

## CRIMINAL LAW AND PROCEDURE

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### I. INTRODUCTION

The authors have endeavored to select from the many cases and bills those that have the most significant practical impact on the daily practice of criminal law in the Commonwealth. Due to space constraints, the authors have stayed away from discussing settled principles, with a focus on the “take away” for a particular case.

### II. CRIMINAL PROCEDURE

#### A. Appeals and Appellate Procedure

In *Murillo-Rodriguez v. Commonwealth*, the Supreme Court of Virginia, in a lengthy, unanimous opinion, explicitly held that a criminal defendant in a jury trial waives his motion to strike made at the conclusion of the Commonwealth’s case when he presents evidence on his own behalf.<sup>1</sup> Therefore, a defendant who presents any evidence must renew his motion to strike at the conclusion of *all* the evidence, or present a timely motion to set aside the verdict.<sup>2</sup> If he does not do so, the appellate court will not consider his challenge to the sufficiency of the evidence.<sup>3</sup> While the court recognized that it had previously held that a defendant who

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1. 279 Va. 64, 83–84, 688 S.E.2d 199, 210 (2010).

2. *See id.*

3. *Id.*

elects to introduce evidence on his own behalf “waives his ability to challenge the sufficiency of the Commonwealth’s evidence in isolation,”<sup>4</sup> the court noted that it had not previously “expressly addressed” the concept of waiver on the merits of a claim which was raised in a motion to strike at the end of the Commonwealth’s case but not renewed at the conclusion of all the evidence.<sup>5</sup>

Murillo-Rodriguez, charged with abduction with intent to defile, failed to make a motion to strike at the conclusion of all the evidence, and nothing in the record indicated that the defendant made a motion to set aside the verdict.<sup>6</sup> On appeal, he argued that under Virginia Code section 8.01-384(A), and the court’s earlier opinion in *King v. Commonwealth*,<sup>7</sup> his motion to strike made at the conclusion of the Commonwealth’s case preserved for appeal the issue of the sufficiency of the evidence.<sup>8</sup> The supreme court rejected that argument.<sup>9</sup>

The court in *Murillo-Rodriguez* held that when a defendant introduces evidence after an unsuccessful motion to strike the Commonwealth’s evidence, “he necessarily changes the quantum of evidence from which his guilt will be determined.”<sup>10</sup> The defendant’s failure to challenge the sufficiency of the evidence at the conclusion of all the evidence “does not present the same issue as was asserted in a previously denied motion to strike the Commonwealth’s evidence.”<sup>11</sup> The supreme court “expressly approve[d]” the court of appeals’ waiver rule.<sup>12</sup> Finally, the court declined to apply the ends of justice exception to consider the merits of the claim.<sup>13</sup>

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4. *Id.* at 74, 688 S.E.2d at 205.

5. *Id.* at 68, 688 S.E.2d at 201. The Court stated that it had previously recognized the “long-standing application” of this concept of waiver by the Court of Appeals of Virginia. *Id.* (citing *Ortiz v. Commonwealth*, 276 Va. 705, 723–24, 667 S.E.2d 751, 762 (2008)).

6. *Id.* at 69, 70, 688 S.E.2d at 201, 202. No transcript of the sentencing hearing before the court was filed, the sentencing order did not reflect that such a motion was made, and Murillo-Rodriguez did not contend on appeal that the motion was made. *Id.* at 70, 688 S.E.2d at 202.

7. 264 Va. 576, 570 S.E.2d 863 (2002).

8. *Murillo-Rodriguez*, 279 Va. at 68, 688 S.E.2d at 201.

9. *Id.* at 83–84, 688 S.E.2d at 210.

10. *Id.* at 79, 688 S.E.2d at 208.

11. *Id.* at 83–84, 688 S.E.2d at 210.

12. *Id.* at 83, 688 S.E.2d at 210.

13. *Id.* at 84, 688 S.E.2d at 210.

The Court of Appeals of Virginia addressed the issue of the use of a statement of facts in lieu of a trial transcript pursuant to Supreme Court of Virginia Rule 5A:8 and the pitfalls associated with that practice in *Delaney v. Commonwealth*.<sup>14</sup> Delaney was convicted in a bench trial of petit larceny.<sup>15</sup> On appeal, he challenged the sufficiency of the evidence to sustain his conviction.<sup>16</sup> The statement of facts, however, contained no indication of “what arguments and objections were presented to the trial court.”<sup>17</sup> Although Delaney contended on appeal that the trial court would not permit any motions or arguments to be included in the statement of facts, he had not objected to the completeness of the statement or challenged on appeal any such limitation by the trial court.<sup>18</sup> Because the statement of facts did not contain the arguments made to the trial court, the court of appeals refused to consider the merits of the sufficiency issue on appeal.<sup>19</sup>

In *Brittle v. Commonwealth*, the defendant challenged the sufficiency of the evidence to support his conviction for petit larceny subsequent offense.<sup>20</sup> He contended that two of the three prior conviction orders introduced at trial were invalid to show a prior larceny conviction because those orders were deficient, failing to show the checked boxes and judge’s signature.<sup>21</sup> Although Brittle made a general motion to strike after the Commonwealth’s evidence and renewed it after presenting no evidence, each time without argument, he did not argue in the trial court that the evidence was insufficient because of lack of proof of prior convictions.<sup>22</sup>

The court of appeals identified the issue in the case as whether the ends of justice exception to Rule 5A:18 was applicable to save the issue which had not been preserved.<sup>23</sup> The court held that, in

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14. 55 Va. App. 64, 68, 683 S.E.2d 834, 836 (2009) (construing VA. SUP. CT. R. pt. 5A, R. 5A:8 (Repl. Vol. 2010)).

15. *Id.* at 66–67, 683 S.E.2d at 835.

16. *Id.* at 66, 683 S.E.2d at 835.

17. *Id.* at 67, 683 S.E.2d at 835–36.

18. *Id.*, 683 S.E.2d at 836.

19. *See id.* at 68–69, 683 S.E.2d at 836.

20. 54 Va. App. 505, 509, 680 S.E.2d 335, 337 (Ct. App. 2009).

21. *Id.* at 511, 680 S.E.2d at 338. A third order, and latest in time, reflected that Brittle had been convicted of petit larceny second offense. *Id.* at 510, 680 S.E.2d at 338. Brittle did not contend on appeal that this order was deficient. *See id.* at 511, 680 S.E.2d at 338.

22. *Id.* at 511, 680 S.E.2d at 338.

23. *Id.* at 512, 680 S.E.2d at 339 (construing VA. SUP. CT. R. pt. 5A, R. 5A:18 (Repl.

order for it to apply the ends of justice exception, Brittle was required to show: “(1) that the trial court erred, and (2) that a grave or manifest injustice will occur or the appellant will be denied essential rights.”<sup>24</sup> The court of appeals reiterated its earlier holdings that, where a challenge to the sufficiency of the evidence has not been preserved at trial, in order to show a manifest injustice, the burden is higher than simply showing that the evidence was insufficient.<sup>25</sup> The test when examining whether a miscarriage of justice has occurred is, rather, “whether the record contains affirmative evidence of innocence or lack of a criminal offense.”<sup>26</sup> The court found that the record in Brittle’s case did not contain such evidence and refused to apply the exception to Rule 5A:18.<sup>27</sup>

In *Roberson v. Commonwealth*<sup>28</sup> and *Ghameshlouy v. Commonwealth*<sup>29</sup> the Supreme Court of Virginia addressed prosecutions brought under local ordinances, where the locality was not named in the notice of appeal from the trial court to the court of appeals. The procedural posture of the two cases was somewhat different and critically led to different results on appeal.

In *Roberson*, the defendant was convicted in general district court of driving under the influence (“DUI”) under a local ordinance.<sup>30</sup> He appealed the judgment to the circuit court and was convicted of DUI in that court.<sup>31</sup> The style of the final order recited that the City of Virginia Beach was the prosecuting entity, but the order referenced only Code section 18.2-266, not the local ordinance.<sup>32</sup> The notice of appeal listed the Commonwealth, not the City, as the appellee.<sup>33</sup> The statement of facts entered in the case in lieu of a transcript did not reference the municipal ordinance, nor did the petition for appeal or brief in opposition.<sup>34</sup> The

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Vol. 2010)).

24. *Id.* at 513, 680 S.E.2d at 339.

25. *Id.* at 514, 680 S.E.2d at 340.

26. *Id.* at 517, 680 S.E.2d at 341 (quoting *Tooke v. Commonwealth*, 47 Va. App. 759, 765, 627 S.E.2d 533, 536 (Ct. App. 2006)).

27. *Id.* at 520, 680 S.E.2d at 343.

28. (*Roberson II*), 279 Va. 396, 399–400, 689 S.E.2d 706, 708 (2010).

29. (*Ghameshlouy II*), 279 Va. 379, 383, 689 S.E.2d 698, 699 (2010).

30. *Roberson v. City of Va. Beach (Roberson I)*, 53 Va. App. 666, 668, 674 S.E.2d 569, 570 (Ct. App. 2009).

31. *Id.*

32. *Id.*

33. *Id.* at 668, 674 S.E.2d at 570.

34. *Roberson II*, 279 Va. at 400, 689 S.E.2d at 708–09.

petition for appeal and brief in opposition filed in the matter listed the Commonwealth as the appellee.<sup>35</sup>

However, when the court of appeals granted the appeal, it re-styled the case to include the City and the Commonwealth as the appellee.<sup>36</sup> The Office of the Attorney General filed a motion seeking correction of the final order under Code section 8.01-428(B).<sup>37</sup> Upon being granted leave by the appellate court to address the motion, however, the circuit court ruled that no correction was necessary; the case had been prosecuted under the city ordinance.<sup>38</sup> The court of appeals subsequently dismissed the appeal for want of jurisdiction, based on the defendant's failure to name an indispensable party in the notice of appeal.<sup>39</sup> Roberson appealed. The Supreme Court of Virginia granted the appeal and instructed the City and the Commonwealth to appear, directing each to answer whether it was the proper appellee.<sup>40</sup>

The defendant argued on appeal in the supreme court that he was in fact convicted under the State Code and thus, the notice of appeal properly named the Commonwealth as the appellee.<sup>41</sup> The supreme court disagreed, noting that the controlling documents at trial indicated that the City was the prosecuting authority and that Roberson was charged with a violation of the local ordinance.<sup>42</sup> While the final order did not refer to the local ordinance, the reference to Code section 18.2-266 identified the statute as being incorporated into the City Code.<sup>43</sup>

The supreme court, contrary to the conclusion of the Commonwealth, the City, and the court of appeals, held that the failure to identify a necessary appellee in the notice of appeal did not automatically deprive the appellate courts of jurisdiction, but was a defect that could be waived.<sup>44</sup> However, the court held that Roberson's notice of appeal failed to sufficiently identify the offense being appealed as the conviction for DUI under the local ordin-

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35. *Id.*

36. *Id.* at 400–01, 689 S.E.2d at 709.

37. *Roberson I*, 53 Va. App. at 668, 670, 674, S.E.2d at 570, 571.

38. *Id.* at 669, 674 S.E.2d at 570.

39. *See id.* at 670, 671, 674 S.E.2d at 571.

40. *Roberson II*, 279 Va. at 403, 689 S.E.2d at 710.

