

THE COMMONWEALTH'S ATTORNEY'S
DRUG PROSECUTION MANUAL
1991 EDITION

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**THE COMMONWEALTH'S ATTORNEY'S
DRUG PROSECUTION MANUAL**

Compiled and Prepared

By

The

COMMONWEALTH'S ATTORNEYS' SERVICES AND TRAINING COUNCIL

NCJRS

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ACQUISITIONS

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for

1991

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INTRODUCTION

This Commonwealth's Attorney's Drug Prosecution Manual is a by product of the Commonwealth's Attorneys' Services and Training Council's four experience with the Multijurisdictional Regional Drug Prosecution Program. This Program was funded and made possible by several grants awarded by the Department of Criminal Justice Services pursuant to the Federal Anti-Drug Abuse Legislation.

Through these federal-state match grants the Council was able to award subgrants to several localities that had entered into regional agreements whereby a regional drug prosecutor would be created for that region. The primary purpose of these multijurisdictional drug prosecutors was to target and prosecute those drug enterprises that operate across local territorial boundaries. By so operating these drug enterprises were able to evade prosecution because territorial limits imposed restraints on local law enforcement efforts once the criminal trail moved across local boundaries.

The Council, in the initial stages of this program, was faced with an unknown task because there was no history of such program from which the Council could draw important lessons. After four years of this program, the Council believes it has identified several crucial factors if such a program is to be successful.

The first critical factor is actual cooperation by the localities. This seemingly apparent factor requires more than the usual public pronouncement at the initiation of a program. Local law enforcement manpower has to be assigned to this program to work only on such program. Without this dedication of manpower and money, this program cannot work.

Another crucial factor identified is the necessary use of an investigative vehicle through which this program can identify and target those criminal elements for prosecution. In these four years these multijurisdictional prosecutors have used (a) the federal grand jury through the United States Attorney's Special Assistant Program, (b) the Multijurisdictional Grand Jury, as permitted under state law, and (c) the taskforce approach that consists of law enforcement personnel from the local and state police units and, sometimes, federal units.

Another important element in a successful multijurisdictional prosecutorial unit is the supervisory oversight performed

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by the Host Commonwealth's Attorney. The multijurisdictional prosecutors in our program are specifically employed by a designated local Commonwealth's Attorney's Office in that cooperative region.

Appearing below in this chapter are two model agreements. One is for the creation of a multijurisdictional regional drug prosecutor; the other is for the creation of a regional task-force. It is believed that these models reflect the most important elements necessary for a successfully effective multijurisdictional regional drug prosecutorial program.

To assist future regional drug prosecutors and to assist prosecutors who have only occasions to try drug cases, this manual was produced. It consists of a compilation of chapters on specific matters that are frequently visited in a drug prosecution trial. These chapters were written by various regional drug prosecutors who have grown with this program. This manual is not intended to be total inclusive of all matters relative to drug prosecutions. This manual is designed to aid and assist the prosecutor.

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MODEL MULTIJURISDICTIONAL PROSECUTORIAL AGREEMENT

WHEREAS, the undersigned are individually elected prosecutors for their respective jurisdictions;

WHEREAS, the undersigned are desirous of pursuing cooperative investigations and more effective prosecutions of organized illegal distribution of narcotics that operate across jurisdictional boundaries of local government;

WHEREAS, the undersigned parties seek to establish effective and efficient lines of communication and intelligence sharing arrangements among the jurisdictions;

WHEREAS, the undersigned parties, to achieve the foregoing objectives, enter into this Memorandum of Agreement whereby a special narcotics prosecutor is authorized to act as an extension of their respective jurisdictions with the goal of identifying, investigating and prosecuting those individuals who have violated the laws of this Commonwealth and who would not otherwise be amenable to prosecution because of jurisdictional boundaries.

NOW, THEREFORE, on this ____ day of _____ of 19__, for and in consideration of mutual, benefits, promises and other consideration, the undersigned mutually agree as follows:

1. A regional, multijurisdictional prosecutorial taskforce shall be created, whose territorial jurisdiction shall coincide with the jurisdictions of the undersigned parties.
2. This multijurisdictional prosecutorial taskforce shall be designated and called: _____.
3. The undersigned parties shall vote and select from among themselves a Host Commonwealth's Attorney, who will employ an experienced licensed attorney who will become the Special Prosecutor for this multijurisdictional prosecutorial taskforce. The employment decision by the Host Commonwealth's Attorney is subject to the following:
 - a. The approval of the undersigned parties.
 - b. This Special Prosecutor shall also meet the qualifications adopted by the Commonwealth's Attorneys' Services and Training Council for this position.

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The Host Commonwealth's Attorney shall have authority over daily and administrative matters in the operation of this multijurisdictional prosecutorial taskforce, but its policy decisions and procedure shall be made by the undersigned parties. The Special Prosecutor will be an Assistant Commonwealth's Attorney on the staff of the Host Commonwealth's Attorney and subject to his or her control as any other Assistant Commonwealth's Attorney in that Office. The Host Commonwealth's Attorney shall house the Special Prosecutor and any support staff for the Unit.

4. The undersigned parties shall be designated and referred to hereinafter as the Regional Prosecutorial Command Group.
5. The multijurisdictional prosecutorial taskforce shall use one of the following investigative methodology:
 - a. With the consent of the U.S. Attorney for the District, a United States Grand Jury where the Special Prosecutor is designated as a Special Assistant United States Attorney;
 - b. Multijurisdictional Grand Jury pursuant to the laws of the Commonwealth of Virginia; or
 - c. An investigative taskforce, consisting of law enforcement personnel from either local government, State Police, and/or United States law enforcement personnel.
5. The objective of this multijurisdictional prosecutorial taskforce is to prosecute criminal cases developed by the taskforce's investigative body, which shall target those criminal suspects not otherwise amenable to criminal investigation because of jurisdictional boundaries that constrain local law enforcement agencies and prosecutorial offices.
 - a. The Special Prosecutor provide the day to day prosecutorial duties as needed by the investigative body.
 - b. The Special Prosecutor shall prosecute these cases developed, upon the request of and under the supervision by the resident Commonwealth's Attorney.
 - c. When requested, the Special Prosecutor shall

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provide legal assistance to regional Commonwealth's Attorneys in other drug related cases.

- d. The resident Commonwealth's Attorney shall have the final authority over prosecutions in his or her jurisdiction.
 - e. Individuals charged or under consideration to be charged shall not be granted immunity without the approval of the resident Commonwealth's Attorney.
6. The Special Prosecutor will report his activities periodically to the Regional Prosecutorial Command Group, and to the Commonwealth's Attorneys' Services and Training Council as prescribed by either the Regional Prosecutorial Command Group or the Commonwealth's Attorneys' Services and Training Council. This reporting shall include not only activities but also such financial data as may be required by the Council as a condition of funding.
7. The Special Prosecutor shall additionally coordinate his or her investigative and prosecutorial activities with other similarly situated Special Prosecutors whether or not funded by the Commonwealth's Attorneys' Services and Training Council.

This agreement will remain in effect until terminated by the parties hereto, upon 60 day written notice, setting forth the date of such termination. However, the withdrawal by one party shall not terminate the agreement among the remaining parties.

IN WITNESS THEREOF, the parties hereto affix its signatures to this agreement:

BY: _____
(Name of Person)
Commonwealth's Attorney for: _____

BY: _____
(Name of Person)
Commonwealth's Attorney for: _____

BY: _____
(Name of Person)
Commonwealth's Attorney for: _____

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BY: _____

(Name of Person)

Commonwealth's Attorney for: _____

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MODEL NARCOTIC TASK FORCE AGREEMENT

WHEREAS, the undersigned local governments desire to curtail and eradicate the criminal activities of major multijurisdictional narcotics violators in their region;

WHEREAS, the undersigned local governments recognize that joint cooperative law enforcement efforts are necessary to curtail such criminal activity;

WHEREAS, the undersigned local governments recognize that a multijurisdictional Drug Task Force, comprising of law enforcement personnel from the respective local government, would have a positive and beneficial effect on the enforcement of the Commonwealth's criminal laws against such illicit activities;

WHEREAS, the undersigned local governments, through the Chief Law Enforcement Officers of their respective local governments, pursuant to their authority under Virginia Code §§ 15.1-131 et seq., enter into this agreement to create a Task Force for their region.

NOW, THEREFORE, the parties jointly resolve and agree to the establishment of a _____ Task Force, hereinafter referred to as "Task Force", the purpose of which is to improve the enforcement of the controlled substance laws as set forth in the Virginia Code § 18.2 - 247 et seq., as amended, and the parties further agree:

- a. The Task Force will be governed by an Advisory Group, the membership of which will be comprised of individuals, one from each participating jurisdiction, appointed by the chief law enforcement official of the appointee's jurisdiction. The purpose of the Advisory Group is to insure that the goals and objectives of the Task Force are met.
- b. A minimum of one (1) experienced officer from each jurisdiction will be detailed to the Task Force for a minimum of one (1) year. During the period of assignment the officers will be under the management of the Virginia State Police/Bureau of Criminal Investigation member assigned to the Task Force, or such other person as the Advisory Group may designate.
- c. All salaries, overtime, pensions, relief, disability Worker's Compensation and other benefits enjoyed by

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Task Force members in their respective jurisdictions shall extend to the services they may perform under this agreement, and each member will be paid by his/her agency.

- d. The officers assigned to the Task Force will adhere to all Virginia State Police/Bureau of Criminal Investigation policies and procedures unless these policies and procedures conflict with those of the local agency. All conflicts as to policy and procedure will be resolved by the Advisory Group.
- e. Conduct which requires disciplinary action against a Task Force member will be reported to the appropriate official of the member's agency for action.

All participating agencies will provide the following equipment to support the activities of the officers assigned to the Task Force:

- a. Vehicles, including costs of repair and maintenance.
- b. Technical equipment, including tape recorder, binoculars, 35mm camera, telephone pager, vest and other support items when available.

The services performed and expenditures made under this agreement shall be deemed to be for a public and governmental purpose and all members of the Task Force shall have the same powers, rights, benefits, privileges, and immunities in every jurisdiction subscribing to this agreement.

Each party shall indemnify and save harmless the other parties to this Agreement from all claims by third parties for property damage or personal injury which may arise out of the activities of the other parties to this Agreement outside their respective jurisdictions while rendering aid under this Agreement. The party receiving assistance shall be solely responsible for indemnifying all parties rendering assistance to it. In no case shall the responding parties have joint or several responsibility for indemnifying other parties rendering assistance.

Each party shall waive any and all claims against all the other parties hereto which may arise out of their activities outside their respective jurisdictions while rendering aid under this Agreement.

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Participating police officers serving under this agreement shall not become involved with matters other than those pertaining to possible violations of narcotics laws, except as required by State law.

Participating police officers serving under this agreement shall not make arrests outside of their individual jurisdictions when conducting general investigative activities not associated with a narcotics investigation, except as required by State law.

The Virginia State Police/Bureau of Criminal Investigation further agrees to provide personnel and equipment for the Task Force activities as follows:

- a. Sufficient office space and telephone service for the Task Force at its _____ Headquarters.
- b. Virginia State Police radio and communications system to each full-time Task Force member.
- c. Virginia State Police/Bureau of Criminal Investigations, through its Drug Trust Account and Criminal Investigation funds, agree to provide:
 1. Payments to informants for information and expenses in Task Force cases. The amounts to be mutually agreed to by Task Force members and Virginia State Police/Bureau of Criminal Investigation policy concerning payment to informants.
 2. For the purchase of drugs as evidence in Task Force cases in keeping with Virginia State Police-/Bureau of Criminal Investigation policy.
 3. "Flash rolls" for furtherance of Task Force investigations, on an as-need basis.
 4. Funds for contractual secretarial services to any agency who would provide a full-time secretary from their agency to the Task Force.

This agreement shall remain in effect until terminated by the parties hereto, upon written notice, setting forth the date of such termination. Withdrawal from this agreement by one party hereto shall be made by written notice to the other parties 45 days prior to said withdrawal. However, withdrawal by one party shall not terminate the agreement among the remaining parties.

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IN WITNESS HEREOF, the parties hereto have executed this agreement.

ATTEST:

BY: _____
(Name of Chief Law Enforcement Officer)
(Jurisdiction No. 1)

BY: _____
(Name of Chief Law Enforcement Officer)
(Jurisdiction No. 2)

BY: _____
(Name of Chief Law Enforcement Officer)
(Jurisdiction No. 3)

BY: _____
(Name of Chief Law Enforcement Officer)
(Jurisdiction No. 4)

Virginia Statutory Drug Prohibitions

Title 18.2
Crimes Involving Health and Safety
Article 1 (Drugs)

§ 18.2-247. Use of terms "controlled substances," "marijuana," "Schedules I, II, III, IV, V and VI" and "imitation controlled substance" in Title 18.2. -

A. Wherever the terms "controlled substances," "marijuana" and "Schedules I, II, III, IV, V and VI" are used in Title 18.2, such terms refer to those terms as they are used or defined in the Drug Control Act, Chapter 34 of Title 54.1.

B. The term "imitation controlled substance" when used in this article means a pill, capsule, tablet, or substance in any form whatsoever which is not a controlled substance, which is subject to abuse, and:

1. Which by overall dosage unit appearance, including color, shape, size, marking and packaging or by representations made, would cause the likelihood that such a pill, capsule, or tablet will be mistaken for a controlled substance unless such substance was introduced into commerce prior to the initial introduction into commerce of the controlled substance which it is alleged to imitate; or

2. Which by express or implied representations purports to act like a controlled substance as a stimulant or depressant of the central nervous system and which is not commonly used or recognized for use in that particular formulation for any purpose other than for such stimulant or depressant effect, unless marketed, promoted, or sold as permitted by the United States Food and Drug Administration.

C. In determining whether a pill, capsule, tablet, or substance in any other form whatsoever, is an "imitation controlled substance," there shall be considered, in addition to all other relevant factors, comparisons with accepted methods of marketing for legitimate nonprescription drugs for medicinal purposes rather than for drug abuse or any similar nonmedicinal use, including consideration of the packaging of the drug and its appearance in overall finished dosage form, promotional materials or representations, oral or written, concerning the drug, and the methods of distribution of the drug and where and how it is sold to the public.

§ 18.2-248. Manufacturing, selling, giving, distributing or possessing with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance prohibited; penalties. -

A. Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.

B. In determining whether any person intends to manufacture, sell, give or distribute an imitation controlled substance, the court may consider, in addition to all other relevant evidence, whether any distribution or attempted distribution of such pill, capsule or tablet included an exchange of or a demand for money or other property as consideration, and, if so, whether the amount of such consideration was substantially greater than the reasonable value of such pill, capsule or tablet, considering the actual chemical composition of such pill, capsule or tablet and, where applicable, the price at which over-the-counter substances of like chemical composition sell.

C. Any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than \$100,000. Upon a second or subsequent conviction of such a violation, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than five years and be fined not more than \$100,000.

D. If such person proves that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II only as an accommodation to another individual who is not an inmate in a community correctional facility, local correctional facility or state correctional facility as defined in § 53.1-1 or in the custody of an employee thereof, and not with intent to profit thereby from any consideration received or expected nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 5 felony.

E. If the violation of the provisions of this article consists of the filling by a pharmacist of the prescription of a person authorized under this article to issue the same, which prescription has not been received in writing by the pharmacist prior to

the filling thereof, and such written prescription is in fact received by the pharmacist within one week of the time of filling the same, or if such violation consists of a request by such authorized person for the filling by a pharmacist of a prescription which has not been received in writing by the pharmacist and such prescription is, in fact, written at the time of such request and delivered to the pharmacist within one week thereof, either such offense shall constitute a Class 4 misdemeanor.

F. Any person who violates this section with respect to a controlled substance classified in Schedules III, IV or V shall be guilty of a Class 1 misdemeanor.

G. Any person who violates this section with respect to an imitation controlled substance shall be guilty of a Class 1 misdemeanor. In any prosecution brought under this subsection, it is not a defense to a violation of this subsection that the defendant believed the imitation controlled substance to actually be a controlled substance.

§ 18.2-248.1. Penalties for sale, gift, distribution or possession with intent to sell, give or distribute marijuana. - Except as authorized in the Drug Control Act, Chapter 34 of Title 54.1, it shall be unlawful for any person to sell, give, distribute or possess with intent to sell, give or distribute marijuana.

(a) Any person who violates this section with respect to:

(1) Not more than one-half ounce of marijuana is guilty of a Class 1 misdemeanor;

(2) More than one-half ounce but not more than five pounds of marijuana is guilty of a Class 5 felony;

(3) More than five pounds of marijuana is guilty of a felony punishable by imprisonment of not less than five nor more than thirty years.

If such person proves that he gave, distributed or possessed with intent to give or distribute marijuana only as an accommodation to another individual and not with intent to profit thereby from any consideration received or expected nor to induce the recipient or intended recipient of the marijuana to use or become addicted to or dependent upon such marijuana, he shall be guilty of a Class 1 misdemeanor.

(b) Any person who gives, distributes or possesses marijuana as an accommodation and not with intent to profit thereby, to an

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inmate of a penal institution as defined in § 53-19.18, or in the custody of an employee thereof shall be guilty of a Class 5 felony.

(c) Any person who manufactures marijuana, or possess marijuana with the intent to manufacture such substance, not for his own use is guilty of a felony punishable by imprisonment of not less than five nor more than thirty years and a fine not to exceed \$10,000.

§ 18.2-248.2: Repealed by Acts 1981, c. 598.

§ 18.2-248.3. Professional use of imitation controlled substances. - No civil or criminal liability shall be imposed by virtue of this article on any person licensed under the Drug Control Act, Chapter 34 of Title 54.1, who manufactures, sells, gives or distributes an imitation controlled substance for use as a placebo by a licensed practitioner in the course of professional practice or research.

§ 18.2-248.4. Advertisement of imitation controlled substances prohibited; penalty. - It shall be a Class 1 misdemeanor for any person knowingly to sell or display for sale, or to distribute, whether or not any charge is made therefor, any book, pamphlet, handbill or other printed matter which he knows is intended to promote the distribution of an imitation controlled substance.

§ 18.2-248.5. Illegal stimulants and steroids; penalty. -

A. Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), Chapter 34 of Title 54.1, it shall be unlawful for any person to knowingly manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute any anabolic steroid.

A violation of subsection A shall be punishable by a term of imprisonment of not less than one year nor more than ten years or, in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months or a fine of not more than \$20,000, either or both.

B. It shall be unlawful for any person to knowingly sell or otherwise distribute, without prescription, to a minor any pill, capsule or tablet containing any combination of caffeine and ephedrine sulfate.

A violation of this subsection B shall be punishable as a Class 1 misdemeanor.

§ 18.2-248.6. Forfeiture of business license upon conviction of sale or distribution of imitation controlled substance; money laundering. - Any person, firm or corporation holding a license to operate any business as required by either state or local law shall forfeit such license upon conviction of a violation of (i) § 18.2-248 relating to an imitation controlled substance or (ii) § 18.2-248.7 relating to money laundering.

§ 18.2-248.7. Money laundering; penalty. - It shall be unlawful for any person to conduct or attempt to conduct a financial transaction, knowing that the property involved in the transaction represents the proceeds of some form of activity which is punishable as a felony under this article (i) with the intent to promote the conduct of any such felony offense or (ii) with knowledge that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of an offense punishable as a felony under this article. A violation of this section is punishable by imprisonment for not more than forty years or a fine of not more than \$500,000 or twice the value of the property, whichever is greater, or by both imprisonment and a fine. As used in this section, "financial transaction" means the movement of funds by wire or otherwise or a transaction involving one or more monetary instruments.

§ 18.2-249. Seizure of property used in connection with or derived from illegal drug transactions. - A. The following property shall be subject to lawful seizure by any officer charged with enforcing the provisions of the article: (i) all money, medical equipment, motor vehicles, and all other personal and real property of any kind or character, used in substantial connection with the illegal manufacture, sale or distribution of controlled substances in violation of § 18.2-248 or of marijuana in violation of § 18.2-248.1, except real property shall not be subject to lawful seizure unless the minimum prescribed punishment for the violation is a term of not less than five years; (ii) everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of § 18.2-248 or of marijuana in violation of § 18.2-248.1; and (iii) all moneys or other property, real or personal, traceable to such an exchange, together with any interest or profits derived from the investment of such money or other property.

B. All seizures and forfeitures under this section shall be governed by the procedures contained in Chapter 22.1 of Title 19.2 of this Code.

§ 18.2-250. Possession of controlled substances unlawful. -

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A. It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (§ 54.1-3400 et seq.).

Upon the prosecution of a person for a violation of this section, ownership or occupancy of premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance.

(a) Any person who violates this section with respect to any controlled substance classified in Schedules I or II of the Drug Control Act shall be guilty of a Class 5 felony.

(b) Any person other than an inmate of a penal institution as defined in § 53-19.18 or in the custody of an employee thereof, who violates this section with respect to a controlled substance classified in Schedule III shall be guilty of a Class 1 misdemeanor.

(b1) Violation of this section with respect to a controlled substance classified in Schedule IV shall be punishable as a Class 2 misdemeanor.

(b2) Violation of this section with respect to a controlled substance classified in Schedule V shall be punishable as a Class 3 misdemeanor.

(c) Violation of this section with respect to a controlled substance classified in Schedule VI shall be punishable as a Class 4 misdemeanor.

B. The provisions of this section shall not apply to members of state, federal, county, city or town law-enforcement agencies when possession of a controlled substance or substances is necessary in the performance of their duties.

§ 18.2-250.1. Possession of marijuana unlawful. -

A. It is unlawful for any person knowingly or intentionally to possess marijuana unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (§ 54.1-3400 et seq.).

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Upon the prosecution of a person for violation of this section, ownership or occupancy of the premises or vehicle in which marijuana was found shall not create a presumption that such person either knowingly or intentionally possessed such marijuana.

Any person who violates this section shall be guilty of a misdemeanor, and be confined in jail not more than thirty days and a fine of not more than \$500, either or both; any person, upon a second or subsequent conviction of a violation of this section, shall be guilty of a Class 1 misdemeanor.

B. The provisions of this section shall not apply to members of state, federal, county, city or town law-enforcement agencies when possession of marijuana is necessary for the performance of their duties.

§ 18.2-251. Persons charged with first offense may be placed on probation; conditions; screening, evaluation and education programs; drug tests; costs and fees; violations; discharge. -

Whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250 or to possession of marijuana under § 18.2-250.1, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions.

As a term or condition, the court may require the accused to enter a screening, evaluation and education program, if available, such as, in the opinion of the court, may be best suited to the needs of the accused. This program may be located in the judicial district in which the charge is brought or in any other judicial district as the court may provide. Each such program shall be certified by the Department of Mental Health, Mental Retardation and Substance Abuse Services. The court shall require the person entering such program under the provisions of this section to pay a fee of not less than fifty dollars nor more than seventy-five dollars.

As a condition of probation, the court shall require the accused

to remain drug free during the period of probation and may require the defendant to submit to such tests during that period as may be necessary and appropriate to determine if the accused is drug free. Such testing may be conducted by personnel of any screening, evaluation and education program to which the person is referred. The cost of such testing may be charged to the person in addition to the fee for the education program.

Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent proceedings.

§ 18.2-251.1. Possession or distribution of marijuana for medical purposes permitted. -

A. No person shall be prosecuted under §§ 18.2-250 or 18.2-250.1 for the possession of marijuana or tetrahydrocannabinol when that possession occurs pursuant to a valid prescription issued by a medical doctor in the course of his professional practice for treatment of cancer or glaucoma.

B. No medical doctor shall be prosecuted under §§ 18.2-248 or 18.2-248.1 for dispensing or distributing marijuana or tetrahydrocannabinol for medical purposes when such action occurs in the course of his professional practice for treatment of cancer or glaucoma.

C. No pharmacist shall be prosecuted under §§ 18.2-248 to 18.2-248.1 for dispensing or distributing marijuana or tetrahydrocannabinol to any person who holds a valid prescription of a medical doctor for such substance issued in the course of such doctor's professional practice for treatment of cancer or glaucoma.

§ 18.2-252. Suspended sentence conditioned upon submission to periodic medical examinations and tests. -

Notwithstanding any other provision of law to the contrary, the trial judge or court trying the case of any person found guilty of violating any law concerning the use, in any manner, of drugs, controlled substances, narcotics, marijuana, noxious chemical substances and like substances, may condition any suspended sentence by first requiring such person to agree to undergo periodic medical examinations and tests to ascertain any use or dependency on the substances listed above and like substances.

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The frequency and completeness of such examinations and tests shall be in the discretion of such judge or court, and the results of the examinations and tests given to the judge or court as ordered. The cost of such examinations and tests shall be paid by the Commonwealth and taxed as a part of the costs of such criminal proceedings. The judge or court, in his or its discretion, may enter such additional orders as may be required to aid in the rehabilitation of such convicted person.

§ 18.2-253. Disposal of seized substances. -

A. All controlled substances, imitation controlled substances, marijuana or paraphernalia the lawful possession of which is not established or the title to which cannot be ascertained, which have come into the custody of a peace officer or have been seized in connection with violations of this chapter, shall be forfeited and disposed of as follows:

1. Upon written application by the Division of Forensic Science the court may order the forfeiture of any such substance or paraphernalia to the Division for research and training purposes and for destruction pursuant to regulations of the United States Department of Justice Drug Enforcement Administration and of the State Board of Pharmacy once these purposes have been fulfilled.

2. In the event no application is made under subdivision 1 of this subsection, the court shall order the destruction of all such substances or paraphernalia which order shall state the existence and nature of the substance or paraphernalia, the quantity thereof, the location where seized, the person or persons from whom the substance or paraphernalia was seized and the manner whereby such item shall be destroyed. A return under oath, reporting the time, place and manner of destruction shall be made to the court and to the Board of Pharmacy by the officer to whom the order is directed. A copy of the order and affidavit shall be made a part of the record of any criminal prosecution in which the substance or paraphernalia was used as evidence and shall, thereafter, be prima facie evidence of its contents.

B. No such substance or paraphernalia used or to be used in a criminal prosecution under this chapter shall be disposed of as provided by this section until all rights of appeal have been exhausted, except as provided in § 18.2-253.1.

§ 18.2-253.1. Destruction of seized substances prior to trial. -

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Where seizures of controlled substances or marijuana are made in excess of ten pounds in connection with any prosecution or investigation under this chapter, the appropriate law-enforcement agency may retain ten pounds of the substance randomly selected from the seized substance for representative purposes as evidence and destroy the remainder of the seized substance.

Before any destruction is carried out under this section, the law-enforcement agency shall cause the material seized to be photographed with identification case numbers or other means of identification and shall prepare a report identifying the seized material. It shall also notify the accused, or other interested party, if known, or his attorney, at least five days in advance that the photography will take place and that they may be present. Prior to any destruction under this section, the law-enforcement agency shall also notify the accused or other interested party, if known, and his attorney at least seven days prior to the destruction of the time and place the destruction will occur. Any notice required under the provisions of this section shall be by first class mail to the last known address of the person required to be notified. In addition to the substance retained for representative purposes as evidence, all photographs and records made under this section and properly identified shall be admissible in any court proceeding for any purposes for which the seized substance itself would have been admissible.

§ 18.2-253.2. Judge may order law-enforcement agency to maintain custody of controlled substances. -

Upon request of the clerk of any court, a judge of the court may order a law-enforcement agency to take into its custody or to maintain custody of substantial quantities of any controlled substances, imitation controlled substances, chemicals, marijuana or paraphernalia used or to be used in a criminal prosecution under this chapter. The court in its order may make provision for ensuring integrity of these items until further order of the court.

§ 18.2-254. Commitment of convicted person for treatment for drug or alcohol abuse. -

A. The court trying the case of any person alleged to have committed any offense designated by this article or by the Drug Control Act (§ 54.1-3400 et seq.) or in any other criminal case in which the commission of the offense was motivated by, or closely related to, the use of drugs and determined by the court to be in need of treatment for the use of drugs may commit such person, upon his conviction and with his consent and the consent

of the receiving institution, to any facility for the treatment of persons for the intemperate use of narcotic or other controlled substances, licensed or supervised by the State Mental Health, Mental Retardation and Substance Abuse Services Board, if space be available in such facility, for a period of time not in excess of the maximum term of imprisonment specified as the penalty for conviction of such offense or, if sentence be determined by a jury, not in excess of the term of imprisonment as set by such jury. Confinement under such commitment shall be, in all regards, treated as confinement in a penal institution and the person so committed may be convicted of escape if he leaves the place of commitment without authority. The court may revoke such commitment, at any time, and transfer the person to an appropriate penal institution. Upon presentation of a certified statement from the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services to the effect that the confined person has successfully responded to treatment, the court may release such confined person prior to - the termination of the period of time for which such person was confined and may suspend the remainder of the term upon such conditions as the court may prescribe.

B. The court trying a case in which commission of the offense was related to the defendant's habitual abuse of alcohol and in which the court determines that such defendant be an alcoholic as defined in § 37.1-217 and in need of treatment, may commit such person, upon his conviction and with his consent and the consent of the receiving institution, to any facility for the treatment of alcoholics licensed or supervised by the State Mental Health, Mental Retardation and Substance Abuse Services Board, if space be available in such facility, for the maximum term of imprisonment specified as the penalty for conviction or a period of time not to exceed ninety days, whichever is less. Confinement under such commitment shall be, in all regards, treated as confinement in a penal institution and the person so committed may be convicted of escape if he leaves the place of commitment without authority. The court may revoke such commitment, at any time, and transfer the person to an appropriate penal institution. Upon the expiration of such commitment to a facility for the treatment of alcoholics, the person committed shall, if there be any time remaining on his sentence, be transferred to the appropriate penal institution to serve the remainder of his term.

§ 18.2-255. Distribution of certain drugs to persons under eighteen prohibited; Penalty. -

A. It shall be unlawful for any person who is at least eighteen

years of age to knowingly or intentionally (i) distribute any drug classified in Schedule I, II, or III or marijuana to any person under eighteen years of age who is at least three years his junior or (ii) cause any person under eighteen years of age who is at least three years his junior to assist in such distribution of any drug classified in Schedule I, II, or III or marijuana. Any person violating this provision shall upon conviction be imprisoned in a state correctional facility for a period not less than ten nor more than fifty years, and fined not more than \$100,000. Two years of the sentence imposed shall not be suspended, in whole or in part for a conviction under this section involving a Schedule I or II controlled substance.

B. It shall be unlawful for any person who is at least eighteen years of age to knowingly or intentionally (i) distribute any imitation controlled substance to a person under eighteen years of age who is at least three years his junior or (ii) cause any person under eighteen years of age who is at least three years his junior to assist in such distribution of any imitation controlled substance. Any person violating this provision shall be guilty of a Class 6 felony.

§ 18.2-255.1. Distribution, sale or display of printed material advertising instruments for use in administering marijuana or controlled substances to minors; penalty. - It shall be a Class 1 misdemeanor for any person knowingly to sell, distribute, or display for sale to a minor any book, pamphlet, periodical or other printed matter which he knows advertises for sale any instrument, device, article, or contrivance for advertised use in unlawfully ingesting, smoking, administering, preparing or growing marijuana or a controlled substance.

