commonwealth*, 11 Va. App. 550, 399 S.E.2d 453 (1991) (admissibility of laboratory analysis under § 19.2-187 of the Code); *Ferrell v. Commonwealth*, 11 Va. App. 380, 399 S.E.2d 614 (1990) (guilty knowledge and modus operandi exceptions to uncharged misconduct rule); *Jones v. Commonwealth*, 11 Va. App. 75, 396 S.E.2d 844 (1990) (hearsay).

VIII. APPEALS

A party is bound, on appeal, by concessions made at trial.¹²⁷ A defendant's failure to renew his motion to strike the Commonwealth's evidence at the close of the evidence precluded him from challenging the sufficiency of the evidence on appeal.¹²⁸ A defendant is deemed to have waived issues he assigns as error when he fails to argue them on brief.¹²⁹ Contentions not raised in the petition for appeal will not be addressed.¹³⁰ The court of appeals defined a proper proffer in *Stewart v. Commonwealth*¹³¹ as "a unilateral avowal of counsel, if unchallenged, or a mutual stipulation of the testimony expected."¹³²

In *Vihko v. Commonwealth*,¹³³ the defendant urged the court of appeals to adopt a *per se* rule invalidating indictments for unauthorized disclosures of special grand jury material.¹³⁴ The court declined because such a rule would not serve the public interest, and because any such violation as may have occurred was "neither so egregious nor pervasive as to justify reversal for prophylactic reasons."¹³⁵

Not all of the decisions concerning appellate procedure were adverse to criminal defendants. In *Harrell v. Commonwealth*,¹³⁶ the court of appeals stated that it could not, on review, "disregard credible, unimpeached evidence of the Commonwealth which exculpates the defendant and creates a reasonable doubt."¹³⁷ The supreme court applied the Rule 5:25 "ends of justice" exception (the "contemporaneous objection rule") in reversing a conviction where the trial court's instruction omitted a material element of the crime charged.¹³⁸

127. *Low v. Commonwealth*, 11 Va. App. 48, 51, 396 S.E.2d 383, 384 (1990); VA. SUP. CT. R. 5A:18.

128. *Smith v. Commonwealth*, 10 Va. App. 592, 595, 394 S.E.2d 30, 31 (1990) (citing *White v. Commonwealth*, 3 Va. App. 231, 233, 346 S.E.2d 886, 887 (1986)).

129. *Quesinberry v. Commonwealth*, 241 Va. 364, 370, 402 S.E.2d 218, 222 (1991).

130. *Goodwin v. Commonwealth*, 11 Va. App. 363, 364, 398 S.E.2d 690, 690-91 n.1 (1990) (citing VA. SUP. CT. R. 5A:12(C)).

131. 10 Va. App. 563, 394 S.E.2d 509 (1990).

132. *Id.* at 568, 394 S.E.2d at 512.

133. 10 Va. App. 498, 393 S.E.2d 413 (1990).

134. *Id.* at 500, 393 S.E.2d at 417.

135. *Id.* at 505, 393 S.E.2d at 417.

136. 11 Va. App. 1, 396 S.E.2d 680 (1990).

137. *Id.* at 11, 393 S.E.2d at 685 (quoting *Harward v. Commonwealth*, 5 Va. App. 468, 479, 364 S.E.2d 511, 516 (1988)).

138. *Jimenez v. Commonwealth*, 241 Va. 244, 249-50, 402 S.E.2d 678, 680 (1991).

IX. CRIMES

A. *Homicide and Self-Defense*

In *Stockton v. Commonwealth*,¹³⁹ the defendant's death sentence was vacated, and the case remanded for resentencing. During the resentencing proceeding, the transcript of testimony given during the guilt phase of the original trial was read to the jury. The defendant objected that this procedure violated his right to confrontation. The supreme court disagreed, noting that the use of the transcript was limited to informing the jury of the nature of the offense for which the defendant had been convicted.¹⁴⁰ In the same case, relying on *Franklin v. Lynaugh*¹⁴¹ and *Frye v. Commonwealth*,¹⁴² the court held that the defendant was not entitled to present evidence or argument that he was innocent.¹⁴³ The court also declined to consider argument that the verdict form prescribed by section 19.2-264.4(D) of the Code "discouraged the jury from giving effect to . . . mitigating evidence once it found an aggravating factor."¹⁴⁴