41. *Id.* at 405–06, 689 S.E.2d at 711–12.

42. *Id.* at 406, 689 S.E.2d at 712.

43. *Id.*

44. *Id.* at 407, 689 S.E.2d at 713.

ance.<sup>45</sup> Thus, while the supreme court did not agree with the court of appeals' rationale for reaching the same result, the supreme court agreed the court of appeals did not have jurisdiction over the appeal of Roberson's conviction for DUI under the local ordinance, and affirmed the judgment of the court of appeals.<sup>46</sup>

In *Ghameshlouy*, the defendant was convicted of state charges as well as a violation of a local ordinance prohibiting failure to identify oneself when asked by a law enforcement officer.<sup>47</sup> The notice of appeal in that case, while identifying the Commonwealth as the only appellee, expressly stated that the conviction had been obtained under the local ordinance.<sup>48</sup> In the court of appeals, Ghameshlouy acknowledged that there was a defect in the notice of appeal but argued that any objection to that defect had been waived by the participation of the Commonwealth's Attorney along with the Attorney General after the appeal had been granted.<sup>49</sup> A divided panel of the court of appeals dismissed the appeal.<sup>50</sup>

The supreme court noted that it had "never required that a notice of appeal be precise, accurate, and correct in every detail before the appellate court can acquire jurisdiction over the case."<sup>51</sup> The supreme court found that the notice of appeal Ghameshlouy filed, although defective, "was sufficient to cause the potential jurisdiction of the court of appeals to consider such appeals to ripen into active jurisdiction over this specific case."<sup>52</sup> The court found that the defect in the notice of appeal in not naming the proper appellee was waived in this case.<sup>53</sup> Thus, the supreme court reversed the court of appeals' dismissal of the case and remanded the matter to the court of appeals for further proceedings.<sup>54</sup>

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45. *Id.* at 408, 689 S.E.2d at 713.

46. *Id.*

47. *Ghameshlouy II*, 279 Va. 379, 383, 689 S.E.2d 698, 699 (2010).

48. *Id.* at 385, 689 S.E.2d at 700–01.

49. *Ghameshlouy v. Commonwealth (Ghameshlouy I)*, 54 Va. App. 47, 54–55, 679 S.E.2d 854, 857–58 (Ct. App. 2009), *rev'd*, 279 Va. 379, 689 S.E.2d 699 (2010).

50. *Id.* at 51, 675 S.E.2d at 856.

51. *Ghameshlouy II*, 279 Va. at 391, 689 S.E.2d at 704.

52. *Id.* at 394, 689 S.E.2d at 705.

53. *Id.* at 394, 689 S.E.2d at 706.

54. *Id.* at 395, 689 S.E.2d at 706. In an unpublished opinion issued September 14, 2010, the Court of Appeals of Virginia reversed and dismissed the defendant's conviction. *Ghameshlouy v. City of Va. Beach*, No. 1882-07-1, slip op. at 5 (Va. Ct. App. Sept. 14, 2010) (Virginia Beach City).

### B. *Arraignment*

Lynell Butler Simmons argued on appeal that his conviction for attempted murder was void because he had not been arraigned on that charge or entered a plea to it at his jury trial.<sup>55</sup> In *Simmons v. Commonwealth*, the Court of Appeals of Virginia rejected the argument.<sup>56</sup>

Simmons was arraigned on numerous charges, including use of a firearm in the attempted murder of Jamar Blackwell.<sup>57</sup> He entered pleas of “not guilty” to the charges and requested trial by jury.<sup>58</sup> He was not, however, arraigned on the attempted murder charge.<sup>59</sup> The “trial court and the parties apparently proceeded under the assumption” that Simmons *had* been arraigned on the attempted murder charge and he pled not guilty to that charge, as he had to the others.<sup>60</sup> The court instructed the jury on the attempted murder charge, counsel argued at length regarding that charge, and the jury completed a separate verdict form for that charge.<sup>61</sup> The final order contained the general recitation that the defendant was arraigned, had pled not guilty, and had requested a trial by jury.<sup>62</sup>

In rejecting Simmons’ contention that his conviction for attempted murder was void, the court of appeals held that “a defendant who understands the nature of the charges against him and defends against them may not void his conviction based upon the absence of a formal arraignment.”<sup>63</sup> The court found that arraignment may be waived, and concluded that a failure to arraign may result in a reversal of a conviction if a timely and proper ob-

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55. *Simmons v. Commonwealth*, 54 Va. App. 594, 596, 681 S.E.2d 56, 57 (Ct. App. 2009).

56. *Id.*

57. *Id.*

58. *Id.* at 597, 681 S.E.2d at 57.

59. *Id.* at 596–97, 681 S.E.2d at 57.

60. *Id.* at 597, 681 S.E.2d at 57.

61. *Id.* at 597–98, 681 S.E.2d at 57–58.

62. *Id.* at 598, 681 S.E.2d at 58.

63. *Id.* at 602, 681 S.E.2d at 60.

jection is presented to the trial court.<sup>64</sup> Here, the defendant waived any such objection.<sup>65</sup>

### C. *Jury Issues*

A jury loses power over its guilty verdict only when it is discharged from service at the close of trial.<sup>66</sup> At the guilt phase of jury trial in *Weeks v. Commonwealth*, the jury convicted Weeks of conspiracy to commit grand larceny and misdemeanor concealment.<sup>67</sup> During the penalty phase deliberations, however, the jury sent a note to the trial judge which advised him that, upon hearing the sentencing instructions, the jury realized the conspiracy charge was a felony, a fact it had not recognized when returning the guilty phase verdict.<sup>68</sup> The jury asked the court, "What should we do? We thought it was a misdemeanor."<sup>69</sup>

The court, with the concurrence of both counsel, responded that the jury had convicted the defendant of two offenses and should impose such punishment as it found just for those offenses.<sup>70</sup> The jury sent a second note out to the court indicating jurors thought they could not have convicted Weeks of the conspiracy charge unless he stole property worth \$200 or more, a fact upon which they had not agreed.<sup>71</sup> The court and jury exchanged additional notes.<sup>72</sup> The trial court then declined to answer yet another question from the jury and did not rule on Weeks's motion for mistrial.<sup>73</sup> The jury next asked if it could change its verdict on "the larceny charge."<sup>74</sup> The court did not rule on the defendant's new mistrial motion and did not answer the jury's question.<sup>75</sup> The jury sent additional notes to the court about its concerns.<sup>76</sup> After the jury re-

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64. *Id.* at 606, 681 S.E.2d at 62.

65. *Id.*

66. *See Weeks v. Commonwealth*, 55 Va. App. 157, 162–63, 684 S.E.2d 829, 832 (Ct. App. 2009).

67. *Id.* at 160, 684 S.E.2d at 831.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 160, 684 S.E.2d at 831.

72. *Id.* at 160–61, 684 S.E.2d at 831.

73. *Id.*

74. *Id.* at 161, 684 S.E.2d at 831.

75. *Id.*

76. *Id.*

turned a sentence, the court denied Weeks's motion to set aside the verdict.<sup>77</sup>

The court of appeals held that the trial court erred.<sup>78</sup> The court noted that the jurors, without any prompting, volunteered that they misread and misunderstood the conspiracy instruction, and sought to reconsider the guilty verdict rendered on that charge.<sup>79</sup> Thus, under "these unique circumstances, the trial court abused its discretion by failing either to declare a mistrial or to set aside the verdict."<sup>80</sup>

The defendant in *Cokes v. Commonwealth* initially waived his right to trial by jury.<sup>81</sup> On the morning of trial, he made a request for a jury.<sup>82</sup> The trial court refused the request.<sup>83</sup> The Supreme Court of Virginia reversed.<sup>84</sup> The court observed that:

[T]he record in this case fails to disclose that the motion was made solely for the purpose of delay or whether, in the ordinary course of the circuit court's operation, Cokes' request for a jury trial could have been accommodated at the time it was made. The record also fails to disclose the number of witnesses who would be inconvenienced by the continuance, or the difficulty rescheduling the trial would present to those witnesses.<sup>85</sup>

The barrenness of the record, the court observed, "leaves this court to speculate whether Cokes's request could have been honored in a timely fashion, thereby vindicating his constitutional and statutory rights without impeding the administration of justice."<sup>86</sup> The court stressed that it was not seeking to undermine the broad discretion of trial courts in this area.<sup>87</sup> Rather, it sought

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77. *Id.* at 161–62, 684 S.E.2d at 831.

78. *Id.* at 165, 684 S.E.2d at 833.

79. *Id.* at 164, 684 S.E.2d at 833. The court noted that "[i]t only makes matters worse that the jurors were more confused than they even knew." *Id.*

80. *Id.* at 165, 684 S.E.2d at 833.

81. 280 Va. 92, 95, 694 S.E.2d 582, 583–84 (2010).

82. *Id.* at 96, 694 S.E.2d at 584.

83. *Id.*

84. *Id.* at 99, 694 S.E.2d at 586.

85. *Id.* at 98, 694 S.E.2d at 585.

86. *Id.*

87. *Id.*

to make clear that the basis of a court's determination must be made on the record.<sup>88</sup>

*Cokes* serves as a reminder of the importance of fashioning a record when denying even late requests for a jury trial.

#### D. *Miranda*

The Supreme Court of Virginia in *Anderson v. Commonwealth* applied the public safety exception to the *Miranda* rule announced by the United States Supreme Court in *New York v. Quarles*,<sup>89</sup> in affirming the trial court's denial of the defendant's suppression motion.<sup>90</sup>

In *Anderson*, the defendant fled from a police officer in a public housing apartment complex during the afternoon hours.<sup>91</sup> As he ran, Anderson tossed an object that the officer soon recognized was a gun.<sup>92</sup> As the officer apprehended Anderson, he asked him if the gun was loaded.<sup>93</sup> Anderson replied that there was a bullet in the gun.<sup>94</sup> Subsequently, after another officer arrived and a criminal check was run, Anderson was arrested for possession of a firearm by convicted felon.<sup>95</sup> He was advised of his *Miranda* rights and gave a statement to the police about his possession of the gun.<sup>96</sup> The trial court denied Anderson's motion to suppress his statements.<sup>97</sup> He then entered a conditional guilty plea, preserving his claim that the court erred in denying the suppression motion.<sup>98</sup>

On appeal, as he had at trial, Anderson argued that the officer violated the rule in *Miranda* when he asked Anderson if the gun was loaded.<sup>99</sup> He also alleged that the officer's error tainted the later statement Anderson gave after receiving *Miranda* warn-

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88. *Id.*

89. 467 U.S. 649, 659 (1984).

90. *Anderson v. Commonwealth*, 279 Va. 85, 92–93, 688 S.E.2d 605, 608–09 (2010).

91. *Id.* at 88, 688 S.E.2d at 606.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 88–89, 688 S.E.2d at 606.

96. *Id.* at 89, 688 S.E.2d at 606.

97. *Id.*

98. *Id.*, 688 S.E.2d at 607.

