

## CRIMINAL LAW AND PROCEDURE

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### I. INTRODUCTION

This article aims to give the criminal law practitioner a succinct review of significant cases regarding criminal law and procedure decided by the Supreme Court of Virginia and the Court of Appeals of Virginia during the past year. The authors have focused their discussion of the cases on cogent points found in the holdings. The article also briefly summarizes recent legislative enactments pertaining to criminal law.

### II. CRIMINAL PROCEDURE

#### A. *Trial*

##### 1. Cross-Examination

In *Cortez-Hernandez v. Commonwealth*, the defendant failed to proffer the questions—and the expected answers—he would have asked a prosecution witness on requested re-cross-examination.<sup>1</sup> This failure defeated his claim that the trial court had erred in not allowing him to re-cross-examine the witness after the Commonwealth elicited new information on its re-direct-examination.<sup>2</sup> The Court of Appeals of Virginia assumed the trial court erred in

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1. 58 Va. App. 66, 75, 706 S.E.2d 893, 898 *aff'd en banc*, 59 Va. App. 37, 716 S.E.2d 484 (2011).

2. *Id.*

prohibiting the defense from conducting re-cross-examination, but it could not determine whether the error was reversible because there had been no proffer nor a showing that the trial court had not allowed a proffer.<sup>3</sup> The court further held that the defendant had not preserved for appeal any argument that his Sixth Amendment right to confrontation had been violated.<sup>4</sup>

## 2. Insanity Defense for Juvenile

A juvenile has no right to assert an insanity defense in a delinquency proceeding.<sup>5</sup> However, a juvenile fourteen years of age or older, who has been charged with an offense that would be punished by incarceration in a state correctional facility if committed by an adult, may elect to have his case transferred from the juvenile court to the circuit court for trial as an adult.<sup>6</sup> The juvenile then would have a statutory right to an insanity defense.<sup>7</sup>

In *D.L.G. v. Commonwealth*, the fifteen-year-old defendant chose to have his case heard in the juvenile court, which found him competent to stand trial, adjudicated him delinquent, and committed him to the custody of the Department of Juvenile Justice.<sup>8</sup> The defendant noted a de novo appeal to the circuit court and then requested a psychiatric evaluation to determine his sanity at the time of the offense, asserting that he had a constitutional right to the exam in the circuit court.<sup>9</sup> The trial court denied his motion.<sup>10</sup>

On appeal to the Court of Appeals of Virginia, the defendant contended that the circuit court's ruling violated his equal protec-

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3. *Id.* at 77–79, 706 S.E.2d at 899–900. The court of appeals also noted the defendant had not re-called the witness during his own case-in-chief. *Id.* at 79, 706 S.E.2d at 900.

4. *Id.* The dissent believed that the defendant preserved his Sixth Amendment claim and that the trial court's error, in limiting the defendant's right of cross-examination, was not harmless. *Id.* at 86–88, 706 S.E.2d at 903–05 (Haley, J., dissenting).

5. *See Commonwealth v. Chatman*, 260 Va. 562, 564–65, 538 S.E.2d 304, 304–05 (2000).

6. *See* VA. CODE ANN. §§ 16.1-270, -272(A) (Repl. Vol. 2010).

7. *See* VA. CODE ANN. § 19.2-168 (Repl. Vol. 2008).

8. 60 Va. App. 77, 79–80, 724 S.E.2d 208, 209–10 (2012), *petition for appeal filed*, No. 120884 (Va. May 25, 2012). The defendant admitted he had poured bleach into his mother's tea and told the investigating police officer he had been "hearing voices and feeling homicidal." *Id.* at 79, 724 S.E.2d at 209.

9. *Id.* at 80, 724 S.E.2d at 210.

10. *Id.*

tion rights under the Fourteenth Amendment.<sup>11</sup> The court of appeals disagreed, noting that “age is not a suspect classification under the Equal Protection Clause” and that there is “no fundamental right” in the Constitution to plead guilty by reason of insanity.<sup>12</sup> The court held that because the defendant chose not to be tried initially as an adult in circuit court, thereby availing himself of an insanity defense, his equal protection rights had not been violated.<sup>13</sup>

### 3. Juror Related to Witness

In *Mayfield v. Commonwealth*, the Court of Appeals of Virginia declined to adopt the defendant’s suggested rule that a prospective juror who is related to a witness is per se disqualified from serving as a juror.<sup>14</sup> During voir dire, a member of Mayfield’s jury panel stated that one of the Commonwealth’s witnesses was her nephew and another witness was the daughter of her cousin.<sup>15</sup> The juror said her family relationship would not be “a problem in deciding the case,” as she had not talked with the individuals about their knowledge of the crime, could disregard her relationship with them, and could evaluate their testimony impartially without regard to any preconceived thoughts about their truthfulness.<sup>16</sup> The trial court denied the defendant’s motion to strike the juror for cause, and defense counsel subsequently used a peremptory strike to remove her.<sup>17</sup>

On appeal to the Court of Appeals of Virginia, Mayfield argued the juror should have been struck for cause, as her family relationship with the witnesses compromised her ability to be impartial and adversely affected public confidence in the judicial system.<sup>18</sup> The court of appeals held the juror’s status, by itself, did

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11. *Id.* at 81, 724 S.E.2d at 210.

12. *Id.* at 83, 724 S.E.2d at 212.

13. *Id.*, 724 S.E.2d at 211–12.

14. 59 Va. App. 839, 845 & n.2, 722 S.E.2d 689, 692, 693 n.2 (2012). The court of appeals noted that while other states have adopted a similar per se rule, the Supreme Court of Virginia has “expressly rejected” such a rule. *Id.* at 845 n.2, 722 S.E.2d at 693 n.2 (citing *Townsend v. Commonwealth*, 270 Va. 325, 331, 619 S.E.2d 71, 74–75 (2005); *Barrett v. Commonwealth*, 262 Va. 823, 826, 553 S.E.2d 731, 733 (2001)).

15. *Id.* at 842, 722 S.E.2d at 691.

16. *Id.* at 842–43, 722 S.E.2d at 691.

17. *Id.* at 843, 722 S.E.2d at 692.

18. *Id.* at 847, 722 S.E.2d at 693–94.

not warrant removing her for cause.<sup>19</sup> However, the court did not address the public confidence argument because Mayfield had not made that argument in the trial court.<sup>20</sup> Mayfield's argument at trial—that the juror was biased—was not sufficient to preserve the separate public confidence argument.<sup>21</sup>

#### 4. Nolle Prosequi

In *Duggins v. Commonwealth*, the Court of Appeals of Virginia held a defendant may not challenge at trial the ruling of a court in an earlier trial that permitted the Commonwealth to nolle prosequi identical indictments.<sup>22</sup> In Duggins's first trial, the Commonwealth moved to nolle prosequi charges after the trial court denied the Commonwealth's motion for a continuance to secure an essential witness.<sup>23</sup> On appeal following his second trial, Duggins argued the court lacked authority to try him on the new indictments because the court erroneously had granted the Commonwealth's nolle prosequi motion.<sup>24</sup> The court of appeals held that a nolle prosequi releases a defendant from liability on an indictment but does not acquit him of the charge.<sup>25</sup> Thus, a nolle prosequi cannot be reconsidered or collaterally attacked after it becomes final.<sup>26</sup>

#### 5. Unavailable Witness

The issue of witness unavailability was addressed in *Turner v. Commonwealth*.<sup>27</sup> Turner was charged with aggravated malicious wounding and use of a firearm during an aggravated malicious wounding, stemming from an altercation involving several high school football players.<sup>28</sup> One of the victim's friends, Poindexter,

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19. *Id.* at 848, 722 S.E.2d at 694.

20. *Id.* at 847, 722 S.E.2d at 694.

21. *Id.*, 722 S.E.2d at 693.

22. 59 Va. App. 785, 794, 722 S.E.2d 663, 667 (2012), *petition for app. filed*, No. 120682 (Va. Apr. 23, 2012)).

23. *Id.* at 788–89, 722 S.E.2d at 665.

24. *Id.* at 789–90, 722 S.E.2d at 665.

25. *Id.* at 791–92, 722 S.E.2d at 666 (quoting *Miller v. Commonwealth*, 217 Va. 929, 935, 234 S.E.2d 269, 273 (1977); *Lindsay v. Commonwealth*, 4 Va. (2 Va. Cas.) 345, 347 (1823)).

26. *Id.* at 792–93, 722 S.E.2d at 667.

27. 284 Va. 201, 201, 726 S.E.2d 325, 327 (2012).

28. *Id.*

identified Turner at the preliminary hearing as the person who shot the victim but then testified at trial that he did not see anyone with a gun and did not see Turner in the area on the night of the offense.<sup>29</sup> The prosecutor unsuccessfully attempted to refresh Poindexter's memory by having him review the preliminary hearing transcript.<sup>30</sup> After the trial court sustained the defendant's objection to admitting the transcript into evidence because it was not properly certified by the court reporter, the Commonwealth called as a witness the attorney who previously represented Turner at the preliminary hearing.<sup>31</sup> Over the defendant's objection, the attorney related the substance of Poindexter's preliminary hearing testimony.<sup>32</sup>

On appeal to the Court of Appeals of Virginia, Turner contended that the trial court erroneously admitted the attorney's testimony because Poindexter was not an unavailable witness, that the attorney had a continuing duty of loyalty to Turner even though he no longer represented him, that the attorney's testimony regarding Poindexter's testimony was inadmissible hearsay, and that the attorney had not independently recalled the testimony but instead had refreshed his memory by reviewing the inadmissible transcript.<sup>33</sup> In affirming the trial court's ruling, the court of appeals held that Poindexter was an unavailable witness even though he was present at trial because his lack of memory of the shooting made his testimony unavailable.<sup>34</sup> The court concluded that the testimony of Turner's former attorney was not an ethical violation because the information to which he testified became public at the preliminary hearing and did not concern any privileged communication from Turner.<sup>35</sup>

The Supreme Court of Virginia, however, reversed the judgment of the court of appeals, vacated Turner's convictions, and remanded the case for a new trial.<sup>36</sup> The supreme court held that the trial court abused its discretion in finding Poindexter to be an unavailable witness because the court failed to determine, as re-

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29. *Id.* at 204–05, 726 S.E.2d at 328–29.

30. *Id.*

31. *Id.* at 205, 726 S.E.2d at 329.

32. *Id.* at 205–06, 726 S.E.2d at 329.

33. *Turner v. Commonwealth*, 58 Va. App. 567, 578–79, 712 S.E.2d 28, 33–34 (2011).

34. *Id.* at 583–84, 712 S.E.2d at 36.

35. *Id.* at 590–91, 712 S.E.2d at 39–40.

36. *Turner*, 284 Va. at 209, 726 S.E.2d at 331.

quired by *Sapp v. Commonwealth*,<sup>37</sup> whether his claimed loss of memory was bona fide or merely an attempt to avoid testifying at Turner's trial.<sup>38</sup> The supreme court further held the error was not harmless because the "inconsistent testimony" of the other witness who said he saw Turner shoot the victim was "not overwhelming evidence of Turner's guilt" and because the testimony of Turner's former attorney, which was erroneously allowed because Poindexter was not unavailable, may have substantially influenced the verdict.<sup>39</sup>

## 6. Venue

Undercover police officers posing as children on the Internet to attract potential predators are not always located in the same jurisdiction as the predators with whom they communicate. In *Spiker v. Commonwealth*, a detective in the Louisa County Sheriff's Office chatted via a computer system with the defendant, who was located in Henrico County.<sup>40</sup> Charged with violating Virginia Code section 18.2-374.3, Spiker contended at trial and on appeal that venue was not proper in Louisa County because he committed the offense in Henrico County when he sent the electronic messages.<sup>41</sup> In a case of first impression, the Court of Appeals of Virginia held venue was proper in Louisa County because the offense was not complete until the messages were received by the undercover officer in Louisa.<sup>42</sup>

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37. 263 Va. 415, 427, 559 S.E.2d 645, 651 (2002).