§ 18.2-255.2. Prohibiting the sale of drugs on or near certain properties. -

A. It shall be unlawful for any person to manufacture, sell or distribute or possess with intent to sell, give or distribute any controlled substance, imitation controlled substance or marijuana at any time while (i) upon the property, including buildings and grounds, of any public, private or parochial elementary, middle or high school; (ii) upon public property or any property open to public use within 1,000 feet of such school property; or (iii) while on any school bus as defined in § 46.2-100.

B. Violation of this section shall constitute a separate and distinct felony. Any person violating the provisions of this section shall, upon conviction, be imprisoned for a term of not less than one year nor more than five years and fined not more

than \$100,000. However, if such person proves that he sold such controlled substance or marijuana only as an accommodation to another individual and not with intent to profit thereby from any consideration received or expected nor to induce the recipient or intended recipient of the controlled substance or marijuana to use or become addicted to or dependent upon such controlled substance or marijuana, he shall be guilty of a Class 1 misdemeanor.

C. If a person commits an act violating the provisions of this section, and the same act also violates another provision of law that provides for penalties greater than those provided for by this section, then nothing in this section shall prohibit or bar any prosecution or proceeding under that other provision of law or the imposition of any penalties provided for thereby.

§ 18.2-256. Conspiracy. - Any person who conspires to commit any offense defined in this article or in the Drug Control Act (§ 54.1-3400 et seq.) is punishable by imprisonment or fine or both which may not be less than the minimum punishment nor exceed the maximum punishment prescribed for the offense, the commission of which was the object of the conspiracy.

§ 18.2-257. Attempts. - (a) Any person who attempts to commit any offense defined in this article or in the Drug Control Act (§ 54.1-3400 et seq.) which is a felony shall be imprisoned for not less than one nor more than ten years; provided, however, that any person convicted of attempting to commit a felony for which a lesser punishment may be imposed may be punished according to such lesser penalty.

(b) Any person who attempts to commit any offense defined in this article or in the Drug Control Act which is a misdemeanor shall be guilty of a Class 2 misdemeanor; provided, however, that any person convicted of attempting to commit a misdemeanor for which a lesser punishment may be imposed may be punished according to such lesser penalty.

§ 18.2-258. Certain premises deemed common nuisance; penalty. -

A. Any office, store, shop, restaurant, dance hall, theater, poolroom, clubhouse, storehouse, warehouse, dwelling house, apartment, building of any kind, vehicle, vessel, boat, or aircraft, which with the knowledge of the owner, lessor, agent of any such lessor, manager, chief executive officer or operator thereof, is frequented by persons under the influence of illegally obtained controlled substances or, as defined in § 54.1--

3401 or for the purpose of illegally obtaining possession of, manufacturing or distributing controlled substances or marijuana, or which is used for the illegal possession, manufacture or distribution of controlled substances or marijuana, shall be deemed a common nuisance. Any such owner, lessor, agent of any such lessor, manager, chief executive officer, or operator who knowingly permits, establishes, keeps or maintains such a common nuisance is guilty of a Class 1 misdemeanor; and, in addition, after due notice and opportunity to be heard on the part of any owner, lessor, or a lienholder not involved in the original offense, by a proceeding similar to that in Chapter 22.1 (§ 19.2-386.1 et seq.) of Title 19.2 and upon proof of guilty knowledge, a court may order that such house, motor vehicle, aircraft, boat, vessel, or other premises, or any room or part thereof, be closed, but the court may upon the owner or lessor giving bond in the penalty of not less than \$500 and with security to be approved by the court, conditioned that the premises shall not be used for unlawful purposes, turn the same over to its owner or lessor; or proceeding may be had in equity as provided in § 18.2-258.01.

B. The penalties provided in this section shall be in addition to any other penalty provided by law.

C. In no civil or in rem proceeding under the provisions of this section shall judgment be entered against the owner, lessor, or lienholder of property unless it is proved: (i) that he knew of the unlawful use of the property and (ii) that he had the right, because of such unlawful use, to enter and repossess the property.

§ 18.2-258.01. Enjoining nuisances involving illegal drug transactions - The attorney for the Commonwealth, or any citizen of the county, city, or town, where such a nuisance as is described in § 18.2-258 exists, may, in addition to the remedies given in and punishment imposed by this chapter, maintain a suit in equity in the name of the Commonwealth to enjoin the same; provided, however, the attorney for the Commonwealth shall not be required to prosecute any suit brought by a citizen under this section. In every case where the bill charges, on the knowledge or belief of complainant, and is sworn to by two witnesses, that a nuisance exists as described in § 18.2-258, a temporary injunction may be granted as soon as the bill is presented to the court provided reasonable notice has been given. The injunction shall enjoin and restrain any owners, tenants, their agents, employees, and any other person from contributing to or maintaining the nuisance and may impose such other requirements as the court deems appropriate. If, after hearing, the court finds that the

material allegations of the bill are true, although the premises complained of may not then be unlawfully used, it shall continue the injunction against such persons or premises for such period of time as it deems appropriate, with the right to dissolve the injunction upon a proper showing by the owner of the premises.

§ 18.2-258.1. Obtaining drugs, procuring administration of controlled substances, etc., by fraud, deceit or forgery. -

A. It shall be unlawful for any person to obtain or attempt to obtain any drug or procure or attempt to procure the administration of any controlled substance or marijuana: (i) by fraud, deceit, misrepresentation, or subterfuge; or (ii) by the forgery or alteration of a prescription or of any written order; or (iii) by the concealment of a material fact; or (iv) by the use of a false name or the giving of a false address.

B. It shall be unlawful for any person to furnish false or fraudulent information in or omit any information from, or willfully make a false statement in, any prescription, order, report, record, or other document required by Chapter 34 of Title 54.1.

C. It shall be unlawful for any person to use in the course of the manufacture or distribution of a controlled substance or marijuana a license number which is fictitious, revoked, suspended, or issued to another person.

D. It shall be unlawful for any person, for the purpose of obtaining any controlled substance or marijuana, to falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian or other authorized person.

E. It shall be unlawful for any person to make or utter any false or forged prescription or false or forged written order.

F. It shall be unlawful for any person to affix any false or forged label to a package or receptacle containing any controlled substance.

G. This section shall not apply to officers and employees of the United States, of this Commonwealth or of a political subdivision of this Commonwealth acting in the course of their employment, who obtain such drugs for investigative, research or analytical purposes, or to the agents or duly authorized representatives of any pharmaceutical manufacturer who obtain such drugs for investigative, research or analytical purposes and who are acting in

the course of their employment; provided that such manufacturer is licensed under the provisions of the Federal Food, Drug and Cosmetic Act; and provided further, that such pharmaceutical manufacturer, its agents and duly authorized representatives file with the Board such information as the Board may deem appropriate.

H. Any person who shall violate any provision herein shall be guilty of a Class 6 felony.

§ 18.2-259. Penalties to be in addition to civil or administrative sanctions. - Any penalty imposed for violation of this article or of the Drug Control Act (§ 54.1-3400 et seq.) shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

§ 18.2-260. Prescribing, dispensing, etc., drug except as authorized in article and Drug Control Act; violations for which no penalty provided. - It shall be unlawful for any person to prescribe, administer or dispense any drug except as authorized in the Drug Control Act (§ 54. 1-3400 et seq.) or in this article. Any person who violates any provision of the Drug Control Act or of this article, for which no penalty is elsewhere specified in this article or in Article 7 (§ 54. 1-3466 et seq.) of the Drug Control Act, shall be guilty of a Class 1 misdemeanor.

§ 18.2-261. Monetary penalty. - Any person licensed by the State Board of Pharmacy who violates any of the provisions of the Drug Control Act (§ 54. 1-3400 et seq.) or of this article, and who is not criminally prosecuted, shall be subject to the monetary penalty provided in this section. If, by a majority vote, the Board shall determine that the respondent is guilty of the violation complained of, the Board shall proceed to determine the amount of the monetary penalty for such violation, which shall not exceed the sum of \$1,000 for each violation. Such penalty may be sued for and recovered in the name of the Commonwealth.

§ 18.2-262. Witnesses not excused from testifying or producing evidence because of self-incrimination. - No person shall be excused from testifying or from producing books, papers, correspondence, memoranda or other records for the Commonwealth as to any offense alleged to have been committed by another under this article or under the Drug Control Act (§ 54.1-3400 et seq.) by reason of his testimony or other evidence tending to incriminate himself, but the testimony given and evidence so produced by such person on behalf of the Commonwealth when called for by the trial

judge or court trying the case, or by the attorney for the Commonwealth, or when summoned by the Commonwealth and sworn as a witness by the court or the clerk and sent before the grand jury, shall be in no case used against him nor shall he be prosecuted as to the offense as to which he testifies. Any person who refuses to testify or produce books, papers, correspondence, memoranda or other records, shall be guilty of a Class 2 misdemeanor.

§ 18.2-263. Unnecessary to negative exception, etc; burden of proof of exception, etc. - In any complaint information, or indictment and in any action or proceeding brought for the enforcement of any provision of this article or of the Drug Control Act (§ 54.1-3400 et seq.), it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this article or in the Drug Control Act, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant.

§ 18.2-264. Inhaling drugs or other noxious chemical substances odor causing, etc., others to do so. -

(a) It shall be unlawful for any person deliberately to smell or inhale any drugs or any other noxious chemical substances including but not limited to fingernail polish or model airplane glue, containing any ketones, aldehydes, organic acetates, ether, chlorinated hydrocarbons or vapors, with the intent to become intoxicated, inebriated, excited, stupefied or to dull the brain or nervous system.

Any person violating the provisions of this subsection shall be guilty of a Class 1 misdemeanor.

(b) It shall be unlawful for any person, other than one duly licensed, deliberately to cause, invite or induce any person to smell or inhale any drugs or any other noxious substances or chemicals containing any ketone, aldehydes, organic acetates, ether, chlorinated hydrocarbons or vapors with the intent to intoxicate, inebriate, excite, stupify or to dull the brain or nervous system of such person.

Any person violating the provisions of this subsection shall be guilty of a Class 2 misdemeanor.

§ 18.2-264.1. Charges for forensic laboratory analysis. - In all cases where a person is found guilty of a violation of this article (§ 18.2-247 et seq.), a fee of \$100 per case for any forensic laboratory analysis performed for use in prosecution of such violation shall be taxed as costs to the defendant and shall

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be paid into the general fund of the state treasury. For the purposes of this section, "guilty" includes any case where the defendant pleads guilty, receives a suspended imposition of sentence or is placed on probation without a judgment of guilt under § 18.2-251.

§ 18.2-265: Repealed by Acts 1979, c. 638.

Article 1.1 (Drug Paraphernalia)

§ 18.2-265.1. Definition. - As used in this article, the term "drug paraphernalia" means all equipment, products, and materials of any kind which are either designed for use or which are intended by the person charged with violating § 18.2-265.3 for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, strength testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana or a controlled substance. It includes, but is not limited to:

1. Kits intended for use or designed for use in planting, propagating, cultivating, growing or harvesting of marijuana or any species of plant which is a controlled substance or from which a controlled substance can be derived;
2. Kits intended for use or designed for use in manufacturing, compounding, converting, producing, processing, or preparing marijuana or controlled substances;
3. Isomerization devices intended for use or designed for use in increasing the potency of marijuana or any species of plant which is a controlled substance;
4. Testing equipment intended for use or designed for use in identifying or in analyzing the strength or effectiveness of marijuana or controlled substances;
5. Scales and balances intended for use or designed for use in weighing or measuring marijuana or controlled substances;
6. Diluents and adulterants, such as quinine hydrochloride, mannitol, or mannite, intended for use or designed for use in cutting controlled substances;
7. Separation gins and sifters intended for use or designed for use in removing twigs and seeds from, or in otherwise clean-

ing or refining, marijuana;

8. Blenders, bowls, containers, spoons, and mixing devices intended for use or designed for use in compounding controlled substances;

9. Capsules, balloons, envelopes, and other containers intended for use or designed for use in packaging small quantities of marijuana or controlled substances;

10. Containers and other objects intended for use or designed for use in storing or concealing marijuana or controlled substances;

11. Hypodermic syringes, needles, and other objects intended for use or designed for use in parenterally injecting controlled substances into the human body;

12. Objects intended for use or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

- a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
- b. Water pipes;
- c. Carburetion tubes and devices;
- d. Smoking and carburetion masks;
- e. Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
- f. Miniature cocaine spoons, and cocaine vials;
- g. Chamber pipes;
- h. Carburetor pipes;
- i. Electric pipes;
- j. Air-driven pipes;
- k. Chillums;
- l. Bongs;
- m. Ice pipes or chillers.

§ 18.2-265.2. Evidence to be considered in cases under this article. - In determining whether an object is drug paraphernalia, the court may consider, in addition to all other relevant evidence, the following:

1. Constitutionally admissible statements by the accused concerning the use of the object;

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2. The proximity of the object to marijuana or controlled substances, which proximity is actually known to the accused;
3. Instructions, oral or written, provided with the object concerning its use;
4. Descriptive materials accompanying the object which explain or depict its use;
5. National and local advertising within the actual knowledge of the accused concerning its use;
6. The manner in which the object is displayed for sale;
7. Whether the accused is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
8. Evidence of the ratio of sales of the objects defined in § 18.2-265.1 to the total sales of the business enterprise;
9. The existence and scope of legitimate uses for the object in the community;
10. Expert testimony concerning its use or the purpose for which it was designed;
11. Relevant evidence of the intent of the accused to deliver it to persons who he knows, or should reasonably know, intend to use the object with an illegal drug. The innocence of an owner, or of anyone in control of the object, as to a direct violation of this article shall not prevent a finding that the object is intended for use or designed for use as drug paraphernalia.

§ 18.2-265.3. Penalties for sale, etc., of drug paraphernalia. -

A. Any person who sells or possesses with intent to sell drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it is either designed for use or intended by such person for use to illegally plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body marijuana or a controlled substance, shall be guilty of a Class 1 misdemeanor.

B. Any person eighteen years of age or older who violates subsection A hereof by selling drug paraphernalia to a minor who is at least three years junior to the accused in age shall be guilty of a Class 6 felony.

C. Any person eighteen years of age or older who distributes drug paraphernalia to a minor shall be guilty of a Class 1 misdemeanor.

§ 18.2-265.4. Seizure and forfeiture of drug paraphernalia. - All drug paraphernalia as defined in this article shall be forfeited

to the Commonwealth and may be seized and disposed of in the same manner as provided in § 18.2-253 of the Code, subject to the rights of an innocent lienor, to be recognized as under § 4-56.

§ 18.2-265.5. Advertisement of drug paraphernalia prohibited; penalty. - It shall be unlawful for any person to place in any newspaper, magazine, handbill or other publication any advertisement, knowing or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended by such person for use as drug paraphernalia. A violation of this section shall be punishable as a Class 1 misdemeanor. A violation of this section shall be punishable as a Class I misdemeanor.

BURDEN OF PROOFS AND RELATED ISSUES

I. INTRODUCTION

The primary purpose of this chapter is to highlight some proof issues that are often encountered in drug prosecutions. An essential task for any successful prosecution, regardless of the nature of the prosecution, is adequate and sufficient trial preparation. This chapter is intended to assist the trial prosecutor in preparing his case; it is not a substitute for either trial preparation or appropriate legal research. This chapter will present synopses of some major legal points involved in drug prosecutions.

II. PROOF OF PARTICULAR ISSUES

A. Accommodation Defense

1. Accommodation defense essentially is a mitigation of punishment type of defense, which the defendant has the burden of proof by the preponderance of the evidence. The intent underlying the accommodation distribution defense is to apply a reduced punishment where the unlawful distribution was made not by dealer in drugs, but by an individual who was motivated by a desire to accommodate a friend. Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984).
2. Once proof establishes the illegal drug sale or distribution, the presumption against an accommodation arises. This presumption continues until the defendant has carried his burden of proof. Stillwell v. Commonwealth, 219 Va. 214, 247 S.E.2d 360 (1978).
3. If there is no credible evidence to support the theory of accommodation, then it is not error not to give an accommodation defense instruction. Schindel v. Commonwealth, 219 Va. 814, 252 S.E.2d 302 (1979). Cf. Gardner v. Commonwealth, 217 Va. 5, 225 S.E.2d 354 (1976) (error not to give instruction where there was no evidence to show that the defendant received or expected to receive any purchase money).

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4. Placing the burden of proof on the defendant with regard to the accommodation defense is not unconstitutional. King v. Commonwealth, 219 Va. 171, 247 S.E.2d 368 (1978).

B. Distribution Intent

1. When proof of intent to distribute drugs rests on circumstantial evidence, quantity which the defendant possesses is a circumstance that may be considered. Quantity alone may be sufficient to establish intent if it is greater than what ordinarily would be possessed for one's personal use. However, possession of small quantity creates an inference that drug was for personal use. Dukes v. Commonwealth, 227 Va. 119, 313 S.E.2d 382 (1984); Dutton v. Commonwealth, 220 Va. 762, 263 S.E.2d 52 (1980). See Eckhart v. Commonwealth, 222 Va. 447, 281 S.E.2d 853 (1981) (Quantity of controlled substance, manner in which it was packaged and presence of paraphernalia used were sufficient to show intent to distribute).
2. Procuring agent theory (whereby there was no sale or distribution if defendant acted solely as agent for recipient of drugs) was found to be inapposite to Virginia statutes. Wood v. Commonwealth, 214 Va. 97, 197 S.E.2d 200 (1973). See Archer v. Commonwealth, 225 Va. 416, 303 S.E.2d 863 (1983) (defendant was an intermediary between supplier, who had actual possession of the drugs, and the purchaser; the defendant had constructive possession).
3. Nature of illegal substance transferred does not have to be proven by direct evidence; it can be shown circumstantially. Evidence of physical appearance of substance involved in transaction, evidence that substance produced expected effects when sampled by someone familiar with illicit drug, evidence that substance was used in same manner as illicit drug, testimony that high price was paid in cash for substance, evidence that transactions involving substance were carried on with secrecy or deviousness, and evidence that substance was called by name of illegal narcotic by defendant and others, are types of circumstan-

tial evidence that may be considered. Users and addicts, if they have gained familiarity or experience with drug, may identify it. Although there was no chemical analysis of the substance allegedly sold by defendant, evidence was sufficient to identify it. Hill v. Commonwealth, 8 Va. App. 60, 379 S.E.2d 134 (1989).

4. Where evidence of intent to distribute is wholly circumstantial, all necessary circumstances proven must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence. Servis v. Commonwealth, 6 Va. App. 507, 371 S.E.2d 156 (1988).
5. Quantity of controlled substance is a factor which may indicate purpose of its possession. Possession of small quantity creates an inference that the drug was for personal use. Possession of a small quantity with other circumstances may be sufficient to indicate an intent to distribute. Servis, supra.
6. Even if drug is packaged for distribution, there must be additional evidence to preclude inference that it was purchased in packaged form for personal use rather than being held for distribution. Evidence that could preclude that inference may be the presence of large or bulk quantities, or the presence of paraphernalia used for packaging. Servis, supra. See, Dutton v. Commonwealth, 220 Va. 762, 263 S.E.2d 52 (1980)(marijuana was packaged for distribution, but no evidence to preclude inference that drugs were for defendant's personal use). QUERY: Does possession for personal use and possession with intent to distribute have to be mutually exclusive?
7. Presence of unusual amount of money, suggesting profit from sales, is another circumstance that negates inference of possession for personal use. Servis, supra. See, also, Minor v. Commonwealth, 6 Va. App. 366, 369 S.E.2d 206 (1988)(money found on defendant's person was circumstantial evidence of intent to distribute).
8. Method of packaging, money found on defendant and

lack of evidence that he personally used marijuana supported defendant's conviction for possession with intent to distribute. Small quantity involved was not necessarily indicative of lack of intent to distribute. Colbert v. Commonwealth, 219 Va. 1, 244 S.E.2d 748 (1978).

C. Possession

1. Constructive possession of drugs may be proved by evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the accused was aware of both the presence and character of the substance and that it was subject to his dominion and control. Proof that the drug was found in the premises or vehicle owned or occupied by the accused is insufficient, standing alone, to prove constructive possession. Powers v. Commonwealth, 227 Va. 474, 316 S.E.2d 739 (1984); Garland v. Commonwealth, 225 Va. 182, 300 S.E.2d 783 (1983). See, also, Castaneda v. Commonwealth, 7 Va. App. 574, 376 S.E.2d 82 (1989); Wymer v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0662-90-1)(Baker)(Apr. 9, 1991).
2. Mere fact that the defendant was the sole resident does not constitute sufficient evidence. Powers, supra. Although occupancy does not give rise to presumption of possession, occupancy may be considered as a factor with other evidence in the determination of whether the defendant constructively possessed the drugs. Garland, supra. See, also, Hodge v. Commonwealth, 7 Va. App. 351, 374 S.E.2d 76 (1988). The fact that the defendant was cotenant could be considered. Eckhart v. Commonwealth, 222 Va. 447, 281 S.E.2d 853 (1981). Mere presence in the another's bathroom while marijuana was found in the apartment is not sufficient evidence to support conviction for possession. Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972). See, also, Fogg v. Commonwealth, 216 Va. 394, 219 S.E.2d 672 (1975)(present in motel room when drug was found).
3. Possession may be jointed. Archer v. Commonwealth, 225 Va. 416, 303 S.E.2d 863 (1983); McGee

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v. Commonwealth, 4 Va. App. 317, 357 S.E.2d 738 (1987)(possession may be shared).

4. Although mere proximity to the drugs does not, standing alone, establish possession, it is a circumstantial factor that may be considered. Lane v. Commonwealth, 223 Va. 713, 292 S.E.2d 358 (19-82).
5. Physical possession giving the defendant immediate and exclusive control is sufficient. Possession, however, does not have to be actual, exclusive or existing for any particular duration. Clodfelter v. Commonwealth, 218 Va. 619, 238 S.E.2d 820 (19-77).
6. Establishing possession is not enough. Proof must also show that the defendant intentionally and consciously possessed the drug with knowledge of its nature and character. When this latter proof is not shown, then the evidence is insufficient. Buono v. Commonwealth, 213 Va. 475, 193 S.E.2d 798 (1973).
7. It is not necessary that the defendant possessed a usable amount of drug in order to be convicted of possession. Modicum is sufficient. Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970).

D. Conspiracy

1. (See Chapter on Conspiracy in this manual for further expository development of this topic).
2. For § 18.2-256, there can be no conspiracy between the defendant, a police officer and his informant who is working as an agent of the officer. In order for a conspiracy to exist, there must be a bilateral meeting of the mind between two or more persons. Therefore, the conviction for conspiracy to distribute drugs is reversed and dismissed. Fortune v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 1523-89-2)(Benton)(June 11, 1991).

E. How Many Offenses?

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1. Convictions for both possession of cocaine and possession of cocaine with intent to distribute are valid as separate offenses when the quantity of drugs remaining with the defendant is greater than the amount involved in the agreed transaction and the evidence establishes that the excess amount was possessed with intent to distribute. Meyers v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. #0104-89-4) (Moon) (April 30, 1991).
2. Under certain circumstances, a party in possession of a controlled substance may intend to distribute them, while another party, who constructively possesses the same substances because they are subject to his dominion and control, may not share the intent to distribute the substances. The appellate court ruled that there was evidence from which the jury could have inferred that someone other (the defendant's mistress) than the defendant owned the drugs with the intent to distribute them. The mistress originally stated that the drugs were hers, not the defendant's, but later, after a plea bargain agreement, recanted such statements. Harrison v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 1934-89-3) (Moon) (June 4, 1991) (Error for the trial court not to give jury instruction on the lesser-included offense of possession of the drugs).
3. Although the defendant was charged with manufacturing, he could have been convicted of lesser offense of possession. Spear v. Commonwealth, 221 Va. 450, 270 S.E.2d 737 (1980).

III. Miscellaneous:

- A. Defendant was properly convicted of second-degree murder when person to whom he distributed cocaine died after ingesting drug. The victim does not become a co-felon because she took the drug. Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984).
- B. Chemist's testimony about effects of LSD was improperly prejudicial to defendant. Smith v. Commonwealth, 223 Va. 721, 292 S.E.2d 362 (1982).
- C. Admission of expert testimony on effects of drug was

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erroneous, but harmless. Evidence of possession of methaqualone with intent to distribute was sufficient. Lane v. Commonwealth, 223 Va. 713, 292 S.E.2d 358 (1982).

- D. It was reversible error for trial court to allow, during defendant's trial for selling marijuana, evidence that he had used drug. Eccles v. Commonwealth, 214 Va. 20, 197 S.E.2d 332 (1973).

SEARCH AND SEIZURE

I. IN GENERAL

The Fourth Amendment states that:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmations, and particularly describing the place to be searched, and the persons or thing to be seized.

A. Scope of the Fourth Amendment

1. Prohibits only UNREASONABLE searches and seizures
2. Prohibits the issuance of warrants not meeting certain requirements as set forth in the Amendment.
3. Applies only to state sponsored action.

B. Analytical Framework

1. Was there a search or seizure?
(If no, go no further - Commonwealth wins; if yes go to next question.)
2. Does the defendant have standing?
(If no, go no further - Commonwealth wins; if yes go to next question.)
3. Was the search constitutionally unreasonable?
(If no, go no further - Commonwealth wins; if yes go to next question.)
4. Should sanctions be imposed?
(If no, go no further - Commonwealth wins; if yes evidence may be suppressed.)

However, even if evidence is suppressed, it may still be used:

- a. defendant may "open the door" to the use of the suppressed evidence by testifying inconsistently with the existence of the evidence, as the privilege cannot be construed to include the right to commit perjury.

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Walder v. United States, 347 U.S. 62 (1954); Harris v. United States, 401 U.S. 222 (1971); and United States v. Havens, 446 U.S. 620 (1980).

- b. may not be used to impeach a defense witness, other than the defendant. James v. Illinois, 110 S.Ct. 648 (1990).

II. WHAT IS A SEARCH

A. Definition

It has been firmly settled that the constitutional prohibition against unreasonable search and seizure is applicable only to agents of the federal and state governments and not to private individuals acting on their own initiative. Burdeau v. McDowell, 256 U.S. 465 (1921); Harmon v. Commonwealth, 209 Va. 574, 166 S.E.2d 232 (1969).

A search occurs when an individual's reasonable expectation of privacy is invaded as a result of state action. The prevailing standard for whether a Fourth Amendment search or seizure has occurred was first articulated in Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347, 361 (1967): "there is a twofold requirement, first, that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.'" See also Cook v. Commonwealth, 216 Va. 71, 73, 216 S.E.2d 48, 49-50 (1975) (holding that there is no reasonable expectation of privacy in that portion of the interior of a car which is exposed to public view).

Scientific enhancement, e.g., a beeper, raises no constitutional issue which visual surveillance would not also raise. United States v. Knotts, 460 U.S. 276 (1983). Thus, the monitoring of a beeper in a private residence which is not open to visual surveillance violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence. United States v. Karo, 468 U.S. 705, 714 (1984).

B. Examples of Reasonable Expectation of Privacy

Places where a person might reasonably expect his concealed objects to be kept private include:

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1. Houses - Kremen v. United States, 353 U.S. 346 (1957); Steagald v. United States, 451 U.S. 204 (1981).
2. Businesses - Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977). But see II(C)(1)(h) *infra*.
3. First class mail - Ex Parte Jackson, 96 U.S. 727 (1878), or packages shipped by private carrier - Walter v. United States, 447 U.S. 649 (1980).

C. Examples of No Reasonable Expectation of Privacy

1. Property exposed to third parties.
 - a. Use of a "pen register" to record the numbers dialed from a telephone in a person's home did not constitute a search because it violated no expectation of privacy which society is prepared to recognize as reasonable. By voluntarily conveying the numbers dialed to the phone company, the defendant assumed the risk that the company would reveal that information to the police. Smith v. Maryland, 442 U.S. 735, 745 (1979).
 - b. Exposure of luggage located in a public place to a trained canine did not constitute a "search" within the meaning of the Fourth Amendment. The manner in which the information is obtained and the content of the information revealed by the procedure is limited; the investigative technique is much less intrusive than a typical search. United States v. Place, 462 U.S. 696 (1983). Similarly, field testing of a white powder uncovered by a private search was not a search, since it revealed only whether the powder was an illegal substance. United States v. Jacobsen, 466 U.S. 109 (1984).
 - c. Absent a substantial likelihood that the contents of a container have been changed during a gap in surveillance, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority. Illinois v. Andreas, 463 U.S. 765 (1983).

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- d. A nominal lessee, who exercised no control or dominion over the property, has no expectation of privacy in order to challenge the admissibility pursuant to a warrantless search of premises which he "nominally" rented. Parks v. Commonwealth, 221 Va. 492, 270 S.E.2d 755 (1980), cert. denied. 450 U.S. 1029 (1981).
- e. An individual has no reasonable expectation of privacy in business records turned over to an accountant. Couch v. United States, 409 U.S. 322 (1973).
- f. There is no reasonable expectation of privacy in a jail. Thus, police officer's electronic surveillance of a visiting room within the jail was admissible. Lanza v. New York, 370 U.S. 139 (1962).
- g. Federal agents had been informed by the employees of a private freight carrier that they had observed a white powdery substance in plastic bags concealed within a tube in a damaged package. Removal of the white powder, by the federal agents, for testing purposes infringed no legitimate expectation of privacy and therefore did not constitute a search within the meaning of the Fourth Amendment. While the agents' assertion of dominion and control did constitute a seizure, that warrantless seizure was not unreasonable. United States v. Jacobsen, 466 U.S. 109 (1984).
- h. The S.E.C., in conducting a non-public investigation into the financial affairs of Harry F. Magnuson and persons with whom he had dealt, subpoenaed financial records of third party, Jerry T. O'Brien, a broker-dealer, and respondent Pennaluna. The target of the investigation, Magnuson, argued that the S.E.C. was required to notify him that subpoenas to third parties had been issued. The court held that Magnuson could not be protected by the Fourth Amendment, since the Fourth Amendment does not protect information communicated to a third party. Once a person relates information to a third party, he loses his expectation of privacy required to challenge admissibility. S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984).

