CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

This article aims to provide a succinct review of noteworthy cases in the areas of criminal law and procedure that the Supreme Court of Virginia and the Court of Appeals of Virginia decided this past year. Instead of covering every ruling or procedural point in a particular case, this article focuses on the "takeaway" of the holdings with the most precedential value. This article also summarizes significant changes to criminal law and procedure enacted by the 2014 Virginia General Assembly.

I. CRIMINAL PROCEDURE

A. *Trial*

1. Competency

In *Dang v. Commonwealth*, the Supreme Court of Virginia considered whether a defendant was entitled to a second competency evaluation.[1] Initially, a court-appointed psychologist evaluated Dang and found him competent to stand trial for murder.[2] Eleven months later, Dang's counsel moved for a second evaluation after learning new information about Dang's life history and childhood trauma.[3] Dang's counsel believed this information could potential-

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1. 287 Va. 132, 135, 752 S.E.2d 885, 887 (2014). Under the Virginia Code, a competency evaluation is required when there is probable cause to believe a defendant "lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense . . . ." VA. CODE. ANN. § 19.2-169.1 (Cum. Supp. 2014).

2. *Dang*, 287 Va. at 136, 752 S.E.2d at 887.

3. *Id*. at 137–38, 752 S.E.2d at 888.

ly be a sign of mental illness or brain injury.[4] Finding no probable cause to believe that Dang lacked understanding of the proceedings or the ability to assist in his defense, the circuit court denied the request and the case proceeded to trial.[5] Dang's counsel renewed the request on the morning of trial, which the circuit court denied after conducting an additional plea colloquy.[6]

The supreme court held the circuit court did not abuse its discretion in finding no probable cause to order a second competency evaluation.[7] In doing so, the supreme court declared "[w]hen the defendant has already been afforded a competency evaluation in which he is found competent, the circuit court need not order a second evaluation unless it is presented with a substantial change in circumstances,"[8] and "evidence supporting probable cause must be directed to the question of defendant's competency at the time of trial."[9] Thus, even if Dang's failure to disclose an accurate life history was an indication of an underlying mental illness or brain injury, that did not necessarily render him incompetent to stand trial.[10] In the supreme court's opinion, the circuit court correctly found no information or substantial change in circumstances to question Dang's present competence.[11] The supreme court acknowledged that many of Dang's responses to the circuit court during the plea colloquies were nonresponsive; however, his tendency to shift focus to the facts of the murder and explain "his side of the story" was addressed by the court-appointed psychologist and consistent with the behavior he exhibited during his evaluation.[12] Therefore, the supreme court found Dang's behavior consistent with a "heightened apprehension of going to trial, rather than a sudden deterioration in his understanding of the nature of the proceedings on the morning of trial."[13]

4. *Id.* at 138, 752 S.E.2d at 888–89.
5. *Id.* at 139, 752 S.E.2d at 889.
6. *Id.* at 140–44, 752 S.E.2d at 890–92.
7. *Id.* at 153, 752 S.E.2d at 897–98.
8. *Id.* at 145, 752 S.E.2d at 893.
9. *Id.* at 148, 752 S.E.2d at 895.
10. *Id.*, 752 S.E.2d at 894–95.
11. *Id.* at 148–49, 752 S.E.2d at 895.
12. *Id.* at 149, 752 S.E.2d at 895.
13. *Id.* at 150, 752 S.E.2d at 896. In the dissenting opinion's view, the majority's holding did not comport with the evidence and the controlling precedent of *Drope v. Missouri*, 420 U.S. 162 (1975). *See Dang*, at 153–54, 157, 752 S.E.2d at 898, 900 (Mims, J., dissent-

2. Right to Counsel

The high-profile murder trial of *Huguely v. Commonwealth* presented a novel right to counsel issue.[14] Huguely, a University of Virginia student, stood trial for killing another student—his former girlfriend.[15] Two attorneys represented Huguely at trial—Rhonda Quagliana and Francis McQ. Lawrence.[16] In the midst of the nearly two-week trial, Quagliana became very ill.[17] Due to Quagliana's illness, the circuit court excused the jury for the entire day on February 16, 2012.[18] The following day, Quagliana remained too ill to attend court.[19] Lawrence offered to question defense witnesses in her absence.[20] But after a recess, Lawrence moved for a continuance, informing the court that Huguely, was uncomfortable with taking any evidence until Quagliana returned.[21] The circuit court denied the request.[22]

The Court of Appeals of Virginia considered whether the circuit court committed reversible error under the Sixth Amendment of the United States Constitution in denying the continuance.[23] Relying on the United States Supreme Court's decision in *United States v. Gonzalez-Lopez*, Huguely argued he was entitled to a new trial because he was forced to proceed in trial without his retained counsel of choice.[24] The court of appeals held the "commonality" in *Gonzalez-Lopez*, and the other cases relied upon by Huguely, "was a ruling *by a trial court* that essentially *barred* a retained attorney from representing the defendant in the first place."[25] In Huguely's case, rather than barring Quagliana from representing him at trial, the circuit court simply responded to

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14. 63 Va. App. 92, 97–98, 102, 754 S.E.2d 557, 559, 561–62 (2014).
15. *Id.* at 98–102, 754 S.E.2d at 560–61.
16. *Id.* at 103, 754 S.E.2d at 562.
17. *Id.* at 102–03, 754 S.E.2d at 562.
18. *Id.* at 103, 754 S.E.2d at 562.
19. *Id.*
20. *Id.* at 104, 754 S.E.2d at 562.
21. *Id.*
22. *Id.*, 754 S.E.2d at 563.
23. *Id.* at 105–06, 754 S.E.2d at 563.
24. *Id.* at 106, 754 S.E.2d 563 (citing United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)).
25. *Id.* at 109, 754 S.E.2d at 565.

her illness.[26] The court of appeals observed that "surely the Sixth Amendment does not impose an absolute requirement, when a defendant is represented by two or more retained attorneys, that a jury trial must completely grind to a halt, as a matter of constitutional law, simply because *one* of the defendant's retained attorneys has become ill."[27] Given the uncertainty of Quagliana's illness, and that the trial judge only ordered the trial to proceed in her absence when doing so had the least impact on her role as co-counsel, the court of appeals found that the trial court had not abused its discretion in denying the continuance.[28]

3. Hearsay

In *Bailey v. Commonwealth*, the Court of Appeals of Virginia considered, as a matter of first impression, whether a defendant's invocation of his Fifth Amendment right not to testify satisfies the unavailability prong of the statement-against-interest hearsay exception.[29] Bailey chose not to testify at his trial for robbery and related charges.[30] Under Bailey's theory of the case, he met with the victim to sell him drugs and, when the victim had tried to take the drugs without paying, Bailey merely took the money he was due for the drugs.[31] In support of this theory, Bailey's girlfriend attempted to testify about statements Bailey allegedly made about the drug transaction.[32] The circuit court ruled the evidence was inadmissible hearsay.[33] In making this ruling, the trial court found the evidence unreliable even though Bailey satisfied the unavailability requirement of the statement-against-interest hearsay exception.[34]

The court of appeals held the circuit court erred as a matter of law in ruling that the testimony of Bailey was unavailable, but did not err in refusing to admit the statements.[35] The court of ap-