38. *Turner*, 284 Va. at 208, 726 S.E.2d at 330–31. The supreme court noted the trial court questioned two other witnesses about their alleged inability to recall details of the offense, although the Commonwealth did not request that they be declared unavailable. *Id.* at 208 n.2, 726 S.E.2d at 331 n.2.

39. *Id.* at 209, 726 S.E.2d at 331. The majority opinion concluded it was unnecessary to address whether Turner's former attorney violated any rules of professional conduct, *id.*, but Justice Lemons issued a concurring opinion in which he stated the attorney had violated Rule 1.9 of the Virginia Rules of Professional Conduct because the information about which he testified was not "generally known" by the public at large, as contemplated by the language of Rule 1.9. *Id.* at 212–13, 726 S.E.2d at 333 (Lemons, J., concurring).

40. 58 Va. App. 466, 467–68, 711 S.E.2d 228, 228–29 (2011).

41. *Id.* at 468–69, 711 S.E.2d at 229.

42. *Id.* at 469, 471, 711 S.E.2d at 229–30. The general venue statute, Virginia Code section 19.2-244, applies to prosecutions under Virginia Code section 18.2-374.3 and requires that a defendant be tried where the offense occurred. *See id.* at 470, 711 S.E.2d at 229–30 (citations omitted). The Commonwealth's evidence must establish a "strong presumption" of where the offense occurred, but venue need not be proved beyond a reasonable doubt because it is not a substantive element of the crime. *See Cheng v. Commonwealth*, 240 Va. 26, 36, 393 S.E.2d 599, 604 (1990) (citations omitted); *Morris v.*

## 7. Withdrawal of Guilty Plea

The Court of Appeals of Virginia held in *Hubbard v. Commonwealth* that the trial court applied the wrong standard in denying Hubbard's motion to withdraw his guilty plea.<sup>43</sup> Hubbard pled guilty to the first-degree murder of his estranged wife but moved to withdraw his plea prior to sentencing.<sup>44</sup> As grounds for his motion, he stated that he had not acted with premeditation and that his attorneys had pressured him to plead guilty.<sup>45</sup> The trial court denied the motion because Hubbard had been represented by "experienced attorneys" and the guilty plea questionnaire showed that he had been "properly informed" about his plea.<sup>46</sup> The trial court surmised that Hubbard was simply unhappy with the punishment he faced.<sup>47</sup>

The court of appeals held that the appropriate standard for determining whether a defendant should be permitted to withdraw his guilty plea was set forth in *Parris v. Commonwealth* and reaffirmed in *Bottoms v. Commonwealth*.<sup>48</sup> Accordingly, in Hubbard's case, the trial court erred because Hubbard's defense was reasonable and not formal or dilatory.<sup>49</sup> Whether the proffered defense is reasonable is based not on the likelihood the factfinder would accept it but on whether it "is one that the law would recognize as such if the factfinder found credible the facts supporting it."<sup>50</sup>

In *Williams v. Commonwealth*, however, the defendant provided insufficient grounds to withdraw his guilty plea.<sup>51</sup> Williams entered an *Alford* plea<sup>52</sup> to a charge of abduction with intent to de-

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Commonwealth, 51 Va. App. 459, 469, 658 S.E.2d 708, 712–13 (2008) (citations omitted).

43. 60 Va. App. 200, 212, 725 S.E.2d 163, 169 (2012).

44. *Id.* at 203–04, 725 S.E.2d at 164–65.

45. *Id.* at 205, 725 S.E.2d at 165. Both of Hubbard's trial attorneys withdrew from the case after he filed his motion to withdraw his guilty plea. *Id.* at 204–05, 725 S.E.2d at 165 (footnote omitted).

46. *Id.* at 205, 725 S.E.2d at 165.

47. *Id.* at 206, 725 S.E.2d at 166.

48. *Id.* at 207, 212, 725 S.E.2d at 166, 169 (citing *Bottoms v. Commonwealth*, 281 Va. 23, 34, 704 S.E.2d 406, 412 (2011); *Parris v. Commonwealth*, 189 Va. 321, 325–26, 52 S.E.2d 872, 874 (1949)). The standard requires the defendant to show he has a reasonable defense and is making his motion in good faith, rather than as a dilatory tactic. *Id.* at 207–08, 725 S.E.2d at 166 (citation omitted).

49. *Id.* at 210, 725 S.E.2d at 168.

50. *Id.*, 725 S.E.2d at 167–68.

51. 59 Va. App. 238, 249–50, 717 S.E.2d 837, 842 (2011).

52. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (holding that a defendant may

file, understanding that he would receive an active prison sentence of fifteen years to be served concurrently with his sentence on an unrelated case.<sup>53</sup> Before he was sentenced, however, he moved to withdraw his plea, asserting that he had been distressed by the harsh sentence given in his other case and that the victim's testimony was not credible.<sup>54</sup> The Court of Appeals of Virginia held there was no merit to the defendant's claim—that he feared he might receive another life sentence—because he knew before entering his plea “exactly” what his sentence would be under the plea agreement.<sup>55</sup> The court also held that the defendant's challenge to the victim's credibility was not a reasonable defense.<sup>56</sup>

## B. Sentencing

### 1. Deferred Disposition

The Virginia appellate courts addressed several issues regarding the authority of trial courts in sentencing criminal defendants. The Supreme Court of Virginia held in *Burrell v. Commonwealth* that a sentencing order provision, which stated the defendant's charge would be reduced from attempted rape to misdemeanor assault and battery upon his successfully completing five years of probation, was void ab initio.<sup>57</sup> Burrell initially was sentenced pursuant to a plea agreement; he then moved to vacate the sentencing order after he was charged with violating his probation.<sup>58</sup> He argued that the sentencing order was void because the trial court had no authority to alter the conviction once twenty-one days had passed after entry of the final judgment.<sup>59</sup> The circuit court ruled that the sentencing order was not a final order,

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properly plead guilty without admitting to participation in the crime).

53. *Williams*, 59 Va. App. at 240–41, 717 S.E.2d at 838.

54. *Id.* at 244–45, 717 S.E.2d at 839–40.

55. *Id.* at 248, 717 S.E.2d at 841–42.

56. *Id.* at 249, 717 S.E.2d at 842.

57. 283 Va. 474, 477, 480, 722 S.E.2d 272, 273, 275 (2012).

58. *Id.* at 477, 722 S.E.2d at 273.

59. *Id.*

that Virginia Code section 19.2-303 conferred jurisdiction to reduce the offense, and that Burrell, having taken advantage of the plea agreement, could not later seek to overturn it.<sup>60</sup>

The supreme court disagreed with all three rulings. The court determined the order was final because it “adjudicated guilt, imposed a sentence, remanded Burrell to the custody of the sheriff, and required that Burrell register as a sex offender upon his release from incarceration.”<sup>61</sup> Importantly, the order did not state specifically that the court retained jurisdiction to reconsider the conviction or sentence.<sup>62</sup> The supreme court further held that section 19.2-303 permitted the trial court to modify only the unserved portion of a sentence and that the invited error doctrine did not apply because the entire sentencing order was void ab initio.<sup>63</sup> The court remanded the case for reconsideration of sentencing.<sup>64</sup>

In *Taylor v. Commonwealth*, the defendant asserted that the trial court, after having found the evidence sufficient to prove Taylor committed grand larceny, had inherent authority to reduce the charge to petit larceny, based on mitigating evidence Taylor presented at the sentencing hearing.<sup>65</sup> The Court of Appeals of Virginia held that the trial court had no constitutional, statutory, or inherent common law authority to acquit Taylor of grand larceny.<sup>66</sup> “[A] Virginia court cannot refuse to convict a guilty defendant merely because it questions the category of offense assigned by the legislature, considers the range of statutory punishment too harsh, or believes certain guilty offenders undeserving of a criminal conviction.”<sup>67</sup>

Similarly, in *Epps v. Commonwealth*, the Court of Appeals of Virginia rejected the defendant’s argument that the trial court had authority to suspend imposition of sentence upon certain conditions and to later vacate the defendant’s conviction if he sat-

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60. *Id.*

61. *Id.* at 478, 722 S.E.2d at 274.

62. *Id.*, 722 S.E.2d at 273–74 (quoting *In re Commonwealth of Va. Dep’t of Corr.*, 222 Va. 454, 464, 281 S.E.2d 857, 863 (1981)).

63. *Id.* at 479–81, 722 S.E.2d at 274–75.

64. *Id.* at 481, 722 S.E.2d at 275.

65. 58 Va. App. 435, 439, 710 S.E.2d 518, 520 (2011) (citation omitted).

66. *Id.*, 710 S.E.2d at 520.

67. *Id.* at 442, 710 S.E.2d at 521.

isfactorily complied with the conditions.<sup>68</sup> Epps pled guilty to possession of cocaine, but before he was sentenced, he was convicted of possession of marijuana, which made him ineligible for a deferred disposition as a first-time drug offender.<sup>69</sup> However, he asked the trial court to suspend imposition of sentence on the cocaine conviction under Virginia Code section 19.2-303.<sup>70</sup> The trial court declined to do so.<sup>71</sup>

On appeal, the Court of Appeals of Virginia held that nothing in section 19.2-303 authorized the relief Epps sought.<sup>72</sup> The court distinguished section 19.2-303 from other specific Virginia Code sections in which a defendant may avoid conviction upon compliance with certain conditions.<sup>73</sup> The court ruled that interpreting section 19.2-303 as Epps suggested would amount to “an act of judicial clemency,” which had not been permitted under the common law and was not authorized by statute.<sup>74</sup> The court also determined that the defendant’s reliance on *Hernandez v. Commonwealth* was misplaced because *Hernandez* did not answer “the question whether a court may defer judgment and continue a case with a promise of a particular disposition at a later date.”<sup>75</sup>

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68. 59 Va. App. 71, 74, 717 S.E.2d 151, 152 (2011).

69. *Id.* at 74–75 & nn.1 & 3, 717 S.E.2d at 152–53 & nn.1 & 3; see VA. CODE ANN. § 18.2-251 (Repl. Vol. 2009 & Cum. Supp. 2012).

70. *Epps*, 59 Va. App. at 75–76, 717 S.E.2d at 153 (footnote omitted). Virginia Code section 19.2-303 permits a trial court to suspend imposition of sentence after conviction in whole or in part and to “place the defendant on probation under such conditions as the court shall determine.” VA. CODE ANN. § 19.2-303 (Cum. Supp. 2012). If the defendant violates the conditions, the trial court may revoke the suspension and sentence the defendant to whatever term might have been imposed originally. *Id.* § 19.2-306(C) (Repl. Vol. 2008).

71. *Epps*, 59 Va. App. at 75–76, 717 S.E.2d at 153.

72. *Id.* at 81, 717 S.E.2d at 156.

73. *Id.* at 80–81, 717 S.E.2d at 155–56 (citing VA. CODE ANN. § 18.2-57.3 (Repl. Vol. 2009) (domestic assault and battery); *id.* § 18.2-251 (Cum. Supp. 2012) (applying to illegal drug possession); *id.* § 19.2-303.2 (Repl. Vol. 2008) (applying to misdemeanor property offenses)).