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- i. The Fourth Amendment prohibition against unreasonable searches and seizures does apply to searches conducted by school officials; however, the legality of the search is conditioned upon reasonableness and not upon a strict adherence to the probable cause requirement. This requires a two-fold inquiry of whether the initial action was justified and whether the search as conducted was reasonably related to the circumstances which justified the initial interferences. Usually it is enough justification that school authorities believe the student is violating either the law or school rules. New Jersey v. T.L.O., 469 U.S. 325 (1985).
- j. A package sent via Piedmont Airlines was identified by sniff dogs as containing drugs. It was addressed to "Midwest Corp., Attention: Starks" (an employee and intermediary of Givens). The president of the corporation opened the package at police request and cocaine was found inside. The court held that defendants could not establish a privacy interest for Fourth Amendment purposes in the contents of a package addressed neither to them nor to some entity which was their alter ego. United States v. Givens, 733 F.2d 339 (4th Cir. 1984).
- k. The belief by telephone subscribers that the numbers they dial are secret is not a reasonable expectation for Fourth Amendment purposes. Smith v. Maryland, 442 U.S. 735 (1979).
- l. In Maryland v. Macon, 472 U.S. 463 (1985) the Court held that a police officer's action in entering a bookstore and examining wares that were "intentionally exposed" did not infringe upon a legitimate expectation of privacy and hence did not constitute a search.
- m. DEA agents placed a beeper in a canister of ether that was to be used by defendants in the manufacture of cocaine. Police traced the beeper to one of the respondents' homes and obtained a warrant to search the house, based in part on information derived from the beeper. The court held that the mere installation of the beeper did not violate defendant's Fourth Amendment rights. But the

court noted that the government was not free from the constraints of the Fourth Amendment to determine by means of an electronic device, whether a particular article (or person) is in an individual's home, without a warrant based on probable cause. United States v. Karo, 468 U.S. 705 (1984), reh. den., 468 U.S. 1250 (1984).

- n. There is no reasonable expectation of privacy in trash left for collection outside the curtilage of a home. California v. Greenwood, 486 U.S. 35, 37 (1988).
- o. There is no reasonable expectation of privacy in a junked car, even when it is left on the defendant's own property. United States v. Ramapuram, 632 F.2d 1149 (4th Cir. 1980).
- p. A subpoena duces tecum for checks and other bank records of accused did not violate any Fourth Amendment interest. There is no expectation of privacy in business records, e.g., checks and deposit slips; they contain only information voluntarily conveyed to the bank. United States v. Miller, 425 U.S. 435 (1976). Obtaining information revealed to a third party and conveyed by such party to the Government is not a violation of defendant's Fourth Amendment rights.

2. Abandoned Property

A search warrant is not necessary for a search of property which has been abandoned. Abel v. United States, 362 U.S. 217 (1960).

Property is considered abandoned if the following two conditions are met:

The abandonment is voluntary. Someone's discarding of property will be considered a voluntary abandonment if the property is discarded only because of a police officer's performance of his normal legal duties. Keiningham v. United States, 307 F.2d 632 (D.C.Cir. 1962). If someone discards property as a result of an officer's illegal conduct, then the property will not be considered voluntarily abandoned, and a warrantless search will be held illegal. Moss v. Cox, 311 F. Supp. 1245 (E.D. Va. 1970).

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The property is discarded outside the area in which someone would have a reasonable expectation of privacy. See generally Katz v. United States, supra.

See Section III, A(2)(c) supra for discussion concerning how the concept of "abandoned property" relates to standing to challenge a search.

a. Examples of abandoned property

i. "Absent proof that a person has made some special arrangement for the disposition of his trash inviolate, he has no reasonable expectation of privacy with respect to it once he places it for collection. The act of placing it for collection is an act of abandonment and what happens to it thereafter is not within the protection of the Fourth Amendment." United States v. Crowell, 586 F.2d 1020, 1025 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979).

ii. A U.S. Border Patrol Agent asked defendant to stop his car for a routine border inspection. Defendant refused to do so and sped off, throwing bags of marijuana out of the car onto the highway. The officer seized the marijuana without a search warrant. The seizure was valid because the marijuana had been voluntarily abandoned while the officer was performing his normal legal duties. United States v. Wilson, 492 F.2d 1160 (5th Cir. 1974), cert. denied. 419 U.S. 858 (1974). Note: in California v. Hodari D., ___ U.S. ___ (April 23, 1991) the Supreme Court ruled specifically that to constitute a seizure for purposes of the Fourth Amendment, there must be either an application of physical force, however slight, or when that is absent, submission to a police officer's show of authority to restrain his liberty, and when an accused flees despite an officer's command to stop, there was no seizure until the officer tackled him. Therefore, the incriminating evidence thrown away by the accused while fleeing constituted abandoned property and not the fruits of a seizure.

iii. After breaking into a residence, defendant drove to a motel. Upon checking out, he informed the motel manager that he was leaving his car

there and would return for it in three or four days. When defendant did not return for the car after ten days, the manager called the police officer, who made a warrantless search of the car and found property which was stolen in a burglary. Defendant never returned to claim the car during the five months between the search and his arrest. The car was held to be abandoned and the search was therefore legal. Hawley v. Commonwealth, 206 Va. 479, 144 S.E.2d 314 (1965), cert. denied, 383 U.S. 910 (1966).

iv. Defendant was arrested in his hotel room on suspicion of being an alien illegally present in the country. He paid his bill and was taken to jail. A police officer searched the room without a warrant after defendant had left. The search of the trash can was held to be legal since defendant had abandoned his motel room. Abel v. United States, 362 U.S. 217 (1960).

b. Property found not voluntarily abandoned

i. Marijuana cigarette which was discarded by defendant subsequent to an illegal seizure by a police officer was held not to have been voluntarily abandoned. Moss v. Cox, 311 F. Supp. 1245 (E.D. Va. 1970).

3. Property in open view

- a. There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside of the vehicle by either inquisitive passersby or diligent police officers. Texas v. Brown, 460 U.S. 730 (1983); Cook v. Commonwealth, 216 Va. 71, 216 S.E.2d 48 (1975).
- b. There is no reasonable expectation of privacy about the exterior of the automobile; thus, police may obtain evidence from the exterior features, such as paint chips on, or tire tread from the suspect car. Cardwell v. Lewis, 417 U.S. 583 (1974).

It was reported to the police that the license

plates of a getaway car were covered by newspapers. A police officer saw a car on a public highway with pieces of newspaper hanging from the license plates. This observation was held not to be a search since the newspapers had been in open view and the officer had a right to be on the highway. United States v. Brown, 383 F.2d 781 (4th Cir. 1967), cert. denied, 389 U.S. 1055 (19-68).

- c. A person's voice. United States v. Dionisio, 410 U.S. 1 (1973).
- d. A person's handwriting. United States v. Mara, 410 U.S. 19 (1973).

III. STANDING TO CONTEST SEARCH

A. The burden of proof is on the defendant to establish standing to contest a search by a preponderance of the evidence.

1. Expectation of Privacy Is the Determining Factor

To determine standing, the Court focuses upon whether the governmental activity intruded upon the defendant's legitimate expectation of privacy. Rakas v. Illinois, 439 U.S. 128, 143 (1978), reh. den., 439 U.S. 1122 (1979) [citing Katz v. United States, 389 U.S. 347 (1967)]. Thus, the two inquiries of "whether there was a search" and "standing" merge into one. The totality of the circumstances will determine whether a search took place (as far as the defendant is concerned) and the right of the defendant to invoke the exclusionary rule. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); United States v. Salvucci, 448 U.S. 83 (1980). The defendant has the burden of establishing that the government intruded on his legitimate expectation of privacy. Rawlings, 448 U.S. at 104; Abell v. Commonwealth, 221 Va. 607, 272 S.E.2d 204 (1980).

Although no one circumstance is controlling, circumstances which may be considered include:

- a. whether the defendant was on the premises at the time of the contested search and seizure;
- b. whether the defendant has a proprietary or possessory interest in the premises:

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- c. whether the defendant had a subjective expectation of privacy in the item searched, see Rawlings, 448 U.S. at 104, 105; and
- d. whether the defendant is charged with an offense that includes, as an essential element of the offense charged, possession of the evidence seized at the time of the contested search and seizure. Brown v. United States, 411 U.S. 223 (1973). See United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979).

However, no automatic standing arises from any circumstance. The automatic standing established for crimes of possession in Jones v. United States, 362 U.S. 257 (1960) was overruled by United States v. Salvucci, 448 U.S. 83 (1980), holding the exclusionary rule applicable only if defendant's own Fourth Amendment rights were violated. A property interest in the seized good is not determinative of standing to challenge the search and seizure. Rawlings v. Kentucky, 448 U.S. 98 (1980).

2. Examples of No Standing

- a. Tenant's interest in premises used by another

A warrantless search and seizure took place in rented premises used primarily by defendant's son. Court held that the defendant had no standing to challenge the invasion of privacy of a third party. Parks v. Commonwealth, 221 Va. 492, 270 S.E.-2d 755 (1980), cert. denied, 450 U.S. 1029 (1981).

- b. Passengers in automobile

Defendants were passengers in an automobile which was searched. They neither owned the automobile nor asserted that they owned the rifle or shells which had been seized. They were not entitled to challenge the search since they had no legitimate expectation of privacy. The burden is on the defendant to establish that his own Fourth Amendment rights were violated. Rakas v. Illinois, 439 U.S. 128 (1979).

Based on informant's tip and their own observations police had reason to believe that two tractor trailers, a U-Haul type truck and a van had been involved in the smuggling of marijuana. The police officers apprehended the motor vehicles, examined the driver's licenses and arrested all occupants after smelling a strong odor of marijuana coming from the vehicles. Search warrants were obtained to search the vehicles. The defendants argued that they had a reasonable expectation of privacy in the contents of their vehicles. The court held that the privacy interest necessary to support standing is an interest in the area searched, not in the items ultimately found. The court held that only those individuals with a sufficient interest in the vehicles, i.e. ownership interest, bailee interest, had standing to object to the search. United States v. Manbeck, 744 F.2d 360 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1981).

c. Disclaimer of ownership/abandonment

i. When the defendant dropped a suitcase and disclaimed ownership after the police arrested him for a narcotics violation, the court held that the ownership denial coupled with the act of dropping the bag placed the article within the concept of an "abandoned" article, thereby precluding the defendant from asserting standing to challenge the search. United States v. Jackson, 544 F.2d 407 (9th Cir. 1976).

ii. When a counterfeiting suspect, upon being questioned by Federal Bureau of Investigation agents, disclaimed ownership of a briefcase in his motel room, the defendant was later without standing to challenge the validity of the search and seizure as the disclaimer analogously amounted to an abandonment of the briefcase. United States v. Williams, 538 F.2d 549 (4th Cir. 1976); United States v. Clark, 891 F.2d 501 (4th Cir. 1989).

Cf. California v. Greenwood, 486 U.S. 35 (1988) (no reasonable expectation of privacy in trash left for collection outside the curtilage of a home - in effect have abandoned it; presumably thus also no standing to challenge search).

d. By agency

No standing arises through the acts of one's agents or co-conspirators in acquiring leases and proprietary interests. The acquisition of property by the defendant's agents or co-conspirators does not confer standing on defendant to contest the search of such property. United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979).

e. Occupants of stolen car

Neither a passenger nor a driver of a stolen automobile have a reasonable expectation of privacy in the vehicle and therefore do not have standing to contest the search of the vehicle. Josephs v. Commonwealth, 10 Va. App. 87, 390 S.E.2d 491 (19-90).

IV. REASONABLENESS OF SEARCH

The reasonableness of a search conducted by a search warrant is covered under Chapters dealing with Search Warrants.

Warrantless searches conducted outside the judicial process, without prior approval of a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. Mincey v. Arizona, 437 U.S. 385 (1978); Katz v. United States, 389 U.S. 347 (1967). The following is a list of those exceptions:

A. Consent

The Fourth Amendment prohibition against unreasonable searches and seizures may be waived by a free and voluntary consent of the defendant to the search and seizure. Bumper v. North Carolina, 391 U.S. 543 (1968). For a more detailed explanation, See Section XII.

B. Search Incident to an Arrest

A search warrant is not necessary if the search is made incident to a valid custodial arrest. For a more detailed explanation, See Section IX (B).

C. Emergencies (Exigent Circumstances)

1. An officer's reasonable belief

In Payton v. New York, 445 U.S. 573 (1980) the Supreme Court held that the Fourth Amendment required warrants for the seizure of property or persons absent exigent circumstances. Exigent circumstances have meant that a search warrant is not necessary if there is an emergency. McDonald v. United States, 335 U.S. 451 (1948). "[I]n determining whether exigent circumstances [are] sufficient to overcome the presumption of unreasonableness and justify a warrantless entry, the court must examine the circumstances as they reasonably appeared to the law enforcement officers on the scene." Verez v. Commonwealth, 230 Va. 405, 411, 337 S.E. 2d 749, 753 (1985), cert. denied, 479 U.S. 813, reh. den., 479 U.S. 1000 (1987); see Keeter & Bray v. Commonwealth, 222 Va. 134, 141, 278 S.E.2d 841, 846, cert. denied, 454 U.S. 1053 (1981) (stating "officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight...but must be judged by their reaction to circumstances as they reasonably appeared to trained law enforcement officers to exist when the decision to enter was made").

Some factors to consider are:

- a. the degree of urgency involved and the time required to obtain a warrant;
- b. the officers' reasonable belief that contraband will be removed or destroyed;
- c. the possibility of danger to others, including officers guarding the site;
- d. information that the owners of the contraband know police are trailing them;
- e. the violent or serious nature of the offense;
- f. the officers' reasonable belief that the suspects are armed;
- g. if a clear showing of probable cause exists at time of entry;

- h. a strong belief the suspects are present and the likelihood of escape.

Verez, 230 Va. at 410-411. An emergency exists, and police may enter without a warrant, in the following circumstances:

2. Examples of emergencies

- a. If it is reasonable for the police to believe that someone is in distress and in need of immediate assistance. United States v. Presler, 610 F.2d 1206, 1211 (4th Cir. 1979). However, upon entering, the police may seize only that evidence which is in plain view. They may not conduct a general search. Id.
- b. There is a very great danger that if the officer does not act quickly, evidence will be lost or destroyed. Parish v. Peyton, 408 F.2d 60 (4th Cir. 1969), cert. denied, 395 U.S. 984 (1969); Fore v. Commonwealth, 220 Va. 1007, 265 S.E.2d 729, cert. denied, 449 U.S. 1017 (1980).

A warrantless entry to secure premises is reasonable when the police have probable cause to believe that evidence is on the premises and that delay would create a substantial risk that the evidence would be lost or destroyed, or the critical nature of the circumstances prevents the use of any warrant procedure. The police may not create their own exigencies. Crosby v. Commonwealth, 6 Va. App. 193, 201, 367 S.E.2d 730 (1988).

However, an entry to secure premises is limited to a security check in those areas in which individuals could hide. Once the premises are secured, the police must leave, although they may set up an external stakeout. Id. at 202.

- c. The Supreme Court has held that an administrative warrant is sufficient if the search is to determine the cause and origin of a recent fire. For a criminal investigation a normal search warrant is needed. Michigan v. Clifford, 464 U.S. 287, reh. den., 465 U.S. 1084 (1984).

- d. When police received a call at 6:00 p.m. revealing that drugs were to be delivered at 6:30 p.m. at a place some 23 blocks away, police were faced with the situation of taking action "now or never." This emergency situation justified the warrantless search of defendant's person. Wright v. Commonwealth, 222 Va. 188, 278 S.E.2d 849 (1981).
- e. Officials, investigating the cause of a midnight fire in a furniture store, entered while the fire was being extinguished. Re-entry 4-5 hours after the fire was extinguished was considered an actual continuation of the first entry and did not require a warrant. However, a warrantless search and seizure several days after the fire was extinguished were unconstitutional, being clearly detached from the initial exigent and warrantless entry. Michigan v. Tyler, 436 U.S. 499 (1978).
- f. At the scene of a homicide, police may make a prompt warrantless search of the area to see if there are any other victims or if the killer is still on the premises. They may seize any evidence that is in plain view during the course of legitimate emergency activities. But there is no "murder scene exception" to the Fourth Amendment and the warrantless four-day search of petitioner's apartment was unconstitutional. Mincey v. Arizona, 437 U.S. 385 (1978).
- g. Defendant, who was found in an incoherent and unconscious condition in his automobile (in Florida), was taken directly to the hospital. The police officer carried a briefcase that had been removed from defendant's car by others, to defendant's motel room where he found a key with which to open the briefcase. The briefcase contained money stolen from a Tennessee bank six days earlier. It was held that the opening of the briefcase was not an unlawful search because the officer opened it in an effort to render emergency aid to a person having a seizure. United States v. Dunavan, 485 F.2d 201 (6th Cir. 1973).
- h. A police officer at a hotel after a shooting was told that defendant had gone upstairs just after the fights, carrying a gun and appearing to be wounded. He was advised that defendant was regis-

tered in room 728. The officer went to the room, knocked on the door, and received no reply. At the officer's request, the hotel clerk opened the door. A thorough search of the room revealed only a bloody sheet on the bed. This intrusion was reasonable and falls within the emergency exception. However, the officer then looked through defendant's closed suitcase and found some money that defendant had stolen in a bank robbery; after the officer discovered that defendant was not in the room, the emergency justifying the search ended. His search of the suitcase without a warrant was thus illegal. United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972), cert. denied, 416 U.S. 943 (1974).

- i. Defendant stole men's suits from a retail store in Charlottesville, Va. He sent them by bus in a cardboard box and duffel bag to an out-of-state city without giving an address for either himself or the person who was to pickup the packages. When the packages finally reached the out-of-state city, the cardboard box had been damaged in transit, revealing men's suits. The items were seized by officers without a warrant. The seizure was held to be legal because the officer had reason to believe someone had inquired after the box and bag and therefore the need to prevent the package from being quickly claimed and lost as evidence amounted to exigent circumstances. Paris v. Peyton, 408 F.2d 60 (4th Cir. 1969), cert. denied, 395 U.S. 984 (1969).
- j. A police officer has a lawful right to investigate any situation which he might reasonably believe to be an emergency. Thus, any evidence observed by the officer during the investigation is admissible. United States v. Barone, 330 F.2d 543 (2nd Cir. 1964), cert. denied, 377 U.S. 1004 (1974).

3. Examples of invalid emergency searches

- a. See Michigan v. Tyler, 436 U.S. 499 (1978).
- b. When defendants refused to grant officers' request to search vehicle, one officer then took the key from the ignition, opened the trunk, found the

locked attache case, pried it open with a screwdriver and found cocaine. It was held that the search of the attache case was invalid because once the keys were removed from the automobile and the attache case was seized by the officers, there was no reason why they could not have obtained a warrant before conducting the search. Abell v. Commonwealth, 221 Va. 607, 272 S.E.2d 204 (1980).

- c. Defendant was shot during a fight and taken to a hospital. Early the next morning a deputy sheriff came to the hospital without a search warrant and asked the nurse on duty to give him defendant's clothing. She took the clothes from the wardrobe in defendant's rooms and turned them over to the officer for examination and testing. The seizure of the clothing was held to be unconstitutional as there was no justification for the seizure. There was no search incident to arrest, no evidence that the clothes were about to be removed or concealed, no consent or authorization given to the nurse, and no authority for her to consent or authorization given to her, and no authority for her to consent to the taking of his clothes. Morris v. Commonwealth, 208 Va. 331, 157 S.E.2d 191 (1967).

D. Hot Pursuit

1. Entry of a House

The police generally do not need a search warrant to enter a house if an officer is in "hot pursuit" of someone he reasonably believes has committed a crime. Warden v. Hayden, 387 U.S. 294 (1967).

In 1980, the Supreme Court held that police may not make a warrantless entry into a suspect's home to make a routine arrest. Payton v. New York, 445 U.S. 573 (1980). This rule is subject to an exception for "exigent circumstances." See id. at 587, 589. However, in Welsh v. Wisconsin, 466 U.S. 740 (1984), the Court held that the gravity of the underlying offense is an important factor to be considered when determining whether an exigency exists. A warrantless entry of a home should rarely be sanctioned when the underlying offense is minor. Id. at 753. In Welsh, the Court refused to apply the "hot pursuit" exception where the defendant was suspected of driving while intoxicated.

Id.

2. Example of search made during "hot pursuit"

Acting on probable cause, police attempted a warrantless arrest of defendant while she was standing in the doorway of her residence. Defendant retreated into vestibule of home and police followed her and then proceeded to arrest and search her. Because the defendant was in a public place when the police first sought to arrest her and, because delay would result in the probable destruction of evidence, the arrest and search incident to arrest were valid. United States v. Santana, 427 U.S. 38 (1976).

E. Plain View

1. Explanation of the Doctrine

A warrantless seizure by police officers of something found in plain view will be lawful if the following four requirements are met:

- a. The object is found in plain view, i.e., without any type of search by the police officer. An object is deemed to be in plain view, even if it is found within a private dwelling. Ker v. California, 374 U.S. 23 (1963). An object is in plain view even if it is found with the help of devices such as binoculars or searchlights, United States v. Lee, 274 U.S. 559 (1927), or a flashlight, Texas v. Brown, 460 U.S. 730 (1982).
- b. "The police officer must lawfully make an 'initial intrusion' or otherwise properly be in a position from which he can view a particular area." Texas v. Brown, 460 U.S. 730, 737 (1982) (citing Coolidge v. New Hampshire, 403 U.S. 443, 465-468 (1970), reh. denied, 404 U.S. 874 (1971); see also Harris v. United States, 390 U.S. 234, 236 (1967) (where police officer, in searching defendant's car after his arrest pursuant to a local police department regulation, found incriminating evidence; it was held that the evidence was admissible because it was found in plain view while the officer was lawfully taking measures "to protect the car while it was in police custody."))

- c. Under the test set forth in Coolidge, the officer must discover incriminating evidence "inadvertently," that is, he may not "know in advance the location of (certain) evidence and intend to seize it," relying on the plain-view doctrine as a pretext. Coolidge v. New Hampshire, 403 U.S. 443, 470 (1971) (plurality opinion).

The requirement that discovery be "inadvertent" was never expressly adopted by a majority of the Supreme Court. Recently, the Supreme Court held that a plain view seizure need not be inadvertent. A search properly confined in area and duration, conducted pursuant to a valid warrant or exception to the warrant requirement, will not be invalidated simply because the officer expects or hopes to find a particular article not named in the warrant during that search. Evenhanded law enforcement is best furthered by the application of objective standards of conduct, rather than standards depending on the subjective state of mind of the officer. Horton v. California, ___ U.S. ___ (1990).

The Virginia cases decided prior to Horton incorporated the inadvertence requirement for plain view seizures. See Lugar v. Commonwealth, 214 Va. 609, 612, 202 S.E.2d 894, 898 (1974) (where police officers were admitted into defendant's apartment to look for fugitive, and upon entering observed controlled substances within plain view on the floor; discovery inadvertent because the officers did not enter the apartment with intent to search for drugs); Holloman v. Commonwealth, 221 Va. 947, 948-949, 275 S.E.2d 620, 622 (1981) (where the court held that police officers, armed with a warrant to search defendant's premises "for concealed property, namely beer and whiskey," illegally seized very small bags containing marijuana; the discovery of the bags was not "inadvertent," but "the product of a deliberate search into 'spaces which obviously could not hide' the things which were the legitimate objects of the search").

- d. "it must be 'immediately apparent' to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to sei-

zure." Texas v. Brown, 460 U.S. 730, 737 (1983) (citing Coolidge, 403 U.S. at 466). Stated alternatively, the police must have probable cause to believe that the items are evidence of a crime, i.e., they must have more than just a "reasonable suspicion." Arizona v. Hicks, 480 U.S. 321, 326 (1987).

In Texas v. Brown, the police officer observed a green balloon inside defendant's car after he had stopped the car pursuant to a routine driver's license checkpoint. From his past experiences with drug offenders, the officer "was aware that narcotics frequently were packaged in balloons like the one in defendant's car." 460 U.S. at 734. Consequently, the police officer's shift in position to more easily view the inside of the car was irrelevant because there is no existing reasonable expectation of privacy in the interior of a car which may be readily observed by normal passersby. Id. at 740.

*For the right to seize objects found in plain view, see Search of the Person, Premises or a Vehicle, IX, X, XI, infra.

2. Examples of a Valid Plain View

- a. For an object to be in plain view, it must be "obvious to the senses." United States v. Sifuentes, 504 F.2d 845, 848 (4th Cir. 1975).
 - i. For example, marijuana was in plain view when it was smelled. Id. See also United States v. Norman, 701 F.2d 295 (4th Cir. 1983), cert. denied, 464 U.S. 820 (1983); United States v. Haley, 669 F.2d 201 (4th Cir. 1982), cert. denied, 457 U.S. 1117 (1983).

This "plain smell" doctrine has been rejected by some courts. See, e.g., United States v. Johns, 707 F.2d 1093, 1096 (9th Cir. 1983), rev'd on other grounds, 469 U.S. 478 (1985) (odor of marijuana contributes to probable cause, but does not justify warrantless search). Odors are by nature "fleeting and evanescent." It is "too easy, after the fact, to assert and essentially impossible to re-

fute" a claim that a substance such as marijuana was smelled. Allowing a plain smell exception to the warrant requirement could end up justifying every warrantless search which turns up marijuana. Blair v. United States, 665 F.2d 500, 513 (4th Cir. 1981) (dissenting opinion).

- ii. A "plain touch" exception has been recognized. No warrant is needed to open a container whose contents have become known through a lawful touching of the outside of the container. United States v. Williams, 822 F.2d 1174, 1183 (D.C. Cir. 1987); see also United States v. Norman, 701 F.2d 295, 297 (4th Cir.), cert. denied, 464 U.S. 820 (1983) (warrantless search of bales valid under plain view where officer smelled marijuana and bales had a distinctive feel and markings typical of those containing marijuana).
- b. Where a police officer placed a person under lawful arrest, he was authorized to accompany him to his room for the purpose of obtaining identification. It is reasonable for the police officer to monitor the movements of an arrested person. Thus, contraband recognized by policeman while lawfully standing in the doorway of defendant's room was admissible. Washington v. Chrisman, 455 U.S. 1 (1982).
- c. When a police officer was lawfully at the defendant's residence to seize the defendant's friend's effects and was interviewing the defendant, the inadvertent observation of bloodstains on the defendant's shoes falls within the plain view exception. Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982), cert. denied, 459 U.S. 1228 (1983).
- d. An operator of a wrecking service, who had been entrusted with possession of defendant's automobile, opened the trunk without instructions from the police, and discovered illegal firearms. He called the police to examine the firearms -- warrantless seizure permissible under the plain view doctrine. United States v. Seller, 511 F.2d 1199

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(4th Cir. 1975).

- e. A police officer was called to the scene of a burning house. He saw a plastic jug filled with a kerosene-like petroleum liquid in plain view beside the house. The jug was held admissible as evidence against the defendant in a trial for arson. The court held that the officer had a right to be on the property because of the emergency, and once on the property the officer found the jug in plain view. Bennet v. Commonwealth, 212 Va. 863, 188 S.E.2d 215 (1972).
- f. A police officer was admitted into defendant's motel room with defendant's permission. Because the officer had gained access to the room lawfully, anything that he saw there in plain view was found without need for a warrant. Johnson v. Commonwealth, 208 Va. 481, 158 S.E.2d 725 (1968), cert. dismissed, 396 U.S. 801 (1969).

3. Examples of Invalid Plain View

A police officer without a search warrant entered defendant's premises. The illegal gambling equipment located there was inadmissible, for the police officer had no legal right to be on the premises. McDonald v. United States, 335 U.S. 451 (1948).

F. Automobile Exception

The Virginia Supreme Court has observed that "an independent exigency justifies the warrantless search of an unoccupied vehicle when there is an immediate need to continue a promising criminal investigation....this exigency is said to be within the spirit, though not the text, of the hot pursuit exception." McCary v. Commonwealth, 228 Va. 219, 229, 321 S.E.2d 637, 642 (1984) (citing United States v. Robinson, 533 F.2d 578, 583-584 (D.C.Cir. 1975), cert.denied, 424 U.S. 956 (1976)). See Section XI

G. Open Fields

1. Generally

The Fourth Amendment protects "persons, houses, papers, and effects." U.S. Const. Amend. IV. It does not

protect "open fields." Hester v. United States, 265 U.S. 57 (1924).

A search warrant is not necessary for searches in open fields beyond a dwelling house and the curtilage around the house. Patler v. Commonwealth, 211 Va. 448, 177 S.E. 2d 618 (1970), cert. denied, 407 U.S. 909 (1972). See also Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974) (where a habeas corpus petition was denied because there could be no reasonable expectation of privacy in the area searched, an extended portion of father-in-law's farm).

Open fields are accessible to the public and the police in ways that a home is not, and fences and "no-trespassing" signs do not effectively bar the public from viewing the contents within. Oliver v. United States, 466 U.S. 170 (1984).

2. Compared to the Curtilage

The protection given to houses by the Fourth Amendment has been extended to the "curtilage" of a house. Oliver v. United States, 466 U.S. 170 (1984). Thus, a frequent question is whether a given area is part of the curtilage of a house, for which police must obtain a search warrant, or is beyond the curtilage and thus part of the "open fields" to which no such limitation applies.

The curtilage is that area around a dwelling which is necessary, convenient, and habitually used by the family for domestic purposes. If there is a fence surrounding the house, particularly if the dwelling is in a rural area, the fence usually marks the end of the curtilage. Bare v. Commonwealth, 122 Va. 783, 94 S.E. 168 (1917). The curtilage does not extend to "open fields," e.g., a cornfield remote from that space necessary, convenient, and habitually used for family purposes. Wellford v. Commonwealth, 227 Va. 297, 315 S.E.2d 235 (1984).

There are four factors used to determine whether an area should be included in the curtilage: the proximity of the area to the home; whether the area is included within an enclosure surrounding the home; the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observa-

tion by passersby. United States v. Dunn, 480 U.S. 294, 301 (1987).

In United States v. Van Dyke, 643 F.2d 992, 993 (4th Cir. 1981), the Fourth Circuit held that a honeysuckle patch located 150 feet from the defendant's house, within an exclusionary fence, was within the curtilage. The court emphasized the facts that the house was located in an isolated, rural area, that entry was provided by a dirt road posted "no trespassing," that a fence limited access, and the fact that the lawn extended almost that far. Id. at 994. The primary focus is whether the area in question harbors those intimate activities associated with domestic life and privacies of the home.

In Dow Chemical Co. v. United States, 476 U.S. 227 (1986), the Supreme Court held that the open areas of an industrial plant complex were not analogous to the curtilage of a dwelling, but were closer to open fields. The Court stressed the use to which the areas were put: "The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant." Id. at 236. As a result, the government was not required to obtain a warrant before taking aerial photographs of the plant. The Court noted that the company did have a reasonable expectation of privacy within the interiors of the buildings comprising the plant. Id.

3. Examples of searches in open fields

- a. No "expectation of privacy [is] extended to the visual observation of [co-defendant's] automobile arriving on [defendant's] premises after leaving a public highway, nor to movements of objects such as the drum of chloroform in the car outside the cabin in the open fields'." Neither a search nor a seizure occurred. United States v. Knotts, 460 U.S. 276, 282 (1983).
- b. It is "lawful for a police officer who is on a public street or sidewalk to look, either deliberately or inadvertently, into an automobile parked on the street and to observe what is exposed therein to open view." Cook v. Commonwealth, 216 Va.

71, 73, 215 S.E.2d 48 (1975).