26. *Id*. at 110, 754 S.E.2d at 565.
27. *Id*.
28. *Id*. at 115, 754 S.E.2d at 568.
29. 62 Va. App. 499, 506, 749 S.E.2d 544, 547 (2013).
30. *Id*. at 503–04, 749 S.E.2d at 545–46.
31. *Id*. at 504, 749 S.E.2d at 546.
32. *Id*.
33. *Id*.
34. *Id*. at 505, 749 S.E.2d at 546.
35. *Id*., 749 S.E.2d at 547.

peals found that because Bailey had complete control over his own availability as a witness, "he failed as a matter of law to prove his testimony was unavailable."[36] The court of appeals recognized that normally "a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent."[37] The court of appeals, however, reasoned that "allowing a defendant to control the admissibility of his prior statement by invoking his Fifth Amendment right not to testify, thereby rendering himself unavailable, would eviscerate the hearsay rule's unavailability requirement."[38] The court refused to interpret the hearsay rule "to allow a defendant to invoke his Fifth Amendment right not to testify as a shield to protect and insulate him against cross-examination only to simultaneously employ that right as a sword to obtain the admission of his alleged extrajudicial prior self-serving hearsay statements."[39]

4. Evidence

The Court of Appeals of Virginia, in *Ferrell v. Commonwealth*, decided whether a principal in the second degree is entitled to admit into evidence an acquittal order from a separate case against the alleged principal in the first degree.[40] Following a shooting, Ferrell and his brother were charged with malicious wounding and use of a firearm during a felony.[41] The trial of Ferrell's brother occurred first and resulted in a not guilty verdict.[42] At Ferrell's trial, the Commonwealth accused Ferrell of acting as a principle in the second degree to his brother's crime.[43] Ferrell argued he could not be found guilty as a principal in the second degree because his brother, the alleged principal in the first degree, had been acquitted by a different jury.[44] Ferrell sought to in-

36. *Id.*

37. *Id.* at 508, 749 S.E.2d at 548 (quoting Boney v. Commonwealth, 16 Va. App. 638, 643, 432 S.E.2d 7, 10 (1993)).

38. *Id.*

39. *Id.* at 509, 749 S.E.2d at 548.

40. 62 Va. App. 142, 143, 743 S.E.2d 284, 285 (2013).

41. *Id.* at 144, 743 S.E.2d at 285.

42. *Id.*

43. *Id.*

44. *Id.*

troduce his brother's acquittal order into evidence, but was denied.[45]

The court of appeals affirmed the circuit court's refusal to admit the order.[46] The court of appeals explained that Virginia follows the common law principle that, unlike an accessory to a crime, "a principal in the second degree could be convicted notwithstanding the prior acquittal of the first-degree principal."[47] The court of appeals thus held that "the order acquitting Ferrell's brother had no legal relevance to Ferrell's guilt or innocence."[48] The differing results in the separate trials could result from a number of explanations: "lenity by the jury toward the brother, a different retelling of the facts by key witnesses, dissimilar strategic decisions of counsel, disparate evidentiary rulings, divergent arguments of counsel, or . . . an honest disagreement between the two juries about the persuasive force of the totality of evidence."[49]

In *Gardner v. Commonwealth*, the Supreme Court of Virginia considered whether the circuit court erred in excluding evidence of good character sought by the defendant.[50] At his trial for various sex crimes against minors, Gardner attempted to question two of his character witnesses "about his reputation in the community for being a good caretaker of children and for not being sexually assaultive or abusive toward them."[51] The Commonwealth objected to the question on the basis that: (1) "Gardner was limited to character evidence concerning reputation for truthfulness, veracity or peacefulness," and (2) the question was improper because the disputed character evidence did not exclusively concern Gardner's reputation before the incident.[52] The circuit court sustained the Commonwealth's objection.[53]

The supreme court held the circuit court erred as a matter of law because "neither ground was a proper basis for sustaining the

45. *Id.*, 743 S.E.2d at 285–86.

46. *Id.* at 143, 743 S.E.2d at 285.

47. *Id.* at 146, 743 S.E.2d at 287 (quoting Standefer v. United States, 447 U.S. 10, 16 (1980)).

48. *Id.* at 150, 743 S.E.2d at 288.

49. *Id.*, 743 S.E.2d at 288–89.

50. No. 131166, 2014 Va. LEXIS 98 at *1, 758 S.E.2d 540, 542 (June 5, 2014).

51. *Id.* at *1, *3, 758 S.E.2d at 542.

52. *Id.* at *3–4, 758 S.E.2d at 544.

53. *Id.* at *4, 758 S.E.2d at 542.

Commonwealth's objection."[54] First, the supreme court reaffirmed that reputation or character evidence is not limited solely to truthfulness, but may be offered "to prove good character for any trait relevant in the case."[55] Next, the supreme court made clear that, unlike evidence of a defendant's bad character, evidence of a defendant's good reputation is not limited to a defendant's reputation before being criminally charged.[56] To hold otherwise, according to the supreme court, would ask the impossible: "that a defense character witness not testify to the defendant's reputation at the time of trial but reconstruct what that reputation was prior to the offense."[57]

5. *Corpus Delicti* Rule

In *Allen v. Commonwealth*, the Supreme Court of Virginia reversed a conviction for aggravated sexual battery, despite the defendant confessing to the crime.[58] Allen confessed to both his daughter and the police that he engaged in inappropriate sexual touching with his four-year-old grandson.[59] Under the *corpus delicti* rule, Allen could not be convicted solely on his extrajudicial confession unless the Commonwealth introduced sufficient evidence independent of the confession to prove the crime actually occurred.[60] The rule requires only "slight corroboration of the confession" to establish the *corpus delicti* beyond a reasonable doubt.[61] The only evidence outside Allen's confession came from the testimony of his daughter that Allen had various opportunities to be alone with his grandson, he sometimes slept in the same bed as his grandson, and they wrestled together.[62] The supreme court found this evidence fell short of satisfying the slight corroboration requirement.[63] The court found Allen's mere opportunity to commit the *corpus delicti* was insufficient to provide

54. *Id.* at *8, 758 S.E.2d at 544.
55. *Id.*
56. *Id.* at *9, 758 S.E.2d at 544.
57. *Id.* at *9–10, 758 S.E.2d at 544.
58. 287 Va. 68, 77–78, 752 S.E.2d 856, 862 (2014).
59. *Id.* at 70–71, 752 S.E.2d at 858.
60. *Id.* at 74, 752 S.E.2d at 860.
61. *Id.*
62. *Id.* at 75, 752 S.E.2d at 860.
63. *Id.* at 77, 752 S.E.2d at 861–62.

slight corroboration.[64] The supreme court further found Allen's sleeping alone and wrestling alone with his grandson was just as consistent with the non-commission of aggravated sexual battery as with its commission.[65]

B. *Sentencing*

1. Deferred Dispositions

The Supreme Court of Virginia revisited the hotly contested issue of a circuit court's authority to withhold a finding of guilt and defer a disposition in *Starrs v. Commonwealth.*[66] In 2011, the court held that "during the interval between the conclusion of the evidence and the entry of a written order adjudicating [a] defendant guilty, [a trial court has] the inherent power, in the exercise of its discretion, to take the matter under advisement and to continue the case for future disposition."[67] The question in *Starrs* was: "[u]pon accepting a guilty plea and entering it in the record, does a trial court nevertheless retain the inherent authority to withhold a finding of guilt and defer the disposition?"[68]

After entering guilty pleas to two felonies, Starrs asked the circuit court to withhold a finding of guilt and continue the case for a period of time, and eventually dismiss the charges.[69] The circuit court determined it did not have the discretion to do that since Starrs had entered a guilty plea.[70] But the supreme court found that mere acceptance and entry of a guilty plea does not constitute "a formal adjudication of guilt."[71] Instead, "a defendant's guilty plea supplies the necessary proof and a trial court, after accepting and entering a guilty plea, may 'proceed to judgment,' i.e., may proceed to adjudicate the defendant guilty and impose the punishment proscribed by law."[72] Thus, the supreme court con-

64. *Id.* at 76, 752 S.E.2d at 861.