99. *Id.* at 91, 688 S.E.2d at 608.

ings.<sup>100</sup> Anderson argued that the *Quarles* public safety exception to *Miranda* did not apply because that exception was limited to situations where the police do not know the location of a potentially dangerous weapon, a scenario not present here.<sup>101</sup>

The supreme court held that the officer's question of whether the gun was loaded was "objectively reasonable" to protect himself and the public from dangers associated with the weapon.<sup>102</sup> The court recognized that the "prototypical example" for application of the public safety exception is the situation where the weapon is missing.<sup>103</sup> The court held, however, that nothing in *Quarles* limits application of the exception to questions about missing weapons.<sup>104</sup>

### E. Plea Agreements

In *Harris v. Commonwealth* the defendant, who was charged with possession of heroin, entered into a plea agreement, which provided that Harris would seek admission into a "drug treatment court program."<sup>105</sup> Under the agreement, if Harris successfully completed the program, the charge would be dismissed.<sup>106</sup> The plea "agreement also provided that violations of the conditions 'may result in . . . dismissal from the program and the imposition of the sentence' contained in the agreement."<sup>107</sup> Harris was terminated from the program and the circuit court set a sentencing date.<sup>108</sup> At that hearing, Harris argued that he had not received notice or opportunity to be heard regarding the termination decision.<sup>109</sup>

The supreme court held that, like a probationer or parolee, Harris had a "liberty interest" dependent upon his compliance

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100. *Id.* at 92, 688 S.E.2d at 608.

101. *Id.* at 91–92, 688 S.E.2d at 608.

102. *Id.* at 93, 688 S.E.2d at 609.

103. *Id.* at 92, 688 S.E.2d at 608.

104. *Id.* The court noted that it was only after arresting Anderson and advising him of his rights under *Miranda* that the officer asked "investigatory questions about Anderson's possession of the gun." *Id.* at 93, 688 S.E.2d at 609.

105. 279 Va. 541, 543, 689 S.E.2d 713, 714 (2010).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 543–544, 689 S.E.2d at 714.

with certain conditions.<sup>110</sup> Accordingly, “before that interest [could] be revoked, Harris was entitled to an orderly process providing him notice and an opportunity to be heard.”<sup>111</sup> Under the terms of the plea agreement, termination from the drug treatment court program would be a “significant factor” in a decision by the court “to impose the terms of the agreement and revoke Harris’ liberty.”<sup>112</sup> Therefore, because Harris had no opportunity to participate in the termination process, the trial court’s refusal to consider evidence of the reasons for the termination was error.<sup>113</sup>

#### F. *Privilege Against Self-Incrimination*

The Court of Appeals of Virginia considered in *Rivera-Padilla v. Commonwealth* whether incriminating statements by the defendant, taken during an interview about whether the defendant should continue to receive welfare benefits, violated her right to avoid self-incrimination protected by the Fifth Amendment.<sup>114</sup> The Department of Social Services (“DSS”) learned that Rivera-Padilla might be working without reporting those wages.<sup>115</sup> DSS then interviewed her to determine whether her children remained eligible for Medicaid benefits.<sup>116</sup> During the course of the interview, she admitted that she had worked under an assumed name, and that she lied about the income so that she would continue to receive benefits.<sup>117</sup> She was convicted of welfare fraud.<sup>118</sup> In analyzing the Fifth Amendment issue, the Court of Appeals of Virginia first noted that, in general, the privilege against self-incrimination is one that a defendant must raise or it will be waived.<sup>119</sup> An exception to this general rule applies in situations where asserting the privilege triggers a penalty.<sup>120</sup> Rivera-Padilla acknowledged that she did not invoke the privilege, but con-

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110. *Id.* at 545, 689 S.E.2d at 715.

111. *Id.*

112. *Id.* at 546, 689 S.E.2d at 716.

113. *Id.*

114. 55 Va. App. 304, 307, 685 S.E.2d 851, 852–53 (Ct. App. 2009).

115. *Id.*, 685 S.E.2d at 853.

116. *Id.*

117. *Id.* at 308, 685 S.E.2d at 853.

118. *Id.* at 307, 685 S.E.2d at 852.

119. *Id.* at 309–10, 685 S.E.2d at 854.

120. *Id.* at 310–11, 685 S.E.2d at 854 (citing *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984)).

tended that she faced a penalty, the loss of welfare benefits, if she invoked the privilege.<sup>121</sup> The court of appeals found the penalty exception inapplicable because Rivera-Padilla was never told that her benefits would be terminated if she invoked the privilege.<sup>122</sup> The court reasoned that

“for purposes of [the penalty] exception, one must distinguish situations where a person will be penalized for the very act of asserting the privilege (e.g., the person will lose their job if they assert the privilege, regardless of the other evidence in the case) from situations where a person is free to assert the privilege but they then run the risk that, based on the remaining evidence, the court or administrative agency will decide the case against them. The exception applies only to the former situation, not the latter.”<sup>123</sup>

### G. *Right to Expert or Investigative Assistance*

In *Dowdy v. Commonwealth*,<sup>124</sup> the Supreme Court of Virginia examined the interaction of two cases dealing with the appointment of expert witnesses for indigent defendants: *Ake v. Oklahoma*<sup>125</sup> and *Husske v. Commonwealth*.<sup>126</sup> In *Husske*, the Court held that “an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth’s expense, must demonstrate that the subject which necessitates the assistance of the expert is ‘likely to be a significant factor in his defense,’ and that he will be prejudiced by the lack of expert assistance.”<sup>127</sup>

The defendant in *Dowdy* claimed that the requirement that a defendant make a preliminary showing of prejudice went beyond and conflicted with the decision in *Ake*.<sup>128</sup> After parsing both decisions, the Supreme Court of Virginia found no conflict. The court observed that *Ake* was concerned that, in certain cases, the defense “may be devastated by the absence” of expert psychiatric help.<sup>129</sup> The court concluded that such language is similar to the

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121. *Id.* at 311, 685 S.E.2d at 854–55.

122. *Id.*, 685 S.E.2d at 855.

123. *Id.* at 314, 685 S.E.2d at 856 (quoting *State v. Rivers*, 146 P.3d 999, 1005 (Alaska Ct. App. 2006)).

124. 278 Va. 577, 581, 686 S.E.2d 710, 712 (2009).

125. 470 U.S. 68 (1985).

126. 252 Va. 203, 476 S.E.2d 920 (1996).

127. *Id.* at 211–12, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 82–83)).

128. *Dowdy*, 278 Va. at 591, 688 S.E.2d at 718.

129. *Id.* at 593, 688 S.E.2d at 719 (emphasis omitted) (quoting *Ake*, 470 U.S. at 83).

requirement in *Husske* that the defendant show prejudice.<sup>130</sup> The court noted an abundance of persuasive authority from other courts that interpret *Ake* in a similar manner.<sup>131</sup> The court observed that the “prejudice requirement [in *Husske*] merely directs a trial court to determine, based on the facts of the particular case, the probable value of providing the requested assistance and the risk of error in the criminal proceeding if such is not provided.”<sup>132</sup> Finally, the court held that, under the circumstances of the case, the trial court did not err in concluding that the defendant had failed to meet the demanding showing required to establish a particularized need for investigative assistance.<sup>133</sup>

#### H. *Confrontation Clause*

Whether evidence is “testimonial” is now the critical threshold question for whether evidence triggers the Confrontation Clause.<sup>134</sup> In *Wilder v. Commonwealth*, the Court of Appeals of Virginia examined whether a 911 call reporting a larceny that had just taken place was testimonial evidence.<sup>135</sup> The caller stated that he observed two individuals break into a fenced area and stated they were carting things away.<sup>136</sup> The court declined to broadly hold that any ongoing felony constituted an ongoing emergency.<sup>137</sup> Four factors, distilled from *Davis v. Washington*,<sup>138</sup> guided the court’s analysis:

- (1) Was the declarant speaking about current events as they were actually happening, “requiring police assistance” rather than describing past events?
- (2) Would a “reasonable listener” conclude that the declarant was facing an ongoing emergency that called for [immediate] help?
- (3) Was the nature of what was asked and answered during the course of a 911 call such that, “viewed objectively, the elicited statements were necessary to be able to resolve the present emergency” rather than “simply to learn . . . what had happened in the past?”

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130. *Id.* (citing *Husske*, 252 Va. at 212, 476 S.E.2d at 925).

131. *Id.* at 593–94, 688 S.E.2d at 719 (citations omitted).

132. *Id.* at 593, 688 S.E.2d at 719.

133. *Id.* at 594–98, 688 S.E.2d at 720–22.

134. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

135. 55 Va. App. 579, 589, 687 S.E.2d 542, 547 (2010).

136. *Id.* at 583, 687 S.E.2d at 544.

137. *Id.* at 591, 687 S.E.2d at 548.

138. 547 U.S. 813, 822 (2006).

(4) What was the “level of formality” of the interview? For example, was the caller frantic, in an environment that was neither tranquil nor safe?<sup>139</sup>

The key factor for the court was (3) above: whether the caller or the public were in danger of harm.<sup>140</sup> Applying these factors, the court held that the 911 call was testimonial in nature.<sup>141</sup> Although the caller was speaking about current events, the caller was not facing any immediate physical danger, nor was there any danger to the public generally.<sup>142</sup> Therefore, admitting the 911 tape into evidence violated the defendant’s confrontation rights.<sup>143</sup>

### III. SEARCH AND SEIZURE

#### A. *Automobile Exception*

In *Duncan v. Commonwealth*, the Court of Appeals of Virginia re-affirmed the well-established rule that the automobile exception to the Fourth Amendment justifies a warrantless search of the entire automobile when the police have probable cause to believe that the vehicle contains contraband.<sup>144</sup> The police initially stopped Duncan’s Ford Ranger for a muffler violation.<sup>145</sup> Once Duncan was stopped, the police learned that his driver’s license was suspended.<sup>146</sup> Although Duncan told the police at first that there were no drugs or weapons in the vehicle, when the officer said he was going to have the vehicle towed, Duncan said there “may” be a gun under the seat.<sup>147</sup> As Duncan got out of the vehicle he admitted that he had a knife on his person.<sup>148</sup> When the officer reached in Duncan’s pocket to retrieve the knife, he pulled out a block of cocaine.<sup>149</sup> The officer discovered a gun under the driver’s

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139. *Wilder*, 55 Va. App. at 590–91, 687 S.E.2d at 547 (quoting *United States v. Cadieux*, 500 F.3d 37, 41 (1st Cir. 2007)).

140. *Id.* at 593, 687 S.E.2d at 548–49.

141. *Id.* at 593–94, 687 S.E.2d at 549.

142. *Id.* at 593, 687 S.E.2d at 549.

143. *Id.* at 594, 687 S.E.2d at 549.

144. *Duncan v. Commonwealth*, 55 Va. App. 175, 179, 684 S.E.2d 838, 840 (Ct. App. 2009).

145. *Id.* at 176, 684 S.E.2d at 839.

146. *Id.* at 177, 684 S.E.2d at 839.