- c. A police officer made a search in a field 200 feet beyond a fence surrounding a murder suspect's farm house. He found shell casings and spent bullets there which matched the murder weapon. The search was held to be valid since the evidence had been found in an open field beyond the curtilage. Patler v. Commonwealth, 211 Va. 448, 177 S.E.2d 618 (1970), cert. denied, 407 U.S. 909 (1972). See also Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974) (where a habeas corpus petition was denied because there could be no reasonable expectation of privacy in the field).
- d. Defendant was suspected of illegally cutting down trees on government property. A police officer without a valid search warrant made matchings between the stumps and the cut trees, which had been stacked immediately behind defendant's house. The officer's action was held to be an invalid search since the cut trees were located within the curtilage and not in the open fields. Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968).
- e. A police officer discovered a still in an out-building on defendant's property. The building was located in a field which was separated from the farmhouse by a fence. The search was held to be legal because the officer's discovery was made in an open field beyond the curtilage. Brock v. United States, 256 F.2d 55 (5th Cir. 1958).

H. Prison Searches

- 1. A prisoner has no legitimate expectation of privacy in his cell. Thus, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." Hudson v. Palmer, 468 U.S. 517, 526 (1984).
- 2. A search warrant is not necessary for random searches of inmates, their cells, and their lockers for security purposes. Marrero v. Commonwealth, 222 Va. 754, 284 S.E.2d 809 (1981) (marijuana and a pipe containing marijuana residue were found in prisoner's dormitory locker; although there was no testimony that prison officials suspected contraband in the locker or that

the prisoner was a security risk, the court held that such a random search was necessary to ensure the security of the institution and the safety of the inmates and others within the prison and that they can be conducted without notice and in the absence of probable cause or specific information.)

I. Administrative Searches

An administrative search is a search or inspection conducted by a government official or agent in a context other than the enforcement of criminal laws.

Administrative inspections of the premises of pervasively regulated activities are permissible without a warrant under a theory of implied consent. In determining the validity of a particular warrantless inspection scheme, five factors are stressed:

- (a) The activity must be one which is "closely regulated," thereby giving rise to diminished expectations of privacy.
- (b) There must be a "substantial" government interest supporting the regulatory scheme.
- (c) Warrantless inspections must be necessary to further the regulatory scheme.
- (d) The statute must provide a "constitutionally adequate substitute" for a warrant by informing the operator that inspections will be made on a regular basis, of their permissible scope, and of who may perform them.
- (e) The "time, place, and scope" of the inspection must be limited. E.g., inspections may be conducted only "during the regular and usual business hours." New York v. Burger, 482 U.S. 691, 700, 708-11 (1987).

1. Examples of highly-regulated activities

- a. Liquor industry. See Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970). Colonnade did not discuss the "implied consent" theory, but dealt with 26 U.S.C. 7342, making it an offense for a liquor licensee to refuse admission to a federal inspector. The Court observed that because "[w]e deal here with the liquor industry

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long subject to close supervision and inspection, as respects that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures." Because the statute does not sanction forcible entries without a warrant, the warrantless search of defendant's catering establishment, after breaking the storeroom lock to enter, was invalid.

- b. Firearms. United States v. Biswell, 406 U.S. 311 (1972).
- c. Mine safety inspections. Donovan v. Dewey, 452 U.S. 594 (1985). Under the Federal Mine Safety and Health Act of 1977, warrantless searches are required; therefore, there is no Fourth Amendment violation.
- d. Precious gems and metals industries. Gallaher v. City of Huntington, 759 F.2d 1155 (4th Cir. 1985). State statute requiring record book be available for warrantless inspection during business hours is constitutional.
- e. Auto junkyards. New York v. Burger, 482 U.S. 691 (1987). The Court stressed the need for warrantless inspections because of the problem of theft associated with this industry. Id. at 708.

2. Other Permissible Administrative Searches

- a. A caseworker's visit to recipient of Aid to Families with Children was not a search. Even if it were considered to be a "search," it would be reasonable under the Fourth Amendment. Wyman v. James, 400 U.S. 309 (1971).
- b. Probationers and parolees may be subjected to warrantless searches because of the "special needs" of the probation system, including the need to supervise probationers to ensure that probation restrictions are in fact observed. Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987).
- c. Entry into the public lobby of a motel and restaurant for the purpose of serving an administrative subpoena on the owner was not forbidden by the

Fourth Amendment. The subpoena merely directed appellee to produce records relevant to an hour and wage examination by the Department of Labor and distinguishes this case for those administrative searches which require a warrant. Donovan v. Lone Steer, Inc., 464 U.S. 408 (1984) (citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) as controlling).

- d. State health inspector's action in conducting daylight, visual pollution tests of smoke emitted from a business's chimneys is not a search. It is within the "open fields" exception to the Fourth Amendment. Air Pollution Variance Board of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974).
- e. Administrative automobile examinations, carried out pursuant to neutral and specific criteria, and involving minimal inconvenience to motorists, may be conducted in order to serve the important public interest in removing drunk drivers from the highways. Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1984), cert. den., 475 U.S. 1084 (1985); cf. Delaware v. Prouse, 440 U.S. 648 (1979) (invalidating a random and discretionary vehicle license and registration checkpoint because it provided police officers with too much discretion).

In Lowe, the police officers were required to stop all southbound vehicles. Lowe, 230 Va. at 277. However, the fact that all vehicles are stopped does not, standing alone, constitute sufficient restraint on the exercise of discretion by police officers to "transform the stop into a constitutionally valid roadblock." Simmons v. Commonwealth, 238 Va. 200, 203, 380 S.E.2d 656 (1989). The Commonwealth must still prove that the police were using an objective, nondiscretionary procedure. Where the decision to establish the roadblock, its location, and its duration were left to the discretion of the troopers, the Commonwealth failed to meet that burden. Id. at 204.

- f. Discovery of contraband drugs in serviceman's apartment during the course of a traditional health and welfare inspection, which was wholly

available to commanding officer of vessel to ensure the fitness and readiness of his military unit was not by virtue of any unlawful search and seizure proscribed by the Fourth Amendment. The apartment was allocated in lieu of standard barracks to servicemen by government. Search was previously scheduled, was in conformity with policy, and was reasonably related to ensuring readiness of unit personnel. Donnelly v. United States, 525 F.Supp. 1230 (E.D. Va. 1981).

- g. Fire inspections are governed by Michigan v. Tyler, 436 U.S. 499 (1979). Fire officials need no warrant to enter a burning building. Once in the building, they may remain after the fire has been extinguished for a reasonable time in order to investigate the cause of the blaze. Id. at 510. However, where reasonable expectations of privacy remain in the fire-damaged property, additional investigations begun after the fire has been extinguished and fire officials have left the scene generally must be made pursuant to a warrant or the identification of some new exigency. Michigan v. Clifford, 464 U.S. 287, 293 (1984). In Michigan v. Clifford, the Court found that the defendants retained "reasonable privacy interests" in their fire-damaged home, stressing the facts that this was a home, that personal belongings remained, and that the defendants had arranged to have it secured against intrusion. Id. at 295. The Court invalidated a search by fire investigators five hours after the fire was extinguished and the firemen left the scene.
- h. Warrantless border searches are permissible without any individualized suspicion. United States v. Ramsey, 431 U.S. 606 (1977). However, some evidence must exist to justify the more intrusive searches. See, e.g., United States v. Montova de Hernandez, 473 U.S. 531 (1985) (reasonable suspicion of alimentary canal drug smuggling sufficient to justify detention at border until suspect submits to x-ray or bowel movement occurs).

3. Searches requiring administrative warrants

- a. Unless an exception has been made, a warrant is

required for an administrative search. See Camara v. Municipal Court, 387 U.S. 523 (1967). However, probable cause for the issuance of an administrative inspection warrant exists if the inspection is based on "reasonable legislative or administrative standards." Camara, 387 U.S. at 534. "Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling." Id. at 538; see also Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

- b. "A judicial determination of reasonableness is needed, so that 'the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer.'" Mosher Steel-Virginia v. Teigo, 229 Va. 95, 99, 327 S.E.2d 87, 91 (1985) (quoting Camara v. Municipal Court, 387 U.S. at 545).

Cf. Illinois v. Gates, 462 U.S. 213, 239 (1982), reh. den., 463 U.S. 1237 (1983). ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others" so that in effect he becomes nothing more than a "rubber stamp.")

- c. Example

A warrant is required where the inspector's discretion is almost unbridled (OSHA inspections). In such cases, a warrant would provide assurances from a neutral officer that an inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing neutral criteria. In addition, the warrant would advise the owner of the scope and objects of the search. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

4. Virginia has separate procedures for inspections in connection with the manufacturing, emitting or presence of a toxic substance. See §§ 19.2-393 through 19.2-397, Code of Virginia (1950, as amended).

V. SHOULD SANCTIONS BE IMPOSED.

A. Exclusionary Rule

1. Evidence found by a police officer as a result of an illegal search and seizure cannot be used as evidence in a later criminal trial. Mapp v. Ohio, 367 U.S. 643 (1961).
2. Any additional evidence that is found as a direct result of an illegal search and seizure will also be excluded from a later trial. Confessions which are products of unlawful police actions are excluded under the "fruit of the poisonous tree" doctrine. Wong Sun v. United States, 371 U.S. 471 (1963). The prosecution bears the burden of showing that the confession was not obtained by exploitation of the illegal search. Hart v. Commonwealth, 221 Va. 283, 269 S.E.2d 806 (1980).

B. Exceptions to the Exclusionary Rule

1. State of the Rule

Evidence can be used at trial even if there has been an illegal search and seizure in these three situations:

a. Independent Source Doctrine

The evidence comes from an independent source. Segura v. United States, 468 U.S. 796, 813-14 (1984) ("[w]hether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which the evidence was seized. Exclusion of evidence as derivative or 'fruit of the poisonous tree' is not warranted here because of that independent source"); see also Murray v. United States, 487 U.S. 533 (1988).

b. Attenuation Doctrine

The connection between the illegal search and seizure and the evidence found has become so attenuated that the taint of the illegal search and seizure has disappeared. Nardone v. United States, 308 U.S. 338 (1939); Reese v. Common-

wealth, 220 Va. 1035, 265 S.E.2d 746 (1980).

c. Inevitable Discovery Doctrine

The evidence inevitably would have been found anyway, even without the illegal search and seizure. Warlick v. Commonwealth, 215 Va. 263, 268, 208 S.E.2d 746 (1974). Cf. Nix v. Williams, 467 U.S. 431 (1984) (adopting inevitable discovery exception for evidence obtained in violation of Sixth Amendment). To take advantage of the inevitable discovery exception, the prosecution must show a reasonable probability that the evidence would have been discovered by lawful means but for the police misconduct; that the leads making the discovery inevitable were possessed by the police at the time of the misconduct; and that the police were actively pursuing the alternative line of investigation prior to the time of the misconduct. Walls v. Commonwealth, 2 Va. App. 639, 656, 347 S.E.2d 175 (1986).

d. The Fruit of Another Tree Doctrine

Where the police have probable cause to arrest a suspect, the Exclusionary Rule does not require the suppression of a statement made by the defendant outside of his home, even though the statement was taken after a warrantless arrest made inside his home in violation of the Fourth Amendment. The Court found that the statement flowed from his arrest outside the home and therefore resulted from another "Tree". New York v. Harris, ___ U.S. ___, 110 S. Ct. 1640 (1990).

2. Examples Where Evidence Held Inadmissible

- a. When officers found drugs beneath counter in small paper bags while searching for beer and whiskey pursuant to a search warrant, the drugs were inadmissible as they were the product of an improper search. Holloman v. Commonwealth, 221 Va. 947, 275 S.E.2d 620 (1981).
- b. A one-month time lapse between the unlawful search and the confession was not sufficient to break the casual connection. Hart v. Commonwealth, 221 Va. 283, 269 S.E.2d 806 (1980).

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- c. Evidence found beyond the permissible limits of a search incident to arrest and beyond the scope of consent given for the search was inadmissible. Lugar v. Commonwealth, 214 Va. 609, 202 S.E.2d 894 (1974).

3. Examples Where Evidence Held Admissible

- a. Defendant stole drugs from a drugstore. A witness saw and identified the car defendant had used in the robbery. A police officer seized part of the drugs from defendant's house after an illegal search. Some hours later at police headquarters the defendant voluntarily told the police where they could find the rest of the drugs after he realized that they might be found by some children. He also admitted that they had been in trouble over drugs before. The drugs found in defendant's house were inadmissible because they were the result of an illegal warrantless search. The drugs voluntarily given up, however, were admissible because the connection between the illegal search and seizure and the voluntary giving up of the drugs became so weakened that the bad effect of the illegal search and seizure had disappeared. The identification of the car was held to be admissible as the evidence coming from an independent source. And defendant's admission that he had been in trouble with other drugs before was held admissible as evidence that would have been found anyway, even without the illegal search and seizure. Warlick v. Commonwealth, 215 U.S. 263, 208 S.E.2d 746 (1974).
- b. A police officer searched A's house for stolen property with an invalid search warrant. The officer arrested A. He then arrested B, who was also in A's house, as an accomplice to the crime. A told the officer that he was innocent. He then made a full, voluntary confession, even after the officer had warned him of his right to remain silent. The confession was held to be admissible since the connection between the illegal search and seizure and the evidence found had become so weakened that the bad effect of the legal search and seizure had disappeared. Wicklin v. Slayton, 356 F. Supp. 140 (E.D.Va. 1973).

- c. A police officer searched A's house for narcotics without a search warrant. A told the officer that B had the narcotics. The officer searched B's house without a search and found the narcotics. B told the officer that C had sold him the narcotics. The officer made an illegal search of C's home, but did not find any narcotics. Several days later, however, C made a voluntary confession. A's statement and the narcotics were held inadmissible in a trial against B because they were additional evidence and as a direct result of an illegal search. C's confession, however, was held admissible in a trial against C since the connection had become so weakened that the bad effect of the illegal search and seizure had disappeared. Wong Sun v. United States, 371 U.S. 471 (1963).

4. Good Faith Exception to the Exclusionary Rule

A search warrant that is ultimately found lacking in probable cause may nevertheless be valid so long as both the magistrate who issued the warrant and the police officer who executed it honestly believed it to be legitimate. As the primary purpose of the exclusionary rule is to deter police misconduct, it is unnecessary as applied to conscientious police employees. United States v. Leon, 468 U.S. 397 (1984), reh. den., 468 U.S. 1250 (1984).

Furthermore, if police officers are assured by the issuing authority that existing problems in the warrant will be corrected, and subsequently rely on that assurance, the warrant will be effective. Massachusetts v. Sheppard, 468 U.S. 981 (1984).

The Virginia Supreme Court has adopted the good faith exception to the exclusionary rule. McCary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637 (1984).

5. When Good Faith Exception Does Not Apply

The Leon Court noted that suppression remained an appropriate remedy if the magistrate issuing the warrant was misled by information in the affidavit which the affiant knew was false or would have known was

false except for his reckless disregard of the truth. 468 U.S. at 923 [citing Franks v. Delaware, 438 U.S. 154 (1978)].

The Court also stated that "we eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant." Id. at 922 n.23. An officer's good faith is to be determined objectively. The question is whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization, not whether the particular officer knew that it was illegal. Id. If no officer of reasonable competence would have requested the warrant, an officer "cannot excuse his own default by pointing to the greater incompetence of the magistrate." Malley v. Briggs, 475 U.S. 335, 346 n.9 (1986).

VI. SEIZURE OF NON-TESTIMONIAL EVIDENCE

A. Seizure of Non-Testimonial Evidence

An individual may be compelled to produce non-testimonial evidence against himself without implicating the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment privilege prohibits the compulsion of testimony incriminating the speaker. It does not prohibit the compelled evidentiary use of an individual's body or any of its attributes when such may be material. See generally, Holt v. United States, 218 U.S. 245 (1910). These attributes include appearance, fingerprints, photographs, measurements, handwriting, speech for identification only, gestures and blood or breath samples. Schmerber v. California, 384 U.S. 757 (1966).

B. Fourth Amendment Ramifications

1. Generally

The taking of such real evidence under compulsion may, however, implicate the Fourth Amendment and its prohibitions on unreasonable seizures of the person and searches and seizures thereupon. Davis v. Mississippi, 394 U.S. 721 (1969). In Davis, without probable cause or reasonable suspicion, police rounded up a number of possible suspects in a rape and compelled them to give

fingerprint exemplars. These were compared with evidence from the scene of the crime. Davis' prints matched and the comparisons constituted evidence of his guilt. The Supreme Court held that his detention, being without probable cause, made the taking of his fingerprints the fruit of the illegal seizure and detention. Thus, the taking of the fingerprints violated the Fourth Amendment. On the other hand, if an accused is legitimately in custody or subject to the jurisdiction of the court, he may be compelled, without violation of the Fourth Amendment, to provide evidentiary use of his body and its characteristics and attributes as real or physical evidence.

In Schmerber, supra, blood samples could be withdrawn without the defendant's consent since he was in custody, having been arrested for drunk driving. This was so because it was an appropriate incident to his arrest, equivalent to a search of his person. Of particular interest was the evanescence of the blood-alcohol content, making unnecessary the obtaining of a search warrant. Note, however, that there are limitations on what a court may permit in terms of removing evidence from the body of a defendant. See Rochin v. California, 342 U.S. 165 (1952) (pumping the stomach to recover swallowed drugs was unconscionable); Winston v. Lee, 470 U.S. 753 (1985) (surgical procedure under general anesthesia to remove bullet for comparison was too great a bodily intrusion).

Schmerber lists other physical or bodily characteristics which may be obtained including fingerprints, photographs, bodily measurements, handwriting exemplars, speech exemplars, gestures, etc. If the individual is in custody, these things may be taken from him. Note that a court order or search warrant, however, may be necessary. In the alternative, these things may be obtained through the subpoena of an investigative grand jury. United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplars); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars).

2. Mandatory Drug Testing

In two recent cases, the Supreme Court upheld mandatory drug testing, without warrant, probable cause or individualized suspicion, of federal employees and employ-

ees of a highly regulated industry (railroad). National Treasury Employees Union v. Von Raab, ___ U.S. ___, 109 S. Ct. 1384 (1989); Skinner v. Railway Labor Executives Association, ___ U.S. ___, 109 S. Ct. 1402 (1989). In Von Raab, the Court upheld a testing program whereby all Customs employees who applied for promotion to positions involving the interdiction of illegal drugs, access to classified materials, or which required the employee to carry a firearm were required to submit to a test of the urine for drugs. The government's compelling interest in safeguarding the border and protecting the public outweighed the employees' expectations of privacy. Von Raab, 109 S.Ct. at 1392. Customs' goal of safeguarding the border "could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission." Similarly, the risk of injury to the public from drug-using agents who carry firearms justifies mandatory drug testing of such agents. Id. at 1393. In Skinner, the Court upheld the mandatory testing of railroad crews after accidents without individualized suspicion, and the discretionary testing of individual employees who violate certain safety rules.

C. Sixth Amendment Ramifications - Right to Counsel Attaching to Seizure of Non-Testimonial Evidence from an Individual.

Under the Sixth Amendment to the United States Constitution, an individual is entitled to the presence and assistance of counsel at all critical stages of the criminal proceedings against him. See Powell v. Alabama, 287 U.S. 45 (1932); Hamilton v. Alabama, 368 U.S. 52 (1961).

In United States v. Wade, 388 U.S. 218 (1967), and in Gilbert v. California, 388 U.S. 253 (1967), it was held that a lineup conducted after indictment was a critical stage of the criminal proceeding; accordingly a defendant is entitled to the presence of counsel at such an event. On the other hand, the taking of handwriting exemplars is not a critical stage, and counsel need not be present; counsel can have new exemplars taken later and make whatever comparisons are appropriate. Gilbert, supra. The same is true as to the taking of blood samples. Schmerber, supra.

The distinction made by the Wade-Gilbert Court was between stages of the criminal proceedings where potentially preju-

dicial events could take place. Thus, a lineup was a critical stage since irreparable and undetectable mis-identification could take place; on the other hand, the taking of voice or handwriting exemplars in a "prejudicial" manner could easily be cured by having the defense counsel take the samples (which held no reasonable expectation of privacy anyway).

Note that the Sixth Amendment right to counsel does not attach at the presentation of a photographic lineup to witness, even if it occurs after indictment, due to the fact that the accused is not present and so cannot be misled or confused as to the law in that situation. United States v. Ash, 413 U.S. 300 (1973). Simms v. Commonwealth, 2 Va. App. 614, 346 S.E.2d 734 (1986).

Note also an extended discussion and review of identification procedures, standards of review and right to counsel in Hill v. Commonwealth, 2 Va. App. 683, 347 S.E.2d 913 (1986).

VII. DOCUMENTS; FIRST AND FIFTH AMENDMENT CONSIDERATIONS

A. Documents Which May be Seized

1. Business Records

There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure. The Fifth Amendment thus generally does not prevent the seizure of voluntarily prepared business records. See United States v. Doe, 465 U.S. 605, 610 (1984) (on particular facts of case, subpoena of business records does violate Fifth Amendment); see also Doe v. United States, 487 U.S. 201, 215 (1988) (upholding order directing defendant to sign consent directive authorizing foreign banks to turn over records).

The Fifth Amendment only comes into play if the defendant were compelled in some way to restate, repeat, or affirm the truth of the contents of the documents sought. U.S. v. Doe, 465 U.S. at 612 [citing Fisher v. United States, 425 U.S. 391, 409 (1976)]. In U.S. v. Doe, the Court deferred to a lower court finding that by producing the records, defendant would admit that they existed, were in his possession, and were authentic and as a result the subpoena did violate the defen-

dant's Fifth Amendment rights. 465 U.S. at 613 n.11.

Subsequently, the Court noted that while Doe required that individuals be given an opportunity to show that the act of production would entail testimonial self-incrimination, corporations need be given no such opportunity. Braswell v. United States, 487 U.S. 99, 104 (1988).

2. Attorney's Business Records

A search warrant will issue for an attorney's business records. The seizure of such papers does not compel an attorney to testify against himself in violation of his Fifth Amendment rights. The records contained statements that the attorney voluntarily committed to writing, and the documents were authenticated by witnesses other than the attorney. Andresen v. Maryland, 427 U.S. 463 (1976). In Andresen, the Court, quoting Justice Holmes, stated that "[a] party is privileged from producing the evidence but not from its production." 427 U.S. at 473 [quoting Johnson v. United States, 228 U.S. 457, 458 (1913)].

For special provisions regarding the issuance of warrants to search attorney's office for evidence of any crime involving a client of such attorney, see § 19.2-56.1, Code of Virginia (1950, as amended) and Rule 3A:12(a) of the Rules of Virginia Supreme Court.

3. Papers Prepared by Accountant

The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege. The IRS served a summons on an attorney directing him to produce accountant's work papers which had been delivered to the attorney by the client. Pre-existing documents which could have been obtained by court process from client when he was in possession may also be obtained from the attorney by a similar process following transfer by the client. The Fifth Amendment privilege against self-incrimination protects a party from being compelled to give testimonial evidence, but not from being compelled to produce such documents. Fisher v. United States, 425 U.S. 391 (1976).

B. Documents Which Are Not Subject to Seizure

1. Personal Records

In 1886, the Supreme Court held that the compulsory production of a man's private papers to establish a criminal charge against him violated the Fourth Amendment's proscription against unreasonable searches and seizures. Boyd v. United States, 116 U.S. 616, 622 (1886); see also Hale v. Henkel, 201 U.S. 43, 76 (1906) (private papers protected from production under either search warrant or subpoena).

Fisher and the two Doe cases bring into question the continued validity of Boyd and its progeny. However, Fisher explicitly reserved the question of whether a taxpayer could be compelled to produce his own personal tax records, as opposed to tax documents prepared on his behalf by accountants. 425 U.S. at 404.

After Fisher and the first Doe case were decided, the Fourth Circuit held that the Fifth Amendment still prevents the government from subpoenaing incriminating papers held in one's individual, as opposed to representative, capacity. United States v. (Under Seal), 745 F.2d 834, 838 (4th Cir. 1984), vacated with instructions to dismiss as moot, 471 U.S. 1001 (1984). Appellee there was the target of an investigation into certain alleged narcotics, tax and currency violations. The subpoena required appellee to produce specified "personal records" which included "records of purchases, trades, sales, receipts, gifts and distribution of controlled substances."

C. Third Party Searches

Property of a non-suspect may be searched under some circumstances.

For Example: A student newspaper office was searched with a warrant for photos, films, etc., relevant to the identification of demonstrators who had assaulted police. The Fourth Amendment does not prohibit the search of property owned or occupied by persons not (responsibly) suspected of complicity in the crime being investigated. The First Amendment did not require the issuance of a subpoena duces tecum. Zurcher v. Stanford Daily, 436 U.S. 547 (1978), reh. den, 439

U.S. 885 (1978).

VIII. OBTAINING AND EXECUTING A SEARCH WARRANT

A. How to Obtain a Search Warrant

1. Where to Obtain a Search Warrant

A search warrant may be obtained from any of the following three sources:

- a. any judge;
- b. any magistrate; or
- c. any other person having authority to issue criminal warrants. Section 19.2-52, Code of Virginia (1950, as amended).
- d. However, only a circuit court judge can issue a warrant authorizing the search of an attorney's office when the search is for evidence of a crime involving a client of the attorney. See, § 19.2-56.1.

NOTE: THE SEARCH WARRANT MUST BE OBTAINED IN THE JURISDICTION WHERE THE PLACE OR PERSON TO BE SEARCHED IS LOCATED.

2. Requirements for Affidavit and Warrant

- a. In order for a police officer to obtain a search warrant from a person authorized to issue it, the officer is required by § 19.2-54 to make out an affidavit of facts by which such person can judge for himself whether a search warrant should be issued. The affidavit must include all of the following elements:
 - (1) a description of the place, thing, or person to be searched;
 - (2) a description of the things or persons to be searched for;
 - (3) a substantial allegation of the offense in relation to which the search is to be made;
 - (4) an allegation that the object, thing or person to be searched constitutes evidence of the commission of the offense; and
 - (5) material facts which would show that

there is probable cause for the issuing of the search warrant.

3. Description of the Place to Be Searched

- a. The search warrant must describe with specificity the premises to be searched. All that is required, however, is that the description be such that the officer can, with reasonable effort, ascertain and identify the place intended. Blair v. Commonwealth, 225 Va. 483, 303 S.E.2d 881 (19-83).

b. Examples

(1) Where the search warrant described the place to be searched as "1601 9th St., S.E., also known as Blair's Auto Sales;" the building was a free-standing, two-story brick structure; the affiant testified that before executing the affidavit he viewed the building, saw a business sign on the side of it, was unaware that the structure contained an apartment, and intended to obtain a warrant to search the entire building; the search of an apartment on the second floor of the building was not prohibited by the warrant, despite its having a different street address, not discovered until after the search. Blair v. Commonwealth, *supra*.

(2) Where the search warrant described the place to be searched as "313 West 27th Street, a dwelling. The apartment of Melvin Lloyd Manley," and the building was a multiple occupancy structure containing five apartments, one of which was occupied by the defendant Manley, the warrant provided the searching officers with sufficient information to identify, without confusion or excessive effort, the defendant's apartment unit. Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309 (1970).

(3) Where the search warrant described the place to be searched as "the basement area of 922 Cleveland Street, Arlington, Virginia, which is known as to be the residence of Steve Frazier" and the basement was part of a house occupied by others, the Court held that because Frazier was the sole tenant of the basement, the warrant was suffi-

ciently definite. Williams v. Commonwealth, 4 Va. App. 53, 354 S.E.2d 79 (1987).

(4) Where the search warrant described the place to be searched as "5755 Westover Hills Village ... south of the James" and the defendant's actual address was "5755 Westover Village Drive" and no other street south of the James containing the words "Westover" and "Village" or "Hills" had an address of 5755, the warrant was sufficient. Robinson v. Commonwealth, 219 Va. 520, 248 S.E.2d 786 (1978).

(5) General rule that a search warrant directed against a multiple-occupancy building will be invalidated if it fails to specify the particular subunit to be searched did not apply where the evidence failed to show the building in which the defendant lived was also occupied by others. Brown and Larson v. Commonwealth, 212 Va. 672, 187 S.E.2d 160 (1972).

4. Description of Person to be Searched For

- a. A person who is to be searched must be described in the affidavit so that he may be identified with reasonable certainty. His name must be given if it is known. If his name is not known, he may be called "John Doe", but the officer must describe what the person looks like and the place where he can be found. United States v. Ferrone, 438 F.2d 381 (3d Cir. 1971), cert. denied, 402 U.S. 1008 (1971).
- b. Example of valid description of person:
"John Doe, a white male with black wavy hair and a stocky build observed using the telephone in Apartment 4-C, 1806 Patricia Lane, East McKeesport, Pennsylvania." This description was held to be sufficient. United States v. Ferrone, 438 F.2d 381 (3d Cir. 1971), cert. denied, 402 U.S. 1008 (1971).

5. Description of Thing to be Searched For

- a. A police officer is permitted to search for and seize four kinds of property under § 19.2-53. They are the following:

(C.A. Drug Prosecution Manual)

- (1) Weapons or other objects used in committing a crime. These are known as "instrumentalities" of a crime.
 - (2) Things that are illegal to sell or possess. These are known as "contraband."
 - (3) Things that have been stolen. These are known as the "fruits" of a crime.
 - (4) Anything that is evidence of the commission of a crime, for example documents, bloody clothing, or body fluids. This is known as "mere evidence." See Warden v. Hayden, 387 U.S. 294 (1967).
- b. The things to be searched for must be clearly described. If the property is contraband, however, it does not have to be described in great detail. Steele v. United States, 267 U.S. 498 (1925); Stanford v. Texas, 379 U.S. 476 (1965), petition for rehearing denied, 380 U.S. 926 (1965).
- c. Examples
- (1) "a 1968 Oldsmobile coupe, Maryland lic. number GE2893. . .0207033. . .364878E143056, this is listed to Jackie Lee McNeill, 7935 Pennsylvania Avenue, 101 Suitland, PG, Maryland." This was held to be sufficient. McNeill v. Commonwealth, 213 Va. 200, 191 S.E.2d 1 (1972).
 - (2) The character of the items to be seized controls to a large extent the degree of specificity required in describing them, and the constitutionally-mandated requirement of particularity carries with it a "practical margin of flexibility." Where the search warrant described the things to be seized as a package of marijuana mailed to the defendant from Jamaica and "related correspondence," and the agents seized the package, the postal receipt for it and travel papers indicating the defendant's travel by air from Miami to Jamaica the previous month, the warrant was sufficiently specific when construed to allow only the seizure of documents related to the package. United States v. Lowry, 675 F.2d 593 (4th Cir. 1982).

(3) The search warrant in question authorized the seizure of "records and movies" from defendant's residence. This description was found adequate enough to extend to the eight audio cassettes which were actually seized. United States v. Truglio, 731 F.2d 1123 (4th Cir. 1984), cert. denied, 469 U.S. 862 (1984).