74. *Id.* at 83–84 & n.9, 717 S.E.2d at 157 & n.9 (quoting *Richardson v. Commonwealth*, 131 Va. 802, 809, 109 S.E. 460, 462 (1921)).

75. *Id.* at 82, 717 S.E.2d at 156 (quoting *Hernandez v. Commonwealth*, 281 Va. 222, 225, 707 S.E.2d 273, 274 (2011)) (internal quotation marks omitted). In *Hernandez*, the Supreme Court of Virginia held that a trial court had discretionary authority to continue a case on its docket for future disposition, subject to conditions ordered by the court. 281 Va. at 226, 707 S.E.2d at 275.

## 2. Mandatory Minimum Sentence

In *Hines v. Commonwealth*, the Court of Appeals of Virginia construed the meaning of a mandatory minimum sentence in connection with Virginia Code section 18.2-53.1, which proscribes the use or display of a firearm while committing or attempting to commit certain felonies.<sup>76</sup> The former version of the statute imposed a “*fixed*” prison term of three years for a first offense and five years for a subsequent offense, and it provided that the sentence could not be suspended in whole or in part.<sup>77</sup> The General Assembly amended the statute in 2004, fixing the sentence at a “mandatory minimum term” of three or five years.<sup>78</sup> Because section 18.2-53.1 does not contain a sentencing range or a class specification, which would set forth a maximum penalty for the offense, the issue in *Hines* was whether the trial court could impose a prison sentence in excess of three years.<sup>79</sup> The trial court sentenced Hines to ten years in prison, with seven years suspended.<sup>80</sup>

Noting that “[a] minimum sets a sentencing floor, not a ceiling,” the court of appeals posited that the absence of a stated maximum punishment meant a trial court could impose up to a life sentence for use of a firearm in the commission of a concomitant felony.<sup>81</sup> The court further observed, however, that under Virginia Code section 18.2-14, “the mandatory minimum is the maximum as well.”<sup>82</sup> After reviewing the legislative history of the applicable statutes, the panel majority concluded that the trial court erred in imposing a sentence of more than three years.<sup>83</sup> The

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76. 59 Va. App. 567, 570–71, 721 S.E.2d 792, 793 (2012).

77. *Id.* at 583, 721 S.E.2d at 799 (Kelsey, J. dissenting).

78. Act of April 12, 2004, ch. 461, 2004 Va. Acts 673 (codified as amended at VA. CODE ANN. § 18.2-53.1 (Repl. Vol. 2009 & Cum. Supp. 2012)). The legislature defined the phrase “mandatory minimum” as the “impos[ition of] the entire term of confinement, the full amount of the fine and the complete requirement of community service prescribed by law,” such that the punishment shall not be suspended in full or in part. Act of Apr. 12, 2004, ch. 461, 2004 Va. Acts 673, 674 (codified as amended at VA. CODE ANN. § 18.2-12.1 (Repl. Vol. 2009 & Cum. Supp. 2012)).

79. *Hines*, 59 Va. App. at 573, 721 S.E.2d at 794.

80. *Id.* at 571, 721 S.E.2d at 794 (footnote omitted).

81. *Id.* at 575–76, 721 S.E.2d at 796.

82. *Id.* at 575, 721 S.E.2d at 796. Virginia Code section 18.2-14 states that where the class of the offense is not specified, the offense “shall be punished according to the punishment prescribed in the section . . . defining the offense.” VA. CODE ANN. § 18.2-14 (Repl. Vol. 2009 & Cum. Supp. 2012).

83. *Hines*, 59 Va. App. at 576–80, 721 S.E.2d at 796–98. The court held the excess

dissent opined, however, that the plain language of section 18.2-53.1 set only a mandatory minimum sentence and, thus, the trial court had discretion to impose the maximum sentence it deemed appropriate.<sup>84</sup>

### 3. Revocation of Suspended Sentence

The Court of Appeals of Virginia held in *Downey v. Commonwealth* that Downey's uncorroborated statement to her probation officer that she had consumed alcohol was sufficient proof she had violated the terms of her suspended sentence.<sup>85</sup> Downey had argued "some slight corroboration" was needed because the probation revocation hearing was akin to a criminal trial in which the corpus delicti could not be established solely by her statement.<sup>86</sup> The court of appeals ruled, however, a revocation hearing was not a criminal prosecution in which "formal procedures and rules of evidence" applied.<sup>87</sup> A hearing at which a trial court considers whether to revoke a probationer's suspended sentence is not a trial to determine whether a defendant has committed a new criminal offense and, thus, the alleged violation "need not be proven beyond a reasonable doubt."<sup>88</sup>

## C. Appeal

### 1. Abatement Doctrine

In a case of first impression, *Bevel v. Commonwealth*, the Supreme Court of Virginia considered whether a criminal conviction should abate ab initio, or merely be dismissed, when the defendant dies while his case is pending on appeal.<sup>89</sup> Bevel was convicted of having sexual relations with his minor daughter, and he died while his petition for appeal was pending in the Court of Appeals

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sentence invalid and remanded the case with instructions to impose a three-year sentence. *Id.* at 580–81 & n.7, 721 S.E.2d at 798 & n.7.

84. *Id.* at 593, 721 S.E.2d at 804 (Kelsey, J., dissenting).

85. 59 Va. App. 13, 22, 716 S.E.2d 472, 476 (2011).

86. *Id.* at 17, 19, 716 S.E.2d at 474–75.

87. *Id.* at 20, 716 S.E.2d at 475 (quoting *Davis v. Commonwealth*, 12 Va. App. 81, 84, 402 S.E.2d 684, 686 (1991)) (internal quotation marks omitted).

88. *Id.* at 21, 716 S.E.2d at 476 (quoting *Slayton v. Commonwealth*, 185 Va. 357, 366, 38 S.E.2d 479, 483 (1946) (internal quotation marks omitted)).

89. 282 Va. 468, 470, 717 S.E.2d 789, 789 (2011).

of Virginia.<sup>90</sup> When Bevel's attorney moved to abate the conviction ab initio, the court of appeals remanded the case to the circuit court to determine whether good cause existed to abate.<sup>91</sup> At the subsequent hearing, the victim objected to the abatement, and the circuit court concluded the conviction should stand.<sup>92</sup> The court of appeals affirmed the circuit court's abatement ruling and dismissed the original merits appeal as moot.<sup>93</sup>

The Supreme Court of Virginia awarded appeals on both issues.<sup>94</sup> In its opinion, the supreme court first noted it had given prior abatement cases disparate treatment and the court then reviewed the history of the abatement doctrine.<sup>95</sup> The court concluded the legislature, not the judiciary, was the appropriate entity to determine the Commonwealth's abatement policy.<sup>96</sup> The supreme court vacated the opinion of the court of appeals that applied the abatement doctrine but affirmed the dismissal of the merits appeal as moot due to Bevel's death, based on the "specific facts and procedural posture" of the case.<sup>97</sup>

## 2. Assignment of Error

The Supreme Court of Virginia emphasized the importance of proper assignments of error in a petition for appeal in *Davis v. Commonwealth*.<sup>98</sup> Before the Court of Appeals of Virginia, Davis contended that the trial court had erred in accepting his guilty plea.<sup>99</sup> After the court of appeals denied his petition, he appealed

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90. *Id.* at 470–71, 717 S.E.2d at 790.

91. *Id.* at 471–72, 717 S.E.2d at 790.

92. *Id.* at 472, 717 S.E.2d at 791.

93. *Id.* at 473–74, 717 S.E.2d at 791–92.

94. *Id.* at 474, 717 S.E.2d at 792.

95. *Id.* at 474–78, 717 S.E.2d at 792–94 (citations omitted).

96. *Id.* at 479–80, 717 S.E.2d at 795. Such legislation was introduced in the Virginia General Assembly in 2012, but did not pass. See H. JOURNAL, House of Delegates of Va., Reg. Sess. \_\_\_ (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb1011>. House Bill 1011 provided that a defendant's criminal conviction would not abate if he died after he was convicted, but his appeal would be moot if he died while the appeal was pending. H.B. 1011, Va. Gen. Assembly (Reg. Sess. 2012).

97. *Bevel*, 282 Va. at 480–81, 717 S.E.2d at 795–96. The supreme court "expressly" did not address whether the death of a criminal defendant would always moot a conviction. *Id.* at 480, 717 S.E.2d at 795. If a conviction "could have a significant negative impact on a deceased defendant's estate or the rights of his heirs or another party," a substitute party could prosecute the appeal, as the English common law permitted. *Id.*, 717 S.E.2d at 796.

98. 282 Va. 339, 339, 717 S.E.2d 796, 796–97 (2011).

99. *Id.*, 717 S.E.2d at 796. Davis pled guilty to violation of Virginia Code section 18.2-

to the supreme court.<sup>100</sup> He assigned as error the ruling of the trial court, rather than the holding of the court of appeals, and the supreme court dismissed his appeal.<sup>101</sup> Noting that Rule 5:17(c)(1)(iii) of the Rules of the Supreme Court of Virginia provides that an assignment of error must “address a finding or ruling of a [t]ribunal from which an appeal is taken”<sup>102</sup> and that insufficient assignments of error required dismissal of the petition, the supreme court stated that sufficient assignments of error in a petition “is a mandatory procedural requirement.”<sup>103</sup> Consequently, “the failure to comply with this requirement deprives this Court of its active jurisdiction to consider the appeal.”<sup>104</sup>

### 3. Filing of Transcript

A change in the Rules of the Supreme Court of Virginia concerning motions to extend time for filing transcripts was at issue in *LaCava v. Commonwealth*.<sup>105</sup> Effective July 1, 2010, Rule 5A:8(a) allows a party ninety days from the entry of final judgment within which to file a motion to extend the sixty-day period within which transcripts pertinent to the appeal may be filed.<sup>106</sup> After LaCava was convicted of embezzlement, she filed her notice of appeal pro se and contacted the court reporter to order transcripts.<sup>107</sup> The court reporter inadvertently misinformed LaCava that the clerk of court would order and file the transcripts.<sup>108</sup> LaCava later obtained appellate counsel, who then learned the transcripts had not been filed.<sup>109</sup> On the eighty-eighth day after the final judgment had been entered, LaCava’s attorney filed a

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308.2(A), which prohibits possession of a firearm after having been convicted of a violent felony within the previous ten years. *Id.*

100. *Id.*

101. *Id.* at 339–40, 717 S.E.2d at 796–97.

102. *Id.* at 339, 717 S.E.2d at 796 (quoting VA. SUP. CT. R. pt. 5, R. 5:17 (Repl. Vol. 2012)).

103. *Id.*

104. *Id.*, 717 S.E.2d at 796–97 (citing *Smith v. Commonwealth*, 281 Va. 464, 467–68, 706 S.E.2d 889, 891–92 (2011); *Jay v. Commonwealth*, 275 Va. 510, 518–19, 659 S.E.2d 311, 315–16 (2008)).

105. 283 Va. 465, 467, 722 S.E.2d 838, 838 (2012).

106. *Id.* at 471, 722 S.E.2d at 840–41. The former version of Rule 5A:8(a) provided that a motion to extend the filing time had to be made within sixty days after entry of the final judgment. *Id.*, 722 S.E.2d at 841.

107. *Id.* at 467, 722 S.E.2d at 839.

108. *Id.* at 467–68, 722 S.E.2d at 839.