65. *Id.* at 77, 752 S.E.2d at 861–62.

66. 287 Va. 1, 4, 752 S.E.2d 812, 814 (2014).

67. *Id.* at 7, 752 S.E.2d at 815 (quoting Hernandez v. Commonwealth, 281 Va. 222, 226, 707 S.E.2d 273, 275 (2011)).

68. *Id.* at 4, 752 S.E.2d at 814.

69. *Id.* at 4–5, 752 S.E.2d. at 814–15.

70. *Id.* at 5, 752 S.E.2d at 815.

71. *Id.* at 13, 752 S.E.2d at 819.

72. *Id.* at 11, 752 S.E.2d at 818 (quoting Hobson v. Youell, 177 Va. 906, 912–13, 15

cluded that the circuit court had "the inherent authority to withhold a finding of [Starrs's] guilt, to defer the disposition, and to consider an outcome other than a felony conviction."[73]

The supreme court, in *Maldonado-Mejia v. Commonwealth*, explained what effect a circuit court's deferred finding of guilt has on an indictment.[74] On May 31, 2011, Maldonado-Mejia entered a plea in accordance with a plea agreement.[75] The plea agreement provided for a deferred finding of guilt, pending her completion of certain programs and undergoing supervised probation.[76] In July 2011, Maldonado-Mejia attempted to buy a firearm.[77] In doing so, she filled out a Bureau of Alcohol, Tobacco, and Firearms ("ATF") form, which asked if she was under indictment.[78] After answering "no" to the question, she was charged with and convicted of making a false statement on an ATF form.[79] On appeal, she argued the entry of her plea meant she was no longer "under indictment."[80] The supreme court, however, held that since she had not been convicted or acquitted, she remained "under indictment" under Virginia law.[81]

2. Re-Sentencing

In *Woodard v. Commonwealth*, the Supreme Court of Virginia considered whether the Court of Appeals of Virginia, after reversing a felony murder conviction, should have also remanded the case to the circuit court for re-sentencing on the remaining two felony drug convictions.[82] Woodard argued that the case should have been remanded because the sentencing guidelines would be

S.E.2d 76, 78 (1941)).

73. *Id.* at 13, 752 S.E.2d at 819. The dissenting opinion believed "the majority's holdings will 'degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess.'" *Id.* at 17, 752 S.E.2d at 822 (McClanahan, J., dissenting) (quoting United States v. Hyde, 520 U.S. 670, 677 (1997)).

74. 287 Va. 49, 51–53, 752 S.E.2d 833, 834–35 (2014).

75. *Id.* at 51, 752 S.E.2d at 834.

76. *Id.* at 52, 752 S.E.2d at 834.

77. *Id.*

78. *Id.*

79. *Id.* at 52–53, 752 S.E.2d at 834.

80. *Id.* at 54, 752 S.E.2d at 835.

81. *Id.* at 55, 752 S.E.2d at 836.

82. 287 Va. 276, 278, 754 S.E.2d 309, 310 (2014); *see* Woodard v. Commonwealth, 61 Va. App. 567, 576, 739 S.E.2d 220, 224 (2013).

different than those used during the first sentencing hearing.[83] The supreme court explained that because of the discretionary nature of sentencing guidelines, Woodard had not suffered any reviewable prejudice.[84] The court concluded that Woodard was not entitled to a new sentencing proceeding just because the sentencing guidelines with a felony murder conviction would be different than the sentencing guidelines without a felony murder conviction.[85]

3. Jury Instructions

The Court of Appeals of Virginia decided in *Bruton v. Commonwealth* that a circuit court did not err in informing the jury during the sentencing phase that the defendant would receive sentence credit for the time he had been incarcerated while awaiting trial.[86] In arguing against allowing a circuit court to tell the jury about pretrial sentencing credits, Bruton relied on the statement in *Coward v. Commonwealth* that a jury should "impose such sentence as seems just" and not concern itself with what may happen afterwards.[87] The court of appeals held that instructing the jury about sentencing credits "did not implicate the policy considerations underlying the *Coward* rule."[88] As the court of appeals explained, instructing the jury about Bruton's statutory credit for time served awaiting trial complied with the imperative that a jury is to be given "the benefit of all significant and appropriate information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decision."[89] If the circuit court had not done so, according to the court of appeals, it would have deprived the jury of "significant and appropriate information necessary to prevent potential misconceptions concerning the effect of its decision."[90]

83. *Woodard,* 287 Va. at 281, 754 S.E.2d at 312.

84. *Id.* at 281–82, 754 S.E.2d at 312.

85. *Id.* at 282, 754 S.E.2d at 312.

86. 63 Va. App. 210, 212, 755 S.E.2d 485, 486 (2014).

87. *Id.* at 213, 755 S.E.2d at 486 (quoting Coward v. Commonwealth, 164 Va. 639, 646, 178 S.E. 797, 800 (1935)).

88. *Id.* at 216, 755 S.E.2d at 488.

89. *Id.* at 217, 755 S.E.2d at 488 (quoting Fishback v. Commonwealth, 260 Va. 104, 113, 532 S.E.2d 629, 633 (2000)).

90. *Id.*

C. *Appeals*

1. Contemporaneous Objections

The issue in a number of recent cases was whether the alleged error had been preserved for appeal by a contemporaneous objection. In *Commonwealth v. Amos*, the Supreme Court of Virginia considered whether the preservation exception in Virginia Code section 8.01-384(A) applied to the defendant's circumstances.[91] Under that exception, when a litigant, through no fault of his own, is prevented from making a contemporaneous objection to a court's ruling or order, the failure to object "shall not thereafter prejudice" the litigant on appeal.[92] After it appeared that Amos falsely testified in a case, she was held in summary contempt and immediately taken to jail without any consideration from the trial court.[93] The Court of Appeals of Virginia, sitting en banc, held by operation of section 8.01-384(A) that Amos did not have an opportunity to object to being held in contempt at the time of the ruling; therefore, the arguments she made on appeal were not procedurally defaulted under Rule 5A:18—the contemporaneous objection rule.[94]

In affirming the court of appeals, the supreme court emphasized that "[t]he statute impose[d] no requirement that when the contemporaneous objection exception applies, a party . . . must file a post-conviction objection or otherwise bring the objection to the court's attention at a later point in the proceedings."[95] The court further emphasized that since litigants will rarely be precluded from making contemporaneous objections, the preservation exception to section 8.01-384(A) will be used sparingly.[96] But when a party is denied the opportunity to raise a contemporaneous objection, as in the unusual circumstances of Amos's case, then the exception applies.[97]

91. 287 Va. 301, 303, 754 S.E.2d 304, 305 (2014).

92. *Id.* at 306, 754 S.E.2d at 307 (quoting VA. CODE ANN. § 8.01-384(A) (Repl. Vol. 2007 & Cum. Supp. 2014)).

93. *Id.* at 304, 754 S.E.2d at 306.

94. *Id.* at 305, 754 S.E.2d at 306 (citing Amos v. Commonwealth, 61 Va. App. 730, 737, 741, 740 S.E.2d 43, 46–47, 49 (2013)).