147. *Id.*

148. *Id.*

149. *Id.*

seat of the Ranger.<sup>150</sup> A search of the remainder of the vehicle revealed paraphernalia associated with the distribution of drugs.<sup>151</sup>

On appeal, the court of appeals assumed without deciding that the search of the vehicle was not justified by the inventory search exception or search incident to arrest.<sup>152</sup> The court held that the search was justified by the automobile exception, given the defendant's admission that a gun may be under the seat and the presence of cocaine in his pocket.<sup>153</sup> The court of appeals rejected Duncan's argument that the search was illegal under *Arizona v. Gant*,<sup>154</sup> noting that, unlike *Gant*, in the instant case the police had information regarding the vehicle independent of the status of the defendant's license.<sup>155</sup> Duncan's statement that there may be a gun under the seat provided the officer with probable cause to search the vehicle for evidence of a concealed weapon.<sup>156</sup>

### B. *Exigent Circumstances*

The Court of Appeals of Virginia examined the issue of the exigent circumstances necessary for a warrantless entry into a home in *West v. Commonwealth*.<sup>157</sup> West's elderly neighbor was sexually assaulted by a man who illegally entered her home.<sup>158</sup> The victim told police that she had bitten her attacker's lip, ear, and finger.<sup>159</sup> When the officer asked the victim if she could identify her assailant, she said she could not, but added that her neighbor "Joe came to mind."<sup>160</sup> She said that she did not believe Joe could be her attacker because they had been neighbors for over twenty years.<sup>161</sup>

Based on the victim's statements about "Joe," several police officers went to the home of her neighbor, Joseph West.<sup>162</sup> After

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150. *Id.*

151. *Id.* at 177–78, 684 S.E.2d at 839.

152. *Id.* at 179, 684 S.E.2d at 840.

153. *Id.* at 179–80, 684 S.E.2d at 840–41.

154. 129 S. Ct. 1710 (2009).

155. *Duncan*, 55 Va. App. at 180–81, 684 S.E.2d at 841.

156. *Id.* at 181, 684 S.E.2d at 841.

157. 54 Va. App. 345, 352, 678 S.E.2d 856, 840 (Ct. App. 2009).

158. *Id.* at 350, 678 S.E.2d at 838–39.

159. *Id.*, 678 S.E.2d at 839.

160. *Id.*

161. *Id.*

162. *Id.*

answering the officers' knock, West hid behind the door so that the police could not see his entire body.<sup>163</sup> When the officers saw West's face, they saw his "lip was cut and had not scabbed over."<sup>164</sup> West began to close the door.<sup>165</sup> A detective stopped West and told him that the police officers wanted to come into the house.<sup>166</sup> West opened the door and the officers went in.<sup>167</sup> Once inside, the officers saw an injury to West's ear.<sup>168</sup> West, who was wearing only underwear, was arrested.<sup>169</sup> His mother brought him a pair of jeans that had an apparent bloodstain on them.<sup>170</sup> The police seized the jeans and took the defendant to the police station.<sup>171</sup>

The court of appeals agreed with the defendant that the police needed both probable cause and exigent circumstances to justify the warrantless entry into the home.<sup>172</sup> The court concluded that both probable cause and exigent circumstances existed, and affirmed the trial court's denial of the motion to suppress.<sup>173</sup> With regard to exigent circumstances, the court of appeals noted that the police were investigating serious crimes, and thus the danger to the community continued until the suspect was restrained.<sup>174</sup> Furthermore, the defendant lived close to the victim's home, could watch the police investigation, and thus could destroy evidence or flee.<sup>175</sup> Finally, the case involved DNA evidence of a type that is easily destroyed.<sup>176</sup>

### C. Franks *Hearings*

A defendant can seek the exclusion of evidence obtained pursuant to a search warrant if the search warrant was issued based

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163. *Id.* at 351, 678 S.E.2d at 839.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 352, 678 S.E.2d at 840.

173. *Id.*

174. *Id.* at 355, 678 S.E.2d at 841.

175. *Id.*

176. *Id.*

upon deliberately false or misleading information.<sup>177</sup> To obtain a *Franks* hearing, a defendant must “make[ ] a substantial preliminary showing that the affidavit for the search warrant contains deliberately false or recklessly false misstatements or omissions necessary to a finding of probable cause.”<sup>178</sup> Even then, before holding a hearing, “the court is required to ‘set to one side’ the alleged false or reckless information or omission and determine whether the warrant affidavit supports a finding of probable cause.”<sup>179</sup>

In *Barnes v. Commonwealth*, the defendant complained that evidence seized during a search of his home must be suppressed because the search warrant was based on a misleading affidavit.<sup>180</sup> Specifically, in the affidavit in support of the search warrant, the detective omitted, among other things, the fact that one of the witnesses to the shooting was unable to identify the defendant from a photographic spread.<sup>181</sup> The warrant application did note that two other witnesses identified the defendant and included other details linking the defendant to the shooting.<sup>182</sup> The trial court held an evidentiary hearing after which the court concluded that the warrant was based on probable cause.<sup>183</sup>

The Supreme Court of Virginia observed that the trial court awarded the defendant a *Franks* hearing without first making “the defendant establish the requisite substantial preliminary showing.”<sup>184</sup> The court held that a hearing under such circumstances is improper.<sup>185</sup> Nevertheless, the court affirmed the holding of the trial court, concluding that the extensive information truthfully conveyed in the affidavit established probable cause for the search.<sup>186</sup> *Barnes* does not break new ground, but it serves as a reminder of the sequence that must be followed in handling *Franks* hearings.

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177. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

178. *Barnes v. Commonwealth*, 279 Va. 22, 33, 688 S.E.2d 210, 216 (2010).

179. *Id.* (quoting *Franks*, 438 U.S. at 156).

180. *Id.* at 25, 688 S.E.2d at 211–12.

181. *Id.* at 27–29, 688 S.E.2d at 213–14.

182. *Id.* at 29, 688 S.E.2d at 214.

183. *Id.*

184. *Id.* at 33, 688 S.E.2d at 216.

185. *Id.*

186. *Id.* at 34–35, 688 S.E.2d at 217.

#### D. *Plain View*

In *Cauls v. Commonwealth*, the Court of Appeals of Virginia reversed the decision of the trial court denying Cauls's motion to suppress the evidence seized from the pocket of his trousers.<sup>187</sup> Police officers executed an arrest warrant for a probation violation at Alexis Satkin's home.<sup>188</sup> Satkin was allowed to change her clothes and an officer accompanied her into the home to do so.<sup>189</sup> The officer saw a digital scale and white powder on the kitchen table.<sup>190</sup> Satkin did not give the officer consent to search the home.<sup>191</sup> The officer conducted a protective sweep of the home and discovered Cauls lying in a bed.<sup>192</sup> The officer told Cauls that a search warrant was being obtained and that he was free to leave.<sup>193</sup> When Cauls said that he was wearing only his underwear, the officer asked if Cauls wanted his pants.<sup>194</sup> Cauls identified a pair of pants on the floor as his.<sup>195</sup> When the officer picked up the pants, he saw a knotted plastic bag protruding from the pocket.<sup>196</sup> The officer removed the baggie and discovered contraband in it.<sup>197</sup>

The court of appeals found that the "officer was entitled to conduct a 'protective sweep' of the residence" to ensure officer safety.<sup>198</sup> The officer did not restrain Cauls's movement, he merely responded to Cauls's request for pants.<sup>199</sup> The court, however, found that the plain view exception did not apply and the officer lacked probable cause to seize the baggie because its incriminating nature was not apparent prior to pulling it out of the pocket.<sup>200</sup> The court held that the officer had "no more than an educated hunch"

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187. 55 Va. App. 90, 104, 683 S.E.2d 847, 853 (Ct. App. 2009).

188. *Id.* at 94, 683 S.E.2d at 849.

189. *Id.*

190. *Id.*

191. *Id.* at 95, 683 S.E.2d at 849.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 96, 683 S.E.2d at 850 (quoting *Maryland v. Bire*, 494 U.S. 325, 327 (1990)).

199. *Id.* at 97, 683 S.E.2d at 850.

200. *Id.* at 102–03, 683 S.E.2d at 852–53.

that the baggie in the pocket contained contraband and thus the seizure was invalid.<sup>201</sup>

### E. *Probable Cause*

Suspects can refuse to perform field sobriety tests for a variety of reasons. The issue in *Jones v. Commonwealth* was whether a police officer could include this refusal in deciding whether probable cause was present to arrest the suspect for driving under the influence of alcohol.<sup>202</sup> The Supreme Court of Virginia answered this question with a qualified “yes.” The court reasoned that such evidence does “tend[ ] to show the driver’s awareness that his consumption of alcohol would affect his ability to perform such tests,” provided that other facts are present showing that a driver consumed alcohol and that such consumption had a “discernable effect . . . on the driver’s mental or physical state.”<sup>203</sup> Accordingly, the court held that “a court may consider the driver’s refusal to perform field sobriety tests when such refusal is accompanied by evidence of the driver’s alcohol consumption and its discernable effect on the driver’s mental or physical state.”<sup>204</sup>

As police departments equip their officers with more and more technology, that technology can give the police an edge in apprehending criminals, but it also can give rise to Fourth Amendment complications.

In another decision styled *Jones v. Commonwealth*, the defendant was stopped when the police observed what they believed was a sale of illegal drugs.<sup>205</sup> Following the stop, the defendant appeared nervous and did not produce a driver’s license or a registration.<sup>206</sup> Instead, he provided the police with a name and social security number.<sup>207</sup> While this information was being verified, an officer conducted a pat-down of the defendant during which the officer seized the defendant’s wallet.<sup>208</sup> Shortly afterward, the dispatcher informed the officers at the scene that the name and so-

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201. *Id.* at 101, 683 S.E.2d at 852.

202. 279 Va. 52, 54, 688 S.E.2d 269, 270 (2010).

203. *Id.* at 58–59, 688 S.E.2d at 272–73.

204. *Id.* at 59, 688 S.E.2d at 272–73.

205. 279 Va. 665, 668, 691 S.E.2d 801, 802 (2010).

206. *Id.*

207. *Id.* at 669, 691 S.E.2d at 803.

208. *Id.*

cial security number were “good.”<sup>209</sup> The defendant claimed that he was illegally seized when the police impermissibly took his wallet during a pat down search.<sup>210</sup> After the wallet was taken, the defendant gave the police consent to search his vehicle.<sup>211</sup> The search yielded firearms and heroin.<sup>212</sup> This consent was invalid, the defendant contended, because it was based upon a detention that was improperly lengthened by the seizure of the wallet.<sup>213</sup> He contended, therefore, that the evidence that was obtained following this illegal seizure of his person should be suppressed.<sup>214</sup>

The Supreme Court of Virginia first agreed that the seizure of the wallet was improper.<sup>215</sup> A pat down search is limited to removing weapons or items the officer recognizes as contraband under the plain feel doctrine.<sup>216</sup> The wallet does not fall under either category and its seizure was, therefore, illegal.<sup>217</sup> That, however, did not end the matter. The court observed that, notwithstanding the seizure of the wallet, the defendant was properly being detained because police were still attempting to determine his identity.<sup>218</sup> The fact that the dispatcher confirmed that the name and social security number the defendant verbally provided to the police did not require an end to the detention.<sup>219</sup> After all, a correct name and social security number did not mean that the defendant was this person.<sup>220</sup> The officers could continue to detain the defendant so that another officer with a computer could produce a photograph and confirm that Jones was the person he claimed to be.<sup>221</sup> Consequently, “the temporary continued seizure of Jones did not amount to an unlawful detention because determining Jones’s

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209. *Id.*

210. *Id.* at 671, 691 S.E.2d at 804.

211. *Id.* at 669–70, 691 S.E.2d at 803.