(4) A warrant describing the items to be seized as "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas" was too general to pass constitutional muster. Stanford v. Texas, 379 U.S. 576 (1965).

6. Description of the Offense

a. The offense in relation to which the search was to be made should be identified briefly and in general terms rather than in the precise and legalistic language usually found in an indictment or arrest warrant. The object is to apprise the subject of the search of the offense being investigated and the evidence sought, and to advise the officers in advance as to what they are to be searching for. Carratt v. Commonwealth, 215 Va. 55, 205 S.E.2d 653 (1974), cert. denied, 420 U.S. 973 (1975).

b. Examples

(1) "Conducting, financing, managing, supervising, directing or owning an illegal gambling business" was held sufficient. Carratt v. Commonwealth, supra.

(2) Description of the offense as "a felony" rendered the search warrant invalid. Moore v. Commonwealth, 211 Va. 569, 179 S.E.2d 458 (1971).

(3) Where the magistrate issued the warrant but left blank the space provided for the name of the offense, the warrant was fatally defective for failure to state offense in relation to which the search was made, and evidence obtained pursuant thereto was inadmissible. Gilluly v. Commonwealth, 221 Va. 38, 267 S.E.2d 105 (1980).

7. Material Facts Showing Probable Cause

(C.A. Drug Prosecution Manual)

- a. Probable Cause: when the totality of the circumstances leads a man of reasonable caution to believe that seizable items are located in the area to be searched. Degree of probability: reasonable belief. Brinegar v. United States, 338 U.S. 160 (1949); Saunders v. Commonwealth, 218 Va. 294, 237 S.E.2d 150 (1977).
- b. Task of issuing magistrate is simply to make practical, common-sense decision whether, given all circumstances set forth in affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in the place. Garza v. Commonwealth, 228 Va. 559, 323 S.E.2d 127 (1984).
- c. The nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence. For example, a warrant issued to search the defendant's residence for a gun was adequately supported by probable cause, even though the affidavit used to obtain the warrant contained no facts indicating the weapon was located in the defendant's residence, because it was reasonable for the magistrate to believe that the defendant's gun and silencer would be found in his residence. United States v. Anderson, 851 F.2d 727 (4th Cir. 1988).
- d. Great deference should be given to magistrate's finding of probable cause. Garza v. Commonwealth, supra. The standard in reviewing magistrate's finding is whether, considering totality of circumstances, magistrate had substantial basis for concluding that probable cause existed. Williams v. Commonwealth, 4 Va. App. 53, 354 S.E.2d 79 (1987).
- e. Fourth Amendment does not require that the sworn statement be reduced to writing. Thus, an insufficient affidavit may be supplemented or rehabilitated by information disclosed to the issuing magistrate upon application for the search warrant. McCary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637 (1984).
- f. Mere conclusory statements are insufficient.

(C.A. Drug Prosecution Manual)

Stallworth v. Commonwealth, 213 Va. 313, 191 S.E.2d 738 (1972).

g. Probable cause must be based upon facts reasonably related in time to the date of the issuance of the warrant. Stovall v. Commonwealth, 213 Va. 67, 189 S.E.2d 353 (1972).

h. Examples

(1) Affidavit attested to on 11/20/69 stated as follows: On 8/27/69, the affiant and Det. Cheslock received information. . .that one, Skip Stovall. . .was to receive a large shipment of hashish on 8/27/69. The affidavit was held to be insufficient because of the significant time lapse between the date of the information and the date of the affidavit making it no longer probable that the property to be searched for was still on the premises. Stovall v. Commonwealth, 213 Va. 67, 189 S.E.2d 353 (1972).

(2) Where a controlled buy occurred in November 1975 and in April 1976, an anonymous informant related that Pierceall had recently been receiving a controlled drug, and Pierceall had been identified with the drug traffic and with known and suspected drug users and distributors since 1972, and where within 24 hours of the issuance of the search warrant defendant was alleged to have been in the company of a convicted drug dealer, the court inferred that the informant's last tip was based upon personal observation. The affidavit, taken as a whole, stated sufficient underlying circumstances to support probable cause. Pierceall v. Commonwealth, 218 Va. 1016, 243 S.E.2d 222 (1978).

(3) "On June 6, 1972, a reliable informer advised the affiant that during the past 24 hours the informer had observed a quantity of heroin and a large supply of hypodermic syringes in the premises to be searched." The information furnished by the informant was sufficient for the magistrate to find that the narcotics were where the informant claimed they were. Warren v. Commonwealth, 214 Va. 600, 202 S.E.2d 885 (1974).

(4) Where the material facts in support of issuance of the warrant were: "information received from CID Agent Herb Hicks that marijuana was kept in apartment. . ." the affidavit was held to state insufficient facts to enable a neutral and detached magistrate to evaluate the informant's conclusion that the marijuana was where he said it was. The affidavit contains "merely a conclusory statement" and thus was held fatally defective. Stallworth v. Commonwealth, 213 Va. 313, 191 S.E.2d 738 (1972).

(5) The affidavit stated, "an informant, personally known to the affiant and known by him to be reliable and to have held a position of confidence and trust, informed this affiant that the premises to be searched are being unlawfully used by the occupants thereof for the illegal possession and distribution of controlled drugs. . ." The affidavit failed to establish probable cause, because it contained no statement of the underlying circumstances upon which the informant based his conclusion that the premises contained controlled drugs. Guzewicz v. Commonwealth, 212 Va. 730, 187 S.E.2d 144 (1972).

8. Reliability of the Facts and Use of Informants

- a. Personal observation by the police is per se reliable.
- b. Victim or eyewitness

Where search warrant affidavit discloses that the information related came from the victim of a crime, or from an eyewitness to the fact related, and the information appears reasonable, the magistrate may infer that it is reliable because it was based on first hand knowledge. Saunders v. Commonwealth, 218 Va. 294, 237 S.E.2d 150 (1977); accord, Drumheller v. Commonwealth, 223 Va. 695, 292 S.E.2d 602 (1982), Thims v. Commonwealth, 218 Va. 85, 235 S.E.2d 443 (1972); McNeill v. Commonwealth, 213 Va. 200, 191 S.F.2d 1 (1972); Corey v. Commonwealth, 8 Va. App. 281, 381 S.E.2d 19 (1989).

- c. Named informants

(1) When information is related to an officer by named citizens who are not typically paid police informants, the standard for assessing their reliability will not be the same as the test applied to those who offer tips as professional informers or those who seek immunity for themselves. Patty v. Commonwealth, 218 Va. 150, 235 S.E.2d 437 (1977), cert. denied, 434 U.S. 1010 (1978).

(2) If there is no reason to hide the name of an informant, an officer should give the informant's name in the affidavit or let the informant fill in an affidavit himself. There is no reason not to disclose the informant's name, for example, if he is willing to testify in court. See McNeill v. Commonwealth, 213 Va. 200, 191 S.F.2d 1 (1972).

d. Procedure - When court orders officer to name informant.

(1) If an officer is ordered by the court to give the name of the informant, he should ask the court for a recess so that he can discuss the matter with his superior in the police department and with the Commonwealth's Attorney. Circumstances may dictate that a particular case be dismissed for refusal to disclose the informant's name if disclosure would prevent his further use as an informant.

(2) If the informant's identity must be kept secret, for example, to permit his further use as an informant in other cases, a police officer will not usually be required to tell a court who the informant is so long as there [is] a substantial basis for crediting the hearsay. Jones v. United States, 362 U.S. 257, 269 (1960), overruled on other grounds, United States v. Salvucci, 448 U.S. 83 (1980); Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987). However, the informant's identity must be disclosed when requested by the defendant and ordered by the court as "helpful" to the defense, especially if the informant is a participant and present at the time of the illegal transaction, i.e., if he is likely to be a highly material witness. Roviaro v. United States, 353 U.S. 53, 63-64 (1957).

In 1987, in determining whether evidence (confidential social services report containing statement of victim of sexual abuse) was required to be turned over to the defense, the Supreme Court reaffirmed its holding that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different." Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (quoting United States v. Bagley, 473 U.S. 667, 682). Thus, knowing the identity of an informant probably must be more than just "helpful" to the defendant.

Denial of disclosure held proper where informant more than mere tipster but less than actual participant. United States v. Brinkman, 739 F.2d 977 (4th Cir. 1984).

e. Unnamed informants

The "two-pronged test" established in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969) has been replaced by a "totality of the circumstances test". The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213 (1983), reh. denied, 463 U.S. 1237 (1983).

It must be noted, however, that the Aguilar/ Spinelli test has not been completely overruled. Its factors are still relevant to whether probable cause exists, just no longer determinative.

(1) In every case where a police officer relies on information for proving probable cause given by an informant whom he does not name in the affidavit, he should allege in the affidavit the following facts:

(a) the facts from which the informant con-

cluded that the thing to be searched for is probably on the person or premises to be searched (these are the same kind of factors that must be alleged if they came from police observation or from a named informant, see subsection 6, above); and

(b) based on the totality of the circumstances, facts from which the officer concluded that (i) the informant is credible; or ii) the information furnished by the informant is reliable. Illinois v. Gates, supra.

Example: police officers obtained a warrant to search defendant's motel room based on an informant's tip that defendant had in his possession, stolen items of jewelry, gold and silver which he had purchased from the burglar. Both the defendant and the burglar were known to the informant and much of the informant's information was corroborated by a police search of the burglar's hotel room conducted hours before the tip was received. Under the "totality of the circumstances" test set forth in Illinois v. Gates the Supreme Court adjudged the tip sufficient to establish probable cause for the issuance of a search warrant. Mass v. Upton, 466 U.S. 727 (1984).

(2) Unnamed informants and controlled buys of narcotics

In addressing the probable cause element of an affidavit on the charge that information establishing the "reliability" of an unnamed informant was absent, the Supreme Court of Virginia states that "controlled buys" of narcotics under the observation of a police officer will attest to the reliability of the informant. Tamburino v. Commonwealth, 218 Va. 821, 241 S.E.2d 762 (1978) (Where additional facts lending reliability were that information from the informant was precise, detailed and current; the informant was a citizen; and the informant admitted being associated with the drug culture and a marijuana user).

(3) The following five ways help establish credi-

bility or reliability:

- (a) The informant has given reliable information in the past.

i) Example

The informer on numerous occasions in the past (three) months has supplied the affiant and the vice squad with drug information which has proved to be correct. Warren v. Commonwealth, 214 Va. 600, 601, 202 S.E.2d 885 (1974); Wheeler v. Commonwealth, 217 Va. 95, 225 S.E.2d 400 (1976); Wright v. Commonwealth, 222 Va. 188, 278 S.E.2d 849 (1981).

ii) Informants used by the police are not required to be infallible. An error in one fact does not render the remainder unusable. Illinois v. Gates, 462 U.S. 213, 245, n. 14 (1983).

- (b) The informant is a private citizen whom the officer knows or who has a reputation for truthfulness.

i) Example

My informant and his family have been known to me for many years. I have always found him to be truthful. I have checked with his neighbors and with his employer, and they tell me he has a reputation for being truthful. I have checked and find that my informant is also a registered voter. See Guzewicz v. Commonwealth, 212 Va. 730, 187 S.E.2d 144 (1972); Brown & Larson v. Commonwealth, 212 Va. 672, 187 S.E.2d 816 (1972); Williams v. Commonwealth, 4 Va. App. 53, 354 S.E.2d 79 (1987).

ii) Disinterested informants

The Fourth Circuit has favorably cited many cases which hold that an informant's prior reliability is not required where the informant is a disinterested party without any criminal involvement or a criminal record. United States v.

Baker, 577 F.2d 1147 (4th Cir. 1978), cert. denied, 439 U.S. 850 (1978); United States v. Darensbourg, 520 F.2d 985 (5th Cir. 1975); United States v. Burke, 517 F.2d 377, 381 (2d Cir. 1975) (stating that otherwise "it would generally be impossible to use hearsay statements of [informers who are victims or witnesses of a crime] since ordinarily they would not be previously known to the police").

iii) An affidavit is sufficient even though there is no proof that officer knew that the informer voluntarily disclosed information about the defendant's criminal activities. United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. Martin, 573 F.2d 1307 (4th Cir. 1978) (unpublished opinion).

(c) The informant states that he himself has participated to some extent in the illegal activity. This is known as "making a declaration against interest".

i) When an informer is a participant in the crime, there is no burden on the state to prove his reliability. United States v. Jackson, 560 F.2d 112 (2d Cir. 1977), cert. denied, 434 U.S. 941 (1978); Wheeler v. Commonwealth, 217 Va. 95, 225 S.E.2d 400 (1976).

ii) Example: "My informer also states that in the past month he has smoked marijuana in the apartment . . . and in the past month he has made two purchases of marijuana from Melvin Lloyd Manley." Manley v. Commonwealth, 211 Va. 146, 184, 176 S.E.2d 309 (1970), cert. denied, 403 U.S. 936 (1971) (one method of substantiating reliability is that the informer had personal knowledge and participated in the illegal activity).

(d) The information that one informant gives is corroborated by another informant

independent from the first.

Example: "That from as many as three different reliable sources, the Winchester Police Department has received information that the said James D. Huff is dealing in and with the unlawful distribution of controlled drugs; that these informants are not know to each other as informers and each has a different connection with the said James D. Huff; and that their individual reliability is established by reason of their position and connection with [defendant] affording each of them the opportunity to learn of his activities, and by reason much of the information given by one is corroborated by the information given by one or both of the others." Huff v. Commonwealth, 213 Va. 710, 713, 194 S.E.2d 690 (1973); United States v. Hyde, 574 F.2d 856, 863 (5th Cir. 1978).

- (e) The information given by the informant is corroborated by police surveillance. Illinois V. Gates, 462 U.S. 213 (1983), reh. den., 463 U.S. 1237 (1983).

i) Examples: The police received an anonymous letter. They corroborated some information in it: (1) the address of the defendant; (2) the location of the alleged drug buys matched the destination of the man; (3) that the man flew to Florida; (4) the man drove a car registered to him northward. The police did not corroborate that the woman flew back to Illinois, nor that the trunk of the auto was loaded with drugs, nor that there were drugs in the basement of the home, nor that the accused did not work. The letter, together with the corroboration by the police, gave probable cause to believe contraband would be found in the Gates' car and home." Illinois v. Gates, 462 U.S. at 241-246.

ii) "On March 16, 1975, at 7:00 p.m., I set up a surveillance of John Doe's home at 915 Franklin Street. At 8:45 p.m., I observed a person I personally know to be a drug user enter the house. This person left the house at 8:50 p.m. at 9:15 p.m. I saw a person who is shown by police records to be a drug user enter the house. Before entering the house this person stood in the shadows and looked around. Before leaving, this person stood at the door and looked around and then left in a hurry. At 11:16 p.m. I saw another person I personally know to use drugs enter the house at 11:20 p.m. This person left the house in a hurry after looking around. See Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975); Huff v. Commonwealth, 213 Va. 710, 194 S.E.-2d 690 (1973); United States v. Ross, 424 F.2d 1016 (4th Cir. 1970), cert. denied, 400 U.S. 819 (1970).

iii) Even though an informant's tip may lack detailed information regarding "how he obtained his information" pursuant to the Aguilar v. Texas, 378 U.S. 108 (1964) requirement, a magistrate may infer from the details presented or from independent corroboration, that the reliability is sufficient under Aguilar. Andrews v. Commonwealth, 216 Va. 179, 183, 217 S.E.2d 812, 815 (1975).

iv) Police received information from two juveniles that a stolen stereo had been placed in the trunk of a blue 1962 Thunderbird which had been purchased with a stolen forged check. The reliability of the informant was unknown. When an officer on the street saw a 1962 blue Thunderbird, as described by the juveniles, bearing no license plates, the officer had from his own investigation verified the reliability of his information. Thims v. Commonwealth, 218 Va. 85, 235 S.E.2d 443 (1977). See

United States v. Branch, 565 F.2d 274 (4th Cir. 1977); United States v. Moreno, 569 F.2d 1049 (9th Cir. 1978), cert. denied, 435 U.S. 972 (1978).

v) Although not controlling on issue of probable cause, there is helpful language in case holding police corroboration of innocent details given by anonymous caller provided articulable suspicion for stop. Alabama v. White, 110 S. Ct. 2412 (1990).

(4) Examples of facts held to be insufficient to show the credibility or reliability of an unnamed informant.

"I received information from courses believed by the police department to be reliable." Riggan v. Virginia, 384 U.S. 152 (1966) (the Virginia Supreme Court, at 206 Va. 499, 144 S.E.2d 298 (1965), held this to be sufficient; the U.S. Supreme Court reversed based on Aguilar). See, Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309 (1970).

- b. "I received reliable information from a credible person." Aguilar v. Texas, 378 U.S. 108 (1964).
- c. "I have been informed by a confidential reliable informant." Spinelli v. United States, 393 U.S. 410 (1969).

9. Standards to Determine the Validity of Search Warrants

- a. Magistrate's allowed to consider evidence not necessarily admissible at trial.

Generally, probable cause for the issuance of a search warrant may be established by evidence which would not be admissible at trial. Affidavits are tested by much less rigorous standards than those governing the admissibility of evidence at trial. Spinelli v. United States, 393 U.S. 410 (1969); Illinois v. Gates, 462 U.S. 213 (1983), reh. den., 463 U.S. 1237 (1983). Probable cause requires only a probability or substantial chance

of criminal activity, not an actual showing of such activity. The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Illinois v. Gates, supra.

Probable cause deals with probabilities, factual and practical information in everyday life, on which reasonable and prudent men act. Magistrate may consider hearsay. Saunders v. Commonwealth, 218 Va. 294, 237 S.E.2d 150 (1977).

b. Information considered

To determine the validity of the warrant, the reviewing court will consider only the information contained in the affidavit. Wiles v. Commonwealth, 209 Va. 282, 163 S.E.2d 595 (1968) (citing to Aguilar).

Verbal Supplement allowed to rebut charge of falseness, where it did not expand facts for probable cause. McCary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637 (1984).

c. Deference accorded magistrate

(1) A magistrate's determination of probable cause for the issuance of a search warrant will be given deference by a reviewing court as long as the magistrate does not act as a "rubber stamp" for the police department. Spinelli v. United States, 393 U.S. 410 (1969). After the fact review of probable cause for issuance of a search warrant should not be de novo, and great deference should be given to the magistrate's decision. Garza v. Commonwealth, 228 Va. 559, 323 S.E.2d 127 (1984).

(2) Affidavit sworn to before magistrate at 1:05 a.m., and the search warrant was issued two minutes later at 1:07 a.m. Defendant argued not sufficient time for magistrate to analyze affidavit and exercise independent judgement. Court refused to adopt inflexible rule, and held that he law presumes the magistrate to have fully discharged his duties. Clodfelter v. Commonwealth, 218 Va. 98, 235 S.E.2d 340, rev'd on other

grounds, 218 Va. 619, 238 S.E.2d 820 (1977).

d. Timeliness

A search warrant will not necessarily be rendered defective because of a time lapse between the commission of the crime, the witness/informant's observations, and the issuance of the warrant. The problem of "stale" probable cause is resolved by an examination of all circumstances involved in the case. See United States v. McCall, 740 F.2d 1331 (4th Cir. 1984) (indicia external to the evidence itself, i.e., the nature of the stolen items, indicated that probable cause had not lapsed). Probable cause can also be found "stale" where the affidavit fails to disclose the date of the crime or the last date the evidence sought was known to be in the defendant's possession. See United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) (the court held that the warrant was insulated from a claim of staleness by the good faith exception). Although defendant's criminal record, alone, did not support probable cause occurring years before issuance of search warrant, fair reading of entire affidavit indicated pattern of criminal conduct probably was continuing at time of affidavit. Pierceall v. Commonwealth, 218 Va. 1016, 243 S.E.2d 221 (1978). Second warrant based on same affidavit one week later justified by pattern. Huff v. Commonwealth, 213 Va. 710, 194 S.E.2d 690 (1973).

10. Attack on Affidavit

a. Certification of affidavit

Even though the affidavit was not certified, the purpose of that requirement was to insure that the affidavit filed with the court clerk is the same one on which probable cause was based, that it was fully served. The omission of the magistrate's signature caused defendant no prejudice; nothing would be gained from suppressing the evidence. Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029 (1983), reh. den., 461 U.S. 940 (1983).

b. Veracity of affidavit

(C.A. Drug Prosecution Manual)

Defendant sought to suppress evidence found on a search of his apartment by attacking the veracity of the affidavit. The court held that there must be allegation of deliberate falsehood or reckless disregard for the truth, and they must be supported by an offer of proof pointing out specific portions claimed to be false, and affidavits or otherwise reliable statements of witnesses should be furnished or an explanation given if they are absent. Allegations of negligence or innocent mistake are insufficient. Impeachment is permitted only of affiant, not of any nongovernmental informant. If probable cause exists even after the improper portion is deleted, inaccuracies are irrelevant. If the remaining content is insufficient to support probable cause, the defendant is entitled to a hearing. The burden is on the defendant to prove that he is entitled to a hearing. The burden also is on the defendant to prove falsity by a preponderance of the evidence. Franks v. Delaware, 438 U.S. 154 (1978). Holding that the Franks standard of deliberate falsity or reckless disregard applies only to the statements of the affiant and not of a nongovernmental informant, Lanier v. Commonwealth, 10 Va. App. 541 (1990).

c. Basis of allegation in affidavit

A search warrant affidavit is not insufficient because it fails to show how the informant knew that the substance that he observed was a narcotic. Wheeler v. Commonwealth, 217 Va. 95, 225 S.E.2d 400 (1976).

SAMPLE SUFFICIENT AFFIDAVIT

State of Virginia

City/County of _____

Before me, the undersigned, this day came _____, who, after being duly sworn, made oath that:

(1) The offense in relation to which the search is to be made: Possession and distribution of controlled drugs.

(2) The description of the property to be searched for: Controlled drugs and drug paraphernalia

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(3) The description of the place to be searched:

Apartment D, occupied by Melvin Watson, including its curtilage, at 313 West 27th Street, Norfolk, Virginia.

(4) The material facts constituting probable cause for the issuance of a search warrant:

On January 5, 1975, I received information from a reliable informant who states that he was at the apartment of Melvin Watson, 313 W. 27th Street, Norfolk, Virginia, this past week and he saw a large quantity of marijuana in a chest in the front room and also some marijuana was in a dresser drawer in the middle room. My informant also states that in the past month he has smoked marijuana in Watson's apartment and in the past month he has made two purchases of marijuana from Melvin Watson.

(5) The property to be search for constitutes evidence of the commission of the offense.

Signature of Affiant

Subscribed and sworn to before me on _____

Magistrate

NOTE: This affidavit illustrates several points:

- (1) When describing the offense it is not necessary to give the section of the Code.
- (2) When searching for contraband the description need not be in detail as would be the case when searching for stolen property.
- (3) The place to be searched is a multiple- occupancy structure and the particular sub- unit is described.
- (4) The probable cause rests upon information from an

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unidentified informant. The affidavit shows that the informant knew where the narcotics were by personal observation, and that the informant is reliable because he made an admission against his interest.

SAMPLE INSUFFICIENT AFFIDAVIT

Commonwealth of Virginia

City/County of _____

Before me, the undersigned, this day came _____
who, after being duly sworn, made oath that:

- (1) The offense in relation to which the search is to be made: Possession and distribution of controlled drugs
- (2) The description of the property to be searched for: Controlled drugs and drug paraphernalia
- (3) The description of the place to be searched: 716 Elm Street
- (4) The material facts constituting probable cause for issuance of search warrant:

Information received from FBI Agent, John Jones, that drugs were kept in apartment. Willies Frank Smith, who lives at the described address, was convicted in 1968, for possession and selling controlled drugs.

- (5) The property to be searched for constitutes evidence of the offense.

Signature of Affiant _____

Subscribed and sworn to before me on _____

Magistrate

NOTE: This affidavit is insufficient in several areas:

- (1) The description of the place to be searched fails to show in what city, county or town it is located. Further, the probable cause shows the

drugs are in an apartment, but the description fails to describe the place as an apartment, or list the particular number.

(2) The probable cause fails to show the date when Agent Jones supplies the information to the affiant. Agent Jones is named in the affidavit; therefore, it is not necessary to show his reliability. The affidavit fails to show how Agent Jones knows drugs are located in the apartment. Information must always be given to show why it is believed the things to be searched for are in the place you want to search. It is good to put in the affidavit the past record of the subject, but this type of information alone will never be enough to justify obtaining search warrant.

B. How to Execute a Search Warrant

1. When a Search Warrant Must be Executed

A police officer is required by § 19.2-56 to execute a search warrant within 15 days of the date it was issued. If it has not been executed during that time, the officer must return the warrant to the magistrate who issued it in order that it be voided.

A copy of the affidavit must be attached to the warrant and served with it. Section 19.2-56.

A police officer may execute a search warrant either during the day or at night.

2. Gaining Entrance to Premises

a. Normal procedure

When a police officer executes a search warrant, he must follow the proper procedures when he enters the premises to be searched. If he fails to do so, then the subsequent search will be invalid, even if the officer enters without force, for example, by using a passkey or by opening a closed but unlocked door. Sabbath v. United States, 391 U.S. 585 (1968).

In most cases the officer must do all of the fol-

lowing before entering the premises to be searched:

- (1) He must announce his presence as a police officer;
- (2) He must announce that his purpose is to execute a search warrant; and
- (3) He must wait a reasonable time either to be admitted or refused admission to the premises. Miller v. United States, 357 U.S. 301 (1958); Heaton v. Commonwealth, 215 Va. 137, 207 S.E.2d 829 (1974).
- (4) The Virginia Court of Appeals has added the requirement that the knocking be accomplished by use of a doorbell or knocker, if available, and if not, by knocking with the knuckles, hand or fist. Although the pounding of a battering ram or other tool produces a loud sound, the message communicated to those within is more important than the volume of the sound. The traditionally recognized methods of knocking give notice that peaceful entry is being sought, and other, louder methods, do not communicate that message. Conviction reversed. Gladden v. Commonwealth, Va. App., 7 VLR 1508 (Rec. No. 1358-89-2) (Jan. 29, 1991).

b. When entrance is refused

If the officer is refused entrance after a reasonable time, he may force his way into the premises. A refusal may be expressed or implied. A refusal can be implied in two circumstances:

- (1) No one has admitted the officer within a time in which it would be reasonable to expect someone to let the officer in if he is going to be admitted at all. This period may range from ten seconds to a minute or more, depending on the circumstances. United States v. Jackson, 585 F.2d 653 (4th Cir. 1978).
- (2) The officer waiting to be admitted sees or hears suspicious circumstances, such as flushing toilets or footsteps running away from the door, which indicate that someone might be concealing or

destroying evidence or trying to escape. Italiano v. Commonwealth, 214 Va. 334, 200 S.E.2d 526 (19-73).

c. No-knock entry

In some circumstances a police officer may enter the premises to be searched without announcing his presence and his purpose. An officer may make a no-knock entry if he possesses facts which make him reasonably believe that an announcement would result in:

(1) the escape of the person to be searched or arrested; or

(2) the destruction of evidence, but see Heaton v. Commonwealth, 215 Va. 137, 207 S.E.2d 829 (19-74) (not enough, standing alone, that evidence is easily disposable); Keeter & Brav v. Commonwealth, 222 Va. 134, 278 S.E.2d 841, cert. denied, 454 U.S. 1053 (1981) (there must be probable cause that evidence will be destroyed if notice is given); or

(3) bodily harm either to the officer or to someone within the premises to be searched. Johnson v. Commonwealth, 213 Va. 102, 189 S.E.2d 678 (19-72), cert. denied, 409 U.S. 1116 (1973). There must be sufficient facts upon which to base the exigent circumstances.

The officer must know facts which would justify such a conclusion before a no-knock entry can be made. A mere suspicion that one of the things listed above might happen is not sufficient to justify a no-knock entry. A no-knock entry is not authorized simply because the search is for drugs. Facts other than that drugs can be easily destroyed, must be known. Heaton v. Commonwealth, 215 Va. 137, 207 S.E.2d 829 (1974).

d. Examples of properly gaining entrance to premises

(1) A police officer went to defendant's house with a warrant to search for gambling equipment used in a lottery. He knew that the paper used in the lottery was easily destructible since it was

very flammable. He also knew that defendant was dangerously armed, and knew that he was under surveillance. The officer knew facts that justified his conclusion that his announcement might permit the destruction of evidence and might result in bodily harm to himself. Carratt v. Commonwealth, 215 Va. 55, 205 S.E.2d 653 (1974), cert. denied, 420 U.S. 973 (1975).

(2) A police officer announced his presence and purpose at defendant's door. After hearing footsteps running away from the door, he broke in. The entry was held to be valid because the officer had reasonably thought there had been an implied refusal of admission. Italiano v. Commonwealth, 214 Va. 334, 200 S.E.2d 526 (1973).

(3) A police officer went to defendant's residence to execute a search warrant for narcotics. He knew that the drugs could easily be disposed of if his presence were announced since he knew that defendant had a double locked door with a peephole and that three or four feet from the room where the drugs were located was a bathroom with a commode and shower. He entered defendant's house by knocking open the door with a sledge hammer, and without announcing his presence or purpose. The search was held to be legal since the officer was aware of facts which justified his conclusion that his announcement might permit the destruction of evidence. Johnson v. Commonwealth, 213 Va. 102, 189 S.E.2d 678 (1972), cert. denied, 409 U.S. 1116 (1973).

(4) Insertion of passkey into motel room door prior to knock and announce was merely preparatory, and did not constitute unlawful entry. Grover v. Commonwealth, 11 Va. App. 143 (1990).

e. Examples of improperly gaining entrance to premises

(1) Police officers, acting without probable cause, telephoned an apartment manager and requested that she enter and inspect defendant's apartment while they awaited the arrival of a search warrant. The resident manager opened and entered the apartment along with other officers

whereupon they found drugs and stolen property. The court held this entry to be unconstitutional and stated that when police officers act to disturb a citizen's expectation of privacy at the instance of another law enforcement agency, the validity of their conduct depends upon whether the requesting officer had probable cause to initiate the action, and with sufficient proof to document the probable cause. The court also held that the apartment manager acted on behalf of the police and thus became an instrument or agent of the state. Sorino v. Texas, 626 S.W.2d 37 (Tex. Crim. App. 1981).

(2) A police officer went to defendant's apartment to execute a search warrant for drugs. He knew that drugs in general were easily disposable, but he did not know where the drugs were located, or whether or not the interior arrangement of the apartment would make disposal of them any easier. He had no reason to believe that he was in danger. The officer's no-knock entry and search of the apartment were held to be illegal because the officer merely had an unsupported suspicion that the drugs might be destroyed if he made an announcement before he entered. Heaton v. Commonwealth, 215 Va. 137, 207 S.E.2d 829 (1974).

- f. Note: Defendant present when search warrant executed may be held to be in custody for Miranda purposes. Wass v. Commonwealth, 5 Va. App. 27, 359 S.E.2d 836 (1987).