95. *Id.* at 306–07, 754 S.E.2d at 307.

96. *Id.* at 309, 754 S.E.2d at 308.

97. *Id.*, 754 S.E.2d at 308–09.

The supreme court illustrated when the preservation exception in section 8.01-384(A) applies, and when it does not, in the consolidated cases of *Maxwell v. Commonwealth* and *Rowe v. Commonwealth*.[98] Maxwell and his counsel left the courtroom while the jury deliberated.[99] In their absence, the jury submitted questions and the circuit court answered them.[100] Maxwell filed a post-trial motion to set aside the conviction, arguing that the circuit court's ex parte communications violated his right to be personally present.[101] The court of appeals determined that Rule 5A:18 prohibited consideration of the merits of Maxwell's appeal.[102] The supreme court disagreed and applied the preservation exception in section 8.01-384(A) to Maxwell's circumstances.[103] Because neither Maxwell nor his attorney were present when the circuit court considered and responded to the jury's questions, the supreme court determined that Maxwell had no opportunity to object to the circuit court's response to the jury's questions in his absence.[104]

The supreme court declined to apply the preservation exception to Rowe's circumstances.[105] There, Rowe's counsel attempted to object to the prosecutor's closing argument.[106] But in stating his objection, Rowe's counsel said only: "Actually, before I make my argument, there is a motion I would like to make outside the presence of the jury."[107] When the circuit court indicated its intent to "deal with it when the jury goes out to retire," Rowe's counsel responded, "[v]ery well."[108] After the jury left to deliberate, Rowe's counsel made a motion for a mistrial based on alleged improper argument by the prosecutor.[109] On appeal, the supreme court held Rowe failed to satisfy the contemporaneous objection requirement because he "failed to state for the court the details of his objection or the time-sensitive nature of his motion."[110] And since the jury

98. 287 Va. 258, 261, 754 S.E.2d 516, 517 (2014).
99. *Id*. at 262, 754 S.E.2d at 517.
100. *Id.*, 754 S.E.2d at 517–18.
101. *Id.* at 263,, 754 S.E.2d at 518.
102. *Id*.
103. *Id*. at 266–67, 754 S.E.2d at 520.
104. *Id*.
105. *Id*. at 267, 754 S.E.2d at 520.
106. *Id*. at 264, 754 S.E.2d at 518.
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*. at 268, 754 S.E.2d at 521.

had already left to deliberate before Rowe made the reason for his objection known to the circuit court, it was too late.[111] Rowe "did not move for a mistrial at a time when the circuit court could have taken action to correct the asserted error."[112]

In *Linnon v. Commonwealth*, the supreme court considered, as a matter of first impression, whether a defendant that does not expressly adopt the objection of a co-defendant may nonetheless rely on that objection on appeal.[113] While employed as teachers at a vocational school, Craig Linnon and his wife Angela engaged in sexual activity with a sixteen-year-old female student.[114] Charged with taking indecent liberties with a minor by a person in a custodial or supervisory relationship, the Linnons were tried jointly, but separate counsel represented them.[115] During trial, the Commonwealth proposed four contested jury instructions.[116] On appeal to the court of appeals, Craig argued the proposed jury instructions were incorrect statements of law.[117] As to the first three of the instructions, the court of appeals ruled that "only Angela objected to them"; therefore, "Craig failed to preserve his argument for appeal [as required by] Rule 5A:18."[118] On appeal to the supreme court, Craig argued that Angela's objections should have been imputed to him because the circuit court understood the joint nature of the defense and had the opportunity to rule on the issue.[119] The supreme court disagreed and adopted the "general rule" that "one party may not rely on the objection of another party to preserve an argument for appeal without expressly joining in the objection."[120]

111. *Id*. at 268–69, 754 S.E.2d at 521.

112. *Id*. at 268, 754 S.E.2d at 521. In dissent, Justices Lemons and Mims would have applied the preservation exception, Virginia Code section 8.01-384(A), to Rowe's circumstances. *Id*. at 269, 271, 754 S.E.2d at 521–22 (Lemons, J., dissenting). Justice McClanahan disagreed with the majority's application of that exception to Maxwell's circumstances. *Id*. at 271, 754 S.E.2d at 522 (McClanahan, J., dissenting).

113. 287 Va. 92, 102, 752 S.E.2d 822, 828 (2014).

114. *Id*. at 96, 752 S.E.2d at 824–25.

115. *Id*. at 97, 752 S.E.2d at 825.

116. *Id*.

117. *Id*. at 101, 752 S.E.2d at 828.

118. *Id*. at 101–02, 752 S.E.2d at 828.

119. *Id*. at 102, 752 S.E.2d at 828.

120. *Id*.

2. Assignments of Error

In a pair of cases, the Supreme Court of Virginia signaled a reluctance to dismiss appeals based on an assignment of error that is not specific enough. In *Findlay v. Commonwealth*, the supreme court took up the issue of whether the assignment of error complied with the specificity requirements of Rule 5A:12(c)(1)(ii).[121] Under that rule, an assignment of error that "merely states that the judgment or award is contrary to the law and the evidence is not sufficient."[122] Findlay's assignment of error read: "The Petitioner/Appellant assigns as error the trial court's denial of his Motion to Suppress all of the seized videos that came from the defendant's computer, and his computer hard drive, and all derivatives thereof."[123]

The supreme court found that Findlay's assignment of error exceeded "the bare-bones allegations prohibited by Rule 5A:12(c)(1)(ii)."[124] In the supreme court's view, Findlay sufficiently "point[ed] to a specific preliminary ruling of the trial court—[its] denial of his motion to suppress—that he believe[d] to be in error."[125] The supreme court rejected the suggestion that the rule "demands the inclusion of a 'because' clause or its equivalent in each assignment of error."[126] The supreme court found such a requirement would be impractical, and in many instances "impossible to satisfy, [because] trial judges do not always state the specific reasons for their rulings."[127] Thus, the supreme court reasoned that "requiring a 'because' clause in each assignment of error would create an unnecessary procedural trap that may bar appellate review of meritorious claims."[128]

The supreme court applied the ruling in *Findlay* to a different assignment of error in *Commonwealth v. Herring*.[129] Herring's as-

121. 287 Va. 111, 113, 752 S.E.2d 868, 870 (2014).

122. VA. SUP. CT. R. 5A:12(c)(1)(ii) (2014).

123. *Findlay,* 287 Va. at 113, 752 S.E.2d at 870.

124. *Id.* at 116, 752 S.E.2d at 871.

125. *Id.*

126. *Id.*

127. *Id.*, 752 S.E.2d at 872.

128. *Id.* The dissenting opinion believed Findlay failed to satisfy the requirement in Rule 5A:12(c)(1) and Rule 5:17(c)(1) that "an assignment of error list 'the specific errors in the rulings below.'" *Id.* at 118, 752 S.E.2d at 873 (Powell, J., dissenting).