212. *Id.* at 670, 691 S.E.2d at 803.

213. *Id.* at 671, 691 S.E.2d at 804.

214. *Id.*

215. *Id.* at 672, 691 S.E.2d at 804.

216. *Id.* (quoting *Grandison v. Commonwealth*, 274 Va. 316, 319–20, 645 S.E.2d 298, 300 (2007)).

217. *Id.* at 672, 691 S.E.2d at 804–05.

218. *Id.* at 674, 691 S.E.2d at 805.

219. *Id.*

220. *Id.*

221. *Id.*, 691 S.E.2d at 805–06.

true identity was within the scope of the . . . investigatory stop and was not unreasonable.”<sup>222</sup>

#### IV. EVIDENTIARY ISSUES

##### A. *Polygraph Evidence*

Under settled Virginia law, polygraph evidence is not admissible in criminal trials due to its unreliability.<sup>223</sup> The Supreme Court of Virginia in *Turner v. Commonwealth* extended that rule to probation revocation hearings.<sup>224</sup> The court rejected the argument that the “more relaxed” standard of admission in such hearings warranted introduction of such evidence.<sup>225</sup> The court stressed that its holding was limited to polygraph evidence itself and that voluntary statements made by a probationer during a polygraph test would be subject to ordinary rules of evidence.<sup>226</sup>

##### B. *Best Evidence*

The Supreme Court of Virginia in *Midkiff v. Commonwealth* rejected the defendant’s argument that the best evidence rule should be extended to digital images because such images could be subjected to manipulation.<sup>227</sup> Police seized the defendant’s computer and made copies of certain files containing child pornography.<sup>228</sup> Some of the copied images and video recordings were displayed at the trial.<sup>229</sup> The court held that the best evidence rule is limited to written documents and, further, based on the testimony presented, the purpose of the rule, to ensure reliability of the evidence, “is amply met in this case.”<sup>230</sup> According to the testimony of the prosecution’s expert, copies of a hard drive can be

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222. *Id.*, 691 S.E.2d at 806.

223. *Billips v. Commonwealth*, 274 Va. 805, 809–10, 652 S.E.2d 99, 101–02 (2007).

224. 278 Va. 739, 745, 685 S.E.2d 665, 667 (2009).

225. *Id.* at 743, 685 S.E.2d at 667.

226. *Id.* at 743–44, 685 S.E.2d at 667–68.

227. 280 Va. 216, 219, 694 S.E.2d 576, 577 (2010).

228. *Id.* at 218, 694 S.E.2d at 577.

229. *Id.*

230. *Id.* at 219, 694 S.E.2d at 577–78.

made without degradation and care and are “considered forensically to be an original.”<sup>231</sup>

### C. *Prior Convictions*

The Supreme Court of Virginia reversed James Lester Waller’s conviction for possession of a firearm by a violent felon, based on its finding that Waller’s previous conviction orders were not properly authenticated at trial in the circuit court.<sup>232</sup> Waller claimed that a judicial signature was “[f]atally lacking . . . in the orders, in the order book, or in an order recorded in the order book on the last day of the term.”<sup>233</sup> Thus, he claimed, pursuant to Code section 17.1-123(A), the orders were not authenticated, and therefore, were inadmissible.<sup>234</sup> The Commonwealth argued that, pursuant to Code section 8.01-389(A), records from any judicial proceeding and any other official record of any court are authenticated and certified by the clerk of court preserved to be a true record.<sup>235</sup>

The court concluded that the two Code sections could be reconciled.<sup>236</sup> Under Code section 8.01-389(A), the records of all judicial proceedings, *except* for orders of circuit courts, are received as prima facie evidence, while circuit court orders may be received only when authenticated pursuant to Code section 17.1-123(A).<sup>237</sup>

## V. SENTENCING

### A. *Juvenile Sentencing*

The Supreme Court of Virginia in *Brown v. Commonwealth* resolved whether juveniles convicted of possession of a firearm should be sentenced to a mandatory minimum or whether the

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231. *Id.* at 218, 694 S.E.2d at 577.

232. *Waller v. Commonwealth*, 278 Va. 731, 735–38, 685 S.E.2d 48, 50–51 (2009).

233. *Id.* at 735, 685 S.E.2d at 50.

234. *Id.*, 685 S.E.2d at 49–50.

235. *Id.* at 735–36, 685 S.E.2d at 50.

236. *Id.* at 737, 685 S.E.2d at 51.

237. *Id.* (construing VA. CODE ANN. § 8.01-389(A) (Repl. Vol. 2007 & Cum. Supp. 2010); *id.* § 17.1-123(A) (Repl. Vol. 2010)). Waller had confessed to law enforcement and testified under oath that he had been convicted of a felony. *Id.* at 738, 685 S.E.2d at 51. The supreme court thus reversed and remanded the case for a new sentencing hearing on the lesser offense of possession of a firearm by a nonviolent felon. *Id.*

court retains discretion in sentencing them as juveniles.<sup>238</sup> The defendant used a firearm in the commission of robbery.<sup>239</sup> Code section 18.2-53.1 specifies that a defendant who is convicted of the offense “shall be sentenced to a mandatory minimum term of imprisonment of three years for a first conviction, and to a mandatory minimum term of five years for a second or subsequent conviction.”<sup>240</sup> Brown argued that this provision did not apply, and that he should instead be sentenced under Code section 16.1-272(A)(2).<sup>241</sup> That provision affords courts discretion in sentencing juveniles, and permits a court to sentence a juvenile tried as an adult to a juvenile disposition.<sup>242</sup> The court found that the more specific statute, section 18.2-53.1, controlled over the more general statute.<sup>243</sup> Therefore, the court of appeals correctly determined that the trial court erred in failing to sentence the defendant to a mandatory minimum term of incarceration.<sup>244</sup>

### B. *Revocation of Suspended Sentences*

In *Mohamed v. Commonwealth*, the Court of Appeals of Virginia addressed a claim that the trial court lacked jurisdiction to revoke a suspended sentence because it entered its order of revocation too late.<sup>245</sup> The court of appeals discussed at length the different types of jurisdiction.<sup>246</sup> The court determined that the “circuit court had subject matter jurisdiction over the . . . revocation hearing because the General Assembly has granted that court subject matter jurisdiction over the specific class of cases of which the” instant case is an example.<sup>247</sup> The court of appeals noted that the authority to exercise jurisdiction is distinct from subject matter jurisdiction.<sup>248</sup> The court described the authority to exercise jurisdiction as the “conditions of fact that must exist . . . as the prerequisites of the authority of the court to proceed to

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238. 279 Va. 210, 213, 688 S.E.2d 185, 187 (2010).

239. *Id.* at 214, 688 S.E.2d at 187.

240. VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 2009 & Supp. 2010).

241. *Brown*, 279 Va. at 220, 688 S.E.2d at 191.

242. § 16.1-272(A)(2) (Repl. Vol. 2010).

243. *Brown*, 279 Va. at 223, 688 S.E.2d at 192.

244. *Id.* at 224, 688 S.E.2d at 193.

245. 56 Va. App. 95, 97, 691 S.E.2d 513, 514 (Ct. App. 2010).

246. *See id.* at 98–102, 691 S.E.2d at 514–16.

247. *Id.* at 100, 691 S.E.2d at 515.

248. *Id.* at 101, 691 S.E.2d at 516 (citing *Nelson v. Warden*, 262 Va. 276, 281, 552 S.E.2d 73, 75 (2001)).

judgment or decree.”<sup>249</sup> Passage of time can be such a condition.<sup>250</sup> However, because Mohamed did not raise the issue at trial, it was defaulted pursuant to Rule 5A:18.<sup>251</sup> The court of appeals rejected Mohamed’s request to invoke the ends of justice exception to that rule.<sup>252</sup> The court noted that Mohamed never fulfilled the restitution requirement of his probation and that probation had in fact been extended indefinitely at an earlier revocation hearing.<sup>253</sup>

### C. Sentences in Excess of the Statutory Maximum

In *Rawls v. Commonwealth*, the Supreme Court of Virginia considered what to do when a defendant is sentenced by a jury in excess of the range permitted by statute.<sup>254</sup> Rawls was convicted of second degree murder.<sup>255</sup> The jury was erroneously instructed on the range of punishment and imposed a sentence of twenty-five years in prison.<sup>256</sup> The actual maximum sentence at the time was twenty years.<sup>257</sup> The court cast aside existing precedent it characterized as lacking in uniformity in favor of a bright line rule.<sup>258</sup> A sentence in violation of the authorized range of punishment, the court held, is void *ab initio*.<sup>259</sup> When that occurs, the defendant will be entitled to a new sentencing hearing.<sup>260</sup> The court reasoned that this procedure obviates speculation concerning what punishment the jury might have inflicted had it known the correct range of punishment and protects the right to trial by jury.<sup>261</sup>

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249. *Id.* (quoting *Porter v. Commonwealth*, 276 Va. 203, 228, 661 S.E.2d 415, 426 (2008)).

250. *Id.*

251. *Id.* at 102, 691 S.E.2d at 516.

252. *Id.*

253. *See id.* at 103, 691 S.E.2d at 516–17.

254. 278 Va. 213, 215, 683 S.E.2d 544, 545 (2009).

255. *Id.*, 638 S.E.2d at 546.

256. *Id.* at 221, 638 S.E.2d at 549.

257. *Id.* at 215, 683 S.E.2d at 546.

258. *Id.* at 220–21, 683 S.E.2d at 548–49.

259. *Id.* at 221, 683 S.E.2d at 549. The court’s characterization of the issue as one of subject matter jurisdiction and its rejection of the Commonwealth’s procedural default arguments suggests that procedural default rules will not apply in this situation. *See id.* at 217–18, 683 S.E.2d at 547. If that is so, then both the defendant and the Commonwealth could, at any time, raise the issue of a sentence that is either below or in excess of the prescribed statutory range.

260. *Id.* at 221, 683 S.E.2d at 549.

261. *Id.*

## VI. SPECIFIC CRIMES

A. *Assault*

The Court of Appeals of Virginia in *Hodnett v. Commonwealth* addressed whether a defendant's actions constituted one or several assaults.<sup>262</sup> While in his cell at the local jail, Hodnett called over one of the correctional officers.<sup>263</sup> He then reached into the toilet with a plastic cup, retrieved pieces of toilet paper and feces, and flung them at the officer.<sup>264</sup> The contents of the cup struck the officer in the chest.<sup>265</sup> Hodnett then reached into the toilet again, and this time threw the contents of the cup on the officer's face.<sup>266</sup> Hodnett argued that his actions were "component parts of a single assaultive act."<sup>267</sup> The court of appeals disagreed.<sup>268</sup> The court reasoned that the trial court found each throw to be a "separate, complete act."<sup>269</sup> Such a determination is a question of fact, binding on appeal unless plainly wrong.<sup>270</sup> The court observed that the injury was complete each time the thrown material hit the officer.<sup>271</sup> Each act involved "a new formation and execution of purpose."<sup>272</sup> Future cases will reveal whether this reasoning will be applied to, for example, a distinct punch or kick.