3. Mistake in Executing the Warrant

In Maryland v. Garrison, 480 U.S. 79 (1987), the police had a warrant to search the third floor apartment at 2036 Park Avenue, but failed to realize that there were two third floor apartments until after the defendant's apartment was searched. The Court held that the evidence discovered was admissible. The validity of a warrant must be judged in light of the information available to the officers at the time they obtained the warrant. Id. at 85. Their failure to recognize the overbreadth of the warrant was objectively reasonable. Id. at 88. Additionally, the officers recognized that they were required to discontinue the search as soon as they discovered that there were two separate units on

the third floor. Id. at 87.

C. Return of the search Warrant

After a police officer has finished a search, he is required by § 19.2-57 to follow the following procedures:

1. he must note the date of execution on the search warrant; and
2. under oath, he must make an inventory of all the property he has seized; and
3. within three days of the date of the search, he must file in the circuit court clerk's office (of the jurisdiction wherein the search was made):
 - a. the search warrant; and
 - b. either the inventory of articles seized or a notation that nothing was seized during the search; and
 - c. the affidavit (unless affidavit was made by voice or videotape recording).

D. Responsibility for property seized/chain of custody

1. Rule:

In order for evidence seized during a search to be used at trial, it must be shown that the article produced at trial is the same thing that was seized. This is proved by showing how the article moved from one person to another from the time of seizure to the time of trial. This is known as the chain of custody of the evidence. The burden is upon the party offering real evidence to show with reasonable certainty that there has been no alteration or substitution of it. Horsley v. Commonwealth, 2 Va. App. 335, 338, 343 S.E.2d 389 (1986).

The standard the court applies is one of reasonable certainty that no alterations or substitutions has occurred; it is not necessary to eliminate all possibility of tampering. This rule is applied in two

different ways:

- a. Evidence subject to chemical or other scientific analysis

Where items of evidence, such as bloody clothes or items in a perk kit, have been subjected to a scientific analysis, the court requires an unbroken chain of possession of the evidence. Robinson v. Commonwealth, 212 Va. 136, 183 S.E.2d 179 (1971), cert. denied, 454 U.S. 895 (1981); Bass v. Commonwealth, 212 Va. 699, 187 S.E.2d 188 (1972).

Cf. Commonwealth ex rel Evans v. Harrison, 5 Va. App. 8, 360 S.E.2d 212 (1987) (technician drawing blood sample for paternity test need not testify to establish chain of custody; authenticity may be established by the practicing physician or qualified scientist who tested the blood); Dotson v. Petty, 4 Va. App. 357, 363, 358 S.E.2d 403 (1987) (courier who transported blood samples need not testify where all "vital links" in the chain of possession were established).

- b. Evidence not subject to scientific analysis

Where the evidence has not been the subject of scientific tests, but is merely being introduced to show that it is an item related in some way to the crime, the trial court can admit it merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, 456 U.S. 938 (1982); Whaley v. Commonwealth, 214 Va. 353, 200 S.E.2d 556 (1973). Chain of custody proof for such an exhibit is required only if it is indistinguishable from others of its kind. Washington v. Commonwealth, 228 Va. 535, 550, 323 S.E.2d 577 (1984).

Some items are self-authenticating. If an exhibit (not subject to scientific analysis) has a unique characteristic by which it may be distinguished with reasonable certainty from others of its kind, identification by that characteristic is sufficient proof of authenticity. Id.

2. Example of Proper Chain of Custody

- a. Police officer A took a bottle of narcotics from defendant. He then gave it to officer B who marked it and then sent it to the state chemist for chemical analysis of its contents. The chemist sent the bottle back to officer B. At trial, officer B could not find his identifying mark. The bottle was still held to be admissible because the chain of custody of the bottle had been shown. Fierst v. Commonwealth, 210 Va. 757, 173 S.E.2d 807 (1970).

3. Example of Break in Chain of Custody

- a. A police officer took a blouse, a pair of panties, and an envelope containing pubic hair from a nurse at a hospital, who told him they were taken from the victim of a rape. The evidence was held to be inadmissible because there was a break in the chain of custody. The officer was not present when the articles were seized and did not know in fact whether they were taken from the victim. The nurse did not testify. Robinson v. Commonwealth, 212 Va. 136, 183 S.E.2d 179 (1971).

IX. Search of Persons

A. Search of the Person With a Search Warrant

1. When a Search Warrant Should Be Obtained

A police officer should get a warrant for the search of a person whenever there is enough time to get one. United States v. Chadwick, 433 U.S. 1 (1977). A warrantless search of a person will only be valid in the following situations:

- a. Consent has been given for the search. See Section XII of this chapter.
- b. The search is incident to an arrest. See Section IX (b) of this chapter.
- c. There is an emergency. See Section IV (C) of this chapter.
- d. The officer is in "hot pursuit" of someone he

reasonably believes has committed a crime. See Section IV (D) of this chapter.

2. Limits on What a Search Warrant Can Authorize

A warrant may not issue for a bullet in a person's body, except where reasonable on a case by case approach. Winston v. Lee, 470 U.S. 753 (1985). See Section IV (C), supra. See also United States v. Crowder, 543 F.2d 312 (D.C.Cir. 1976) (en banc), cert. denied, 429 U.S. 1062 (1977). But when a bullet is surgically removed for medical reasons and is turned over to the police, and nothing suggests that the police played a role in the decision to operate, the physician does not act as an agent of the police in violation of defendant's Fourth Amendment rights. The Fourth Amendment applies only to searches and seizures taken by or at the direction of the state. Craft v. Commonwealth, 221 Va. 258, 269 S.E.2d 797 (1980).

"The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers." Winston v. Lee, 470 U.S. 753, 760 (1985). It is not enough that the evidence sought by such a procedure would be "useful" to the Commonwealth. There must be a compelling need for it, id. at 766, for example, to prevent a miscarriage of justice.

3. Use of Force

A police officer is permitted to use whatever degree of force is reasonable and necessary while conducting a search of a person under a search warrant, but cannot offend common ideas of decency. See Rochin v. California, 342 U.S. 165 (1952).

4. Scope of the Search

- a. If a search warrant authorizes only the search of a person, a police officer can search only the following places:

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- (1) the entirety of the person named in the warrant, see United States v. Robinson, 414 U.S. 218 (1973); and
- (2) the area in the immediate control of the person being searched from which he could reach for a weapon or for evidence

so as to: (a) protect the officer; (b) prevent escape; and (c) prevent the destruction of evidence. See Chimel v. California, 395 U.S. 752 (1969), reh. den., 396 U.S. 869 (1969).

- b. A warrant to search a particular person does not justify the search of his companion.

Example: A search warrant for drugs on the premises of a tavern and one employee does not justify the search of any other person on the premises except where the search is conducted to either protect the policeman from attack or prevent the disposal or concealment of anything particularly described in the warrant. A person's mere propinquity to others independently suspected of a criminal activity does not, without more, give rise to probable cause to search that person. Ybarra v. Illinois, 444 U.S. 85 (1979), reh. den., 444 U.S. 1049 (1979).

5. What Can Be Seized

Under a warrant authorizing the search of a person a police officer may seize the following things:

- a. anything in the permissible area which the warrant authorizes to be seized;
- b. any other evidence in the permissible area reasonable related to the offense listed in the warrant, United States v. Bridges, 419 F.2d 963 (8th Cir. 1969); and
- c. anything else that is evidence of an illegal act if the evidence is in plain view of the place where the officer makes the search of the person. See Coolidge v. New Hampshire, 403 U.S. 443 (1971), reh. den., 404 U.S. 874 (1971). Inadvertence no longer required, Horton v. California, 110 S.

Ct. 2301 (1990). See also Cantrell v. Commonwealth, 7 Va. App. 269, 373 S.E.2d 328 (1988).

B. Search Incident to Arrest

1. Need for Full Custody Arrest

a. General rule

A police officer may make a warrantless search of a person in connection with his arrest if the arrest results in the person's being taken into custody for the purpose of transportation. However, a search may not be made in connection with a minor traffic offense for which the officer only issues a summons. United States v. Robinson, 414 U.S. 218 (1973).

If an arrest is made without probable cause or with an invalid arrest warrant, or if it is for any other reason unlawful, the search incident to that arrest is also invalid. Leatherwood v. Commonwealth, 215 Va. 161, 207 S.E. 2d 845 (1974). Where an ordinance later declared unconstitutional, since officer acted in good faith in arresting defendant, search incident to arrest was valid. Jones v. Commonwealth, 230 Va. 14, 334 S.E.2d 536 (1985).

b. Examples of search incident to a full custodial arrest:

(1) Police may search the personal effects of a person under lawful arrest as part of the routing and administrative procedure at a police station incident to booking and jailing the suspect. The search is an inventory search; no warrant is required. Illinois v. Lafayette, 462 U.S. 640 (1983).

(2) Acting upon a tip from an informant, the police had probable cause to believe the defendant was participating in a felony in their presence and had the right to make a warrantless arrest. The search of defendant's person incident to that arrest was lawful, and the heroin found in his coat pocket was admissible. Wright v. Commonwealth, 222 Va. 188, 278 S.E.2d 849 (1981).

(3) Where a locked footlocker was lawfully seized from the open trunk of a parked automobile and opened an hour later at the federal building after arrests and without a warrant, the mobility theory does not apply; once seized there was no danger that the contents could be removed. The search was not incident to arrest. Once police reduced luggage or other personal property not immediately associated with person of arrestee to their exclusive control, and there is no longer any danger that arrestee might gain access to property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. United States v. Chadwick, 433 U.S. 1 (1977).

(4) A DEA agent received an anonymous tip that Penny Porter would arrive at National Airport from Miami at 7:00 or 9:00 p.m. carrying a quantity of cocaine. The informant described Ms. Porter, the clothes she would be wearing, and what she would be carrying. The officer checked and found that a T. Porter had left Miami on an Eastern flight that evening. The agent observed a woman matching the physical description he had been given. He then approached the woman, identified himself and asked if she would mind speaking with him. She voluntarily accompanied the agent to the DEA office where she was asked for identification. Defendant began to search through her carry-on bag. The agent asked if he could look inside and the defendant responded she did not mind. The agent placed the bag on the counter, felt the sides and looked inside for any type of weapon, never putting his hands inside the bag. The defendant then voluntarily handed the agent a small envelope containing marijuana, at which point she was arrested. After reading her the Miranda warnings, the agent conducted a warrantless search of the bag, which subsequently revealed a plastic bag containing cocaine. The Court upheld the warrantless search of her tote bag as a search incident to arrest since it was within her reach and might have contained weapons. United States v. Porter, 738 F.2d 622 (4th Cir.), cert. denied, 469 U.S. 983 (1984).

(5) Defendant was arrested for harboring and

concealing a fugitive. At the scene of the arrest, after both men were handcuffed, a search of one of the bags in the room uncovered two .38 caliber revolvers and ammunition. The court held that the arrest of the defendants justified the search of the bag since an agent reasonably believed that weapons were in it. United States v. Silva, 745 F.2d 840 (4th Cir. 1984), cert. denied, 470 U.S. 1031 (1984).

(6) In United States v. Berry, 560 F.2d 861 (7th Cir. 1977), cert. denied, 439 U.S. 840, vacated on other grounds, 571 F.2d 2 (1978), the appeals court ruled that a warrantless search of a closed briefcase after a proper arrest was invalid as the threat of access of any evidence contained therein was no longer present.

(7) A police officer suspected defendant of engaging in a numbers operation, but he did not know any facts which supported his suspicion. He arrested defendant, and in the search incident to arrest, he found a numbers list. The search was held to have been invalid since there was no probable cause for the arrest. Bryson v. Commonwealth, 211 Va. 85, 175 S.E.2d 248 (1970).

2. Time and Place of Search Incident to an Arrest

a. General rule

A search incident to an arrest must occur in such a way that it and the arrest are part of a continuous, uninterrupted transaction. Two things are necessary for this to occur:

(1) The search must be made as soon as practical after the arrest, Preston v. United States, 376 U.S. 364 (1964), or slightly preceding the arrest, Rawlings v. Kentucky, 448 U.S. 98 (1980).

(2) The search must be made at or near the place of the arrest. Vale v. Louisiana, 399 U.S. 30 (1970).

These two requirements will be considered to have been fulfilled if the police officer takes the arrested person to the station house or to another

detention center to be searched. Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974); United States v. Edwards, 415 U.S. 800 (1974).

b. When a search before an arrest is valid

A search incident to an arrest is normally required to follow the arrest. A police officer cannot make a search of a person without probable cause and then arrest the person if something incriminating turns up. Jones v. Peyton, 411 F.2d 857 (4th Cir. 1969), cert. denied, 396 U.S. 942 (1969). But where the defendant admits ownership over the item and the police had probable cause to arrest him immediately upon admission of ownership, and the fruits of the search were not necessary to support probable cause to arrest the defendant, a search which slightly preceded the arrest is legal. Rawlings v. Kentucky, 448 U.S. 98 (1980).

A search before an arrest is valid only if:

- (1) probable cause for the arrest existed before the search warrant began; and
- (2) the search and arrest occur almost at the same time. Italiano v. Commonwealth, 214 Va. 334, 200 S.E.2d 526 (1973).

c. Examples of valid searches incident to arrest.

(1) Relying on Chambers v. Maroney, 399 U.S. 42 (1970), reh. den., 400 U.S. 856 (1970), the Supreme Court noted that the 'probable cause factor' which develops at the scene "obtains at the station house." Thus, although the defendant was arrested at a bank, the search of his car at the station house 45 minutes later without a warrant or consent was valid. Texas v. White, 423 U.S. 67 (1975), reh. den., 423 U.S. 1081 (1975).

(2) In United States v. Wyatt, 561 F.2d 1388 (4th Cir. 1977), the Fourth Circuit stated that the seizure of the defendant's papers five minutes after his arrest was contemporaneous with the arrest and therefore valid.

(3) Defendant was arrested for breaking and entering after 11:00 p.m. and was taken to the station house. As no other clothes could be obtained for him because of the late hour, the clothes he had been wearing at his arrest were not seized until the next morning. The search and seizure were held to have been valid. It was made at the station house as soon as practical after the arrest. United States v. Edwards, 415 U.S. 800 (1974).

d. Examples of invalid searches incident to an arrest because of time or place.

(1) Defendant shot her husband in front of a restaurant in the presence of a police officer. The officer arrested defendant, who was then taken away. He searched defendant's apartment both immediately after the arrest and later that same evening. It was located on the second floor of a building 60 to 90 feet away from the scene of the arrest. During the search, the officer found incriminating evidence. The search was held to have been invalid since it was not incident to an arrest. It was not made at the scene of the arrest, and it was made too long after the arrest. Creasy v. Leake, 422 F.2d 69 (4th Cir. 1970).

(2) Police officer, in the course of executing a lawful search warrant (of defendant's residence) for narcotics, made a "pat search" of defendant's person even though he had no probable cause to believe that defendant possessed narcotics. He discovered narcotics on defendant and subsequently arrested him. The search was held to be unlawful because it was unsupported by probable cause and was not incidental to a valid arrest. That the pat search produced "fruits of crime" is immaterial. "While reasonable searches may be made incidental to a prior lawful arrest, an arrest may not be based upon a prior unlawful search (made in the absence of probable cause)." United States v. Haywood, 284 F. Supp. 245, 249 (E.D. La. 1968).

3. Use of Force

a. Rule

A police officer conducting a search incident to an arrest is permitted to use whatever degree of force is reasonable and necessary. If he uses an unreasonable amount of force, the search is unlawful. Rochin v. California, 342 U.S. 165 (1952).

EXAMPLES: An unarmed man was shot and killed by police while fleeing from the burglary of an unoccupied house. Court held that a seizure occurs when police restrain the freedom of a person to walk away and apprehension by use of a deadly force is a seizure subject to reasonableness requirements. A police officer may not seize an unarmed non dangerous suspect by shooting him dead. Tennessee v. Garner, 471 U.S. 1 (1985).

For the degree of force that may be used in getting into the premises to make a search incident to an arrest, see Section X., C., subsection 2.

b. Examples of use of force

A police officer entered defendant's house to arrest him for illegally possessing narcotics. The officer saw two capsules of narcotics lying on a table beside defendant. Defendant grabbed them and then swallowed them. The officer jumped on defendant and tried to take the capsules out of his mouth. When that failed, the officer took the defendant to a hospital to have defendant's stomach pumped against his will. This procedure eventually produced the capsules. The search and seizure by the stomach pump was held to have been invalid because it was an unreasonable amount of force. Rochin v. California, 342 U.S. 165 (1952).

4. Scope of the Search

a. Rule

A police officer making a search incident to an arrest may search only the following places:

- (1) the entirety of the person being arrested, United States v. Robinson, 414 U.S. 218 (1973); and
- (2) the area in the immediate control of the

person being arrested into which he could reach for a weapon or for evidence.

The purpose of this search must be to: (a) protect the officer; (b) prevent escape; or (c) prevent the destruction of evidence. Chimel v. California, 395 U.S. 752 (1969), reh. den., 396 U.S. 869 (1969).

(3) Accessories carried by defendant may be searched incident to a full custodial arrest, for they are within the area in which the defendant might reach to grab a weapon or an item of evidence. United States v. Litman, 739 F.2d 137 (4th Cir. 1984).

(4) A protective sweep in conjunction with an in-home arrest was allowed where officer had reasonable and articulable facts that area to be swept harbored a dangerous individual. Maryland v. Buie, 110 S. Ct. 1093 (1990).

(5) Once suspect is placed under arrest, officer may accompany him where ever he goes, therefore, warrantless entry into hotel room held lawful. Servis v. Commonwealth, 6 Va. App. 507, 371 S.E.2d 156 (1988).

b. Strip searches - governed by § 19.2-59.1

(1) May not be conducted of persons arrested for traffic violations, Class 3 or 4 misdemeanors, or violations of city, county or town ordinances which are punishable by less than 30 days in jail, unless there is reasonable cause to believe on the part of the officer that the individual is concealing a weapon.

(2) Must be performed by persons of the same sex as the person arrested and on premises where the search cannot be observed by persons not physically conducting the search.

(3) A search of a body cavity must be performed under sanitary conditions and a search of any body cavity other than the mouth shall be conducted either by or under the supervision of medically

trained personnel. See § 19.2-59.1 for definition and exceptions.

c. Examples of scope of the search

(1) In Lugar v. Commonwealth, 214 Va. 609, 202 S.E.2d 894 (1974), police officers were admitted into an apartment after asking the occupants for a fugitive named Hodges who they believed had burglarized a drug store and fled there. "Upon entering the apartment, the officers observed in plain view, on the floor of one of the rooms, two red capsules, which they recognized as seconal, a controlled drug, and a container marked "Seconal", which they recognized as a type of container used by wholesalers." Id. at 609. After arresting the three occupants, the officers requested to search the apartment, but were denied permission. In total disregard of the refusal, officers proceeded to make lengthy search, approximately one and one-half hours in duration, of the entire apartment. The search of the house held to be invalid; the court stated, "[a]s incident to the arrests, the officers could make a search, limited by Chimel v. California, 395 U.S. 752, 763 (1969), to each occupant's person and to the area within his reach where he might obtain a weapon or destroy evidence." Id. at 613. The seizure of the two red capsules and the container were, however, valid under the plain view doctrine. Id.

(2) A police officer went to the apartment building where defendant lived to arrest him for possession narcotics. The officer found and arrested defendant in the office of the apartment and found some narcotics. The search of the apartment was held to have been illegal since it was conducted beyond defendant's person and that area within his immediate control. McMillon v. Commonwealth, 212 Va. 505, 184 S.E.2d 773 (1971).

(3) Where police place occupants of automobile under full custodial arrest, passenger compartment and any containers found therein, whether open or closed, may be searched incident to the arrest. Pack v. Commonwealth, 6 Va. App. 434, 368 S.E.2d 921 (1988).

5. What May Be Seized

- a. During a search incident to an arrest, a police officer may seize the following things:

(1) Anything in the permissible area (see subsection 4 above) that is evidence of the offense for which the officer has probable cause to make the arrest. Jordan v. Peyton, 264 F. Supp. 946 (W.-D.Va. 1967).

(2) Anything in the permissible area that is evidence of any other offense. Fierst v. Commonwealth, 210 Va. 757, 173 S.E.2d 807 (1970).

(3) Anything else which is outside the permissible area that is evidence of the offense for which the officer makes the arrest or of any other offense if:

(a) the evidence is in plain view of the spot where that officer makes the arrest; and

(b) the officer's discovery of the evidence is inadvertent, that is, the officer neither knows the location of the evidence nor intends to seize it before he goes to make arrest. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

- b. Examples of what may be seized

(1) See Lugar v. Commonwealth, supra (discussed at Section IX.(B)(4)(c), above).

(2) A police officer on a public street suspected that defendant might have just committed a burglary. He asked defendant for some identification. Defendant responded by cursing and hitting the officer. The officer arrested defendant for obstructing justice and made a search incident to the arrest. He found on defendant's person a credit card that had been stolen three months before, which he seized. The seizure was held to have been valid because the credit card was found in the permissible area even though evidence of another offense. Sullivan v. Commonwealth, 210 Va. 201, 169 S.E.2d 577 (1969), cert. denied, 397

U.S. 998 (1970).

6. Searches Incident to an Arrest Are Not Illegal

The Attorney General has opined that searches incident to lawful arrests are not proscribed by § 19.2-59, which provides that no police officer shall conduct a search unless he has a search warrant issued by the proper officer. Opinion to the Honorable H.W. Burgess, Superintendent, Department of State Police, June 24, 1976.

Section 19.2-59 has generally been interpreted to prohibit only unreasonable searches, i.e., those violating the Fourth Amendment. Burnham v. West, 681 F. Supp. 1169, 1172 (E.D. Va. 1988) [citing McClannan v. Chaplain, 136 Va. 1, 14, 116 S.E. 495, 498 (1923)].

7. Search Incident to a "Pretext Arrest"

In United States v. Robinson, 414 U.S. 218 (1973), the Court held that a full search of the person incident to a "full custody arrest" may be conducted regardless of whether weapons or evidence are likely to be found on the person of the suspect. In Scott v. United States, 436 U.S. 128, 136-37 (1978), the Court stated that an officer's actions must be assessed objectively, without regard to his subjective intent. As a result of these cases, lower courts are rarely willing to look into the question of whether a stop or arrest for a minor crime was motivated by the desire to search for evidence of another crime, for which probable cause was lacking. See Harris v. Commonwealth, 9 Va. App. 355, 388 S.E.2d 280 (1990) (stop for broken brake light valid even if it was a pretext to search for drugs); Limonja v. Commonwealth, 8 Va. App. 532, 383 S.E.2d 476, cert. denied, ___ U.S. ___, 110 S. Ct. 1925 (1989).

Police may use opportunity presented by legal arrest to learn more about crime for which they have no probable cause to arrest. James v. Commonwealth, 8 Va. App. 98, 379 S.E.2d 378 (1989).

X. SEARCH OF PREMISES

A. When a Search Warrant Should Be Obtained

1. It is imperative that a police officer obtain a search

warrant in all situations where there is sufficient time to do so. McDonald v. United States, 335 U.S. 451 (1948). As the court stated in McDonald, "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe-haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." Id. at 455-456. Accordingly, the government bears the burden of proving sufficient exigent circumstances to justify an exception to the warrant requirement. Id.

2. Examples

- a. Officers answering a report of a homicide entered a home and made a general exploratory search for evidence of a crime without a search warrant. The daughter of the decedent made the call and admitted the officers. Court held that a warrantless search must fall into one of the narrow exceptions, and although police may make warrantless entries when they believe there is need for immediate aid, to see if there are other victims, or if they believe the killers are still on the premises, there is no "murder scene" exception. Accordingly, the two hour general search without a warrant was seen as too great of an intrusion. Thompson v. Louisiana, 469 U.S. 17 (1984). Cantrell v. Commonwealth, 7 Va. App. 269, 373 S.E.2d 328 (1988); Reynolds v. Commonwealth, 9 Va. App. 430, 388 S.E.2d 659 (1990).
- b. After receiving reports of a car being driven erratically, officers arrived on the scene and discovered defendant driver's identity and residence from the motor vehicle registration card left in his abandoned vehicle. Officers then went to defendant's house, and after being admitted by a member of the family, proceeded to his bedroom and arrested him for driving under the influence of intoxicants in violation of Wisconsin law.

The court held that the arrest was unlawful, ob-

serving that "before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances to overcome the presumption of unreasonableness that attaches to all warrantless home entries." Welsh v. Wisconsin, 466 U.S. 740, 750 (1984). The government failed to make the requisite showing of exigent circumstances in relying on the hot pursuit doctrine because:

(1) The officer was not in "hot pursuit" of the defendant. There was "no immediate or continuous pursuit of the petitioner from the scene of a crime." Id. at 753.

(2) There was no danger to the public safety as defendant had already abandoned his car at the scene of the accident and arrived home. Id.

(3) The offense involved, a first offense for driving while intoxicated, was minor. Id. at 750. In Wisconsin, driving while intoxicated was a non-criminal civil forfeiture offense with no possible imprisonment. See Wis. Stat. §§ 346.65(2) (1975) and 346.65(2)(a) (1981-82).

B. When a Search Can Be Made Without a Warrant

A search of premises can be made without a warrant in the following situations:

1. Consent has been given for the search. See Section XII.
2. There is an emergency. See Section IV (C).
3. The officer is in "hot pursuit" of someone he reasonably believes has committed a crime. See Section IV (D).
4. The search is to be made in open fields beyond the curtilage. See Section IV (G).
5. Examples of Protective Sweep / Plain view
 - a. Having arrested defendant in front of his house, federal agents, without a warrant, searched his house for an accomplice. Officers had knowledge

of an accomplice of defendant on the day before the arrest. Officers feared that there might be an armed accomplice in the house, who, upon observing the arrest of the defendant, would fire on them. In the course of a "protective sweep" the officers had the right to seize any evidence of the crime in plain view. United States v. Baker, 577 F.2d 1 (4th Cir. 1978), cert. denied, 439 U.S. 850 (1978); Maryland v. Buie, 110 S. Ct. 1093 (1990). See also Michigan v. Tyler, 436 U.S. 499, 511 (1978), (where the Court held that "an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze"; all subsequent entries may be made only upon a valid search warrant; search warrants for buildings damaged by fire shall be issued pursuant to regulations governing search warrants for administrative searches).

- b. In United States v. Jacobsen, 466 U.S. 109 (1984), employees of a private carrier examined a damaged package (cardboard box wrapped in brown paper) and discovered a white powdery substance in the innermost of a series of four plastic bags that had been concealed in a tube inside the package. Employees notified the DEA. Upon arrival, the DEA agent removed the tube and the plastic bags from the tube. After extracting a minute portion of the powder and subjecting it to a field chemical analysis, the agent confirmed that the substance was cocaine. On this information, the agent obtained a warrant to search the premises to which the package was addressed, executed the warrant and, subsequently, arrested defendant.

The Supreme Court held that the warrantless chemical testing of the powder was valid, thus the subsequently issued search warrant of defendant's residence and the arrests were also valid:

- (1) The initial intrusion by the carrier employees did not violate the Fourth Amendment because the search was by private persons, not government agents.
- (2) The agent's removal and "manual inspection of the tube and its contents did not tell him any-

thing more than he had already been told (by the carrier employees)...[Therefore], [i]n light of what the agent already knew about the contents of the package it was as if the contents were in plain view." Id. at 109, 110. Thus, his "seizure" of the tube and its contents was reasonable because it was fully apparent that the tube contained an illegal substance.

(3) The field test was also not an unreasonable search and seizure because "[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." Id. at 123.

C. Use of Force in Search of Premises

1. Rule

A police officer is permitted to use whatever degree of force is reasonable and necessary while conducting a search of the premises. McGuire v. U.S., 273 U.S. 95 (1927).

2. Example of Use of Force

In McGuire, supra, revenue agents, armed with a valid warrant to search defendant's premises for liquor, executed the warrant and destroyed all of the seized liquor save one quart of whiskey and one quart of alcohol which they retained as evidence. Defense counsel argued that the officers, in destroying the liquor, became "trespassers ab initio," thus the two retained bottles were not admissible. The court held that "[e]ven if the officers were liable as trespassers ab initio, .. distinct from the destruction of the rest." The seizure, subsequent to a validly authorized search, did not infringe upon any protected constitutional issue.

D. Scope of the Search of Premises

1. Generally

- a. A police officer may search the premises only to the extent which is authorized by the search warrant. Perry v. Commonwealth, 208 Va. 283, 156 S.E.2d 566 (1967) . Any search beyond those lim-

its is illegal. United States v. Harris, 365 F. Supp. 261 (N.D. Ohio 1972), aff'd, 486 F.2d 1404 (6th Cir. 1973) (although the search warrant authorized the search of a ground floor suite only in an apartment building, police officer's search of the entire building, when they knew that it was comprised of three separate suites occupied by different families, was deemed to be unlawful).

- b. Within the scope of the search authorized by the search warrant, an officer may search only where he would reasonably expect what is looking of to be found. For example, he would not reasonably expect to find a stolen television set inside a small desk drawer, or a man inside a very small plastic bag. See Lugar v. Commonwealth, 214 Va. 609, 202 S.E.2d 894 (1974).
- c. A police officer may search until he finds all the property to be searched for listed in the warrant. At that time the search must end. The officer may not lawfully search for any more evidence. Clere v. Commonwealth, 212 Va. 472, 184 S.E.2d 820 (19-71) . He may, however, seize any evidence that he finds in plain view until he departs the premises after lawfully executing the search warrant. United States v. Feldman, 366 F. Supp. 356 (D. Hawaii, 1973).
- d. A valid warrant to search a premises for contraband implicitly authorizes police officers to detain the occupants while a proper search is conducted. Michigan v. Summers, 452 U.S. 692 (1981). Detention may be "custodial" triggering Miranda, depending on circumstances. Wass v. Commonwealth, 5 Va. App. 27, 359 S.E.2d 836 (19-87).
- e. Where officers have probable cause to search and others are in process of obtaining warrant, and delaying entry would create substantial risk that evidence would be lost or destroyed, entry for limited purpose of securing premises and preserving status quo is authorized. Crosby v. Commonwealth, 6 Va. App. 193, 367 S.E.2d 730 (1988).

2. Examples of Scope of the Search

- a. See United States v. Harris, supra.
- b. A police officer was authorized to search for evidence of a numbers operation at defendant's residence at 216 Forest Street. The officer found some evidence on the second floor. The officer was held to have made his search within the residence with the same address as the first floor. Perry v. Commonwealth, 208 Va. 283, 156 S.E. 2d 566 (1967).
- c. A search warrant authorized a police officer to search for contraband liquor at the "premises known as the Harvey Fine residence." No liquor was found in the house but the officer discovered some hidden in a shed twenty feet behind the house. The evidence was held to have been found within the scope of the warrant since "premises" included not only a dwelling but the curtilage around it. Fine v. United States, 207 F.2d 324 (6th Cir. 1953), cert. denied, 346 U.S. 923 (1954).
- d. Search warrant authorizing search of defendant's dwelling held to cover occupant's automobile found within curtilage of premsis, even though not named in warrant. Glenn v. Commonwealth, 10 Va. App. 150, 390 S.E.2d 505 (1990).