129. No. 130989, 2014 Va. LEXIS 94, at *8, 758 S.E.2d 225, 230 (June 5, 2014).

signment of error stated: "1. The trial court erred by failing to grant the defendant[']s motion to strike the Commonwealth's evidence as being insufficient as a matter of law to sustain his convictions for attempted murder, abduction[,] and the use of a firearm in the commission of a felony."[130]

The Commonwealth, in part, argued the assignment of error was insufficient because it "merely state[d] that the judgment is contrary to the law and the evidence."[131] The Commonwealth attempted to distinguish *Findlay* by suggesting that cases involving the sufficiency of the evidence differ from those challenging the suppression of the evidence.[132] As to sufficiency of the evidence claims, the Commonwealth argued that "appellants should be required to provide greater substance than what *Findlay* outlined for an assignment of error to be sufficient."[133] The supreme court disagreed and found *Findlay* dispositive.[134] In the court's view, Herring's assignment of error pointed to a specific ruling Herring believed to be in error—the court's failure to grant Herring's motion to strike.[135] Thus, the supreme court found that Herring had satisfied Rule 5A:12(c)(1)(ii) by "lay[ing] his finger on the error in his assignment of error."[136] The court again rejected the proposition that "appellants include a 'because' clause or its equivalent in their assignments of error to explain why it was error for the trial court to take the action that it did."[137]

II. CRIMINAL LAW

A. *Searches*

In *Rideout v. Commonwealth*, the Court of Appeals of Virginia considered whether the police breached the defendant's reasona-

130. *Id.* *5–6, 758 S.E.2d at 229.

131. *Id.* at *7, 758 S.E.2d at 230.

132. *Id.* at *9, 758 S.E.2d at 230.

133. *Id.*

134. *Id.* at *7, 758 S.E.2d at 230.

135. *Id.* at *8, 758 S.E.2d at 230.

136. *Id.* at *9, 758 S.E.2d at 230 (quoting Findlay v. Commonwealth, 287 Va. 111, 115, 752 S.E.2d 868, 871 (2014)).

137. *Id.* at *9–10, 758 S.E.2d at 230. The dissenting opinion stated, "it is now difficult to envision an assignment of error that would be deemed insufficient under the majority's reasoning." *Id.* at *37, 758 S.E.2d at 238 (Powell, J., concurring in part and dissenting in part).

ble expectation of privacy in the contents of his personal computer files.[138] During an investigation into the exploitation of children on the Internet, police discovered that child pornography had been shared on a peer-to-peer file sharing program called Shareaza LE from an Internet protocol ("IP") address issued to Rideout.[139] Police executed a search warrant at Rideout's residence and discovered more child pornography.[140] In an attempt to suppress the child pornography that gave rise to the search warrant, Rideout claimed he had a reasonable expectation of privacy in his computer files under the Fourth Amendment because he had been using the Shareaza program under the mistaken belief he had disabled its sharing features.[141]

The court of appeals held that Rideout did not have an expectation of privacy in those files given his decision to install the Shareaza file-sharing program on his computer.[142] The court compared Rideout's installation of the program to "a person who hands over the keys to his house to a number of friends."[143] As the court of appeals explained, "[t]hat person should not be surprised when some of those friends simply come inside his house without knocking on the door."[144] The court further explained that even if Rideout had the subjective intention to prevent others from accessing his files, he did not have an objective reasonable expectation of privacy in those files.[145] By installing the file-sharing program on his computer, Rideout assumed the risk that others—including the police—could access his files.[146]

The court of appeals again considered whether the police violated the defendant's Fourth Amendment rights while investigating the defendant for possession of child pornography in *Jeffers v.*

138. 62 Va. App. 779, 782, 753 S.E.2d 595, 597 (2014).

139. *Id.* at 782–83, 753 S.E.2d at 597.

140. *Id.* at 783–84, 753 S.E.2d at 597.

141. *See id.* at 784–86, 753 S.E.2d at 597–98.

142. *Id.* at 789, 753 S.E.2d at 600.

143. *Id.*

144. *Id.*

145. *Id.* at 789–90, 753 S.E.2d at 600 (applying the logic of United States v. Borowy, 595 F.3d 1045, 1047–48 (9th Cir. 2010)).

146. *Id.* at 790, 753 S.E.2d at 600. The court of appeals further held that the exclusionary rule would not be an appropriate remedy because "the police clearly did not engage in any conduct that ought to be deterred through the application of the exclusionary rule." *Id.* at 790–92, 753 S.E.2d at 600–01.

Commonwealth.[147] Police obtained a search warrant after discovering child pornography had been downloaded from an IP address located at Jeffers's residence.[148] The search warrant directed the officers to search for evidence of child pornography at Jeffers's property, including the home and barn.[149] During the search, police discovered that Jeffers actually lived in the barn and that a computer in the barn contained child pornography.[150]

On appeal, Jeffers argued that "the officers misinterpreted the scope of the warrant to include the barn."[151] Jeffers reasoned that once officers discovered that Jeffers actually lived in the barn, they could not search there because the barn was no longer within the scope of the warrant.[152] The court of appeals disagreed, pointing out that "[t]he search warrant did not state that the barn could be searched *only* if no one resided in it."[153] Furthermore, "[t]he officers were not required to assume that the magistrate assumed the barn was unoccupied."[154] The court found "[s]uch a piling of one assumption upon another" could not be "squared with the straightforward reasonableness requirement of the Fourth Amendment."[155]

In *Fauntleroy v. Commonwealth*, the court of appeals considered whether a vehicle was lawfully impounded and, thus, whether the resulting inventory search of that vehicle violated the Fourth Amendment.[156] During a traffic stop, the officer discovered that Fauntleroy's vehicle displayed an inspection sticker that had been issued for a different vehicle.[157] When questioned about it, Fauntleroy admitted to purchasing the "hot" sticker.[158] The officer impounded the vehicle, conducted an inventory search, and discovered illegal drugs in the vehicle.[159] The circuit

147. 62 Va. App. 151, 154, 156, 743 S.E.2d 289, 290–91 (2013).
148. *Id*.
149. *Id*. at 155, 743 S.E.2d at 291.
150. *Id*.
151. *Id.* at 156, 743 S.E.2d at 291.
152. *Id*.
153. *Id*. at 158, 743 S.E.2d at 292.
154. *Id*.
155. *Id*. (citing United States v. Nichols, 344 F.3d 793, 797–98 (8th Cir. 2003)).
156. 62 Va. App. 238, 239–40, 746 S.E.2d 65, 65 (2013).
157. *Id*. at 241–42, 746 S.E.2d at 66–67.
158. *Id*. at 242, 746 S.E.2d at 67.
159. *Id.*

court denied Fauntleroy's motion to suppress the drugs found in the search.[160]

In affirming the circuit court's denial of the motion to suppress, the court of appeals held the officer's decision to impound the vehicle was objectively reasonable.[161] The court of appeals observed that, based on Fauntleroy's unauthorized possession of the fraudulent inspection sticker, an officer could reasonably infer Fauntleroy's vehicle likely had a significant defect that rendered it unsafe to operate on the highways until it was repaired.[162] An officer could also reasonably infer that Fauntleroy did not intend to have the vehicle inspected, given his "fraudulent display of an inspection sticker that had been issued for another vehicle."[163]

B. *Specific Crimes*

1. Driving Without a Valid Driver's License

In *Carew v. Commonwealth*, the Court of Appeals of Virginia explained the proof required to convict a defendant of driving a motor vehicle without a valid driver's license in violation of Virginia Code section 46.2-300.[164] At the time of her charge of driving without a valid driver's license, Carew's license had been suspended for failing to attend a clinic interview.[165] The Department of Motor Vehicles had sent Carew an order requiring her to attend a clinic interview, but the letter was returned "unclaimed."[166] On appeal, Carew argued her conviction should be overturned because the evidence did not show she had been notified that her license had been suspended.[167] The court of appeals prefaced that "[a] license is not suspended until notice of that status is received by the holder,"[168] and explained that "[w]hen the predicate for invalidity under [Virginia] Code § 46.2-300 is a suspended license, the Commonwealth must prove the defendant received notice of