1. Premeditation

The court of appeals rejected a defendant's claim that the evidence was insufficient to establish premeditation where the defendant testified that he killed his father in a rage.¹⁴⁵ Similarly, in *Hargrove v. Commonwealth*,¹⁴⁶ the court found no evidence to justify the conclusion that the defendant should have known of the likelihood of his falling asleep while driving. The evidence presented in *Hargrove* did not preclude the reasonable hypothesis that the defendant reasonably believed he could drive home safely; thus, the circumstantial evidence was not sufficient to support the conviction of involuntary manslaughter.¹⁴⁷ Furthermore, in *Cheng v. Commonwealth*,¹⁴⁸ the supreme court reversed a conviction of

139. 241 Va. 192, 402 S.E.2d 196 (1991).

140. *Id.* at 203-07, 402 S.E.2d at 202-06.

141. 487 U.S. 164, *reh'g denied*, 487 U.S. 1263 (1988).

142. 231 Va. 370, 345 S.E.2d 267 (1986).

143. *Stockton*, 241 Va. at 210-11, 402 S.E.2d at 207.

144. *Id.* at 215, 402 S.E.2d at 209.

145. *Shell v. Commonwealth*, 11 Va. App. 247, 257, 397 S.E.2d 673, 678 (1990).

146. 10 Va. App. 618, 394 S.E.2d 729 (1990).

147. *Id.* at 622; 394 S.E.2d at 732.

148. 240 Va. 26, 393 S.E.2d 594 (1990).

capital murder where the circumstantial evidence did not justify an inference that the defendant was the actual perpetrator.¹⁴⁹

2. Self-Defense

Several recent decisions addressed self-defense. In *Bolyard v. Commonwealth*,¹⁵⁰ the defendant testified that he killed the victim in self-defense when the victim attacked him with a gun. Other witnesses said the victim was unarmed. The court of appeals held that the testimony did not permit a jury instruction on involuntary manslaughter.¹⁵¹ In another case, *Delacruz v. Commonwealth*,¹⁵² the trial court erred because it did not give a jury instruction for self-defense when the evidence supported the defendant's theory.¹⁵³

3. Retreat From Aggression

The distinction between justifiable and excusable homicide was discussed in *Foote v. Commonwealth*.¹⁵⁴ Because Foote was without fault in the inception of the aggression, he was not required to retreat before offering resistance. When he stopped and fired at his attacker while he was being chased, he engaged in a legitimate continuing resistance. Having been confronted by deadly force, he was within his rights to use deadly force in return.¹⁵⁵

149. *Id.* at 42-43, 393 S.E.2d at 608.

150. 11 Va. App. 274, 397 S.E.2d 894 (1990).

151. *Id.* at 276-77, 397 S.E.2d at 896. An "accidental" killing, occurring during the commission of an unlawful act, such as mutual combat, is involuntary manslaughter. In cases such as *Bolyard*, where the death was not accidental, the killing was either an act of self-defense or it was not. In some cases, however, self-defense may have an application to accidental deaths. If, for example, the defendant accidentally kills the decedent while the defendant is defending himself, he is entitled to acquittal.

152. 11 Va. App. 335, 398 S.E.2d 103 (1990).

153. The defendant had testified that when he heard the commotion caused by police officers conducting a no-knock entry to execute a search warrant, he thought a robbery was underway. He armed himself and stood by the closed door leading into his room. When the police broke open this door, he was knocked down. At trial he explained that the brandishing of his firearm for which he was convicted, was an accident, incidental to his fall. *Id.* at 337-38, 398 S.E.2d at 104-05.

154. 11 Va. App. 61, 396 S.E.2d 851; see also *supra* note 1 and accompanying text.

155. *Id.* at 68-69, 396 S.E.2d at 855-56.