E. What May Be Seized

1. Rule

A police officer may seize only the property listed in the warrant to be seized. Marron v. United States, 275 U.S. 192 (1927).

However, "once the privacy of the dwelling has been lawfully invaded, it is senseless to require police to obtain an additional warrant to seize items discovered in the process of lawful search." Andresen v. Maryland, 427 U.S. 463 (1976). A police officer may seize property not mentioned in the warrant if:

- a. It is other evidence reasonably related to the offense for which the search warrant was issued. United States v. Avery, 447 F.2d 978 (4th Cir. 1971), cert. denied, 405 U.S. 930 (1972); see also United States v. Dornhofer, 859 F.2d 1195, 1199

(4th Cir. 1988) (seizure of child pornography not mentioned in warrant upheld because it tended to show defendant's intent to order such pornography through the mail and absence of mistake).

When searching premises pursuant to a warrant, an officer may examine an item to determine whether it is evidence reasonably related to the offense for which the search warrant was issued. For example, during a search for chemicals and drug paraphernalia named in a warrant, officers opened envelopes and read letters which were inside. The seizure of the letters was upheld. United States v. Crouch, 648 F.2d 932, 933 (4th Cir. 1981).

- b. It is property which the officer knows or has probable cause to believe is evidence of another crime. Anglin v. Director, 439 F.2d 1342, 1347 (4th Cir. 1971); Blair v. Commonwealth, 225 Va. 483, 303 S.E.2d 881 (1983). Some cases have stated this exception as allowing officers, in the course of a lawful search, to seize evidence of other crimes that is in "plain view." See Gray v. Commonwealth, 233 Va. 313, 327, 356 S.E.2d. 157 (1987), cert. den., 484 U.S. 873 (1987). However, plain view here has a different meaning than usual. "In plain view" here means anywhere the police could lawfully look for that evidence which is named in the warrant.

A police officer, however, cannot seize evidence under these two exceptions if his discovery of it is made after he has found all the property listed on the warrant to be seized, unless it is in plain view, United States v. Feldman, 366 F. Supp. 365 (D. Hawaii 1973).

2. Examples of What May Be Seized

- a. A search warrant authorized a police officer to search defendant's residence for money stolen during a bank robbery. While he was searching, he found and seized a floor plan of the bank. The seizure was held to have been lawful since the floor plan was other evidence of the crime for which the search warrant had been issued, i.e. bank robbery. United States v. Avery, 447 F.2d 978 (4th Cir. 1971), cert. denied, 405 U.S. 930

(1972).

- b. Police officers, acting under a validly issued warrant to search defendant's premises for stolen coins from a coin collection, could lawfully seize evidence of criminal activity in plain view if it was discovered inadvertently while searching for the coins. Blair v. Commonwealth, 225 Va. 483, 303 S.E.2d 881 (1983). The court distinguished the case of Lugar v. Commonwealth, supra, on the basis of the lawful object of the search. In Lugar the police had probable cause to believe that a fugitive had fled to a particular apartment, and were admitted by the occupants to ascertain for themselves whether the fugitive was located in the apartment. Thus, while lawfully taking a look around the apartment, the officers could seize anything within plain view, but the search had to be limited to those areas in which a grown man may be located. Blair, however, involved a lawful search for coins, small items which could be hidden anywhere.
- c. A search warrant directed a police officer to search only for a package of illegally imported hashish. After the package was found, he continued his search and seized incriminating wrappers, telegrams, and passports. The seizure of the latter evidence was held to have been found after the seizure of all the evidence listed in the search warrant to be searched for, and thus inadmissible. United States v. Feldman, 366 F. Supp. 356 (D.Hawaii 1973).

F. Search of Persons Found on Premises

1. Search

The Supreme Court has ruled that a person's presence on the premises to be searched with a warrant does not, without more, give rise to probable cause to search that person. If the police officer has reasonable belief that the person is armed and dangerous, then the Terry frisk doctrine applies. Absent such a belief, probable cause must exist to support a search of a person on the premises without a warrant. Ybarra v. Illinois, 444 U.S. 85 (1979), reh. den., 444 U.S. 1049 (1979).

2. Detention of Persons on Premises

But a warrant to search the premises for contraband does carry with it the authority to detain the occupants of the premises while a search is being conducted. If the search of the premises gives rise to probable cause to arrest the detainee, he may be arrested and his person searched incident to arrest. Michigan v. Summers, 452 U.S. 692 (1981); Williams v. Commonwealth, 4 Va. App. 53, 354 S.E.2d 79 (1987). Detention of defendant found leaving premises in vehicle upheld also. Allen v. Commonwealth, 3 Va. App. 657, 353 S.E.2d 162 (1987).

3. Furtive Movements

A police officer is permitted to search a person found on the premises if:

- a. The person makes a "furtive movement" which the officer would reasonably interpret to be an indication of being armed and dangerous. See, Ybarra, supra.
- b. The officer has probable cause to believe that items are concealed on the person. But mere presence on premises does not constitute probable cause. Id.

4. Personal Possessions

A search of a person's personal possessions is not considered a search of the person if they are outside his physical possession. United States v. Johnson, 475 F.2d 977 (D.C. Cir. 1973). See, also, United States v. Teller, 397 F.2d 494 (7th Cir. 1968), cert. denied, 393 U.S. 937 (1968).

5. Frisks

A police officer may frisk the exterior clothing of a person found on the premises for weapons, if he believes that his safety is in danger; however, he may not routinely frisk all persons present for weapons. Ybarra v. Illinois, 444 U.S. 85 (1979) (the warrant to search the tavern and bartender who was reportedly dealing drugs did not authorize a routine frisk of all patrons because it [the warrant] did not state that the

informant had ever witnessed a drug deal between the bartender and a patron nor that the tavern was regularly frequented by individuals purchasing drugs).

6. Example of Valid Search of Person Found on Premises

A search warrant authorized a police officer to search defendant's apartment. While the officer was making his search, defendant entered the apartment and left her purse unattended on the bed. As a part of his search of the bedroom the officer looked through the purse and found some drugs. The search was held to have been valid since the purse was out of defendant's physical possession. The search was thus part of the search of the premises and not a search of the person. United States v. Teller, 397 F.2d 494 (7th Cir. 1968), cert. denied, 393 U.S. 937 (1968).

7. Examples of Invalid Search of Persons Found on Premises

- a. A police officer obtained a search warrant to search a woman's apartment for stolen coats, checks, and identification cards. When he went to execute the warrant, the only person he found on the premises was a man whose identify he did not know. The officer searched the man and found some marijuana in his wallet. The search of the man was held to have been unlawful since the warrant had not authorized a search of any persons, and the officer did not have any reason to believe the man had any evidence of an illegal act in his possession. State v. Fox, 168 N.W.2d 260 (MN 1969).
- b. Police entered a boardinghouse with a warrant to search for drugs in room 1. They saw a man matching the description given in the warrant exiting a room with the defendant. When she saw the police, defendant tried to push past them, clutching her purse tightly. The police stopped her by grabbing her purse. They searched it and found a gun. The search of the purse was found unlawful because the police did not have any reason to believe that the defendant was armed or dangerous. They had no reason to believe that she was anything other than an innocent visitor. Her attempt to leave tends to show that she had no intention to harm the officers. Lett v. Commonwealth, 7 Va. App. 191,

196, 372 S.E.2d 195 (1988).

XI. SEARCH OF VEHICLES

A. When a Warrant Should Be Obtained

1. Rule

A police officer should obtain a warrant to search a vehicle whenever there is enough time to get one.

Coolidge v. New Hampshire, 403 U.S. 443 (1971); McDonald v. United States, 335 U.S. 451 (1948).

2. Examples of When a Search Warrant Should be obtained.

a. The vehicle has broken down and cannot be driven away. See United States ex rel. Clark v. Mulligan, 347 F. Supp. 989 (D.N.J. 1972).

b. The vehicle is parked on private property, and there are no facts which indicate that it will be driven away, or that evidence in it will be destroyed. See Coolidge v. New Hampshire, 403 U.S. 443 (1971).

c. However, the Court has since acknowledged that warrantless vehicle searches are permissible even where "the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not non-existent." United States v. Chadwick, 433 U.S. 1 (1977); see also Cardwell v. Lewis, 417 U.S. 583 (1974) (allowing warrantless search of car parked in a public parking lot after arrest of the driver elsewhere).

B. Search Without a Warrant

1. Rule

A police officer may search a vehicle without first obtaining a search warrant where there is no opportunity to secure a search warrant, and if:

a. the search is made incident to a full custodial arrest, Smith v. Commonwealth, 212 Va. 606, 186 S.E.2d 65 (1972);

b. the search is based on probable cause, Carroll v.

United States, 267 U.S. 132 (1925); Michigan v. Thomas, 458 U.S. 259, 261 (1982) (per curiam) (no exigent circumstances required as long as probable cause exists); see also McCary v. Commonwealth, 228 Va. 219, 227, 321 S.E.2d 637 (1984) (reserving question of whether probable cause without exigent circumstances would permit warrantless search of auto);

- c. the search occurs during a Terry stop;
- d. the search is based on an articulable and objectively reasonable belief that the suspect is dangerous, Michigan v. Long, 463 U.S. 1032 (1983);
- e. a strong possibility exists that suspects will flee, United States v. Shepherd, 714 F.2d 316 (4th Cir. 1983), cert. denied, 466 U.S. 938 (1983);
- f. the search comes under the plain view doctrine, see United States v. Harris, supra; Texas v. Brown, supra;
- g. the vehicle is abandoned. Wells v. Commonwealth, 6 Va. App. 541, 371 S.E.2d 19 (1988) (abandoned vehicle may be searched without warrant, no expectation of privacy).

2. Search Incident to an Arrest

a. Rule

A police officer may make a contemporaneous search of a vehicle in connection with a full custodial arrest without first obtaining a search warrant if the person he arrests is inside or beside the vehicle. Kirby v. Commonwealth, 209 Va. 806, 167 S.E.2d 411 (1969); Pack v. Commonwealth, 6 Va. App. 434, 368 S.E.2d 921 (1988).

b. Definition of full custodial arrest

A "full custodial" arrest means an arrest where the suspect is taken into custody for the purpose of transporting him to a police facility. United States v. Robinson, 414 U.S. 218 (1973). If the officer merely issues a summons and does not take the person into custody for the purpose of trans-

porting him, the officer may not search the vehicle. Gustafson v. Florida, 414 U.S. 260 (1973).

c. Limitations on search incident to arrest

An officer making such a search, however, is limited to searching the following places:

(1) The entirety of the person being arrested, United States v. Robinson, 414 U.S. 218 (1973).

(2) The passenger compartment of the auto, New York v. Belton, 453 U.S. 454 (1981), reh. den., 453 U.S. 950 (1981), and the area in the immediate control of the person being arrested from which he could reach for a weapon or for evidence of a crime. This includes open or closed containers found in the passenger compartment. See United States v. Chadwick, 433 U.S. 1 (1977) (footlocker in car); Pack v. Commonwealth, 6 Va. App. 434, 368 S.E.2d 921 (1988) (all areas of car may be searched including open and closed containers). The purpose of such a search is to:

(a) protect the officer;

(b) prevent escape; and

(c) prevent the destruction of evidence. See Chimel v. California, 395 U.S. 752 (1969), reh. den., 396 U.S. 869 (1969).

The Belton court noted that the search of the passenger compartment was reasonable because the full custodial arrest "justified the infringement of arrestee's privacy interests." Id. at 457-463. This area would usually extend to the interior of the vehicle, and would not include, for example, the inside of the trunk, under the hood, or inside a locked glove compartment. A police officer's warrantless search of an automobile's passenger compartment, as contemporaneously incident to the lawful custodial arrest of the automobile's occupant's may include the contents of any open or closed containers found in the automobile's passenger compartment. Id.

(3) The automobile exception has been extended to

include mobile homes. Although a mobile home does possess some of the attributes of one's residence, it is nevertheless readily mobile. California v. Carney, 471 U.S. 386 (1985).

3. Searches Based on Probable Cause

A police officer may make a warrantless search of a vehicle if:

- a. He has probable cause to believe that the vehicle contains evidence of an illegal act, Townes v. Commonwealth, 234 Va. 307, 362 S.E.2d 650 (1987). An exception to the warrant requirement of the Fourth Amendment is that police officers may stop and search a moving vehicle if they have probable cause to believe that it contains seizable objects. Wescott v. Commonwealth, 216 Va. 123, 216 S.E.2d 60 (1975); Schaum v. Commonwealth, 215 Va. 498, 211 S.E.2d 73 (1975); Derr v. Commonwealth, 6 Va. App. 215, 368 S.E.2d 916 (1988).
- b. The vehicle is moving or capable of being quickly moved so that if the officer does not search immediately, evidence could be destroyed or lost. Carroll v. United States, 267 U.S. 132 (1925). See United States v. Ross, 456 U.S. 798 (1982) (once police officers have lawfully stopped a vehicle, and they have sufficient probable cause to believe that the vehicle is carrying "contraband," they may conduct a thorough warrantless search of that vehicle).
- c. If a vehicle may be "searched on the spot" because there is probable cause to believe the occupants have recently committed a crime, it may also be searched at the police station subsequent to the occupant's arrest. "The probable-cause factor" existing at the scene at the stop, "still obtain[s] at the station house." Chambers v. Maroney, 399 U.S. 42, 52 (1970), reh. den., 400 U.S. 856 (1970); see also Texas v. White, 423 U.S. 67 (1975), reh. den., 423 U.S. 1081 (1975) (following Chambers); Schaum v. Commonwealth, supra.
- d. Examples

When a police officer had been informed that a

large plane load of marijuana had been delivered in the area, he immediately proceeded to the home of Poole who was the subject of a drug trafficking investigation at the time. Once there, the officer observed a car pulling into the driveway and, under cover of darkness, things being transferred from one car to the other. When one of the cars pulled out of the driveway, the officer stopped it and informed the driver that he was conducting an investigatory search. He did not arrest the driver. Upon request the driver gave the officer the keys to the trunk which the officer then searched. The driver was then arrested. The court held that defendant's consent to the search of the trunk was not coerced on the grounds that defendant was not arrested until after the search. And, even if the defendant did not consent, a warrantless search of the trunk was lawful based on probable cause established by the officer's observations. United States v. Poole, 718 F.2d 671 (4th Cir. 1983).

Defendant was driving a car which matched witnesses' descriptions of the car a robbery and shooting suspect had been driving. The car was stopped and a search conducted for proof of the identity of the suspect, weapons used in the robbery and evidence of other crimes. The court held that exigent circumstances due to a vehicle's mobile nature may exist to justify a warrantless search. Urgent need may be demonstrated by:

- (a) admission of a grave offense;
- (b) clear showing of probable cause;
- (c) reasonable belief that the suspect is armed.

These factors together with the diminished expectation of privacy of a vehicle justify a search. McCary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637 (1981).

4. Scope

Where police officers have probable cause to believe that contraband is concealed somewhere in an automobile they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages that may conceal the object of the search.

United States v. Ross, 456 U.S. 798 (1982). Caveat: In arriving at the decision, the Court rejected its holding in Robbins v. California, 453 U.S. 420 (1981), but adhered to its holding in Arkansas v. Sanders, 442 U.S. 753 (1979), that when probable cause is directed at a specific container within a vehicle, the officer may only seize the specific container, and must obtain a search warrant before that container is opened. He is limited in his search to places where he could reasonably expect to find that for which he has probable cause to search for. He would not expect to find, for example, a stolen television set inside the glove compartment. See Lugar v. Commonwealth, *supra*; Blair v. Commonwealth, *supra*.

5. Examples of Valid Warrantless Searches of Vehicles

- a. Police observed a car traveling erratically and at an excessive speed. The car swerved off into a shallow ditch. Apparently in response to the policeman's question, defendant, who appeared to be under the influence of something, began walking toward the open door of the car. The officers observed a large hunting knife on the floorboard of the vehicle. They then stopped him and frisked him, revealing no weapons. Observation of something protruding from under the armrest led to a search of the interior of the vehicle. The need for protection of the police justified the Terry-type search of the passenger compartment. Where the police possess an articulable and objectively reasonable belief that the suspect is potentially dangerous, they may conduct an area search of the passenger compartment for weapons. Michigan v. Long, 463 U.S. 1032 (1983); Glover v. Commonwealth, 3 Va. App. 152, 348 S.E.2d 434 (1986).
- b. Acting on information from an informant, the police stopped a car and arrested the driver, opened the trunk, and found a closed brown bag which contained heroin. After they drove the car to headquarters a zippered pouch containing cash was found during another warrantless search. It was held that police, who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it, may conduct a warrantless search of the vehicle that is as thorough as a magistrate could autho-

size in a warrant particularly describing the place to be searched. United States v. Ross, 456 U.S. 798 (1982). The Ross Court stated:

"The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found."

- c. Where police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle even after it has been impounded and is in police custody. The justification of such warrantless search does not vanish once the car has been immobilized. United States v. Hollywood Motor Co., Inc., 458 U.S. 263 (1982).
- d. Probable cause to search the portion of defendant's vehicle under the right front seat where the radar detection device was discovered existed where, upon trooper's activation of radar, the brake lights of the vehicle came on, and the trooper observed a cord hanging down from the mirror and the driver fumbling over the visor. Leeth v. Commonwealth, 223 Va. 335, 288 S.E.2d 475 (1982), cert. denied, 456 U.S. 906 (1982).

The trooper's search of the front seat area of the car did not violate the Fourth Amendment. The court found that probable cause did exist, under the automobile exception to the Fourth Amendment warrant requirement, "when the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." Leeth v. Commonwealth, 223 Va. at 340-341 [quoting Taylor v. Commonwealth, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981), cert. denied, 456 U.S. 906 (1982)].

- e. After defendant's arrest

Where his car was on a large commercial lot open

for public business and police knew that confederates existed who might remove it or evidence in the trunk, a warrantless search of the trunk and seizure of its contents are justified based on exigent circumstances. Even if the police officers could have obtained a search warrant earlier, the warrantless search was not unconstitutional. If probable cause is marginal, particularization difficult, and the likelihood of reaching a magistrate uncertain, police officers need not seek out a magistrate in order to search a vehicle in a public place, i.e. beside a public highway. Ample probable cause is sufficient. Fore v. Commonwealth, 220 Va. 1007, 265 S.E.2d 729, cert. denied, 449 U.S. 1017 (1980).

- f. The defendant argued that his conviction was improper as evidence proffered at trial by the Commonwealth resulted from an illegal search and seizure. The Supreme Court of Virginia affirmed the conviction stating that although the vehicle was rendered inoperable by a gas station attendant who removed the coil to insure the car would not be driven off before the bill was paid, and that seven officers were present at the "stake out" for over five hours, the police could validly search without a warrant under the exigency exception. The court stated that the "wiser course for the police would have been to acquire a search warrant" but that on the facts, the officers properly waited for the defendant to resume control, then immediately commenced the search as exigent circumstances could have arisen at any time. Patty v. Commonwealth, 218 Va. 150, 235 S.E.2d 437 (1977), cert. denied, 434 U.S. 1010 (1978). See United States v. Mitchell, 538 F.2d 1230 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977), reh. den., 431 U.S. 925 (1977); Thims v. Commonwealth, 218 Va. 85, 235 S.E.2d 443 (1977).
- g. A police officer received information from a known reliable informant that a yellow Mustang automobile, bearing District of Columbia license plates, was transporting drugs to the area of Azalea and Chamberlain Avenues in Richmond. The informant reported that the information had been given to him in a telephone call. The officer went to the designated area and discovered a yellow Mustang

with District of Columbia license plates. As the officer drove past the Mustang, he shined a spotlight on the car and observed the defendant, sitting in the passenger seat, remove what appeared to be a handrolled cigarette from his mouth and throw it to the floor of the car. The officer then opened the car door, smelled marijuana, seized the cigarette, and arrested defendant for possession of marijuana. The officer then searched the car and discovered quantities of marijuana and LSD which he seized. Although the informant's tip was insufficient to establish probable cause, the warrantless search of the car was held to be valid.

Probable cause, as a legal standard, was found to deal with probabilities concerning the factual and practical considerations in everyday life as perceived by reasonable and prudent persons. A determination of whether probable cause existed will be tested against what the totality of the circumstances meant to police officers, trained in analyzing the observed conduct for purposes of crime control. Hollis v. Commonwealth, 216 Va. 874, 223 S.E.2d 887 (1976).

The furtive gesture of defendant in attempting to hide the cigarette combined with the appearance of the cigarette on the floor of the car gave the officer probable cause to search the car without obtaining a warrant. See Washington v. Commonwealth, 219 Va. 857, 252 S.E.2d 326 (1979).

- h. A police officer was told by a reliable informant that a burglary had been committed by persons who drove away in a dark blue Valiant with North Carolina plates. The officer believed the car was owned by a man suspected of other burglaries. He was informed by another officer that a car fitting this description had been spotted temporarily parked in front of the house of a well-known "fence" for stolen goods. The officer saw this car on the highway and pulled it over. He made a warrantless search of it, finding the items stolen in the burglary. The search was held to have been valid. Schaum v. Commonwealth, supra.
- i. Automobile identification number

- (1) In New York v. Class, 475 U.S. 106 (1986), the Supreme Court upheld the right of police to search a vehicle for the vehicle identification number without a warrant. Two New York City police officers observed Class driving above the speed limit with a cracked windshield. When stopped, one officer went to the front of the vehicle to look for the vehicle identification number. The officer entered the car to move papers obscuring the number. In so doing, he observed the handle of a gun in plain view protruding from under the driver's seat. The New York Court of Appeals suppressed the gun as "fruit" of an unreasonable search. The Supreme Court reversed holding that the identification number is designed to be placed in plain view and, therefore, there was no reasonable expectation of privacy in the vehicle identification number. The mere viewing of the formerly obscured vehicle identification number was not ... a violation of the Fourth Amendment." Id at 114; see also Deer v. Commonwealth, supra.
- (2) Police went to a garage and repair shop to inspect vehicles, pursuant to § 16.1-9. Police determined serial numbers of automobile by checking engine number and confidential serial number of the vehicle. The search of that part of a vehicle on which serial or identification numbers are found is regarded as such a minimal invasion of a person's privacy that such a search, if a search at all, need not be based on probable cause but on some lesser standard. Shirley v. Commonwealth, 218 Va. 49, 235 S.E.2d 432 (1977).

6. Examples of Invalid Searches

- a. A police was informed that someone driving an "old make model car" had fired into an occupied residence. The officer saw a suspicious looking car and stopped it. He searched the car and found an air rifle under he front seat. The search was held to have been invalid since the officer did not have reason-

able or probable cause to believe that the vehicle probably contained the gun used to fire into the house. Dyke v. Taylor Implement Manufacturing Co., 391 U.S. 216 (1968).

C. Plain View

1. Rule

A police officer has not made a search if he discovers evidence of an offense inside or outside a vehicle in plain view from a place where the officer has a right to be. A search warrant is not necessary to observe or seize evidence found in plain view. Cardwell v. Lewis, 417 U.S. 583 (1974); Harris v. United States, 390 U.S. 234 (1968); Townes v. Commonwealth, supra; Cantrell v. Commonwealth, 7 Va. App. 269, 373 S.E.2d 328 (1988).

When a police officer looks through the glass of a car parked on a public street and sees contraband therein, the officer has not conducted a search in the constitutional sense. Cook v. Commonwealth, 216 Va. 71, 216 S.E.2d 48 (1975). What a person knowingly exposes to the public is not a subject of protection by the constitutional prohibition against unreasonable searches. See Katz v. United States, 389 U.S. 347 (1967); see also, Horton v. California, ___ U.S. ___ (1990) (police may be using plain view to look for illegal activity, inadvertent finding not necessary).

A police officer may also seize evidence discovered in "plain view" when he is placed in an area because of emergent circumstances. Hunter v. Commonwealth, 8 Va. App. 81, 378 S.E.2d 634 (1989).

2. Examples of Valid Plain View

- a. Where the police initially stopped the vehicle as part of a license check, and saw a balloon tied in a way drug users commonly do, and by leaning over to see what was inside the car, saw other balloons and a white powder, there was a valid search and seizure. Texas v. Brown, 460 U.S. 730 (1983). The Court stated, "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." Id. at 741-42 [quoting Payton

v. New York, 445 U.S. 573, 587 (1980)].

- b. A police officer went to execute a search warrant for marijuana at defendant's apartment. He stood on the public sidewalk, looked into the car and saw a plastic face mask with an attached hose, containing a marijuana residue, which he had seen being used to smoke marijuana in the defendant's presence. He seized the mask although he did not have a warrant to search the car. The seizure was held to have been legal since the evidence had been found in plain view from a place where the officer had a right to be. Cook v. Commonwealth, 216 Va. 71, 216 S.E.2d 48 (1975); see Smith v. Slayton, 484 F.2d 1188 (4th Cir. 1973), cert. denied, 415 U.S. 924 (1974); Wells v. Commonwealth, supra, (upheld use of flashlight to enhance what can be seen from a plain view position).
- c. The plain view doctrine will be applied if highly suspicious circumstances require a search of the interior of a vehicle. A police officer discovered an unoccupied car parked in a desolate spot. He saw a wallet containing money lying beside the car and noticed that the appearance of the passenger compartment indicated that there might have been a scuffle. Without first obtaining a search warrant, he opened the car door to try to find some identification of the car's owner and found some marijuana on the floor board. The officer in such circumstances had the right to try to find out who owned the car. The marijuana discovered during that attempt was found in plain view rather than by a search. Fox v. Commonwealth, 213 Va. 97, 189 S.E.2d 367 (1972); Hunter, supra.
- d. A police officer believed that defendant had used his automobile to push another car over a bank, after he had murdered the car's owner. While defendant's automobile was parked in a public parking lot, the officer scraped some paint from the car's exterior and took a print of the tire to see if they matched tire tracks at the scene of the murder and foreign paint chips on the murdered man's car. The evidence was held to have been taken validly without a search warrant since the exterior of the car was in plain view from a place

where the officer had a right to be. The Court's rationale was that the initial "purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy." Cardwell v. Lewis, 417 U.S. 583, 589 (1974), citing Jones v. United States, 357 U.S. 493, 498 (1958). The taking of paint chips from the exterior of the vehicle and an examination of the vehicle's tire did not infringe upon the owner's expectation of privacy.

- e. Under the plain view doctrine, police who were conducting surveillance of a home at which an agent was negotiating the sale of marijuana and who had probable cause to believe that a vehicle on the premises in plain view was being used to transport marijuana were thus authorized to seize the car. The proper seizure of the car did not taint the seized \$29,000 in cash found upon a search of the car's trunk. No warrant was needed due to probable cause to believe the vehicle contained contraband. United States v. \$29,000 U.S. Currency, 745 F.2d 853 (4th Cir. 1984).

D. Use of Force

1. Rule

If police officer has probable cause to search a vehicle, he is permitted to use whatever degree of force is reasonable and necessary under the circumstances to effectuate the search. United State v. Averitt, 477 F.2d 1009 (6th Cir. 1973), cert. denied, 414 U.S. 851 (1973).

2. Example of Valid Use of Force

A police officer went to investigate a tip that a drug store was being robbed. When he arrived at the scene, the burglar had fled, leaving his car behind. The car was towed to an unattended police garage, from which it was shortly thereafter stolen. When the car was eventually found, it looked as if someone had tried to remove evidence of the burglary from the trunk. Realizing the need to prevent the further destruction of evidence, the officer forced open the trunk with a crowbar and found items stolen from the drug store. The search was held to have been valid since the offi-

cer had used a reasonable amount of force in conducting the search. United States ex rel. McNeil v. Rundle, 325 F. Supp. 672 (E.D. Pa. 1971).

3. Excessive Force

A police officer had probable cause to believe that defendant's automobile contained contraband liquor. When the car came into view, the officer gave chase down a public highway at speeds of up to 85 m.p.h. Although there was no danger of losing sight of the car, the officer opened fire with a sawed-off shotgun shooting out one of the tires. After stopping the car in this manner, the officer searched the car and found illegal spirits. The search was held invalid since the degree of force used was unreasonable and unnecessary, unduly endangering innocent people both in the suspect's car and other cars on the highway. United States v. Costner, 153 F.2d 23 (6th Cir. 1946).

E. What May Be Seized

1. With a Search Warrant

A police officer with a search warrant may seize:

- a. the property listed on the warrant to be seized;
- b. other evidence of the offense for which the warrant was issued or of any other offense as long as the discovery of the additional evidence is in plain view and is made before the discovery of all the property listed in the warrant. Horton v. California, ___ U.S. ___ (1990) (plain view exception permits discovery of evidence whether inadvertent or not).

2. Without a Search Warrant

a. Rule

A police officer making a search without a search warrant may seize:

- (1) Anything which is evidence of the crime for which the officer had probable cause to make the arrest or make the search. Vass v. Commonwealth, 214 Va. 740, 204 S.E.2d 280 (1974):

(2) Anything which is evidence of another crime. Blair v. Commonwealth, 225 Va. 483, 303 S.E.2d 881 (1983).

In both of the above instances, if the "plain view" doctrine is involved, police officers cannot search into spaces which obviously could not hide the things which were the legitimate objects of the search. Hollowman v. Commonwealth, 221 Va. 947, 275 S.E.2d 620 (1981).

b. Examples of what may be seized without a warrant

A police officer was told by a reliable informant that a 1967 Cadillac, blue with a black top, bearing Maryland license number 466839, was owned by defendant. The informant further stated that the car contained heroin and was about to leave a particular address. The officer found the car, stopped it, and searched it. He found in the car and seized a television set which had been stolen from motel the day before. The seizure was held to have been valid since during search based on probable cause, the officer had discovered evidence of another crime. McKoy v. Commonwealth, 212 Va. 224, 183 S.E.2d 153 (1971). See also Illinois v. Gates, 462 U.S. 213 (1983), reh. den., 463 U.S. 1237 (1983) (totality of the circumstances test determines the validity of a search based on informants tip).

F. Search after seizure of vehicle

1. Based on Probable Cause

a. Rule

If a police officer has probable cause to believe that a vehicle contains evidence of an illegal act, he is not required to search the vehicle immediately after he has stopped it and arrested its occupants. He may postpone his search until the vehicle has been removed from the highway and taken elsewhere, for example, to the station house. He is not required to obtain a warrant for such a delayed search if the probable cause factor that developed at the scene still obtained at the station house. Chambers v. Maroney, 399 U.S. 42,

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reh. den., 400 U.S. 856 (1970). See also Texas v. White, 423 U.S. 67 (1975); United States v. Ross, supra.