160. *Id*. at 244, 746 S.E.2d at 67–68.
161. *Id*. at 248, 746 S.E.2d at 70.
162. *Id*. at 251, 746 S.E.2d at 71.
163. *Id*.
164. 62 Va. App. 574, 575, 750 S.E.2d 226, 227 (2013).
165. *Id*.
166. *Id*. at 575–76, 750 S.E.2d at 227.
167. *Id*. at 575, 750 S.E.2d at 227.
168. *Id*. at 578, 750 S.E.2d at 228.

the suspension."[169] Since the evidence did not prove that Carew had notice that her driver's license was suspended, the court of appeals reversed her conviction.[170]

2. Conspiracy

The charges in *Chambliss v. Commonwealth* arose from a car chase that began in Spotsylvania County.[171] While being transported to jail, Chambliss escaped from police, jumped into a car driven by his co-conspirator, and fled.[172] Shortly thereafter, Chambliss and the co-conspirator were apprehended in Caroline County.[173] Chambliss was tried and convicted in Caroline County of conspiracy to elude the police.[174] Chambliss argued the conspiracy to elude occurred entirely in Spotsylvania County; once the car entered Caroline County, there was no evidence of any new conspiracy to sustain the conviction.[175] Conspiracy, however, can be a continuing offense in certain circumstances.[176] Under the totality of the circumstances, the Court of Appeals of Virginia found sufficient evidence to demonstrate "a single conspiracy continuing from Spotsylvania County into Caroline County."[177]

3. Firearms

In *Jordan v. Commonwealth*, the Supreme Court of Virginia revisited the proof needed to sustain a conviction for possession of a firearm by a convicted felon in violation of Virginia Code section 18.2-308.2.[178] A thirteen-year-old witness testified that while his father was inside a convenience store, Jordan approached his vehicle, pointed a "gun" at his head, and told him to get out of the

169. *Id.* at 578–79, 750 S.E.2d at 228.
170. *Id.*
171. 62 Va. App. 459, 463, 749 S.E.2d 212, 214 (2013).
172. *Id.*
173. *Id.* at 463–64, 749 S.E.2d at 214–15.
174. *Id.* at 464, 749 S.E.2d at 215.
175. *Id.*
176. *See id.* at 467–68, 749 S.E.2d at 216–17; *see also* Barber v. Commonwealth, 5 Va. App. 172, 177–78, 360 S.E.2d 888, 890–91 (1987) (citing United States v. MacDougall, 790 F.2d 1135, 1144 (4th Cir. 1986)).
177. *Chambliss,* 62 Va. App. at 468, 749 S.E.2d at 217.
178. 286 Va. 153, 155, 747 S.E.2d 799, 799 (2013).

truck.[179] The witness also testified that he was familiar with handguns and that Jordan's gun appeared to be a "Raven" semi-automatic pistol.[180] In affirming Jordan's conviction for possession of a firearm by a convicted felon, the supreme court observed that even though Jordan did not verbally threaten to kill the witness, the acts of pointing the gun at the witness and directing him to exit the truck suggested that if the witness did not comply, Jordan would shoot him.[181] The supreme court explained that this conduct, along with the witness's identification of the firearm as a "Raven" pistol, were matters for the trier of fact.[182] Refusing to substitute its judgment for that of the jury, the supreme court found sufficient evidence to convict Jordan of the offense.[183]

In *Bonner v. Commonwealth*, the Court of Appeals of Virginia, sitting en banc, considered the proper venue for the charge of altering a serial number on a firearm in violation of section 18.2-311.1.[184] Bonner was found with the firearm in question in Brunswick County.[185] There was "scant" evidence, however, about the firearm.[186] Specifically, "[t]here was no testimony as to who had filed down the serial number, when it was obliterated, or where the removal was done."[187] When a crime constitutes a discrete act, venue is generally appropriate where the crime is committed.[188] In contrast, "[w]hen a crime constitutes a continuing offense, venue may be proper in more than one jurisdiction."[189] Analyzing the plain language of section 18.2-311.1, the court of appeals held that the crime of altering a serial number is a discrete act, and not a continuing offense.[190] Once a person "intentionally removes, defaces, alters, changes, destroys, or oblite-

179. *Id.*, 747 S.E.2d at 800.

180. *Id.* at 158, 747 S.E.2d at 801.

181. *Id.* at 158–59, 747 S.E.2d at 801–02.

182. *Id.*

183. *Id.* at 159, 747 S.E.2d at 801–02. The dissenting opinion disagreed that the evidence was sufficient to convict Jordan, opining that the majority upheld the conviction solely on the witness's belief the instrument looked like a firearm. *See id.* at 159–63, 747 S.E.2d at 802–04. (Powell, J., dissenting).

184. 62 Va. App. 206, 208–09, 745 S.E.2d 162, 163–64 (2013).

185. *Id.* at 209–10, 745 S.E.2d at 164.

186. *Id.* at 210, 745 S.E.2d at 164.

187. *Id.*

188. *Id.* at 211–12, 745 S.E.2d at 165.

189. *Id.* at 212, 745 S.E.2d at 165.

190. *Id.*

rates" the serial number of a firearm, the crime is complete.[191] Under the facts of the case, there was no evidence Bonner was the one who filed down the serial number, let alone any evidence of where that discrete act occurred that would create a "strong presumption" that venue in Brunswick County was proper.[192]

4. Forgery and Uttering

In *Henry v. Commonwealth*, the Court of Appeals of Virginia reversed the defendant's forgery and uttering convictions.[193] Henry had provided false financial information to a court clerk when completing and signing forms to determine his eligibility for indigent defense services.[194] Relying on the proposition that "the gravamen of forgery is the want of genuineness or authenticity in a document," Henry argued he did not commit forgery because the financial statements were still financial statements, even if they contained a lie.[195] The court of appeals agreed, observing that "in order for Henry's forgery conviction to be upheld, the Commonwealth was required to prove that Henry's conduct with respect to the financial statements altered the genuineness and authenticity of those documents, making them *not in fact what they purported to be*."[196] Despite Henry's misrepresentations, the court of appeals found his conduct did not alter the financial statements' "material nature."[197]

5. Involuntary Manslaughter

The involuntary manslaughter charges in *Cheung v. Commonwealth* arose from a bus crash on Interstate 95 in which the bus driver fell asleep, killing four passengers.[198] For a number of reasons, the Court of Appeals of Virginia found the bus driver, Cheung, criminally negligent for causing the crash.[199] First, the

191. *Id.* (quoting VA. CODE ANN. § 18.2-311.1 (Repl. Vol. 2014)).
192. *Id.* at 215–16, 745 S.E.2d at 167.
193. 63 Va. App. 30, 34, 753 S.E.2d 868, 870 (2014).
194. *Id.* at 35–36, 753 S.E.2d at 870.
195. *Id.* at 39–40, 753 S.E.2d at 872 (citing Brown v. Commonwealth, 56 Va. App. 178, 188, 692 S.E.2d 271, 276 (2010)).
196. *Id.* at 40, 753 S.E.2d at 872.
197. *Id.* at 42, 753 S.E.2d at 873.
198. 63 Va. App. 1, 3, 753 S.E.2d 854, 855 (2014).
199. *Id.* at 8, 11–13, 753 S.E.2d at 857, 859–60.