109. *Id.* at 468, 722 S.E.2d at 839.

motion in the Court of Appeals of Virginia to extend the time for filing the transcripts.<sup>110</sup> The court of appeals denied the motion because LaCava had not shown good cause as to why she had not requested the extension before the original sixty-day filing period had expired.<sup>111</sup> The court also denied LaCava's petition for appeal, based on the absence of the transcript.<sup>112</sup>

The Supreme Court of Virginia vacated and remanded the decision of the court of appeals.<sup>113</sup> The supreme court held that nothing in the "plain language of Rule 5A:8(a)" supported the interpretation the court of appeals had given to the rule.<sup>114</sup> The supreme court also determined LaCava had established good cause to extend the filing deadline and directed the court of appeals to consider her petition for appeal on its merits.<sup>115</sup>

In *Belew v. Commonwealth*, the Supreme Court of Virginia held that the Court of Appeals of Virginia erred in not considering a transcript, which was pertinent to issues raised by the defendant on appeal and which had not been timely filed pursuant to Rule 5A:8(a), but had been made a part of the appellate record under Virginia Code section 8.01-428(B) and Rule 5A:9.<sup>116</sup> The court reporter timely filed two of the transcripts pertinent to Belew's appeal but neglected to file the transcript of the actual trial because the circuit court's case management system showed the hearing scheduled for that day had been continued.<sup>117</sup> Belew did not discover the trial transcript had been omitted until after the sixty-day deadline for filing had passed.<sup>118</sup> After the court reporter filed the transcript, Belew asked the circuit court to make it part of the record, contending a clerical error had occurred and could be corrected under section 8.01-428(B).<sup>119</sup> The circuit court grant-

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110. *Id.*

111. *Id.* at 469, 722 S.E.2d at 839.

112. *Id.*, 722 S.E.2d at 839–40.

113. *Id.* at 472, 722 S.E.2d at 841.

114. *Id.* at 471, 722 S.E.2d at 840–41.

115. *Id.* at 472, 722 S.E.2d at 841.

116. 284 Va. 173, 181, 726 S.E.2d 257, 261 (2012).

117. *Id.* at 176, 726 S.E.2d at 258–59.

118. *Id.* at 176–77, 726 S.E.2d at 259.

119. *Id.* at 176, 726 S.E.2d at 259. Virginia Code section 8.01-428(B) permits a trial court to correct clerical mistakes in the record "arising from an oversight or from an inadvertent omission . . . at any time on its own initiative or upon the motion of any party" before an appeal is docketed in the appellate court. VA. CODE ANN. § 8.01-428(B) (Repl. Vol. 2007 & Cum. Supp. 2012). After the appeal is docketed, mistakes may be corrected with leave of the appellate court. *Id.*

ed Belew's motion and also ordered the transcript be sent to the court of appeals.<sup>120</sup> Subsequently, Belew filed her petition for appeal in the court of appeals which rejected the petition because the trial transcript had not been timely filed and could not be considered by the court.<sup>121</sup>

The supreme court, with three justices dissenting, reversed the ruling of the court of appeals, holding that the court reporter's failure to prepare and file the trial transcript was a clerical mistake, which the circuit court had authority to correct.<sup>122</sup> Thus, the circuit court also had authority under Rule 5A:9 to make the transcript a part of the appellate record.<sup>123</sup> The majority rejected the argument that Belew was required to request an extension of time from the court of appeals to file the transcript.<sup>124</sup>

#### 4. Use of Statement of Facts

In *Smith v. Commonwealth*, the Court of Appeals of Virginia held that a rebuttable presumption exists as to whether a statement of facts, prepared in lieu of a transcript in accordance with Rule 5A:8(c) of the Rules of the Supreme Court of Virginia, is binding upon the appellate court "as an accurate recitation of the incidents at trial."<sup>125</sup> Trial counsel prepared the statement of facts for Smith's appeal, in which he challenged the trial court's ruling that he had violated the terms of his suspended sentence, but the circuit court judge who certified the document was not the judge who had presided at trial.<sup>126</sup> Although properly a part of the appellate record, the statement of facts was not consistent with oth-

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120. *Belew*, 284 Va. at 176, 726 S.E.2d at 259.

121. *Id.* at 176-77, 726 S.E.2d at 259.

122. *Id.* at 181, 726 S.E.2d at 261. The dissent held that Virginia Code section 8.01-428(B) did not apply because Belew's "inattentiveness" and failure to ask for an extension of time to file the transcript under Rule 5A:8(a) were not clerical mistakes that could be remedied under the statute. *Id.* at 186, 726 S.E.2d at 264 (Powell, J., dissenting); see VA. SUP. CT. R. pt. 5A, R. 5A:8 (Repl. Vol. 2012) (granting a party ninety days from the entry of final judgment to file a motion to extend the sixty-day period for filing a transcript).

123. *Belew*, 284 Va. at 181, 726 S.E.2d at 261.

124. *Id.*

125. 59 Va. App. 710, 722, 722 S.E.2d 310, 315 (2012); see *New Bay Shore Corp. v. Lewis*, 193 Va. 400, 404, 69 S.E.2d 320, 322 (1952) (holding a trial transcript, certified by a trial judge, is presumed to be correct, and absent proof to the contrary, is binding on an appellate court).

126. *Smith*, 59 Va. App. at 715-16, 721, 722 S.E.2d at 312, 315.

er parts of the record.<sup>127</sup> The document incorrectly stated Smith had pled not guilty, while the trial court's order stated he had pled no contest; the document also made no reference to some of Smith's prior convictions—those admitted as evidence at the revocation hearing—but referred to other prior convictions that may not have been admitted as evidence.<sup>128</sup> Given these discrepancies, the court of appeals concluded that the statement of facts was inaccurate and thus not binding.<sup>129</sup> The court then held that Smith's no contest plea waived his claim on appeal.<sup>130</sup>

## 5. Preservation of Issues

In *Brandon v. Cox*, the litigant's failure to obtain a ruling from the trial court on a motion to reconsider waived her argument on appeal on the same grounds.<sup>131</sup> After the circuit court denied Brandon's request to obtain a security deposit from her former landlord, she moved the court to reconsider, but the court did not rule on the motion.<sup>132</sup> Brandon appealed to the Supreme Court of Virginia and filed a statement of facts, which contained little information about arguments made at trial or the court's ruling and which made no reference to the motion for reconsideration.<sup>133</sup> The supreme court held that, because the record did not show the trial court knew of the motion to reconsider or had an opportunity to rule on it, Brandon had not properly preserved her argument on appeal.<sup>134</sup> The dissent, however, stated the court should have applied the ends of justice exception to Rule 5:25 of the Rules of the Supreme Court of Virginia, even though Brandon had not asked the court to do so, because Brandon had experienced a "grave injustice."<sup>135</sup>

In *Dickerson v. Commonwealth*, the Court of Appeals of Virginia held that Dickerson's closing argument in his bench trial, dur-

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127. *Id.* at 717, 719, 722 S.E.2d at 313–14.

128. *Id.* at 717, 722 S.E.2d at 313.

129. *Id.* at 722, 722 S.E.2d at 315.

130. *Id.* at 724, 722 S.E.2d at 316.

131. 284 Va. 251, 256–57, 726 S.E.2d 298, 301 (2012). Although the case concerns a civil matter, the procedural point addressed is one of first impression and is equally applicable to criminal cases. *Id.* at 256, 726 S.E.2d at 301.

132. *Id.* at 254, 726 S.E.2d at 299–300.

133. *Id.*, 726 S.E.2d at 300.

134. *Id.* at 256–57, 726 S.E.2d at 301.

135. *Id.* at 257–58 & n.2, 726 S.E.2d at 302 & n.2 (Mims, J., dissenting).

ing which he asked the judge to believe his testimony over the police officer's testimony, did not preserve his claim on appeal that the evidence was legally insufficient to sustain his conviction for possession of cocaine.<sup>136</sup> "[W]hen the accused elects to forgo a motion to strike and proceed directly to closing argument, it is incumbent on him to make the trial court aware that he is challenging something other than the veracity of the evidence that supports the Commonwealth's theory."<sup>137</sup>

In *Flanagan v. Commonwealth*, the Court of Appeals of Virginia addressed the effect of a mistrial on preserving issues for appeal.<sup>138</sup> Flanagan was convicted of possessing or manufacturing explosive materials in violation of Virginia Code section 18.2-85.<sup>139</sup> His first trial ended in a mistrial, and he was retried six months later.<sup>140</sup> Before his first trial, he moved to dismiss the charge on the basis that section 18.2-85 was void for vagueness, but he did not renew his motion before the second trial.<sup>141</sup> When Flanagan raised the constitutionality of the statute on appeal, the court of appeals held that he had not preserved the issue because the trial court's ruling in the case that ended in a mistrial did not carry over automatically to the later retrial.<sup>142</sup> Accordingly, Flanagan was "required to renew his motion[] with specificity in order to preserve the record."<sup>143</sup> The court declined to apply either the good cause or ends of justice exception to Rule 5A:18.<sup>144</sup> The court of appeals further determined that Flanagan's motion to set aside the verdict had not preserved the issue because he filed his motion more than twenty-one days after the trial court entered the final order.<sup>145</sup>

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136. 58 Va. App. 351, 358–59, 709 S.E.2d 717, 720 (2011). Dickerson testified he had not possessed cocaine, while the police officer testified he had discovered cocaine in Dickerson's pocket during a search incident to his arrest for public intoxication. *Id.* at 355, 709 S.E.2d at 718–19.

137. *Id.* at 357–58, 709 S.E.2d at 720.

138. 58 Va. App. 681, 692–94, 714 S.E.2d 212, 217–18 (2011) (citation omitted).

139. *Id.* at 688, 714 S.E.2d at 215.

140. *Id.* at 693, 714 S.E.2d at 217.

141. *Id.*

142. *Id.* at 692–93, 714 S.E.2d at 217 (quoting *Elliott v. Commonwealth*, 267 Va. 396, 428, 593 S.E.2d 270, 290 (2004)).

143. *Id.* at 693, 714 S.E.2d at 217–18 (quoting *Elliott*, 267 Va. at 428, 593 S.E.2d at 290) (internal quotation marks omitted).

144. *Id.* at 694–95, 714 S.E.2d at 218–19.

145. *Id.* at 694, 714 S.E.2d at 218 (citations omitted).

## 6. Review of Sufficiency of Evidence

Under Supreme Court of the United States precedent, an appellate court, when reviewing the sufficiency of the evidence in a case, must consider *all* of the evidence admitted at trial, including evidence that may have been admitted erroneously.<sup>146</sup> Adhering to this principle, the Court of Appeals of Virginia rejected the defendant's argument in *Rushing v. Commonwealth* that the court should consider only the properly admitted evidence in determining whether the evidence was sufficient to prove he had participated in a criminal street gang in violation of Virginia Code section 18.2-46.2(A).<sup>147</sup> The court of appeals then concluded the evidence, "viewed in its entirety, amply support[ed]" the verdict.<sup>148</sup>

The Supreme Court of Virginia, however, disagreed and reversed the ruling of the court of appeals.<sup>149</sup> The supreme court addressed both the evidentiary and sufficiency questions raised by Rushing in his appeal, although the court noted the "better appellate practice" would identify the "precise error" at issue by separately assigning error to the admission of evidence and to the sufficiency of evidence supporting the conviction.<sup>150</sup> After determining the challenged evidence was erroneously admitted,<sup>151</sup> the court held such evidence could not be considered in reviewing the sufficiency of the evidence.<sup>152</sup> Citing *Crawford v. Commonwealth*,<sup>153</sup> the court stated it had adopted a different standard of appellate review than the one used in *Lockhart*.<sup>154</sup> The court thus found the evidence insufficient to prove Rushing had participated in a crim-

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146. See *Lockhart v. Nelson*, 488 U.S. 33, 41 (1988); see also *McDaniel v. Brown*, 558 U.S. 120, \_\_\_ 130 S. Ct. 665, 672 (2010) (per curiam).