In *Clark v. Commonwealth*, the Supreme Court of Virginia affirmed the defendant's conviction for assault of her son's school bus driver.<sup>273</sup> The defendant placed her car in the bus circle during the morning bus drop off.<sup>274</sup> She approached the victim's bus on foot and threatened to get the victim and "f\_\_\_" her up, promising to do so wherever the victim went.<sup>275</sup> When the victim drove

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262. 56 Va. App. 235, 235–36, 692 S.E.2d 647, 647 (Ct. App. 2010).

263. *Id.* at 236, 692 S.E.2d at 647.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 236, 692 S.E.2d at 648.

268. *Id.* at 237–38, 692 S.E.2d at 648.

269. *Id.* at 237, 692 S.E.2d at 648.

270. *Id.* (quoting *Glasco v. Commonwealth*, 26 Va. App. 763, 774, 497 S.E.2d 150, 155 (Ct. App. 1998)).

271. *Id.* at 237, 692 S.E.2d at 648.

272. *Id.* at 238, 692 S.E.2d at 648.

273. 279 Va. 636, 643, 691 S.E.2d 786, 790 (2010). The defendant's son had been barred from riding the bus. *Id.* at 638, 691 S.E.2d at 787.

274. *Id.* at 638–39, 691 S.E.2d at 787.

275. *Id.* at 639, 691 S.E.2d at 787.

her bus for the afternoon bus run that same day, Clark again was waiting for her.<sup>276</sup> Clark again approached the bus and reminded the victim that she had said she would “get” the victim.<sup>277</sup>

The supreme court identified the relevant question in the case as “whether Clark committed an overt act with the intent to place [the victim] in fear or apprehension of bodily harm.”<sup>278</sup> The court held that, viewing Clark’s words and actions in her afternoon approach of the bus in the context of her earlier threat to the victim, the defendant’s afternoon approach “was an act sufficient to create a reasonable apprehension on the part of [the victim] that she was about to be attacked.”<sup>279</sup>

### B. *Assault by Mob*

The defendant in *Hamilton v. Commonwealth* challenged the sufficiency of the evidence for his three convictions for assault by mob.<sup>280</sup> The first of these assaults took place when a dozen members of a gang attacked an individual at a party.<sup>281</sup> During the assault, the defendant was seen “doing something with his hands around the middle of [the victim’s] back but was not rendering assistance to” the victim.<sup>282</sup> The victim suffered cigarette burns on his back.<sup>283</sup> The defendant was wearing red, the color of the Bloods gang members involved in the attack.<sup>284</sup> With respect to the attack on the victim who suffered cigarette burns, the Supreme Court of Virginia held that the evidence, although conflicting, was clear that the attack was the work of a mob and the evidence further supported the conclusion that the defendant was a member of that mob.<sup>285</sup>

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276. *Id.*

277. *Id.*

278. *Id.* at 642, 691 S.E.2d at 789. The court noted that Virginia, like many jurisdictions, has merged the common law crime of assault with the common law tort. *Id.* at 641, 691 S.E.2d at 789 (citing *Carter v. Commonwealth*, 269 Va. 44, 46–47, 606 S.E.2d 839, 841 (2005)).

279. *Id.* at 643, 691 S.E.2d at 790.

280. 279 Va. 94, 102, 688 S.E.2d 168, 173 (2010).

281. *Id.* at 99–100, 688 S.E.2d at 171–72.

282. *Id.* at 100, 688 S.E.2d at 172.

283. *Id.* at 99, 688 S.E.2d at 172.

284. *Id.*, 688 S.E.2d at 171.

285. *Id.* at 104–05, 688 S.E.2d at 174–75.

Two other individuals at this party were struck in the head with tiki torches by a single assailant.<sup>286</sup> During these attacks, “a lot of people were wearing red,” were flashing gang signs with their hands, and were saying “Blood-at.”<sup>287</sup> “The term ‘Blood-[a]t’ is a ‘Blood war cry’ used to call members of the gang to ‘converge’ and ‘provide whatever . . . assistance is required.’”<sup>288</sup> Someone handed a gun to another individual, saying, “Kill that motherf\_ker.”<sup>289</sup> These facts supported the factfinder’s conclusion that the assaults were the work of a mob, and that it was the same mob that perpetrated both assaults.<sup>290</sup> Moreover, the evidence, the court held, supported the conclusion that the defendant was a member of that mob.<sup>291</sup> He wore red, the color of the gang perpetrating the assault, he admitted to exchanging words with one of the victims who was assaulted with a tiki torch, and further admitted to pointing a gun at one of these victims.<sup>292</sup>

### C. *Attempted Robbery*

In *Rogers v. Commonwealth*, the Court of Appeals of Virginia addressed the requirements necessary to prove an attempted crime.<sup>293</sup> An attempted crime is comprised of “the intent to commit the crime and the doing of some direct act toward its consummation, but falling short of the accomplishment of the ultimate design.”<sup>294</sup>

The defendant and two confederates planned to rob the residents of an apartment in Arlington.<sup>295</sup> The men were armed with guns.<sup>296</sup> The defendant put a bandana over his face to hide his identity as the men approached the front door of the apartment.<sup>297</sup> One of the men rang the doorbell of the chosen apartment, but no

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286. *Id.* at 101–02, 688 S.E.2d at 173.

287. *Id.* at 101, 688 S.E.2d at 173.

288. *Id.* at 98, 688 S.E.2d at 171.

289. *Id.* at 105, 688 S.E.2d at 175.

290. *Id.* at 104–06, 688 S.E.2d at 175.

291. *Id.* at 105, 688 S.E.2d at 175.

292. *Id.* at 107–08, 688 S.E.2d at 176.

293. 55 Va. App. 20, 24–25, 683 S.E.2d 311, 313 (Ct. App. 2009).

294. *Id.* (quoting *Johnson v. Commonwealth*, 209 Va. 291, 293, 163 S.E.2d 570, 573 (1968)).

295. *Id.* at 23, 683 S.E.2d at 312–13.

296. *Id.*, 683 S.E.2d at 313.

297. *Id.*

one answered the door.<sup>298</sup> In fact, a resident of the home looked through the peephole of the door, saw the men and the weapons, and directed another resident to call the police.<sup>299</sup>

In affirming the conviction for attempted robbery, the court of appeals held that the men prepared for the crime and “actually began the robbery.”<sup>300</sup> The court held that “[t]he intervention of an external factor, such as a victim’s refusal to cooperate by opening the door, does not somehow absolve a defendant of attempting to commit a crime,” but only frustrates the completion of the crime.<sup>301</sup>

#### D. *Criminal Contempt*

The Supreme Court of Virginia reversed and vacated criminal contempt convictions for two attorneys in *Singleton v. Commonwealth*.<sup>302</sup> In each case, the lawyer had contacted the prosecutor assigned to his client’s criminal case prior to the court date and counsel and the prosecutor had agreed that the case would be continued.<sup>303</sup> Although the court had not entered orders continuing the cases, defense counsel in each case excused the client from appearing on the originally scheduled court date.<sup>304</sup> In each case, the lawyer was held in contempt.<sup>305</sup> The supreme court reversed the convictions because the records in the cases failed to demonstrate an intent by the attorneys to “obstruct or interrupt the administration of justice,” as required by Code section 18.2-456(1).<sup>306</sup>

#### E. *Credit Card Fraud*

Many employers allow their employees to use corporate credit cards. To convict for credit card fraud, it is not enough to prove that the defendant used his employer’s credit card for personal

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298. *Id.*

299. *Id.* at 22, 683 S.E.2d at 312.

300. *Id.* at 27, 683 S.E.2d at 315.

301. *Id.* at 29, 683 S.E.2d at 315.

302. 278 Va. 542, 552, 685 S.E.2d 668, 674 (2009).

303. *Id.* at 545, 547, 685 S.E.2d at 670, 671.

304. *Id.*

305. *Id.* at 546, 547, 685 S.E.2d at 670, 671.

306. *Id.* at 551, 685 S.E.2d at 673 (quoting VA. CODE ANN. § 18.2-456(1) (Repl. Vol. 2009 & Cum. Supp. 2010)).

purchases.<sup>307</sup> As the Court of Appeals of Virginia held in *Saponaro v. Commonwealth*, if the defendant made unauthorized purchases while in lawful possession of the credit card the defendant is not guilty of credit card fraud.<sup>308</sup> *Kovalaske v. Commonwealth*<sup>309</sup> offers a useful counterpoint to *Saponaro*. In *Kovalaske*, the defendant was entrusted with a credit card on two occasions for the limited purpose of making specific purchases.<sup>310</sup> The defendant later took the credit card from his employer's truck and purchased items for his own use.<sup>311</sup> The credit card was recovered from the defendant's person.<sup>312</sup> The Court of Appeals of Virginia distinguished *Saponaro*, noting that, in *Kovalaske*, the defendant "did not misuse his employer's credit card while it was in his lawful possession; appellant misused [his employer's] credit card while it was in his *wrongful possession*."<sup>313</sup>

#### F. *Drugs*

In *Herron v. Commonwealth*, the Court of Appeals of Virginia addressed both the sufficiency of the evidence to prove a violation of Code section 53.1-203(5) and Herron's claim that his conviction violated the Fifth Amendment.<sup>314</sup>

Police arrested Herron on an outstanding warrant for assault and battery, and he denied having any contraband on his person.<sup>315</sup> The search incident to arrest was interrupted by Herron's conduct.<sup>316</sup> Immediately prior to entry into the jail, the officer again asked him if he had any contraband on his person, and advised him that it was an additional offense to take an illegal substance into the jail.<sup>317</sup> Herron denied having any drugs.<sup>318</sup> A strip

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307. See VA. CODE ANN. § 18.2-195(b)(i) (Repl. Vol. 2009 & Supp. 2010) (defining credit card fraud as, among other things, obtaining goods or services by representing oneself as the holder of a credit card number *without consent* of the cardholder).

308. 51 Va. App. 149, 152–53, 655 S.E.2d 49, 50–51 (Ct. App. 2008).

309. 56 Va. App. 224, 692 S.E.2d 641 (Ct. App. 2010).

310. *Id.* at 227, 692 S.E.2d at 643.

311. *Id.* at 227–28, 692 S.E.2d at 643.

312. *Id.* at 228, 692 S.E.2d at 643–44.

313. *Id.* at 232–33, 692 S.E.2d at 646.

314. 55 Va. App. 691, 694, 688 S.E.2d 901, 902 (Ct. App. 2010).

315. *Id.*, 688 S.E.2d at 902–03.

316. *Id.* at 695, 688 S.E.2d at 903.

317. *Id.*

318. *Id.*

search at the jail revealed a baggy of cocaine between Herron's buttocks.<sup>319</sup>

The court of appeals rejected Herron's argument that the evidence failed to establish that he intended to bring drugs into the jail.<sup>320</sup> The court found that the statute does not require proof of intent, but rather is a strict liability statute.<sup>321</sup> Relying on authority from other jurisdictions, the court of appeals held that the only voluntary act required is entry into the jail knowing that one is carrying contraband.<sup>322</sup>

The court of appeals also rejected Herron's contention that the application of Code section 53.1-203(5) violated Herron's Fifth Amendment rights because "he was faced with the choice of either admitting to the criminal act of possessing cocaine or facing a further charge of possessing contraband inside a correctional facility."<sup>323</sup> The court noted that the "Fifth Amendment does not insulate a defendant from all difficult choices that are presented during the course of criminal proceedings."<sup>324</sup> The court concluded that Herron was not compelled to incriminate himself, but made the choice to not disclose the drugs he had on his person.<sup>325</sup> While he was undoubtedly presented with a dilemma, it was a dilemma of his own making, and thus no constitutional violation occurred.<sup>326</sup>

### G. *Escape*

The defendant in *Thomas v. Commonwealth* was charged with escape from custody on a felony charge.<sup>327</sup> He had been arrested on suspicion of dealing marijuana, but broke free from the officer's custody.<sup>328</sup> The key issue was whether he, in the words of the statute, had been taken into custody on a "charge of criminal of-

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319. *Id.*

320. *Id.* at 696, 701, 688 S.E.2d at 903, 906.