record showed Cheung undertook a trip of substantial distance while in a sleepy condition.[200] Second, ample evidence established that Cheung—who had consumed multiple energy drinks and told others he was tired—was aware of his impaired condition hours before the crash.[201] Third, given his erratic driving prior to the crash, Cheung should have known his drowsy state was adversely affecting his driving.[202] Finally, Cheung was more culpable than the typical driver since he "disregarded the risk that he would fall asleep *while driving a bus*."[203] As the court of appeals emphasized, "[w]hen a bus is driven negligently, this negligence threatens the safety of not only those traveling near the bus, but also the safety of the numerous passengers riding on the bus."[204]

6. Malicious Wounding

In *Burkeen v. Commonwealth*, the Supreme Court of Virginia considered whether one punch with a bare fist constituted malicious wounding.[205] While outside of a bar, Burkeen approached the victim and asked to see his pool cue.[206] Burkeen then demanded the victim sell him the pool cue.[207] When the victim attempted to retrieve the cue, Burkeen let go of it and immediately punched the victim in the face.[208] Burkeen cursed at and degraded the victim, proclaimed he was in the Army and could bench press 200 pounds, and began to strike the victim again before a third individual intervened and stopped him.[209] The victim suffered a fracture of the bones around his cheek and nose.[210]

A conviction for malicious wounding requires an "intent to maim, disfigure, disable, or kill."[211] Under ordinary circumstances that intent cannot be presumed from a punch with a bare fist;

200. *Id*. at 11, 753 S.E.2d at 859.
201. *Id*. at 12, 753 S.E.2d at 859.
202. *Id*.
203. *Id*. at 13, 753 S.E.2d at 859.
204. *Id*., 753 S.E.2d at 859–60.
205. 286 Va. 255, 257, 749 S.E.2d 172, 173 (2013).
206. *Id*.
207. *Id*.
208. *Id*., 749 S.E.2d at 173–74.
209. *Id*. at 257–58, 749 S.E.2d at 174.
210. *Id*. at 258, 749 S.E.2d at 174.
211. *Id*. at 259, 749 S.E.2d at 174 (quoting VA. CODE ANN. § 18.2-51 (Repl. Vol. 2014)).

however, "an assault with a bare fist may be attended with such circumstances of violence and brutality" that an intent to maim may be established.[212] In making this determination, the supreme court found it proper "to consider not only the method by which a victim is wounded, but also the circumstances under which that injury was inflicted in determining whether there is sufficient evidence to prove [malicious wounding]."[213] The supreme court found that the circumstances of Burkeen's unprovoked attack constituted such violence and brutality that, even though Burkeen delivered only one blow, he acted with malice and intended to maim the victim.[214]

7. Possession of Child Pornography

In *Papol v. Commonwealth*, the Court of Appeals of Virginia considered whether charges of possession of child pornography under the recidivism provision of the statute could be tried together in the same proceeding as the predicate offense.[215] The grand jury charged Papol with one count of possession of child pornography under subsection (A) of Virginia Code section 18.2-374.1:1, and eleven additional counts of possession of child pornography, second or subsequent violation, under subsection (B) of the statute.[216] Papol argued he could not be charged with the additional eleven counts unless they physically occurred after he had already been convicted of the first count.[217] The court of appeals reasoned since subsection (B) of the statute did not use the word "conviction" as a predicate for the enhanced felony charge, but simply spoke of a "second or subsequent violation," the legislature intended to authorize the enhanced penalty without a prior conviction.[218] Therefore, the court of appeals held that Papol "committed the first violation when he possessed the first

212. *Id.*, 749 S.E.2d at 175 (quoting Fletcher v. Commonwealth, 209 Va. 636, 640, 166 S.E.2d 269, 273 (1969)).

213. *Id.* at 260–61, 749 S.E.2d at 175.

214. *Id.* at 261, 749 S.E.2d at 176.

215. 63 Va. App. 150, 153–54, 754 S.E.2d 918, 920 (2014) (citing VA. CODE ANN. § 18.2-374.1:1(B) (Repl. Vol. 2014)).

216. *Id.* at 152–53, 754 S.E.2d at 920; *see* VA. CODE ANN. § 18.2-374.1:1(A)–(B) (Repl. Vol. 2014).

217. Papol, 63 Va. App. at 153, 754 S.E.2d at 920.

218. *Id.* at 155, 754 S.E.2d at 921.

offending image [and e]ach of the other images he possessed was a subsequent violation of the statute."[219]

8. Sodomy

In a recent federal habeas corpus case, *MacDonald v. Moose*, the Court of Appeals for Fourth Circuit found the anti-sodomy provisions of Virginia Code section 18.2-361(A) facially unconstitutional.[220] In *Saunders v. Commonwealth*, Saunders collaterally attacked his underlying convictions of consensual sodomy with juveniles under section 18.2-361(A).[221] Saunders urged the Court of Appeals of Virginia to adopt the Fourth Circuit's ruling, reject a contrary decision by the Supreme Court of Virginia, and find the trial court was without jurisdiction to enter judgment against him for his crime.[222] The court of appeals declined, finding the Fourth Circuit's holding in *MacDonald* merely persuasive.[223] Since the Supreme Court of Virginia had upheld the constitutionality of section 18.2-361(A), the court of appeals was bound to follow that precedent.[224]

9. Unreasonable Refusal

In *D'Amico v. Commonwealth*, the Supreme Court of Virginia interpreted the statute prohibiting the unreasonable refusal to submit to a breath test—Virginia Code section 18.2-268.3.[225] Before attempting to administer the breath test to D'Amico, the breath test operator read a refusal form, as required by section 18.2-268.3(B).[226] D'Amico refused to take the test.[227] Thereafter,

219. *Id.*

220. 710 F.3d 154, 156 (4th Cir. 2013) (applying Lawrence v. Texas, 539 U.S. 558 (2003)).

221. 62 Va. App. 793, 799, 801, 753 S.E.2d 602, 605–06 (2014). Saunders's collateral attack came during the direct appeal of his convictions for breaching the terms of his suspended sentence. *Id.* at 799, 753 S.E.2d at 605.

222. *Id.* at 804, 753 S.E.2d at 607.

223. *Id.*, 753 S.E.2d at 608.

224. *Id.* at 805, 753 S.E.2d at 608 (citing McDonald v. Commonwealth, 274 Va. 249, 260, 645 S.E.2d 918, 924 (2007)). The 2014 Virginia General Assembly amended Virginia Code section 18.2-361(A) by removing the language prohibiting sodomy. *See infra* Part (IV)(G). And the Supreme Court of Virginia has granted review of Saunders' appeal. Saunders v. Commonwealth, *appeal granted*, No. 140507 (Va. Sept. 16, 2014).

225. 287 Va. 284, 286, 288, 754 S.E.2d 291, 292–93 (2014).