147. 58 Va. App. 594, 597, 606, 712 S.E.2d 41, 43, 47 (2011). Rushing contended a photograph of him and prior felony convictions of other gang members were admitted improperly. *Id.* at 600, 712 S.E.2d at 44. The court of appeals did not address whether the items were admissible because the court determined that issue was merely a "subset" of the sufficiency question. *Id.* at 602, 712 S.E.2d at 45.

148. *Id.* at 610, 712 S.E.2d at 49.

149. *Rushing v. Commonwealth*, 284 Va. 270, 279, 726 S.E.2d 333, 339 (2012).

150. *Id.* at 277–78, 726 S.E.2d at 338.

151. *Id.* at 277, 726 S.E.2d at 337–38. The supreme court held the conviction of an alleged gang member was not relevant because there was no evidence to show he was actually a gang member when he committed the offense; the court also found there was no foundation to admit the photograph of Rushing. *Id.*

152. *Id.* at 278, 726 S.E.2d at 338–39.

153. 281 Va. 84, 704 S.E.2d 107 (2011).

154. *Rushing*, 284 Va. at 278, 726 S.E.2d at 339 (referencing *Lockhart v. Nelson*, 448 U.S. 33 (1988)).

inal gang because section 18.2-46.2(A) required proof of two predicate crimes by gang members and, excluding the inadmissible evidence of the alleged gang member's conviction, the Commonwealth had proven only one crime.<sup>155</sup>

### III. CRIMINAL LAW

#### A. *Constitutional Issues*

##### 1. Search and Seizure

Under settled Fourth Amendment principles, a police officer may conduct a brief, investigatory stop of an individual when the officer has a reasonable, articulable suspicion that criminal activity is afoot.<sup>156</sup> The Fourth Amendment does not require, however, any level of suspicion to justify consensual encounters between police and citizens.<sup>157</sup> In *Branham v. Commonwealth*, the Supreme Court of Virginia addressed these two principles.<sup>158</sup> Shortly after midnight, officers attempted to serve warrants on Jesse Ford for cocaine charges.<sup>159</sup> Ford lived in a rural area, about a quarter of a mile from the public road.<sup>160</sup> As officers drove down Ford's driveway, they found it blocked by a vehicle occupied by Branham.<sup>161</sup> An officer walked to Branham's vehicle and asked to see his driver's license.<sup>162</sup> An "unusually nervous" Branham complied with the request, and the officer conducted a record check of the license.<sup>163</sup> The officer noted that Branham lived nearby.<sup>164</sup> Branham told the officer he had been "out looking for somebody up there [but] couldn't find the residence."<sup>165</sup> But Branham did not

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155. *Id.* The supreme court did not address whether the erroneous admission of Rushing's photograph affected the verdict. *Id.* at 278–79, 726 S.E.2d at 339.

156. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

157. *See United States v. Drayton*, 536 U.S. 194, 200–01 (2002).

158. 283 Va. 273, 280–81, 720 S.E.2d 74, 78 (2012).

159. *Id.* at 276–77, 720 S.E.2d at 76.

160. *Id.* (footnote omitted).

161. *Id.* at 277, 720 S.E.2d at 76.

162. *Id.*

163. *Id.*

164. *Id.*

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

provide the name or address of the person he was trying to locate.<sup>166</sup> Branham eventually consented to a search of his person, which yielded a plastic baggie containing cocaine.<sup>167</sup>

On appeal, Branham argued the trial court should have suppressed the evidence against him because the search represented the fruits of an illegal seizure.<sup>168</sup> According to Branham, he was seized, within the meaning of the Fourth Amendment, as soon as the officer took his driver's license to make a record check.<sup>169</sup> The supreme court, however, held the record check of the license was entirely consensual, noting that the officer's request to see Branham's license was no more than a request.<sup>170</sup> The court further held that "as the chain of events unfolded, [the officer] developed a reasonable, articulable suspicion that criminal activity was afoot."<sup>171</sup> The time, place, and manner of the encounter were all circumstances allowing an officer to reasonably suspect Branham was not parked in the driveway of a person wanted for cocaine charges at nearly one in the morning because he was lost.<sup>172</sup>

In *Shifflett v. Commonwealth*, the Court of Appeals of Virginia considered whether a state trooper had reasonable suspicion to conduct an investigatory stop of a vehicle bearing a "farm use" license plate.<sup>173</sup> Around 10:00 p.m. one night in February, after a recent snowstorm, a state trooper noticed a pickup truck on the highway with three people in the cab.<sup>174</sup> The pickup truck had a store bought "farm use" license plate, rather than an official plate issued by the Virginia Department of Motor Vehicles for registered farm use vehicles.<sup>175</sup> Observing that "in the wintertime you don't see many farm use vehicles on the road," the trooper stopped the truck to determine if it was, in fact, an unregistered

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166. *Id.*

167. *Id.* at 277–78, 720 S.E.2d at 76–77. Branham also consented to a search of his vehicle, which uncovered two sets of digital scales containing a white powder residue consistent with cocaine. *Id.* at 278, 720 S.E.2d at 77.

168. *Id.*

169. *Id.*

170. *Id.* at 280, 720 S.E.2d at 78 (stating that Virginia Code section 46.2-104, which requires a driver to exhibit his driver's license to an officer for identification, applies only when a driver has received a signal to stop from a law enforcement officer).

171. *Id.*

172. *See id.* at 280–81, 720 S.E.2d at 78.

173. 58 Va. App. 732, 740, 716 S.E.2d 132, 137 (2011).

174. *Id.* at 734–35, 716 S.E.2d at 134.

175. *Id.* at 734, 716 S.E.2d at 134 (citation omitted).

vehicle being used exclusively for farm use.<sup>176</sup> The trooper discovered several empty beer cans and a bottle of whiskey in the truck and noted the driver, Shifflett, smelled of alcohol, had glassy, bloodshot eyes, and slurred his speech.<sup>177</sup> As the officer initially suspected, “[t]he pickup truck was not being used for agricultural purposes that night.”<sup>178</sup>

Shifflett entered a conditional guilty plea to driving while intoxicated and to operating an unregistered, uninspected, and uninsured vehicle.<sup>179</sup> On appeal, Shifflett argued the trial court should have suppressed the evidence of his guilt because the trooper lacked a reasonable suspicion to stop his “farm use” vehicle.<sup>180</sup> Under Virginia’s statutory scheme for vehicle licensing and registration, a *registered* farm use vehicle may be used for some “nonfarm use[s].”<sup>181</sup> An *unregistered* farm use vehicle, on the other hand, is subject to stricter limitations, and must be “used *exclusively* for agricultural or horticultural purposes,” and, even then, its use must fit within a limited list of farm-related activities.<sup>182</sup> The court of appeals found “[s]everal circumstances” that created a reasonable suspicion that Shifflett—traveling “in the dead of winter” at night after a snowstorm—might not have been using his unregistered pickup truck consistent with the statutory exemptions for farm use vehicles.<sup>183</sup>

## 2. Miranda Rights

Under well-established Fifth Amendment principles, when a suspect requests an attorney during a custodial interrogation, the police must immediately stop questioning the suspect.<sup>184</sup> The suspect, however, must clearly and unambiguously assert his right to counsel in order to invoke the protections afforded by *Miranda*

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176. *Id.* at 735, 716 S.E.2d at 134.

177. *Id.*

178. *Id.*

179. *Id.* at 734, 716 S.E.2d at 133.

180. *Id.*, 716 S.E.2d at 133–34.

181. *Id.* at 737, 716 S.E.2d at 135 (alteration in original) (quoting VA. CODE ANN. § 46.2-698(B)(2) (Repl. Vol. 2010)) (internal quotation marks omitted).

182. *Id.* at 738, 716 S.E.2d at 135 (quoting VA. CODE ANN. § 46.2-665(A) to (B) (Cum. Supp. 2012)) (internal quotation marks omitted).

183. *Id.*, 716 S.E.2d at 136.

184. *See* *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

and *Edwards*.<sup>185</sup> If a suspect makes a reference to an attorney that is ambiguous or equivocal, an officer may ask clarifying questions to determine whether the suspect actually wants an attorney.<sup>186</sup> In *Stevens v. Commonwealth*, the Supreme Court of Virginia examined whether the investigating officers should have stopped questioning the defendant after he made reference to an attorney during a custodial interrogation.<sup>187</sup>

Police arrested Stevens in connection with two murders, advised him of his *Miranda* rights, and interrogated him.<sup>188</sup> The next day, Stevens was transported for his initial court appearance where he was to have counsel appointed.<sup>189</sup> The magistrate's order, however, sent Stevens to the wrong court on the wrong day.<sup>190</sup> Later that day, the investigating officers brought Stevens in for more questioning.<sup>191</sup> At the beginning of the interview, an officer asked Stevens if he still understood his rights.<sup>192</sup> After Stevens acknowledged he did, the officer told Stevens he had the right to have a lawyer present during the interview.<sup>193</sup> Stevens said, "That's what I want, a lawyer, man."<sup>194</sup> The officer asked if Stevens now wanted a lawyer, to which Stevens responded, "I mean, that's what I thought they brought me up here for today."<sup>195</sup> The officer responded, "The question is do you want a lawyer before you talk to us again or are you willing to talk to us?"<sup>196</sup> Stevens agreed to talk to the officers without an attorney.<sup>197</sup> Stevens then made incriminating statements during his interview.<sup>198</sup>

On appeal, Stevens argued that the statement, "[T]hat's what I want, a lawyer man," was clear and unambiguous and, therefore, the words themselves precluded further questioning by the offic-

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185. See *Davis v. United States*, 512 U.S. 452, 459–60 (1994) (discussing *Edwards*, 451 U.S. 477; *Miranda v. Arizona*, 384 U.S. 436 (1966)).

186. *Id.* at 461.

187. 283 Va. 296, 302, 720 S.E.2d 80, 82 (2012).

188. *Id.* at 299, 720 S.E.2d at 81.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 300, 720 S.E.2d at 81.

193. *Id.*

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

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

196. *Id.*, 720 S.E.2d at 82 (internal quotation marks omitted).

197. *Id.*

198. *Id.* at 301, 720 S.E.2d at 82.

ers.<sup>199</sup> The supreme court rejected the notion that the court only could consider the words spoken and not their context.<sup>200</sup> The court observed that whether a suspect has invoked his right to counsel during a custodial interrogation is an objective inquiry, and that the request “must be such that ‘a reasonable officer *in light of the circumstances*’ would understand the statement to be a request to have counsel present for the interrogation.”<sup>201</sup> The court found the circumstances preceding Stevens’ request for an attorney could be understood by a reasonable police officer as a request for either a lawyer during the interrogation or for a lawyer to represent Stevens in court.<sup>202</sup> Therefore, the court held the officers reasonably could have viewed Stevens’ request as ambiguous and were permitted to ask clarifying questions.<sup>203</sup>

In *Commonwealth v. Quarles*, the Supreme Court of Virginia considered whether police impermissibly engaged the defendant in interrogation, or its functional equivalent, after he invoked his right to counsel.<sup>204</sup> Quarles and an eleven-year-old accomplice decided to “rob a white lady” near Virginia Commonwealth University.<sup>205</sup> Quarles hit the first woman they encountered in the head with a brick, and they robbed her.<sup>206</sup> The police took the pair into custody and brought them to the precinct.<sup>207</sup> Detective Alston first interviewed Quarles’ accomplice.<sup>208</sup> Afterwards, Officer Papeo told Detective Alston in the hallway of the station that Quarles wished to talk to an attorney.<sup>209</sup> Detective Alston said, “[T]hat’s fine if he doesn’t want to talk to me. I wasn’t the person that robbed a white lady and hit her in the head with a brick.”<sup>210</sup> Quarles, sitting approximately ten to fifteen feet away, overheard the detective’s comment and expressed a desire to speak to him.<sup>211</sup>

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199. *Id.* at 303, 720 S.E.2d at 83 (alteration in original) (internal quotation marks omitted).