321. *Id.* at 698, 688 S.E.2d at 904-05.

322. *Id.* at 700-01, 688 S.E.2d at 905-06.

323. *Id.* at 701-02, 688 S.E.2d at 906.

324. *Id.* at 702, 688 S.E.2d at 906 (quoting *Doss v. Commonwealth*, 23 Va. App. 679, 687, 479 S.E.2d 92, 96-97 (Ct. App. 1996)).

325. *Id.* at 704, 688 S.E.2d at 907.

326. *Id.*

327. 56 Va. App. 1, 1, 690 S.E.2d 298, 298 (Ct. App. 2010).

328. *Id.* at 3-4, 690 S.E.2d at 299.

fense.”<sup>329</sup> A charge, the Court of Appeals of Virginia explained, is a “formal written complaint” or a “formal accusation of an offense.”<sup>330</sup> Thomas was arrested, but not “charged” as the statute contemplates.<sup>331</sup> Therefore, the court reversed his conviction.<sup>332</sup> Remarkably, the court invoked the ends of justice exception to the rule of procedural default to reach this outcome, noting that the record affirmatively showed that an element of the offense did not occur.<sup>333</sup>

### I. *Larceny*

Establishing the value of stolen items can be treacherous terrain for prosecutors. In *Baylor v. Commonwealth*, the defendant was investigated in a case of several stolen catalytic converters.<sup>334</sup> He challenged the evidence used by the prosecution to prove that the value of the stolen items exceeded \$200.<sup>335</sup> Several witnesses called by the prosecution testified that the replacement cost for the converters ranged from \$400 to \$2200 for each converter.<sup>336</sup> The Court of Appeals of Virginia first observed that “where an item has no market value, the actual value must be shown.”<sup>337</sup> In this instance, the parties were in agreement that there was no market for catalytic converters as auto parts.<sup>338</sup> Therefore, the prosecution was required to show actual value.<sup>339</sup> The court observed that establishing the replacement cost is not the same as establishing the actual value of the items at the time of the theft.<sup>340</sup> Furthermore, no evidence was presented about their

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329. *Id.* at 6, 690 S.E.2d at 300 (quoting VA. CODE ANN. § 18.2-479(B) (Repl. Vol. 2009)).

330. *Id.* (quoting *Hubbard v. Commonwealth*, 276 Va. 292, 296, 661 S.E.2d 464, 467 (2008)).

331. *Id.* at 7, 690 S.E.2d at 301.

332. *Id.*

333. *Id.* at 5, 690 S.E.2d at 300.

334. 55 Va. App. 82, 84, 683 S.E.2d 843, 844 (Ct. App. 2009).

335. *Id.* at 86, 683 S.E.2d at 845.

336. *Id.* at 88–89, 683 S.E.2d at 846.

337. *Id.* at 88, 683 S.E.2d at 845 (emphasis omitted) (quoting *DiMaio v. Commonwealth*, 46 Va. App. 755, 764, 621 S.E.2d 696, 701 (Ct. App. 2005)).

338. *Id.*, 683 S.E.2d at 845–46.

339. *Id.* (citing *Lund v. Commonwealth*, 217 Va. 688, 692, 232 S.E.2d 745, 748 (1977)).

340. *Id.* at 89, 683 S.E.2d at 846.

value as scrap.<sup>341</sup> The replacement value evidence, therefore, fell short of establishing the value of the items.<sup>342</sup>

The court cautioned, however, that replacement cost can be relevant in some situations. The court noted that for items that appreciate rather than depreciate, replacement cost may be relevant.<sup>343</sup> Moreover, for some items that are recent or of a particular character, replacement cost will be tantamount to actual value or fair market value.<sup>344</sup> But

where, as here, there is an absence of evidence linking replacement value to an accurate determination of actual or fair market value, mere evidence of replacement value alone is insufficient as a matter of law to support an inference by the fact finder that the value of stolen property necessarily exceeds the statutory threshold.<sup>345</sup>

The supreme court affirmed a conviction for grand larceny in *Carter v. Commonwealth*, where the defendant and his confederate, Browning, attempted to obtain a refund from a home improvement store for buckets of paint that neither had purchased.<sup>346</sup>

Carter entered the store and put several buckets of paint in a shopping cart.<sup>347</sup> He and Browning took the paint to the return desk and sought a refund for the listed price of the paint.<sup>348</sup> The store employee did not give a refund, but called the loss prevention officer.<sup>349</sup> The supreme court rejected Carter's claim that the evidence was insufficient to show that he intended to steal the paint.<sup>350</sup> The court held that conduct of a customer in moving merchandise, "which makes the customer's possession [of the merchandise] clearly adverse to the store," constitutes a "trespassory taking."<sup>351</sup> One may take another's property by trespass even though he has not removed it from the premises or presence of

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341. *Id.* at 88 n.5, 683 S.E.2d at 846 n.5.

342. *Id.* at 90, 683 S.E.2d at 847.

343. *Id.* at 89–90, 683 S.E.2d at 846.

344. *Id.* at 90, 683 S.E.2d at 846.

345. *Id.*, 683 S.E.2d at 846–47.

346. 280 Va. 100, 103, 694 S.E.2d 590, 592 (2010).

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* at 108, 694 S.E.2d at 595.

351. *Id.* at 106, 694 S.E.2d at 594 (citing *Freeman v. Meijer, Inc.*, 291 N.W.2d 87, 89 (Mich. Ct. App. 1980)).

the owner.<sup>352</sup> The court held that at the moment ownership of the paint was asserted “there was evidence that Carter and his accomplice had taken the store’s paint just the same as if they had walked out of the store with that paint,” and concluded that the “conduct establishe[d] sufficient possession to constitute larceny.”<sup>353</sup>

### J. *Forcible Sodomy*

In *Sanford v. Commonwealth*, the Court of Appeals of Virginia affirmed the defendant’s conviction for forcible (oral) sodomy through the use of the victim’s mental incapacity, pursuant to Code section 18.2-67.1(A)(2).<sup>354</sup> The defendant did not deny that an act of sodomy occurred, but challenged the proof of the mental incapacity of the sixteen-year-old victim.<sup>355</sup> The court noted that “it is the confluence of IQ (or mental age) *and* adaptive skills that are relevant to the establishment of mental incapacity.”<sup>356</sup> In this case, the victim, who had an IQ of forty-six and lacked the ability to assess cause and effect relationships was closer to severe than mild mental retardation.<sup>357</sup> She could only perform basic hygiene tasks, if reminded, and needed constant adult supervision.<sup>358</sup> She had had no education as to “oral sex.”<sup>359</sup> The court of appeals concluded the evidence was sufficient to prove that she lacked the mental capacity to understand “the nature or consequences” of the act of sodomy.<sup>360</sup>

### K. *Receiving Stolen Property*

The defendant in *Whitehead v. Commonwealth* shared an apartment with the father of her child.<sup>361</sup> She told the police she

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352. *Id.* (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 19.2(i), at 979 (5th ed. 2010)).

353. *Id.* at 107, 694 S.E.2d at 595 (citing *Welch v. Commonwealth*, 15 Va. App. 518, 524, 425 S.E.2d 101, 105 (Ct. App. 1992)).

354. 54 Va. App. 357, 358–59, 678 S.E.2d 842, 843 (Ct. App. 2009).

355. *Id.* at 362, 678 S.E.2d at 844–45.

356. *Id.* at 364, 678 S.E.2d at 845.

357. *Id.* at 360–61, 678 S.E.2d at 843–44.

358. *Id.* at 361, 678 S.E.2d at 844.

359. *Id.*

360. *Id.* at 365, 678 S.E.2d at 846 (quoting VA. CODE ANN. § 18.2-67.10(3) (Repl. Vol. 2009 & Supp. 2010) (defining “mental incapacity”)).

361. 278 Va. 105, 108–09, 684 S.E.2d 577, 578–79 (2009).

knew this man was stealing and using the proceeds from the thefts to support her and her child.<sup>362</sup> The defendant was convicted of receiving stolen property on the theory of constructive receipt because she benefitted from the proceeds of the theft.<sup>363</sup> The Supreme Court of Virginia agreed with the defendant that the evidence was insufficient to establish a “receipt” of stolen property.<sup>364</sup> The court observed that it had never accepted the theory of constructive possession.<sup>365</sup> The defendant did not “receive[ ]” the property merely because she benefitted from the proceeds of its sale.”<sup>366</sup>

#### L. *Involuntary Manslaughter*

The supreme court addressed the issue of proximate cause for involuntary manslaughter in *Brown v. Commonwealth*.<sup>367</sup> A police officer signaled Brown to stop his vehicle, and Brown initially complied with the direction.<sup>368</sup> However, when the officer approached the driver’s window, Brown drove away at a very high rate of speed, passing within five feet of the officer.<sup>369</sup> Another officer pursued Brown’s vehicle, which was traveling far in excess of the speed limit.<sup>370</sup> When this second officer swerved to avoid colliding with a vehicle not involved in the chase, the officer struck yet another uninvolved car, killing the driver.<sup>371</sup>

On appeal, Brown complained that his actions did not directly cause the death, and argued that the victim died solely because the officer decided “to continue the high speed chase into a populated area.”<sup>372</sup> In addressing Brown’s claim, the supreme court reaffirmed that “[a] proximate cause is ‘an act or omission that, in natural and continuous sequence unbroken by a superseding cause, produces a particular event and without which that event

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362. *Id.* at 109, 684 S.E.2d at 578.

363. *Id.* at 112, 684 S.E.2d at 580.

364. *Id.* at 113, 684 S.E.2d at 581.

365. *Id.*

366. *Id.*

367. 278 Va. 523, 526, 685 S.E.2d 43, 44 (2009).

368. *Id.*

369. *Id.*, 685 S.E.2d at 44–45.

370. *Id.*, 685 S.E.2d at 45.

371. *Id.* at 527, 685 S.E.2d at 45.