226. *Id.* at 286, 754 S.E.2d at 292; *see* VA. CODE ANN. § 18.2-268.3(B) (Repl. Vol. 2014).

the arresting officer signed the refusal form and presented it to the magistrate to charge D'Amico with unreasonably refusing to take a breath test.[228] During his bench trial, D'Amico unsuccessfully argued that not only was the refusal form inadmissible, but also that his conviction was invalid because the breath test operator, not the arresting officer, had actually read the refusal form to him.[229]

The crux of D'Amico's argument on appeal was that the reading and execution of the refusal form, as stated in subsections (B) and (C) of the statute, constituted part of the elements of the offense of unreasonable refusal.[230] The supreme court, however, observed that the elements of the offense are completely stated in subsection (A): "unreasonably refusing to submit to a blood and/or breath test after being arrested for driving under the influence of alcohol or drugs."[231] The supreme court held that subsection (A) does not incorporate the procedural requirements set forth in subsections (B) and (C).[232] Thus, D'Amico was not prejudiced by the admission of the refusal form and "its admission was, at most, harmless error."[233]

III. LEGISLATION

A. *Accessories After the Fact*

Previously, accessories after the fact to any felony were guilty of a Class 1 misdemeanor.[234] Under new legislation, an accessory after the fact to a homicide offense that is punishable by death or as a Class 2 felony is guilty of a Class 6 felony.[235]

227. *D'Amico*, 287 Va. at 287, 754 S.E.2d at 293.
228. *Id.*
229. *Id.*
230. *Id.* at 289, 754 S.E.2d at 294.
231. *Id.* (citing VA. CODE ANN. § 18.2-268.3(A) (Repl. Vol. 2014)).
232. *Id.*
233. *Id.* at 290, 754 S.E.2d at 294.
234. *See* VA. CODE ANN. § 18.2-19 (Repl. Vol. 2014).
235. Act of Apr. 6, 2014, ch. 668, 2014 Va. Acts ___, ___ (codified as amended at VA. CODE ANN. § 18.2-19 (Cum. Supp. 2014)).

B. *"Celebratory Gunfire"*

Seven-year-old Brendon Mackey died after he was struck by a falling bullet fired at a Fourth of July fireworks show.[236] The 2014 Virginia General Assembly passed "Brendon's Law" to strengthen the penalty for celebratory gunfire.[237] Under the legislation, "[a]ny person who handles any firearm in a manner so gross, wanton, and culpable as to show a reckless disregard for human life and causes the serious bodily injury of another person resulting in permanent and significant physical impairment is guilty of a Class 6 felony."[238]

C. *Conditional Guilty Plea for Misdemeanors*

Virginia Code section 19.2-254 allows a defendant to enter a conditional guilty plea, reserving the right to appeal the adverse determination of a pretrial motion, such as a motion to suppress.[239] The defendant may withdraw the guilty plea if he or she prevails on appeal.[240] Under the statute's old language, a defendant could not enter a conditional guilty plea to a misdemeanor charge—he could only do so for felonies.[241] The 2014 Virginia General Assembly gave defendants the same right to enter a conditional guilty plea in a misdemeanor case in circuit court that exists in a felony case.[242]

D. *Judicial Recusal for Rejected Plea Agreements*

If a judge rejects a plea agreement in a criminal or juvenile delinquency case, the law now requires the judge to immediately

236. Markus Schmidt, *Bill on Celebratory Gunfire Is Signed,* RICH. TIMES-DISPATCH, Apr. 4, 2014, at B2.

237. *See id*.

238. Act of Mar. 31, 2014, ch. 444, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-56.1 (Cum. Supp. 2014)).

239. VA. CODE ANN. § 19.2-254 (Cum. Supp. 2014).

240. *Id*.

241. *See id.* (Repl. Vol. 2008); *see also* Cross v. Commonwealth, 49 Va. App. 484, 493, 642 S.E.2d 763, 767 (2007), *vacated on other grounds*, 52 Va. App. 598, 665 S.E.2d 861 (2008).

242. Act of Mar. 3, 2014, ch. 52, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 19.2-254 (Cum. Supp. 2014)).

recuse himself or herself from any further proceedings on the same matter unless the parties agree otherwise.[243]

E. *Recording Misdemeanor Cases*

The 2014 Virginia General Assembly passed legislation requiring the circuit court in misdemeanor cases to allow the parties to record evidence and incidents of trial by a mechanical or electronic device in cases in which there is no court reporter or other court approved recording.[244] The purpose of the recording is to aid counsel in producing a statement of facts for appeal when there is no transcript.[245] The recording, however, shall not be made a part of the record unless otherwise permitted.[246]

F. *"Revenge Porn"*

The 2014 Virginia General Assembly passed legislation to criminalize "revenge porn," the vengeful posting of nude photographs on the internet by former partners.[247] Under the legislation, a person is guilty of a Class 1 misdemeanor if, "[w]ith the intent to coerce, harass, or intimidate" the depicted person, he or she "maliciously disseminates or sells any videographic or still image created by any means whatsoever that depicts another person who is totally nude, or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast."[248] Venue for the crime is "in the jurisdiction where the unlawful act occurs or where any videographic or still image created by any means whatsoever is produced, reproduced, found, stored, received, or possessed" in violation of the statute.[249]

243. Act of Mar. 5, 2014, ch. 165, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 16.1-277.2, 19.2-254 (Cum. Supp. 2014)).

244. Act of Mar. 3, 2014, ch. 78, 2014 Va. Acts ___ (codified at VA. CODE ANN. § 17.1-128.1 (Cum. Supp. 2014)).

245. *Id.*

246. *Id.*

247. *See* J. Reynolds Hutchins, *Bell Bill Targets 'Revenge Porn,'* DAILY PROGRESS (Mar. 10, 2014, 10:30 PM), http://www.dailyprogress.com/news/bell-bill-targets-revenge-porn/article_b5217fae-a8ae-11e3-905b-0017a43b2370.html.

248. Act of Mar. 31, 2014, ch. 399, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 18.2-386.1, -386.2 (Cum. Supp. 2014)).

249. *Id.*

G. *Sex Crimes*

In apparent response to the decision by the Court of Appeals for the Fourth Circuit in *McDonald v. Moose*,[250] the 2014 Virginia General Assembly removed the language generally prohibiting sodomy from Virginia Code section 18.2-361.[251] The 2014 General Assembly, however, added the words "anal intercourse, cunnilingus, fellatio, and anilingus" to numerous other Virginia Code sections pertaining to sex trafficking and sex crimes against children.[252]

The 2014 Virginia General Assembly also passed legislation which states: "In a criminal case in which the defendant is accused of a felony sexual offense involving a child victim, evidence of the defendant's conviction of another sexual offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant."[253] The law contains a notice provision requiring the Commonwealth to advise the defendant at least fourteen days prior to trial that it intends to introduce his prior convictions into evidence and to provide documentation of those convictions.[254] The law contains a provision, however, stating that evidence offered under this provision may still be excluded under the Virginia Rules of Evidence, including Rule 2:403, involving the exclusion of relevant evidence on the grounds it is prejudicial, misleading, confusing, or needlessly cumulative.[255]

H. *Wearing a Mask in Public*

The 2014 Virginia General Assembly amended Virginia's prohibition against wearing a mask in public to add an intent element to the crime.[256] Under the law, except in certain situations, a

250. *See supra* Part III(B)(8).

251. Act of Apr. 23, 2014, ch. 794, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 17.1-275.12, 18.2-67.5:1, -346, -348, -356, -359, -361, -368, -370, -370.1, -371, -374.3 (Cum. Supp. 2014)).

252. *See id*.

253. Act of Apr. 23, 2014, ch. 782, 2014 Va. Acts ___ (codified at VA. CODE ANN. § 18.2-67.7:1 (Cum. Supp. 2014)).

254. *Id*.

255. *Id*.; *see* VA. SUP. CT. R. 2:403 (2014).

256. Act of Mar. 5, 2014, ch. 167, 2014 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-422 (Cum. Supp. 2014)).

person over the age of sixteen who wears a mask, hood, or other device that hides or covers a substantial portion of the face with the intent to conceal his identity is guilty of a Class 6 felony.[257]

257. *Id.*