4. Felony Murder: Drug Use

Assisting another in ingesting a lethal dose of a controlled substance may form the basis for a conviction of felony murder under section 18.2-33 of the Code.¹⁵⁶

B. Mob Crimes

Criminal liability may attach for certain crimes committed while a member of a mob, as defined by section 18.2-38 of the Code, without any act of aiding or abetting.¹⁵⁷ In *Harrell v. Commonwealth*, the court of appeals discussed the criteria distinguishing individual behavior while part of a mob from "mob" behavior.¹⁵⁸ In this case, it was just as likely that the acts in question were those of individuals involved in a fray, as they were those of a mob assembled for a criminal purpose.¹⁵⁹

C. Conspiracy

The "totality of the circumstances" test for determining whether there is one or multiple conspiracies was adopted from *United States v. MacDougall*¹⁶⁰ in *Barber v. Commonwealth*.¹⁶¹ In *Bowman v. Commonwealth*,¹⁶² the court of appeals applied the relevant factors and agreed with the appellant that he was involved in only one continuing conspiracy to distribute cocaine.¹⁶³

156. *Hickman v. Commonwealth*, 11 Va. App. 369, 372-73, 398 S.E.2d 698, 700 (1990). In this case the defendant did not make the distribution or inject the drugs into the victim. His conduct was limited to participating jointly with the victim in the possession of cocaine, and as a principal in the second degree to the victim's ingestion. *Id.*

157. *Harrell v. Commonwealth*, 11 Va. App. 1, 7-8, 396 S.E.2d 680, 683 (1990).

158. *Id.*

159. *Id.* at 11, 396 S.E.2d at 685. The statutory definition requires only that the members of the mob "collectively band together with the common purpose and intention of committing an assault and battery upon a person." *Id.* at 7, 396 S.E.2d at 683. An express call to join forces is not necessary, as the purpose and intent may be inferred from the circumstances. However, neither mere assemblage, nor the fact of an assault by members of the group, is sufficient to demonstrate intent. *Id.*

160. 790 F.2d 1135 (4th Cir. 1986).

161. 5 Va. App. 172, 177, 360 S.E.2d 888, 890-91 (1987).

162. 11 Va. App. 259, 397 S.E.2d 886 (1990).

163. *Id.* at 266, 397 S.E.2d at 890. The court held that the defendant could not be convicted for each separate agreement to distribute cocaine, but only for one conspiracy. *Wooten v. Commonwealth*, 235 Va. 89, 368 S.E.2d 693 (1988), was distinguishable because it involved different conspiracies to distribute different drugs. The agreement in *Bowman* was to distribute only one drug, cocaine, and was not susceptible to prosecution as multiple conspiracies under *Wooten*. *Bowman*, 11 Va. App. at 266, 397 S.E.2d at 890.

In the same case, the court held that in passing section 18.2-23.1 of the Code, the General Assembly did not intend to prohibit prosecutors from prosecuting for conspiracy a person who has been convicted of one of many offenses committed during the course of the conspiracy. If, as was the case here, the defendant committed a series of related offenses on different dates and was convicted for the underlying offense on only certain dates, he can be convicted of conspiracy for any of the remaining dates. Also, the prosecutor must be able to prove the conspiracy without the introduction of evidence of the substantive offense for which the defendant has already been tried.¹⁶⁴

A conviction for acting as a principal in the second degree does not require specific intent of the defendant to commit the crime. Instead, the Commonwealth need only show the defendant's awareness, actual or constructive, of the principal's intention and that he in some way encouraged, incited or aided the principal in the commission of the crime.¹⁶⁵ In *Bell v. Commonwealth*,¹⁶⁶ robbers told their victims to remain in the building for ten minutes or they would be shot. Then, they lighted a gasoline-soaked cushion in front of the only exit, telling the victims it would not hurt them, but only slow them down. Smoke and heat filled the room. The court of appeals held that this evidence presented was sufficient to demonstrate an intent to kill, to support a conviction for attempted capital murder.¹⁶⁷

D. *Traffic and DUI*

1. Refusing to be Tested

In *Commonwealth v. Rafferty*,¹⁶⁸ the supreme court held that the charge of unreasonably refusing to take a blood or breath test is administrative and civil in nature.¹⁶⁹ The Commonwealth can appeal an adverse decision to the supreme court. The proceeding must be commenced by summons.¹⁷⁰

164. *Id.* at 264, 397 S.E.2d at 888-89.

165. *Rollston v. Commonwealth*, 11 Va. App. 535, 540, 399 S.E.2d 823, 826-27 (1991).