372. *Id.*

would not have occurred.”<sup>373</sup> Because an incident can have more than one proximate cause, each actor whose conduct is a proximate cause is criminally liable “unless the causal chain is broken by a superseding act that becomes the sole cause of the death.”<sup>374</sup> Here, the officer who struck the victim acted in direct response to Brown’s decision to flee from the first officer.<sup>375</sup> Brown continued to drive dangerously in excess of the speed limit, knowing that the police were chasing him.<sup>376</sup> The court concluded that his actions constituted a proximate cause of the death and affirmed his involuntary manslaughter conviction.<sup>377</sup>

### M. *Obscene Telephone Call*

After an altercation with his girlfriend, the defendant in *Lofgren v. Commonwealth* called her over the telephone and, rather than whisper sweet nothings to win her back, adopted a different strategy.<sup>378</sup> He told her, “I can’t believe you f\_\_ing c\_\_ . . . You’re a fucking bitch . . . I hate you . . . I can’t believe you’re doing this. [W]e had plans.”<sup>379</sup> For good measure, he left an additional message again calling her a “f\_\_ing c\_\_” and saying “you f\_\_ing suck.”<sup>380</sup> For these outbursts, the defendant was convicted of using, over the telephone, “obscene, vulgar, profane, lewd, lascivious language” with the intent to harass or intimidate.<sup>381</sup> The court reversed the conviction.<sup>382</sup> To be convicted under section 18.2-427, the speech must be “obscene.”<sup>383</sup> Although the words the defendant used “can have sexual connotations when utilized in certain contexts,” the Court of Appeals of Virginia concluded that he did not use them so as to “appeal to the prurient interest in sex,” nor did he go “substantially beyond the customary limits of candor in

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373. *Id.* at 529, 685 S.E.2d at 46 (quoting *Williams v. Joynes*, 278 Va. 57, 62, 677 S.E.2d 261, 264 (2009)).

374. *Id.*

375. *Id.* at 530, 685 S.E.2d at 47.

376. *Id.*

377. *Id.* at 530–31, 685 S.E.2d at 47–48.

378. 55 Va. App. 116, 684 S.E.2d 223 (Ct. App. 2009).

379. *Id.* at 118, 684 S.E.2d at 224.

380. *Id.*

381. *Id.* at 118, 684 S.E.2d at 225 (quoting VA. CODE ANN. § 18.2-427 (Repl. Vol. 2009)).

382. *Id.* at 117, 684 S.E.2d at 225.

383. *See Perkins v. Commonwealth*, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (Ct. App. 1991) (limiting the reach of Code section 18.2-427 to “obscene” speech).

description or representation of such matters.”<sup>384</sup> Instead, he “used the offensive words as vulgar curse or swear words to communicate his frustration, anger, contempt or disgust with the victim after the incident.”<sup>385</sup> Because the speech was not obscene, the defendant could not be convicted under the statute.<sup>386</sup> Cases such as *Lofgren* illustrate the difficulty of obtaining a conviction under this statute.

#### N. *Obstruction of Justice*

The Court of Appeals of Virginia affirmed the conviction for obstruction of justice pursuant to Code section 18.2-460(B) in *Testa v. Commonwealth*.<sup>387</sup> When police officers arrived to investigate a complaint of domestic violence between Testa and his girlfriend at the home Testa shared with his stepfather, the girlfriend’s father met the officers and told them that Testa was armed and dangerous.<sup>388</sup> The officers were aware that Testa had recently assaulted other sheriff’s deputies.<sup>389</sup>

Testa’s stepfather admitted the police into the home, where Testa had locked himself into a bedroom.<sup>390</sup> One of the officers asked Testa to come out of the room so he could hear Testa’s side of the story.<sup>391</sup> He responded to the officer with a vile suggestion and then said that he would pick the officers off “one by one.”<sup>392</sup> Testa added that if he was going back to jail he was going to bring them down with him.<sup>393</sup> He also made threatening comments concerning the girlfriend and her family.<sup>394</sup>

The court of appeals held that under the plain wording of Code section 18.2-460(B), the crime of obstruction of justice involves “merely an *attempt* to intimidate or impede the officer with either

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384. *Lofgren*, 55 Va. App. at 121, 684 S.E.2d at 226 (quoting obscenity definition found in VA. CODE ANN. § 18.2-372 (Supp. 2010)).

385. *Id.*

386. *Id.* at 122, 684 S.E.2d at 226.

387. 55 Va. App. 275, 285, 685 S.E.2d 213, 217–18 (Ct. App. 2009).

388. *Id.* at 279, 685 S.E.2d at 215.

389. *Id.* at 279–80, 685 S.E.2d at 215.

390. *Id.* at 280, 685 S.E.2d at 215.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

threats or force.”<sup>395</sup> The court concluded that there was ample evidence that Testa attempted to intimidate the officers with threats of violence.<sup>396</sup>

### O. *Reckless Driving*

In *Chibikom v. Commonwealth*, after parsing the elements of improper driving<sup>397</sup> and reckless driving by speed,<sup>398</sup> the court of appeals concluded that improper driving is not a lesser-included offense of reckless driving by speed.<sup>399</sup> Thus, the court of appeals concluded that the trial court did not err in refusing the defendant’s tendered instruction, which would have allowed the jury to convict the defendant charged with the reckless offense of improper driving.<sup>400</sup>

The court of appeals held that “[e]very commission of reckless driving by speed does not also constitute a commission of improper driving. In addition, improper driving is not composed entirely of the elements of reckless driving by speed.”<sup>401</sup> The court noted that the improper driving statute contained a culpability requirement that the strict liability reckless driving by speed statute did not.<sup>402</sup> The court further noted that, pursuant to the improper driving statute, only the prosecutor, or a court, as opposed to a jury, may reduce a reckless driving charge to improper driving.<sup>403</sup>

### P. *Robbery*

In *Williams v. Commonwealth*, the court concluded that what began as a larceny escalated into a robbery.<sup>404</sup> A group of young men were skateboarding at an abandoned dealership when they were approached by three men, including the defendant.<sup>405</sup> Fol-

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395. *Id.* at 285, 685 S.E.2d at 218.

396. *Id.*

397. *See* VA. CODE ANN. § 46.2-869 (Repl. Vol. 2010).

398. *See* § 46.2-862 (Repl. Vol. 2010).

399. 54 Va. App. 422, 426, 680 S.E.2d 295, 297 (Ct. App. 2009).

400. *Id.* at 424–25, 680 S.E.2d at 296.

401. *Id.* at 426, 680 S.E.2d at 297.

402. *Id.*

403. *Id.* at 427, 680 S.E.2d at 297.

404. 278 Va. 633, 637, 685 S.E.2d 178, 180 (2009).

405. *Id.* at 635, 685 S.E.2d at 179.

lowing an exchange of taunts, one of the skateboarders noticed that his cellular phone, which had been sitting on a ledge, was missing.<sup>406</sup> He demanded that the defendant return the phone, but the defendant refused.<sup>407</sup> The defendant produced a black, flat object from his pocket that the victim thought might be a gun.<sup>408</sup> The defendant asked if they “had a problem.”<sup>409</sup> The victim abandoned his attempt to recover the telephone.<sup>410</sup> The Supreme Court of Virginia sustained the defendant’s conviction for robbery.<sup>411</sup> The court explained that when he initially took the phone, the defendant committed a larceny.<sup>412</sup> Larceny is a continuing offense.<sup>413</sup> When the victim asked for the return of his property, and the defendant responded by “introduc[ing] the threat of force or violence by reaching into his waistband, showing a ‘flat, black object’ and asking if Fox and Brown ‘had a problem,’ his offense matured into robbery.”<sup>414</sup>

#### Q. *Trespass*

The facts in *Baker v. Commonwealth* established that the defendant was present on “posted” property.<sup>415</sup> He challenged the sufficiency of the evidence, contending that the prosecution had failed to prove that the signs had been posted by “the owner, lessee, custodian or other person lawfully in charge of the property.”<sup>416</sup> The trespass statute provides in relevant part that

If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons or by the holder of any easement or other right-of-way authorized by the instrument creating such interest to post such signs on such lands, structures, premises or portion or area

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406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at 640, 685 S.E.2d at 182.

412. *Id.* at 638, 685 S.E.2d at 181.

413. *Id.* (citing *Commonwealth v. Jones*, 267 Va. 284, 287, 591 S.E.2d 68, 70 (2009)).

414. *Id.* at 639, 685 S.E.2d at 181.

415. 278 Va. 656, 659, 685 S.E.2d 661, 663 (2009).

416. *Id.* at 661–62, 685 S.E.2d at 664.

thereof at a place or places where it or they may be reasonably seen, . . . he shall be guilty of a Class 1 misdemeanor.<sup>417</sup>

Construing this language, the Supreme Court of Virginia concluded that

the plain language of Code § 18.2-119 requires proof, as an element of the crime of trespass, that oral or written notice of the proscription against entry be given or a “no trespassing” sign be posted by the owner, lessee, custodian, or other person lawfully in charge of the property, or by the holder of an easement or other right-of-way who was authorized to post such a sign by the instrument creating that person’s interest in the property.<sup>418</sup>

Because the prosecution failed to present any evidence that the signs on the property were posted by one of the persons enumerated in the statute, the court dismissed the conviction.<sup>419</sup>

## VII. LEGISLATIVE CHANGES

Due to the difficult budget situation, legislative changes were limited this year.

The most significant legislative changes came in a special session called in response to the United States Supreme Court’s decision in *Melendez-Diaz v. Massachusetts*.<sup>420</sup> The General Assembly enacted a new “notice and demand” statute<sup>421</sup> along the lines of what the *Melendez-Diaz* Court signaled would be acceptable under the Confrontation Clause.<sup>422</sup>

The General Assembly resurrected the anti-spam statute, which had been invalidated on First Amendment grounds in *Jaynes v. Commonwealth*.<sup>423</sup> The new statute applies only to commercial electronic mail, rather than to all electronic mail.<sup>424</sup>

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417. VA. CODE ANN. § 18.2-119 (Repl. Vol. 2009 & Supp. 2010) (emphasis added).

418. *Baker*, 278 Va. at 662, 685 S.E.2d at 664.

419. *Id.* at 663, 685 S.E.2d at 665.

420. 557 U.S. \_\_\_, 129 S. Ct. 2527 (2009) (holding that certificates of analysis are testimonial statements covered by the Sixth Amendment’s Confrontation Clause).

421. Act of Aug. 21, 2009, ch. 1, 2010 Va. Acts \_\_\_ (codified as amended in scattered sections of VA. CODE ANN.).

422. *Melendez-Diaz*, 557 U.S. at \_\_\_, 129 S. Ct. at 2541.

423. See 276 Va. 443, 464, 666 S.E.2d 303, 314 (2008).

424. Act of Apr. 11, 2010, ch. 489, 2010 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 18.2-152.2, -152.3:1 (Supp. 2010)).

Any person who is authorized to possess a firearm is now expressly exempted from the prohibition on concealed weapons, provided that it is a handgun “possessed while in a personal, private motor vehicle or vessel and such handgun is secured in a container or compartment in the vehicle or vessel.”<sup>425</sup> This statutory change overturns the result in *Leith v. Commonwealth*.<sup>426</sup> The exception applies only to the prohibition on carrying a concealed weapon found in Code section 18.2-308.<sup>427</sup> It does not apply to other prohibitions on firearms, such as possessing a firearm with the intent to distribute drugs.<sup>428</sup>

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425. VA. CODE ANN. § 18.2-308(A), -308(B)(10) (Supp. 2010).

426. *See* 17 Va. App. 620, 621, 440 S.E.2d 152, 153 (Ct. App. 1994) (upholding conviction for possessing a concealed weapon when weapon was located in a locked console inside the vehicle).

427. *See* § 18.2-308(B) (Supp. 2010).

428. *Id.* § 18.2-308.4 (Repl. Vol. 2009 & Supp. 2010).