200. *Id.* at 303–04, 720 S.E.2d at 83 (citations omitted).

201. *Id.* at 304, 720 S.E.2d at 83–84 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)).

202. *Id.* at 305, 720 S.E.2d at 84.

203. *Id.*

204. 283 Va. 214, 220, 720 S.E.2d 84, 87 (2012).

205. *Id.* at 217, 720 S.E.2d at 85 (internal quotations omitted).

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

207. *Id.*, 720 S.E.2d at 85–86.

208. *Id.*, 720 S.E.2d at 86.

209. *Id.* at 218, 720 S.E.2d at 86.

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

211. *Id.*

Detective Alston responded, “[N]o that’s fine, you don’t have to talk to me. I’m good.”<sup>212</sup> Quarles persisted and later confessed.<sup>213</sup>

Prior to trial, Quarles moved to suppress his confession on the grounds that Detective Alston obtained the evidence in violation of his *Miranda* rights under the Fifth Amendment.<sup>214</sup> The circuit court denied the motion, but the Court of Appeals of Virginia eventually reversed.<sup>215</sup> On appeal to the supreme court, the Commonwealth assigned error to the court of appeals’ holding that the police impermissibly interrogated Quarles after he invoked his right to counsel.<sup>216</sup> Applying Supreme Court of the United States precedent, the supreme court analyzed whether Detective Alston should have known his statement was “reasonably likely to elicit an incriminating response” from the defendant.<sup>217</sup> Considering the content and context of the statement, the court held Detective Alston should not have known Quarles was likely to respond with incriminating evidence.<sup>218</sup> For instance, Quarles may have inferred that his accomplice had confessed based on the detective’s use of the term “white lady”; however, the court did not find “such minor exposure to evidence” reasonably likely to elicit an incriminating response.<sup>219</sup>

## B. *Specific Crimes*

### 1. Aggravated Sexual Battery

In a pair of consolidated cases, *Gonzin v. Commonwealth* and *Cousins v. Commonwealth*, the Court of Appeals of Virginia reversed the defendants’ convictions for aggravated sexual battery and remanded for resentencing on the lesser-included offense of sexual battery.<sup>220</sup> Cousins invited the victim, a seventeen-year-old female, to “come over later” after she finished work at Dairy

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

213. *Id.*

214. *Id.*

215. *Id.* at 219, 720 S.E.2d at 86 (citing *Quarles v. Commonwealth*, 58 Va. App. 13, 26, 707 S.E.2d 7, 13 (2011)).

216. *Id.* at 219, 720 S.E.2d at 87.

217. *Id.* at 222, 720 S.E.2d at 88 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)) (internal quotation marks omitted).

218. *Id.* at 224, 720 S.E.2d at 89.

219. *Id.* at 223–24, 720 S.E.2d at 89.

220. 59 Va. App. 1, 3–4 & n.2, 716 S.E.2d 466, 467 & n.2 (2011) (citation omitted).

Queen.<sup>221</sup> After the victim's shift, she went to the address Cousins provided her, which was Gonzin's trailer.<sup>222</sup> At some point, Cousins asked the victim to come into the back bedroom.<sup>223</sup> Once in the bedroom, Gonzin grabbed her arms, while Cousins pulled off her clothes.<sup>224</sup> The two men then proceeded to sexually abuse her against her will.<sup>225</sup> Afterwards, the victim was "really upset" and had trouble sleeping.<sup>226</sup> The next day, a Sexual Assault Nurse Examiner (SANE) nurse examined the victim.<sup>227</sup> The SANE nurse did not discover any bruises or lacerations on the victim.<sup>228</sup>

Cousins and Gonzin were convicted of aggravated sexual battery.<sup>229</sup> On appeal, the two men did not dispute they sexually abused the victim "against her will by force, threat or intimidation."<sup>230</sup> Rather, they contended the Commonwealth failed to prove one of the essential elements of the offense—namely, that the victim suffered "serious bodily or mental injury."<sup>231</sup> The Commonwealth argued solely that the victim suffered a serious mental injury.<sup>232</sup> Applying the plain meaning of the word "serious," the court of appeals found that, in order to elevate misdemeanor sexual battery to felony aggravated sexual battery, the bodily or mental injury must be "grave" in appearance or "requiring considerable care."<sup>233</sup> The court of appeals found that the victim in this case was understandably upset, as any victim of sexual abuse would be, but held that the Commonwealth failed to establish the victim's mental injury was particularly grave or treated with considerable care.<sup>234</sup> The court suggested, however, that the victim impact evidence presented at sentencing might have established a serious mental injury.<sup>235</sup> But since the Commonwealth did not

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221. *Id.* at 4, 716 S.E.2d at 467 (internal quotation marks omitted).

222. *Id.*, 716 S.E.2d at 467–68.

223. *Id.*, 716 S.E.2d at 468.

224. *Id.*

225. *Id.* at 5, 716 S.E.2d at 468 (footnote omitted).

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

227. *Id.* at 5–6, 716 S.E.2d at 468.

228. *Id.* at 6, 716 S.E.2d at 468.

229. *Id.*, 716 S.E.2d at 469.

230. *Id.* at 8, 716 S.E.2d at 469.

231. *Id.* at 6, 716 S.E.2d at 469 (internal quotation marks omitted).

232. *Id.* at 9, 716 S.E.2d at 470.

233. *Id.* at 8–9, 716 S.E.2d at 470 (quoting *Nolen v. Commonwealth*, 53 Va. App. 593, 598, 673 S.E.2d 920, 922 (2009)) (internal quotation marks omitted).

234. *Id.* at 10, 716 S.E.2d at 471.

235. *See id.* at 11 & n.7, 716 S.E.2d at 471 & n.7. The court of appeals also provided a

present that evidence during the guilt phase of trial, the court could not consider it.<sup>236</sup>

## 2. Child Neglect

In *Carrington v. Commonwealth*, the Court of Appeals of Virginia affirmed a case of child neglect against a mother's boyfriend.<sup>237</sup> Carrington lived with his girlfriend and her twelve-month-old son.<sup>238</sup> One day, Carrington's girlfriend attempted to give the baby a bottle because he was crying.<sup>239</sup> When the baby would not stop crying, Carrington punched the child's left thigh three times, causing a fracture.<sup>240</sup> As a result, Carrington was convicted of child neglect.<sup>241</sup>

The child neglect statute applies to "[a]ny parent, guardian, or other person responsible for the care of the child."<sup>242</sup> In *Snow v. Commonwealth*, the court of appeals previously held that "one may become a person 'responsible for the care of a child' by a voluntary course of conduct and without explicit parental delegation of supervisory responsibility or court order."<sup>243</sup> Carrington maintained that *Snow* requires an individual to be left alone with a child in order to be held responsible for the child, and since the child's mother was with the child at the time of the incident, Carrington was not another person responsible for the care of the child.<sup>244</sup> The court of appeals declined to read *Snow* or the child neglect statute that narrowly.<sup>245</sup> The court determined that nothing in the language of the statute says that an individual cannot have joint responsibility with another individual for the child, or that an individual cannot be responsible if a parent or guardian is

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list of examples of evidence which could support a fact finder's conclusion that a serious mental injury has occurred. *Id.* at 11, 716 S.E.2d at 471.

236. *Id.* at 11–12, 716 S.E.2d at 471.

237. 59 Va. App. 614, 617, 721 S.E.2d 815, 816 (2012).

238. *Id.*

239. *Id.*

240. *Id.* at 617–18, 721 S.E.2d at 816.

241. *Id.* at 617, 721 S.E.2d at 816.

242. *Id.* at 620, 721 S.E.2d at 818 (alteration in original) (quoting VA. CODE ANN. § 18.2-371.1(A) (Repl. Vol. 2009)).

243. *Id.* at 621, 721 S.E.2d at 818 (quoting *Snow v. Commonwealth*, 33 Va. App. 766, 773, 537 S.E.2d 6, 10 (2000)).

244. *Id.*

245. *Id.*

also present at the time of the child's injury.<sup>246</sup> The court found Carrington, through his voluntary course of conduct, was a person responsible for care of the child because he held himself out to be the father of the child, "looked out" for the child, and even helped feed, bathe, and put the child to sleep.<sup>247</sup>

### 3. Driving Under the Influence

To be convicted of driving under the influence ("DUI") of alcohol, the defendant must "drive or operate" a motor vehicle.<sup>248</sup> In *Enriquez v. Commonwealth*, the Supreme Court of Virginia established a new bright-line rule to determine whether a person operates a motor vehicle when sitting behind the driver's seat of a parked vehicle.<sup>249</sup> As a parking attendant attempted to place a parking ticket under the windshield wiper of an illegally parked vehicle, the attendant heard the vehicle's radio playing and discovered Enriquez asleep behind the wheel.<sup>250</sup> Unable to wake Enriquez, the parking attendant called the police for help.<sup>251</sup> The police eventually woke Enriquez, administered a field sobriety test, and arrested him for DUI.<sup>252</sup> An officer testified that when he first approached the vehicle, he could hear the radio playing and "see the light from the radio area," but he could not recall if the keys were in the "on" or "off" position of the ignition.<sup>253</sup>

In previous DUI cases, the supreme court found the position of the key in the ignition—whether in the "on" or "off" position—determinative in deciding whether a defendant "operated" a vehicle.<sup>254</sup> The dissenting opinion in *Stevenson v. City of Falls Church* opined that distinction should not make a difference and that a

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246. *Id.*

247. *Id.* at 621–22, 722 S.E.2d at 818 (internal quotation marks omitted).

248. VA. CODE ANN. § 18.2-266 (Cum. Supp. 2012).

249. 283 Va. 511, 516, 722 S.E.2d 252, 255 (2012).

250. *Id.* at 513, 722 S.E.2d at 253.

251. *Id.*

252. *Id.* at 514, 722 S.E.2d at 254.