166. 11 Va. App. 530, 399 S.E.2d 450 (1991).

167. *Id.*

168. 241 Va. 319, 402 S.E.2d 17 (1991).

169. *Id.* at 324-25, 402 S.E.2d at 20.

170. *Id.* at 324, 402 S.E.2d at 20. It was not fatal that the magistrate's certificate or refusal was not attached to the summons as required as by § 18.2-268(Q) of the Code. *Id.* at 324-25, 402 S.E.2d at 20-21.

2. Blood Alcohol Test Analysis

Because of a statutory provision requiring that blood samples be stored in sealed containers, when a vial of a person's blood is received by a forensic laboratory unsealed, the court cannot assume that the blood samples belong to the defendant, even if there is no evidence of tampering or breakage.¹⁷¹ Thus, in *Williams v. Commonwealth*,¹⁷² the unsealed condition of the vial was held not to be a mere procedural matter covered by section 18.2-268(Z) of the Code. In the absence of statutory compliance, the trial court erred in assuming that it had the correct vial of blood before it.¹⁷³ This year the court of appeals also held that a certificate of blood analysis proffered into evidence pursuant to section 18.2-268(L) of the Code must be filed in accordance with the requirements of section 19.2-187 of the Code.¹⁷⁴ The language "as indicated by a chemical analysis" creates a presumption that the blood alcohol content determined by the test is the blood alcohol content at the time of the offense.¹⁷⁵

3. Driving While Intoxicated

Section 18.2-266 of the Code concerns operating a motor vehicle while intoxicated.¹⁷⁶ The City of Manassas successfully incorporated by reference section 18.2-266(i) of the Code into a city ordinance.¹⁷⁷ A Fairfax ordinance, which provided penalties for the offense of driving while intoxicated, was held invalid because it did not provide that convictions under section 18.2-266 of the Code could be considered prior convictions for purposes of enhancing punishment.¹⁷⁸

171. 10 Va. App. 636, 394 S.E.2d at 729.

172. *Id.*

173. *Id.*

174. *Basfeild v. Commonwealth*, 11 Va. App. 122, 124, 398 S.E.2d 80, 81 (1990). The court found no conflict or inconsistency between the two statutes noting that:

[C]ode § 18.2-268(1) provides for admissibility in the context of the implied consent law, imposing the requirement of submission to testing and prescribing the procedures by which that requirement is enforced. Section 19.2-187 imposes a condition for exoneration of an otherwise hearsay document from the application of the Hearsay Rule, thus making that document inadmissible.

Id.

175. *Id.* at 125, 398 S.E.2d at 81-82.

176. VA. CODE ANN. § 18.2-246 (Repl. Vol. 1988).

177. *Reardon v. City of Manassas*, 11 Va. App. 244, 245, 397 S.E.2d 544, 545 (1990).

178. *Commonwealth v. Knott*, 11 Va. App. 44, 396 S.E.2d 148 (1990). The ordinance ran afoul of the prohibition in VA. CODE ANN. § 15.1-132 of lesser punishments in local ordinances than those prescribed by the general law. *Id.*

4. Habitual Offenders

To be effective, a suit to declare a prisoner an habitual offender need not be brought against his appointed committee.¹⁷⁹ However, the fact that a non-resident did not actually receive notice of a show cause proceeding to declare him an habitual offender did not affect the validity of the judgment where the Commonwealth had complied with the provisions of the Code relating to substituted service.¹⁸⁰

5. Radar

Finally, although evidence is not admissible to challenge generally the reliability of radar for measuring speed,¹⁸¹ evidence may be heard alleging that a particular reading may be inaccurate.¹⁸²

E. *Property offenses*

Section 18.2-104(b) of the Code provides for enhanced punishment for convictions under section 18.2-103 if the defendant has been previously convicted of a "like" offense.¹⁸³ The crime of uttering a bad check is not a "like" offense for purposes of this statute.¹⁸⁴

Common law trespass is not a lesser-included offense of statutory burglary under section 18.2-91 of the Code, even where the indictment alleges the burglary of a dwelling. Thus, the defendant

179. *Ruffin v. Commonwealth*, 10 Va. App. 488, 492, 393 S.E.2d 425, 427-28 (1990). However, in this case the conviction for driving after having been declared a habitual offender was reversed. The prisoner's guardian ad litem had failed to discuss with the defendant the habitual offender petition which had been brought against him, and failed also to investigate thoroughly the underlying facts. Because the defendant was denied due process in the underlying adjudication, the order was void. *Id.* at 495-96, 393 S.E.2d at 429.