253. *Id.*

254. Compare *Nelson v. Commonwealth*, 281 Va. 212, 214, 707 S.E.2d 815, 815–16 (2011) (affirming a DUI conviction when the defendant was in the driver's seat of a parked vehicle with the radio playing and the ignition key was in an "on or accessory position"), with *Stevenson v. City of Falls Church*, 243 Va. 434, 435, 438, 416 S.E.2d 435, 436, 438 (1992) (reversing a DUI conviction when defendant was asleep behind steering wheel of parked car and the key was in the ignition, but the arresting officer could not recall whether the key was in the "on" or the "off" position).

drunk behind the steering wheel of a parked vehicle with the key in the ignition is in “actual physical control” of the vehicle because he could immediately place the vehicle in motion and become a menace to the public.<sup>255</sup> Reversing course and adopting the reasoning of the *Stevenson* dissent, the supreme court in *Enriquez* established a bright-line rule that, when an intoxicated person is seated behind the steering wheel of a motor vehicle on a public highway with the key in the ignition, he is in actual physical control of the vehicle and, therefore, guilty of operating the vehicle under the influence of alcohol.<sup>256</sup>

#### 4. Gangs

*Morris v. Commonwealth* involved members of criminal street gangs, the Bloods and the Crips, working together to carry out acts of gang violence.<sup>257</sup> Morris, a member of a Bloods gang, attended a party with several members of the Crips.<sup>258</sup> Morris took part in a discussion in which the leader of the Crips discussed “going on gang missions” and attacking people to improve one’s “status in the gang.”<sup>259</sup> Morris then participated in these attacks.<sup>260</sup>

Under Virginia Code section 18.2-46.2, an individual is guilty of criminal street gang participation if that person “actively participates in or is a member of a criminal street gang and . . . knowingly and willfully participates in any predicate criminal act committed for the benefit of, at the direction of, or in association with any criminal street gang.”<sup>261</sup> On appeal to the Court of Appeals of Virginia, Morris asserted that the evidence failed to prove that he, a Blood, acted “for the benefit of, at the direction of, or in association with the Crips.”<sup>262</sup> Specifically, Morris asserted he did not share the Crips’ purpose for the attacks: “to gain or

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255. *Stevenson*, 243 Va. at 439–40, 416 S.E.2d at 438–39 (Compton, J., dissenting) (quoting VA. CODE ANN. § 46.2-100 (1992 Cum. Supp.)).

256. *Enriquez*, 283 Va. at 516, 722 S.E.2d at 255.

257. 58 Va. App. 744, 746, 716 S.E.2d 139, 139–40 (2011).

258. *Id.* at 746, 716 S.E.2d at 140.

259. *Id.* at 746–47, 716 S.E.2d at 140 (internal quotation marks omitted).

260. *Id.* at 747, 716 S.E.2d at 140 (footnote omitted).

261. *Id.* at 748–49, 716 S.E.2d at 141 (quoting VA. CODE ANN. § 18.2-46.2 (Repl. Vol. 2009)).

262. *Id.* at 749, 716 S.E.2d at 141.

improve rank within the Crips.”<sup>263</sup> The Court of Appeals of Virginia held that the statute does not expressly require the defendant to have the same specific objective of achieving rank within the gang.<sup>264</sup> In this case, it was enough that Morris participated “‘in association with’ the Crips gang members when he acted with a shared intent to attack innocent people.”<sup>265</sup> Moreover, since Morris participated in the planning of these attacks and knew their objective, the court held that he did not only associate with the Crips, he also worked for their benefit and at their direction.<sup>266</sup>

## 5. Harassing E-Mails and Telephone Calls

The Supreme Court of Virginia decided two cases concerning whether harassing e-mails and telephone calls were “obscene.” In *Barson v. Commonwealth*, the court reversed Barson’s conviction of “harassment by computer” in violation of Virginia Code section 18.2-152.7:1.<sup>267</sup> Barson sent his estranged wife hundreds of harassing e-mails accusing her of sexual promiscuity.<sup>268</sup> The Court of Appeals of Virginia initially reversed Barson’s conviction on the grounds that the content of his emails was not “obscene” as that term had been defined by the court of appeals in *Allman v. Commonwealth*.<sup>269</sup> In its en banc decision, however, the court of appeals expressly overruled *Allman* and adopted a broader definition of obscenity derived from the dictionary.<sup>270</sup> Barson’s e-mails were found obscene within this newly adopted definition.<sup>271</sup>

The dispositive question before the supreme court in *Barson* was what definition of “obscene” should apply: the statutory definition found in Virginia Code section 18.2-372 or the dictionary definition utilized by the court of appeals.<sup>272</sup> The supreme court

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263. *Id.* at 750, 716 at 141 (internal quotation marks omitted).

264. *Id.*, 716 S.E.2d at 141.

265. *Id.*

266. *Id.* at 751, 716 S.E.2d at 142.

267. 284 Va. 67, 69, 75, 726 S.E.2d 292, 293, 296 (2012) (internal quotation marks omitted).

268. *Id.* at 69–70, 726 S.E.2d at 293.

269. *Id.* at 70, 726 S.E.2d at 293–94 (citing *Allman v. Commonwealth*, 43 Va. App. 104, 596 S.E.2d 531 (2004)).

270. *Id.*, 726 S.E.2d at 294 (citing *Barson v. Commonwealth*, 58 Va. App. 451, 461–64, 711 S.E.2d 220, 225–27 (2011)).

271. *Id.*

272. *Id.* at 72, 75, 726 S.E.2d at 294, 296.

held that the statutory definition applies.<sup>273</sup> Following the Supreme Court of the United States decision in *Miller v. California*, the General Assembly applied the “*Miller test*” in enacting a statutory definition of obscenity in section 18.2-372.<sup>274</sup> In *Allman*, the court of appeals held that the statutory definition of obscene found in section 18.2-372 should apply to prosecutions of obscene telephone calls under section 18.2-427.<sup>275</sup> Because the computer harassment statute contains parallel language to the telephone harassment statute, the court of appeals later applied that same definition in a case involving harassment by computer.<sup>276</sup>

Since the legislature is presumed to be aware of appellate court decisions, but has not amended the harassment statutes in the eight years since *Allman* utilized the statutory definition of obscene, the supreme court found the legislature acquiesced in its usage.<sup>277</sup> The court went on to hold that as “offensive, vulgar, and disgusting” as the language of Barson’s emails to his wife may have been, the language did not meet the standard of obscenity provided by section 18.2-372.<sup>278</sup>

In *Rives v. Commonwealth*, the Supreme Court of Virginia made clear that the legal definition of obscene is not applicable in all cases involving harassment by telephone or computer.<sup>279</sup> *Rives*

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273. *Id.* at 75, 726 S.E.2d at 296.

274. *Id.* at 72, 726 S.E.2d at 294–95 (citing *Miller v. California*, 413 U.S. 15 (1973)). The *Miller* test definition of obscenity contains three parts: (i) considered as a whole, the material has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, (ii) the material goes substantially beyond the customary limits of candor in description or representation of such matter, (iii) and the material taken as a whole, does not have serious literary, artistic, political or scientific value. VA. CODE ANN. § 18.2-372 (Repl. Vol. 2009).

275. *Barson*, 284 Va. at 72–73, 726 S.E.2d at 295 (citing *Allman v. Commonwealth*, 43 Va. App. 104, 109, 596 S.E.2d 531, 534 (2007)).

276. *Id.* at 73, 726 S.E.2d at 295 (citing *Airhart v. Commonwealth*, No. 1219-05-2, 2007 Va. App. LEXIS 11, at \*1–2 (Ct. App. Jan. 16, 2007)).

277. *Id.* at 74, 726 S.E.2d at 296.

278. *Id.* at 75, 726 S.E.2d at 296. While the concurring opinion did not consider the *Miller* test to be constitutionally mandated when applied to statutes regulating harassing conduct, rather than speech protected by the First Amendment, the concurring opinion agreed with the majority’s reasoning that the General Assembly tacitly approved of the *Allman* decision by leaving the relevant statutes unchanged for eight years. *Id.* at 77, 726 S.E.2d at 297–98. (Russell, J., concurring). The concurring opinion also viewed Barson’s conviction under a broader standard of obscenity to be a retroactive criminalization of his conduct in violation of his constitutional right to due process. *Id.* at 79, 726 S.E.2d at 298.

279. 284 Va. 1, 2–4, 726 S.E.2d 248, 250 (2012). Even though *Rives* concerned the telephone harassment statute, the analysis would be the same under the parallel computer harassment statute. See VA. CODE ANN. §§ 18.2-427, -152.7:1 (Cum. Supp. 2012).

used “angry, vulgar, and threatening language” in a series of telephone messages left for the victim.<sup>280</sup> The Court of Appeals of Virginia affirmed Rives’ conviction of harassment by telephone under the *Miller* test for obscenity.<sup>281</sup> The supreme court took a different route in affirming the conviction.<sup>282</sup>

The supreme court observed that Virginia Code section 18.2-427 proscribes “three separate species of conduct” in the use of telephone and radio communication, which are intended to coerce, intimidate or harass: “(1) obscene language, (2) obscene suggestions or proposals, and (3) threats of illegal or immoral acts.”<sup>283</sup> As the court pointed out, the first two of these offenses are qualified by the word “obscene,” but the last is not so limited.<sup>284</sup> The court concluded that “whether language used in telephonic communications is obscene is immaterial in cases involving threats to commit illegal or immoral acts, where the threat is made with the intent to coerce, intimidate or harass any person.”<sup>285</sup> Applying the “right result for the wrong reason” doctrine, the court held that Rives’ language was sufficient to enable a fact finder to conclude he threatened the victim with physical injury in the form of a sexual offense.<sup>286</sup>

## 6. Larceny

The issue in *Little v. Commonwealth* arose out of the criminal activity of a high school teacher and one of his students.<sup>287</sup> The student-teacher relationship evolved into criminal activity when the student involved Little, the teacher, in a plan to break into

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280. *Rives*, 284 Va. at 1, 726 S.E.2d at 249.

281. *Id.* at 2, 726 S.E.2d at 249.

282. *Id.*, 726 S.E.2d at 250.

283. *Id.* at 3, 726 S.E.2d at 250 (quoting VA. CODE ANN. § 18.2-427 (Cum. Supp. 2011)).

284. *Id.*

285. *Id.* at 4, 726 S.E.2d at 250.

286. *Id.* at 2–4, 726 S.E.2d at 250 (citing *Perry v. Commonwealth*, 280 Va. 572, 579, 701 S.E.2d 431, 435–36 (2010)). The supreme court found the “right result for the wrong reason” doctrine applicable because the case went to trial on stipulated facts, because the record fully supported the reasoning the court adopted, and because Rives was on notice at trial that he was charged with violating Virginia Code section 18.2-427. *Id.* at 3, 726 S.E.2d at 250. Two justices dissented from the holding, opining that it was inappropriate to apply the doctrine because Rives was not on notice to present evidence to rebut the charge of “threaten[ing] any illegal or immoral act” with the intent to harass. *Id.* at 5, 726 S.E.2d at 251 (Kinser, J., dissenting) (alteration in original) (internal quotation marks omitted).

287. 59 Va. App. 725, 728, 722 S.E.2d 317, 318 (2012).

cell phone retail stores, steal the display phones, and sell them.<sup>288</sup> Because the student did not have a driver's license, Little agreed to drive him to the stores.<sup>289</sup> Little then drove the student to and from two AT&T stores, where the student smashed a brick through the storefront windows, entered the stores, and stole display phones.<sup>290</sup>

The issue on appeal to the Court of Appeals of Virginia was whether the value of the stolen goods exceeded the \$200 minimum to elevate Little's larceny conviction to grand larceny.<sup>291</sup> Ordinarily, the value of stolen property is its market value, particularly, its retail value.<sup>292</sup> In this case, however, the stolen phones were display models, which had no clear market value.<sup>293</sup> The court of appeals noted that in *Baylor v. Commonwealth*, it held that "where an item had no market value, the actual value [of the item] must be shown" to meet the statutory threshold.<sup>294</sup> The court previously noted that "stolen property may be of such a character or recent manufacture that replacement value accurately reflects actual or fair market value."<sup>295</sup> In *Little*, because it was a reasonable inference that the display phones were new models in good working condition, the court found the evidence of their replacement value closely approximated their actual value.<sup>296</sup> The court affirmed the conviction based on evidence that the cost to replace the phones well exceeded the statutory amount to elevate the offense to grand larceny.<sup>297</sup>

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288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 730, 722 S.E.2d at 319. Little was convicted of receiving stolen property in violation of Virginia Code section 18.2-108, which must be read in connection with Virginia Code sections 18.2-95 and 18.2-96 to determine the degree of larceny. *Id.*

292. *Id.* at 731, 722 S.E.2d at 320 (quoting *Robinson v. Commonwealth*, 258 Va. 3, 5-6, 516 S.E.2d 475, 476 (1999)) (internal quotation marks omitted).