180. *Steed v. Commonwealth*, 11 Va. App. 175, 179, 397 S.E.2d 281, 284 (1990). The court of appeals distinguished *Bibb v. Commonwealth*, 212 Va. 249, 183 S.E.2d 732 (1971), because the statute in that case stated that notice given according to the provisions of the statute constituted only prima facie evidence of valid service of process; whereas the statute in this case "expressly states that compliance is sufficient to constitute valid service." *Steed*, 11 Va. App. at 179, 397 S.E.2d at 284.

181. *Thomas v. City of Norfolk*, 207 Va. 12, 14, 147 S.E.2d 727, 729 (1966).

182. *Myatt v. Commonwealth*, 11 Va. App. 163, 166, 397 S.E.2d 275, 277 (1990).

183. VA. CODE ANN. § 18.2-104(b) (Repl. Vol. 1988).

184. *Snead v. Commonwealth*, 11 Va. App. 643, 648, 400 S.E.2d 806, 808 (1991). The enhancement applies only to prior shoplifting-type offenses. *Scott v. Commonwealth*, 217 Va. 425, 427, 230 S.E.2d 236, 237 (1976).

in such a case is not entitled to an instruction permitting a verdict of guilty to the less serious offense.¹⁸⁵ The court of appeals has also held that an alley, under certain circumstances, may not be intended for public use, and thus may be an area the use of which may permit prosecution for trespassing under section 18.2-119 of the Code.¹⁸⁶

F. Rape

In *Maynard v. Commonwealth*,¹⁸⁷ the defendant broke into the victim's house and assaulted her during a two hour period. Later that morning, she discovered money missing from her wallet. The defendant was convicted of breaking and entering with the intent to commit larceny. This conviction was reversed, as the evidence did not exclude the possibility that someone other than the intruder took the money.¹⁸⁸

In *Myers v. Commonwealth*,¹⁸⁹ the court of appeals affirmed a conviction of rape and held that the evidence was sufficient to show force, threat, or intimidation even though there was no weapon or threat of physical harm. The victim testified to a subjective fear of the defendant and a fear of having to walk back through the woods, the alternative the defendant had presented her.¹⁹⁰

G. Bigamy

A reasonable belief that one is divorced is not a defense to bigamy.¹⁹¹

X. CONCLUSION

The greatest value of this year's appellate decisions, as in previous years, lies in their publication—that is the numerous rulings establishing case law on commonly-encountered issues. At times, the intermediate court has ruled more conservatively than popularly imagined in the past, and in a few decisions, the court's rea-

185. *Taylor v. Commonwealth*, 11 Va. App. 649, 400 S.E.2d 794 (1991).

186. *Miller v. Commonwealth*, 10 Va. App. 472, 475, 393 S.E.2d 431, 433 (1990).

187. 11 Va. App. 437, 440, 399 S.E.2d 635, 637 (1990).

188. *Id.* at 452-53, 399 S.E.2d at 644.

189. 11 Va. App. 634, 636-37, 400 S.E.2d 803, 805-06 (1991).

190. *Id.*

191. *Stuart v. Commonwealth*, 11 Va. App. 216, 217, 397 S.E.2d 533, 533 (1991).

soning seems a bit strained. Some observers comment on the irony of the defense bar's increasing reliance on the Supreme Court of Virginia to reverse the court of appeals. In some instances, the supreme court has fulfilled the function as a court of last resort, even for the defense. For the most part, however, the court of appeals remains, in realistic terms, the sole appellate court for criminal appeals. In this practical sense, and in the court's continuing resolution of procedural and discretionary issues historically and exclusively decided on a case by case basis by the trial courts, the court of appeals has assumed a dominant role in the criminal justice system. This is evident in that it has published case law where before there was none, and has established uniformity on common questions of sufficiency, practice and procedure. This role has been both valuable and welcome.