293. *Id.*

294. *Id.* at 732, 722 S.E.2d at 320 (quoting *Baylor v. Commonwealth*, 55 Va. App. 82, 84-85, 683 S.E.2d 843, 844 (2009)).

295. *Id.* at 732-33, 722 S.E.2d at 320 (quoting *Baylor*, 55 Va. App. at 89-90, 683 S.E.2d at 846).

296. *Id.* at 733, 722 S.E.2d at 321.

297. *Id.*

## 7. Malicious Wounding

The malicious wounding statute makes it a crime to “maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill.”<sup>298</sup> In *English v. Commonwealth*, the Court of Appeals of Virginia addressed the scope of “bodily injury” required to sustain a conviction under the statute.<sup>299</sup> English viciously beat the female victim, causing her intense pain and leaving her barely able to move.<sup>300</sup> Months after the attack, the victim continued to need medical treatment for her nerve damage and severe back pain.<sup>301</sup>

On appeal, English challenged the sufficiency of the evidence to convict him of maliciously causing bodily injury in violation of Virginia Code section 18.2-51.<sup>302</sup> The court of appeals commented that the malicious wounding label to section 18.2-51 is misleading because the statute includes several other acts besides malicious wounding.<sup>303</sup> “Even if a victim is not shot, stabbed, cut, or wounded, a defendant still violates the statute if he ‘by any means’ causes the victim ‘bodily injury.’”<sup>304</sup> To prove bodily injury, the court held that the victim need not experience any observable wounds, cuts, or broken skin; nor must the victim offer proof of broken bones or bruises.<sup>305</sup> The court concluded that internal bodily injuries—no less than external injuries—fall within the scope of the malicious wounding statute.<sup>306</sup> The court rejected English’s argument that expert medical testimony was necessary to prove the victim’s injuries.<sup>307</sup> The victim’s testimony about her injuries was more than sufficient to find that English’s beating caused her bodily injury.<sup>308</sup>

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298. VA. CODE ANN. § 18.2-51 (Repl. Vol. 2009).

299. 58 Va. App. 711, 719, 715 S.E.2d 391, 395 (2011) (citations omitted).

300. *Id.* at 715–16, 715 S.E.2d at 393.

301. *Id.* at 716, 715 S.E.2d at 394.

302. *Id.* at 715, 715 S.E.2d at 393.

303. *Id.* at 718, 715 S.E.2d at 394.

304. *Id.* (citing *Dawkins v. Commonwealth*, 186 Va. 55, 64, 41 S.E.2d 500, 505 (1997)).

305. *Id.* at 719, 715 S.E.2d at 395 (quoting *Luck v. Commonwealth*, 32 Va. App. 827, 831–32, 531 S.E.2d 41, 43 (2000) (footnote omitted)).

306. *Id.*

307. *Id.* at 720–21, 715 S.E.2d at 395–96.

308. *Id.* at 719–20, 715 S.E.2d at 395.

## 8. Possession of Controlled Substances

In *Sierra v. Commonwealth*, the Court of Appeals of Virginia interpreted the mens rea requirement of the statute prohibiting possession of a controlled substance, Virginia Code section 18.2-250.<sup>309</sup> During a search incident to arrest, police found eight prescription pills in Sierra's pockets.<sup>310</sup> Two of these pills contained methylphenidate, a controlled substance.<sup>311</sup> Sierra testified that he asked an individual for some Tylenol or aspirin for back pain.<sup>312</sup> Sierra claimed he did not know the pills he received were Concerta, a brand name of methylphenidate.<sup>313</sup> The trial court expressly found Sierra's explanation not credible because the pills were obviously some sort of controlled substance.<sup>314</sup>

The court of appeals examined whether a defendant has to know the exact substance he is possessing to be convicted under section 18.2-250.<sup>315</sup> The court found the statute's plain language indicates that the legislature intended to criminalize the knowing and intentional possession of "a controlled substance," whatever that controlled substance may be.<sup>316</sup> Therefore, the court declined to add any other specific mens rea requirement to the statute.<sup>317</sup> The court held that a defendant need know only that he is possessing a controlled substance to be guilty of violating the statute.<sup>318</sup> Because the trial court had discretion to disbelieve Sierra's testimony that he thought the pills were aspirin or Tylenol, and because under these facts, the pills obviously were some kind of controlled substance, the conviction was affirmed.<sup>319</sup>

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309. 59 Va. App. 770, 776, 722 S.E.2d 656, 659 (2012).

310. *Id.* at 774, 722 S.E.2d at 658.

311. *Id.* (citing VA. CODE ANN. § 54.1-3447) (Repl. Vol. 2009)).

312. *Id.*

313. *Id.*

314. *Id.* at 775, 722 S.E.2d at 658.

315. *Id.*

316. *Id.* at 778, 722 S.E.2d at 659–60 (internal quotation marks omitted).

317. *Id.*, 722 S.E.2d at 660.

318. *Id.* at 783, 722 S.E.2d at 662.

319. *Id.* at 784, 722 S.E.2d at 663.

## IV. LEGISLATION

A. *Crimes Against Children*

An adult who commits the crimes of rape, forcible sodomy, or object penetration against a child under the age of thirteen now faces a mandatory minimum sentence of life in prison.<sup>320</sup> The 2012 Virginia General Assembly also made it a class six felony to display child pornography or a “grooming video or materials” to a child under the age of thirteen with the intent to entice, solicit, or encourage the child to engage in various sexual acts.<sup>321</sup> The term “grooming video or materials” is defined as a cartoon, animation, image, or series of images depicting a child engaged in various sexual acts.<sup>322</sup>

In response to the child sexual abuse scandal at Pennsylvania State University, the General Assembly sought to strengthen its mandatory child abuse reporting laws.<sup>323</sup> Athletic coaches, directors, employees, and volunteers of sports organizations were added to the list of individuals required to report suspected child abuse or neglect to the Virginia Department of Social Services,<sup>324</sup> as were administrators and employees of day camps, youth centers, and youth recreation programs,<sup>325</sup> and employees of public or private institutions of higher learning.<sup>326</sup> The mandatory reporting time was lowered from seventy-two hours to “as soon as possible, but no longer than 24 hours after having reason to suspect a reportable offense of child abuse or neglect.”<sup>327</sup> In addition to increased fines for failing to report suspected child abuse or neglect, a person who knowingly and intentionally fails to report acts of

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320. Act of Apr. 4, 2012, ch. 605, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. §§ 18.2-61, -67.1.2, -67.2 (Cum. Supp. 2012)).

321. Act of Apr. 5, 2012, ch. 624, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 18.2-374.4 (Cum. Supp. 2012)).

322. *Id.*

323. Kathy Adams, *Va. Legislators Seek Penalty for Silence with Stronger Laws on Reporting Child Abuse*, VIRGINIAN-PILOT, Feb. 2, 2012, at A1.

324. Act of Mar. 30, 2012, ch. 391, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 63.2-1509 (Cum. Supp. 2012)).

325. *Id.*

326. Act of Apr. 18, 2012, ch. 815, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 63.2-1509 (Cum. Supp. 2012)).

327. Act of Apr. 9, 2012, ch. 728, 2012 Va. Acts \_\_\_\_ (codified as amended at VA. CODE ANN. § 63.2-1509 (Cum. Supp. 2012)).

rape, sodomy, or object sexual penetration of children “shall be guilty of a Class 1 misdemeanor.”<sup>328</sup>

### B. *Ignition Interlock Systems for First Time DUI Offenders*

An ignition interlock system is a device that attaches to a vehicle’s ignition and measures a driver’s blood alcohol content before the vehicle can start.<sup>329</sup> As a condition of a restricted license, first time DUI offenders now are prohibited from operating a motor vehicle without an ignition interlock system.<sup>330</sup>

### C. *Mandatory Time for Repeat Drug Trafficking Offenses*

An offender who commits a second offense of possession with intent to distribute controlled substances in violation of Virginia Code section 18.2-248 now will have to serve a mandatory minimum sentence of at least three years.<sup>331</sup> The mandatory minimum sentence for a third or subsequent offense was increased from five years to ten years.<sup>332</sup>

### D. *New Jury for Sentencing*

In criminal cases, if a jury cannot agree on a punishment, the trial court must now “impanel a different jury to ascertain punishment.”<sup>333</sup> If, however, the defendant, the attorney for the Commonwealth, and the court agree, the court must fix the punishment.<sup>334</sup>

### E. *Search Warrant for GPS Tracking Device*

In the wake of the Supreme Court of the United States decision in *United States v. Jones*, which held that police installation of a

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328. *Id.*

329. Act of Mar. 7, 2012, ch. 141, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 18.2-270.1, -271.1 (Cum. Supp. 2012)).

330. *Id.*

331. Act of Apr. 9, 2012, ch. 710, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-248 (Cum. Supp. 2012)).

332. *Id.*

333. Act of Mar. 7, 2012, ch. 134, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 19.2-295.1 (Cum. Supp. 2012)).

334. *Id.*

GPS tracking device on a suspect's vehicle constituted a search under the Fourth Amendment, the 2012 Virginia General Assembly codified a procedure by which law enforcement officers may obtain a search warrant to install a tracking device on a suspect's vehicle.<sup>335</sup> A law enforcement officer may apply for a search warrant to permit the use of a tracking device from a judicial officer located in the jurisdiction where the tracking device is to be installed, or located in the jurisdiction where there is probable cause to believe the crime has been, is being, or will be committed.<sup>336</sup> The warrant will issue upon a showing of probable cause and will authorize the use of the tracking device for up to thirty days; the court must seal the search warrant, affidavit, return, and any related pleadings; for good cause shown, the court may grant extensions for use of the tracking device, not to exceed thirty days each; and the installation of the tracking device must be accomplished within fifteen days of the issuance of the warrant.<sup>337</sup> Within ten days after the use of the tracking device has ended, officers must remove it from the property being tracked, return the warrant to the issuing judge, and serve a copy of the warrant on the person who was tracked and the person whose property was tracked.<sup>338</sup>

#### F. *Strangulation*

The 2012 Virginia General Assembly created the new crime of strangulation, a class six felony.<sup>339</sup> Strangulation is committed by a person who: (i) without consent; (ii) impedes the blood circulation or respiration of another person; (iii) by knowingly, intentionally, and unlawfully applying pressure to the neck of such person; (iv) resulting in wounding or bodily injury to such person.<sup>340</sup>

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335. See *United States v. Jones*, 565 U.S. \_\_\_, \_\_\_, 132 S. Ct. 945, 949 (2012) (footnote omitted); Act of Apr. 5, 2012, ch. 636, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 19.2-56.2 (Cum. Supp. 2012)).

336. Act of Apr. 5, 2012, ch. 636, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 19.2-56.2 (Cum. Supp. 2012)).

337. *Id.*

338. *Id.*

339. Act of Apr. 4, 2012, ch. 602, 2012 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 18.2-51.6 (Cum. Supp. 2012)).

340. *Id.*