- (1) If the officer does not have probable cause to search the vehicle, he cannot make a warrantless search of it at a later time as part of the search incident to an arrest. Preston v. United States, 376 U.S. 364 (1964).
- (2) In answer to a radio message, a police officer went to the emergency room of a hospital. Upon the officer's arrival he found the plaintiff's car parked at the emergency room door and the plaintiff's wife dead on the front seat. Soon thereafter a Detective arrived and observed a television set, a plastic basket, two green bags containing wet clothes, a shotgun, and a box of soap in the car. The police impounded the car and its contents. The plaintiff was later charged with second degree murder. Two days later the car was searched and the articles removed and given to relatives. The court held that since the officers, in removing the articles from the car, were doing no more than they could have done at the time of the arrest, the defendant's 4th Amendment rights were not violated by the warrantless search. Wilkins v. Whitaker, 714 F.2d 4 (4th Cir. 1983), cert. denied, 468 U.S. 1217 (1984).

b. Examples of valid search after seizure of vehicle based on probable cause.

- (1) A police officer learned that a service station had been robbed by four men who escaped in a blue compact station wagon. One had been wearing a trench coat and another, a green sweater. The officer saw a car, meeting that description on the highway, stopped it, and observed that two of the men were wearing the described clothing. He arrested the men and seized their car, which was taken back to the police station and searched without a warrant. Weapons and evidence of the robbery were found. The search was held to have been valid since the officer had proba-

ble cause to believe that evidence of the robbery was in the vehicle. It was immaterial that the search was conducted at the police station rather than at the site where the car was seized. Chambers v. Maroney, 399 U.S. 42 (1970), reh. den., 400 U.S. 856 (1970).

- (2) Where defendant's car is searched at the time of his arrest and later is impounded, police can search the car after it has been impounded. Court held that the justification for initial search did not disappear later. Florida v. Meyers, 466 U.S. 380 (1984). When a moving vehicle is stopped by an officer who has probable cause to search, the law allows both an immediate search and a subsequent warrantless search at the station house. See Chambers, supra; United States v. Whitley, 734 F.2d 994 (4th Cir. 1984), cert. denied, 474 U.S. 873 (1985) (bank robbery suspect's car was searched at arrest and later at the station house); United States v. Jones, 469 U.S. 478 (1984) (warrantless search of packages seized from two pickup trucks three days earlier held to be valid; the court stated "Ross . . . establishes that the Customs officers could have lawfully searched the packages when they were first discovered inside the trucks at the desert airstrip . . . there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure." Id. at 484 (quoting Texas v. White, supra at 68 and Chambers v. Maroney, supra at 52); Michigan v. Thomas, 458 U.S. 259, 261 (1982) (per curiam) ("the justification to conduct such a warrantless search does not vanish once the car has been immobilized").

c. Example of invalid search after seizure of person

- (1) Defendant was arrested in his automobile for vagrancy. His car was towed to the station house. Although the police officer did not have probable cause to believe that evidence of some offense was in the car, nor was he impounding the vehicle, he searched it. He

found articles which indicated that defendant had been planning to rob a bank. The search was held invalid. It was not based on probable cause, and it could not be justified as part of a search incident to an arrest because the search was too remote in time and place. Preston v. United States, 376 U.S. 364 (1964).

- (2) An officer had a fugitive warrant for the driver of vehicle, in which the defendant was a passenger. The defendant was asked twice to exit the vehicle, but he refused. The third time the defendant stepped out based on a threat by the officer. The officer conducted a pat-down because he saw movement in the car before it pulled off the road and the driver was known for carrying a weapon. The officer discovered a hard object on the defendant which turned out to be a film canister. The officer opened the canister believing it to contain drugs, which were found. The trial court suppressed the evidence and the Court of Appeals affirmed. The Virginia Supreme Court held that there was no reasonable basis to believe the defendant had drugs in the canister. The Court rejected the argument that the search could be conducted based on the officer's training and experience. Harris v. Commonwealth, 241 Va. 146, ____ S.E.2d ____ (1991).
- (3) Defendant was present during the execution of a search warrant against a third person's house. The defendant was not named in the warrant, but was patted-down for police safety. During the pat-down a film canister was recovered, which when opened was found to contain illegal narcotics. The court held the search invalid. There was no testimony regarding the officer's training and experience. Helms v. Commonwealth, 10 Va. App. 368, 392 S.E.2d 496 (1990).

2. Inventory of Vehicles

a. Rule

When a police officer arrests a person away from his home, and in or near his vehicle, it is sometimes necessary that the officer take the vehicle into custody for safekeeping. Even if the officer does not have probable cause to search the vehicle, he is permitted to remove the articles inside the car and make an inventory of them under the following conditions.

- (1) Making an inventory is a regular, written procedure of the officer's local police department;
- (2) This procedure is followed substantially every time a vehicle is taken into custody (if the officer picks and chooses the vehicles he inventories, it will look as if he is making an invalid warrantless search for evidence); and
- (3) No other immediate means were available for the disposition of the vehicle. Cabbler v. Commonwealth, 212 Va. 520, 184 S.E.2d 781 (1971), cert. denied, 405 U.S. 1073 (1972).

Any evidence found during an inventory search may be seized and used. See, Florida v. Wells, ___ U.S. ___ (1990) (closed containers may be opened during inventory search); Servis v. Commonwealth, 6 Va. App. 507, 371 S.E.2d 156 (1988). If the officer finds any evidence of an illegal act during the inventory, he may seize it. Cabbler v. Commonwealth, supra.

However, when a police officer arrests the operator of a motor vehicle and there is no legal cause for the retention of the motor vehicle by the officer, the person has the statutory right to designate another person who is present at the scene and is a licensed driver to drive the vehicle to a place designated by the person arrested. If such a designation is not made, the officer may cause the vehicle to be taken in for safekeeping. Section 19.2-80.1, Code of Virginia (1950, as amended); Cabbler, supra.

b. Examples of valid inventory of vehicles

- (1) Defendant's automobile was impounded by police for multiple parking violations. Without a warrant police unlocked the automobile, and found drugs in plastic bags in the glove compartment. The police were following standard procedure.

Valid policies support inventory practice:

- * protection of owner's property while it remains in police custody;
 - * protection of police against claims or disputes over lost or stolen property; and
 - * protection of police from potential danger. South Dakota v. Opperman, 428 U.S. 364 (1976); Cabbler v. Commonwealth, 212 Va. 520, 184 S.E.2d 781 (1971), cert. denied, 405 U.S. 1073 (1972).
- (2) Defendant's car which was illegally parked in a fire lane was ticketed and later towed from private property. Prior to impoundment, an inventory search was made by the officer pursuant to a Police Department directive. It was held that the search of defendant's car was conducted in conformity with established inventory procedures and was a valid inventory search. Girardi v. Commonwealth, 221 Va. 459, 270 S.E.2d 743 (1980), cert. denied, 451 U.S. 913 (1981).
 - (3) Defendant was arrested at a hospital for shooting into an occupied house. His car was parked in a no-parking zone in the driveway which led to the hospital's emergency entrance. A police officer removed the car to the police garage to be stored for safekeeping until defendant was released from custody. He did not have probable cause to search the car. However, under a written, regularly used regulation of his police department, he removed the contents of the car and made an inventory of them. He discovered that some of the goods in the car were stolen and seized them as evidence. The seizure was held to have been valid since the stolen goods were discovered during a regularly followed procedure of inventorying the con-

tents of cars taken into custody for safe-keeping. Cabbler v. Commonwealth, supra.

- (4) The search of appellant's car, towed to police station while appellant was only considered a suspect, was a "good faith" inventory search. Boggs v. Commonwealth, supra.

3. Forfeited Vehicle

a. Rule

When a police officer makes an arrest for any of the offenses listed below, and the accused is operating a vehicle which the officer has probable cause to believe has been used in connection with the same criminal activity, the officer should take the vehicle into custody for forfeiture.

Offenses which result in the forfeiture of a vehicle include:

- (1) Illegally transporting alcoholic beverages. Section 4-56, Code of Virginia (1950, as amended);
- (2) Illegally transporting controlled drugs (only when vehicle is used in connection with the illegal manufacture, sale or distribution of controlled substances). Section 18.2-249, Code of Virginia (1950, as amended); See Haina v. Commonwealth, 235 Va. 571, 369 S.E.-2d 401 (1988).
- (3) Knowingly transporting stolen goods worth \$200 or more. Section 18.2-110, Code of Virginia (1950, as amended).
- (4) Participation in a prearranged, organized and planned speed competition. Section 46.2-867, Code of Virginia (1950, as amended).

A police officer may search a vehicle which has been seized for forfeiture proceedings at any time without obtaining a search warrant. Cooper v. California, 386 U.S. 58 (1967).

b. Examples of search of forfeited vehicles

Defendant was arrested for transporting heroin in his car. The vehicle was seized and held for forfeiture proceedings. A week after the seizure, a police officer made a warrantless search of the car and discovered paper which had been used to wrap the heroin. The search was held to have been valid since the car had been seized for forfeiture proceedings. Copper v. California, 386 U.S. 58 (1967).

4. Vehicles Seized as Evidence

a. Rule

A vehicle itself may be seized as evidence of a crime. It may be seized as:

- (1) a fruit of a crime, United States v. Zaicek, 519 F.2d 412 (2d Cir. 1975); or
- (2) an instrumentality of a crime, Weaver v. Lane, 382 F.2d 251 (7th Cir. 1967), cert. denied, 392 U.S. 930 (1968).

A police officer may make a closer inspection of a lawfully seized vehicle and seize any evidence found at any time without obtaining a search warrant. United States ex rel. Spero v. McKendrick, 409 F.2d 181 (2d Cir. 1969).

b. Examples of vehicles seized as evidence

- (1) A police officer stopped a car he had probable cause to believe was stolen. He seized the car as evidence and searched the car. He found and seized a pistol in the glove compartment and several bonds (stolen from the mails) in an attache case in the trunk. The seizure of the latter was held valid since it resulted from an examination of a vehicle seized as a fruit of a crime. United States v. Zaicek, 519 F.2d 412 (2d Cir. 1975).
- (2) Defendant had used his car to hijack a truck. A police officer stopped defendant on the highway, arrested him and seized his car as

evidence. The officer later made a warrantless examination of the car and seized some incriminating evidence that he had found. The seizure of the evidence was held to have been valid since it resulted from an inspection of a vehicle seized as an instrumentality of a crime. United States ex rel. Spero v. McKendrick, 409 F.2d 181 (2d Cir. 1969).

G. Limited Search of Occupants of Vehicle

1. Rule

If a police officer stops a vehicle for an arrest or on probable cause, he may not search the unarrested occupants of the vehicle without probable cause merely because they are present in the stopped vehicle.

United States v. Di Re, 332 U.S. 581 (1948). An officer is not permitted to make a frisk of occupants of a vehicle without probable cause merely because they are present in the stopped vehicle. Id. An officer is permitted to make a frisk of an occupant's outer clothing, however, if he believes that the occupant might have a weapon in his possession. United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971); See also § 19.2-83, Code of Virginia (1950, as amended).

2. Example of Valid Limited Search of Occupant of Vehicle

A reliable informant told a police officer that A was leaving a particular bar in his automobile with hashish in his possession. B was also in the car. The officer stopped the car and frisked A, finding a concealed revolver. The officer then looked in B's purse and discovered marijuana, which he seized. The seizure was held to have been valid because it "was reasonable and proper as a normal protective measure on the part of law enforcement authorities ... to "ascertain the contents of the place where she would have been most likely to hide a weapon." United States v. Vigo, 487 F.2d 295, 298 (2d. Cir. 1973).

3. Example of Invalid Limited Search of Occupants of Vehicle

A police officer was told by a reliable informant that A, who was driving a particular car, had counterfeit

gasoline coupons in his possession. The car was stopped and A was arrested. B was also in the car. The officer frisked B, but found no weapons. He did not have any reason to believe that B had counterfeit coupons in his possession. Nevertheless, he made a thorough search of B's person anyway and found two coupons in his pocket and over a hundred in an envelope concealed between B's shirt and underwear. The search of B was held to have been invalid. The officer did not have the authority to search an unarrested person without probable cause merely because he was present in the stopped vehicle. United States v. Di Re, 332 U.S. 581 (1948).

When an officer has made a valid stop of an automobile, he may require the operator to get out of the vehicle. Pennsylvania v. Mimms, 434 U.S. 106 (1977).

XII. CONSENT SEARCHES

A. Who May Give Consent

1. Rule

Valid consent to a search eliminates the need to obtain a search warrant and the need for probable cause. Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Mendenhall, 446 U.S. 544 (1980), reh. den., 448 U.S. 908 (1980). One who shares use, access, or control of property also shares in the right to consent to a search. Illinois v. Rodriguez, 110 S.Ct. 2793 (1990); United States v. Matlock, 415 U.S. 164 (1974); Black v. Commonwealth, 223 Va. 277, 288 S.E.2d 449 (1982); Henry v. Commonwealth, 211 Va. 48, 175 S.E.2d 416 (1970). If someone else give his consent, the search is invalid, Stoner v. California, 376 U.S. 483 (1964), unless the person giving consent is in one of the special categories below.

If two people have joint ownership or possession of a place or thing, either one of them may given a valid consent to the search. Frazier v. Cupp, 394 U.S. 731 (1969). Consent to search may also be given by one who has common authority over the premises to which the search is directed. Thus, because the defendant gave a neighbor a key to his residence, the neighbor had an expectation of mutual use of the property and neighbor's consent to the search of the defendant's home was

valid. United States v. Sor-Lokken, 557 F.2d 755 (10th Cir. 1977), cert. denied, 434 U.S. 894 (1977). Note that if one of them has exclusive possession over some part of the jointly owned or occupied property, only he may consent to the search of that part. Reeves v. Warden, 346 F.2d 915 (4th Cir. 1965).

Once a valid consent is given, a police officer may seize evidence to be used against the following individuals:

- a. The person giving consent. Rollins v. Commonwealth, 207 Va. 575, 151 S.E.2d 622 (1966), cert. denied, 386 U.S. 1026 (1967).
- b. Someone else other than the person giving consent. Rees v. Commonwealth, 203 Va. 850, 127 S.E.2d 406 (1962), cert. denied, 372 U.S. 964 (1963), reh. den., 373 U.S. 947 (1963).

2. Examples of Who May Give Consent

a. Husband and Wife

A spouse can consent to the search of premises used jointly by both husband and wife. United States v. Lawless, 465 F.2d 422 (4th Cir. 1972); Reynolds v. Commonwealth, 9 Va. App. 430, 388 S.E.2d 659 (1990). This is true even if the man and woman are not legally married but just living together. United States v. Matlock, 415 U.S. 164 (1974); Illinois v. Rodreguez, supra. But if one of them has sole control over part of the premises, the other cannot give a valid consent to search that part. A wife, for example, could not give a valid consent to search a locked garage which her husband alone had rented and to which her husband had the only key. United States ex rel. Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970). See also United States v. Block, 590 F.2d 535 (4th Cir. 1978). But although an estranged wife has a property interest in the home used by her husband, she may not consent to the search of the dwelling occupied by her husband because the estranged wife has no expectation of mutual usage of the residence and a mere property right is insufficient interest to support her consent to the search of another's dwelling. Bettuo v. Pel-

ton, 260 N.W.2d 423 (Iowa 1978).

b. Landlord and tenant

(1) Rule

A landlord, including a hotel owner, cannot give valid consent to search a tenant's premises. Chapman v. United States, 365 U.S. 610 (1961). A landlord may give a valid consent, however, if:

(a) the tenant has abandoned the premises, Abel v. United States, 362 U.S. 217 (1960); or

(b) the tenant has been evicted, People v. Superior Court for County of Los Angeles, 83 Cal. Rptr. 732, 3 Cal. App. 3d 648 (1970); O'Dell v. Commonwealth, 7 Va. App. 567, 375 S.E.2d 756 (19-88) (women who put tenant out could consent to search the bags left behind).

(2) Virginia rule where landlord and tenant both had access

The Virginia Supreme Court has held that the consent of the landlord to search a garage was valid. "[C]onsent to search given by one with common authority over property is valid as against the absent, non-consenting person with whom the authority is shared." Black v. Commonwealth, 223 Va. 277, 283, 288 S.E.2d 449 (1982). The landlord and tenant both had right of access to the garage.

(3) Example - Motel

In United States v. Killebrew, 560 F.2d 729 (6th Cir. 1978), the appeals court held that the warrantless entry of a motel room occupied by the defendant was invalid when the only consent to enter was derived from the manager.

c. Parent and child

(1) Rule

A parent may authorize the search of premises occupied by dependent children if the parent has access to these premises. United States v. Peter-

son, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1975) and 424 U.S. 925 (1976). See Mackall v. Commonwealth, 236 Va. 240, 372 S.E.2d 759 (1988) (mother had joint right over premises and consented); Green v. Commonwealth, 223 Va. 706, 292 S.E.2d 605 (1982) (where the Court held that defendant's mother was not coerced to consent to a search of her apartment because she consented to a search of her son's room before she knew police had a warrant).

(2) Examples

(a) If the parent is excluded from the child's premises over which the child has exclusive control, the parent cannot give a valid consent to search her son's room when she had acquiesced to his locking the door and telling her to keep out, People v. Nunn, 55 Ill. 2d 344, 304 N.E.2d 81 (1973), cert. denied, 416 U.S. 904 (1974); nor could a parent consent to the search of a footlocker set aside for the son's use, United States v. Block, 590, F.2d 535 (4th Cir. 1978).

(b) The mother of the defendant can validly consent to a search of her son's dresser by police officers. United States v. Wright, 564 F.2d 785 (8th Cir. 1978). See People v. Moorer, 396 N.Y.S.2d 698 (1977) (proper consent by mother to search of son's room even where son pays rent); Mackall v. Commonwealth, supra.

d. Employer and employee

(1) Employee's consent

An employee cannot give a valid consent to the search of his employer's premises unless she has been left in charge of the premises. United States v. Block, 202 F. Supp. 705 (S.D.N.Y. 1962). For example, an office manager in sole control of an office and its records, could validly consent. United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946), cert. denied, 329 U.S. 742 (1946).

(2) Employers's consent

An employer may usually give a valid consent to search the premises used by his employees. Friedman v. United States, 381 F.2d 155 (8th Cir. 19-67). But his consent does not extend to the search of a part of the premises used solely by an employee; for example, an employer may not give valid consent to search the closed drawers of a desk used only by an employee if the employee had a reasonable expectation of privacy with regard to the desk drawer. United States V. Blok, 188 F.2d 1019 (D.C. Cir. 1951). See also Reeves v. Warden, 226 F. Supp. 953 (D. Md. 1964), aff'd, 345 F.2d 915 (4th Cir. 1965); O'Connor v. Ortega, 480 U.S. 709 (1987).

(3) Examples

(a) The owner of a truck may consent to the search thereof even if the defendant has possession. The court reasoned that the defendant could not expect to use the vehicle free from inspection by owner/employer or police. United States v. Carter, 569 F.2d 801 (4th Cir. 1977), cert. denied, 435 U.S. 973 (1978).

(b) Where prison guard was hired on the condition of employment and, therefore, the search uncovering contraband was valid. United States v. Sihler, 562 F.2d 349 (5th Cir. 1978).

e. School Officials

(1) Elementary and high school students

The Virginia Supreme Court has not ruled whether a school official may consent to the search of a student's locker. The best procedure is to obtain a search warrant where possible.

(2) College students

The Virginia Supreme Court has not ruled whether a college official may validly consent to the search of a college student's dormitory room. Some courts have held that he may give a valid consent. People v. Kelly, 195 Cal. App.2d 669, 16 Cal. Rptr. 177 (1961). Other courts have indicated that he cannot. Commonwealth v. McCloskey, 217 Pa.

Super. 432, 272 A.2d 271 (1970).

f. Co-tenants

(1) Following a bank robbery, the police obtained the name and address of the owner of the getaway vehicle and at the address arrested Miss Ail and the defendant. Miss Ail, after stating that she had full access to every area of the apartment she shared with the defendant, consented to the search thereof. The consent was valid and, therefore, the search was also. United States v. Finch, 557 F.2d 1234 (8th Cir. 1977), cert. denied, 434 U.S. 927 (1977).

(2) A cohabitant of an apartment shared with defendant can validly consent to the search of the common areas of the apartment, and evidence that the defendant committed a homicide was validly seized. State v. Martin, 261 N.W.2d 341 (Minn. 1978).

g. Joint occupants of motel room

The defendants were convicted of possession of heroin after a police informant consented to the search of the motel room used by informant and his buyers; the search and consent were valid. United States v. Gulma, 563 F.2d 386 (9th Cir. 1978).

h. Gratuitous bailee

A gratuitous bailee of a locked box to which he does not have access cannot validly consent to the search of the contents of the box by police officials. United States v. Diggs, 569 F.2d 1264 (3d Cir. 1977).

B. Need for Consent to be Voluntary

1. Rule

- a. A consent is valid only if it is given voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Hairston v. Commonwealth, 216 Va. 387, 219 S.E.2d 668 (1975), cert. denied, 425 U.S. 937 (1976). A consent is not voluntary if given only after:

(1) A police officer, by his conduct, taken as whole, has threatened, intimidated, or coerced the person into giving consent. United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973).

If the officer has a gun in his hand when he asks to search, the consent will probable be held to be involuntary. United States v. Mapp, 476 F.2d 67 (2d Cir. 1973).

(2) The officer shows the person an invalid search warrant or tells the person he has a warrant to search when he does not in fact have one. Bumper v. North Carolina, 391 U.S. 543 (1968); Cf. Green v. Commonwealth, *supra*.

(3) A search conducted by a police officer utilizing an invalid search warrant (lack of probable cause) cannot later be deemed a consent search unless it can be proven that consent was voluntarily given. McMillon v. Commonwealth, 212 Va. 505, 184 S.E.2d 773 (1971). A heavy burden rests upon the Commonwealth to overcome the presumption of involuntariness.

An officer is not required to tell the person being asked to consent to the search that he has a right to refuse consent, if the officer's conduct, taken as a whole, indicates that he has not coerced the person into consenting. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Watson, 423 U.S. 411 (1976), *reh. den.*, 424 U.S. 979 (1976); United States v. Mendenhall, 446 U.S. 544 (1980), *reh. den.*, 448 U.S. 908 (1980); Richards v. Commonwealth, 8 Va. App. 612, 383 S.E.2d 268 (1989) (consent based on totality of the circumstances).

A person's consent is not involuntary just because he gives it after he has been arrested, but courts will look more closely at such a consent to make sure it has not been coerced. United States v. Ellis, 461 F.2d 962 (2d Cir. 1972), *cert. denied*, 409 U.S. 866 (1972); Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987). If a police officer gives the person his Miranda warnings before he asks for consent to search, the consent will usually be considered voluntary, absent other coer-

cive acts. United States v. Watson, 423 U.S. 411 (1976).

Defendant, in custody, may validly consent to a search of his hotel room prior to the administering of Miranda warnings. The consent is not of the nature of an incriminating statement prohibited by the Fifth Amendment. Commonwealth v. E. A. Clore Sons, 222 Va. 543, 281 S.E.2d 903 (1981); United States v. Watson, 423 U.S. 411 (1976).

b. Burden of proof

The burden of proof is on the prosecution to demonstrate that the consent was freely and voluntarily given. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Reynolds v. Commonwealth, *supra*.

2. Examples of Valid Consent

- a. A police officer stopped a car for having only one headlight and a license plate light burning. The driver was unable to produce a valid driver's license after he was requested to show one. Although the officer did not have probable cause to search, he asked the driver if he could make a search of the car. He did not inform the driver of his right to refuse consent. The driver replied, "Sure, go ahead." The officer found three stolen checks in the glove compartment. The search was held to have been valid even if the officer did not warn of the right to refuse consent. The consent was voluntary since the officer, by his conduct taken as a whole, had not coerced the consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
- b. Defendant was in custody, handcuffed, sitting on the floor and surrounded by police officers. Defendant refused to sign a waiver form but stated: "you go ahead and search." Fact of custody alone is not enough in itself to demonstrate a coerced consent to search. Burden on Commonwealth to prove the voluntariness of any consent. Whether consent was freely given is a question of fact to be determined from the totality of the circumstances. Here the consent was voluntary. There were no guns drawn and no threats or promises.

Lowe v. Commonwealth, 218 Va. 670, 239 S.E.2d 112 (1977), cert. denied, 435 U.S. 930 (1978).

- c. Where police officers had a search warrant but did not inform the defendant's mother of the warrant until after she had agreed for the police to search the apartment, the consent was not coerced. Green v. Commonwealth, 223 Va. 706, 292 S.E.2d 605 (1982).
- d. Consent was knowing and voluntary where, after lawful arrest, while defendant was at police station, upon being told warrant was being sought, he consented to a search of his belongings. United States v. Corbitt, 675 F.2d 626 (4th Cir. 1982).
- e. Consent was not violated where the defendant was predisposed to change a five-dollar bill upon being asked and readily complied without seeking any assurances from the postal supervisor, who did not divulge his true identity or purpose in asking for change. United States v. Allen, 683 F.2d 114 (4th Cir. 1982), cert. denied, 459 U.S. 876 (1982).
- f. The girlfriend of a suspected bank robber initially agreed to a search of her apartment, but, when police reached the apartment, she questioned the necessity of the search and said she would not let it proceed. At the station house, the girlfriend changed her mind again and executed a written consent form. Thereafter, the police returned to the apartment and conducted a search.

The Court held that, while it would have been better and time certainly allowed the officer to obtain a search warrant, the fact that the girlfriend's consent was voluntarily given means that items seized were properly admitted. But the government has the burden of proving that an individual's consent was freely and intelligently given. United States v. Morrow, 731 F.2d 233 (4th Cir. 1984), cert. denied, 467 U.S. 1230 (1984).

3. Examples of Invalid Consent

- a. A Police officer saw defendant take a package containing heroin into an apartment at 2:00 a.m.

and return empty-handed several moments later. After arresting defendant outside, the officer demanded entrance into the apartment without a search warrant. After an implied refusal, the officer, gun in hand, broke down the door and found a woman wearing nightclothes in her bedroom. After arresting her, he demanded to know where the package was. He did not tell her she had a right to refuse consent. She pointed toward the closet. The officer searched the closet and found the package. The search was held to have been invalid because the consent to search was coerced. United States v. Mapp, 476 F.2d 67 (2d Cir. 1973).

- b. Defendant was arrested for rape. A police officer went to defendant's house and told his grandmother that he had a warrant to search for the gun used during the rape. The grandmother replied, "Go ahead." The officer searched and found the gun. The warrant was either nonexistent or invalid. A consent is not voluntary if a person consents after an officer has shown her an invalid warrant or when the officer tells her that he has a warrant when he does not in fact have one. Bumper v. North Carolina, 391 U.S. 543 (1968).
- c. A police officer arrested defendant for possessing narcotics on a mere suspicion without probable cause. Defendant was asked to empty his pockets. He consented to do so, and the officer discovered narcotics among the items defendant had in his possession. The search was held to have been invalid. Defendant's consent was not voluntary since it took place after an arrest without probable cause. McMillon v. Commonwealth, 212 Va. 505, 184 S.E.2d 773 (1971).

C. Scope of the Search

1. Rule

If a police officer has been given a valid consent, his search is limited to the following places:

- a. The area to which consent has been given to search. Strong v. United States, 46 F.2d 257 (1st Cir. 1931), appeal dismissed per stipulation, 284 U.S. 691 (1931); Walter v. United States, 447 U.S.

649 (1980).

- b. The places within the area of consent where he could reasonably expect to find what he is looking for. Lugar v. Commonwealth, 214 Va. 609, 202 S.E.2d 894 (1974).

2. Examples of Scope of the Search

- a. A police officer asked defendant if he could search a barn for contraband liquor, when defendant consented, the Officer searched the barn, but found no liquor. He then investigated a root cellar, covered with boards, several feet outside the barn. Here he found some liquor. The search of the root cellar was held to have been illegal since consent had been given only for the search of the barn. The officer exceeded the scope of defendant's consent by searching elsewhere. Strong v. United States, 46 F.2d 257 (1st Cir. 1931), appeal dismissed per stipulation, 284 U.S. 691 (1931).
- b. A police officer asked if he could search a house for a man suspected of a robbery. Consent was given. The officer searched the house and found controlled drugs inside bags and small closed containers. The search of the bags and containers was held to have been illegal since the officer could not have reasonably expected to find a man inside them. Lugar v. Commonwealth, 214 Va. 609, 202 S.E.2d 894 (1974).

D. Revocation of Consent

1. Rule

A consent to search may be revoked at any time while the search is going on. At that time the police officer must stop his search. Any evidence the officer has found before the consent is revoked, however, may be seized. Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965).

2. Example of Revocation of Consent

A police officer saw defendant sitting in a car at an early hour of the morning. Although he had no probable

cause to search, the officer asked if he could search the car. Defendant gave his consent. The officer searched the passenger compartment and the trunk for about fifteen minutes without finding any evidence of a crime. Defendant, believing he was being unduly delayed and harassed, asked the officer to stop his search. The officer refused and continued his search, finding some contraband drugs. The search after the officer was asked to stop was held to have been invalid. When defendant revoked his consent, the officer no longer had the right to continue the search. People v. Martinez, 259 Cal.App.2d 943, 65 Cal.Rptr. 920 (1968).

E. Implied Consent

By voluntarily going to the emergency room, the defendant impliedly consented to needed medical treatment. There was no evidence that the police played a role in the decision to operate; therefore, there was no search of defendant's body for the bullet, or seizure of the bullet by the doctor acting as an agent of the police. Craft v. Commonwealth, 221 Va. 258, 269 S.E.2d 797 (1980); Cf. Elliotte v. Commonwealth, 7 Va. App. 234, 372 S.E.2d 416 (1988) (there is no consent based on the defendant's lack of resistance); Crosby v. Commonwealth, 6 Va. App. 193, 367 S.E.2d 730 (1988) (submitting to lawful authority does not equal consent).

A government informant who is cooperating with the authorities impliedly consents to searches by the officials. Thus, the defendant's conviction arising from a search of an automobile occupied by the driver-informant and the defendant was valid. United States v. Kurck, 552 F.2d 1320 (8th Cir. 1977).

XIII. STOP AND FRISK

A. Stop

1. Rule

If a police officer reasonably suspects that a person in a public place:

- a. is committing, has committed, or is about to commit a felony, or
- b. possesses a concealed weapon in violation of § 18.2-308, Code of Virginia (1950, as amended), he

may, acting under § 19.2-83:

- (1) stop the person; and
- (2) ask him his name and address.

2. Restriction of Virginia Statute

Section 19.2-83 is more restrictive than Terry v. Ohio, 392 U.S. 1 (1968). It allows a stop only upon:

- (1) reasonable suspicion of a felony, or
- (2) possession of concealed weapon, Simmons v. Commonwealth, 217 Va. 552, 231 S.E.2d 218 (1977), whereas Terry allows a stop upon a suspicion of criminal activity.

There are, however, no Virginia cases that followed the standards of Terry in which the requirements of the statute were not fulfilled. See Simmons v. Commonwealth, 217 Va. 552, 231 S.E.2d 218 (1977).

3. Stop Defined

A stop is a brief detention of an individual which must be a minimum intrusion permitting the officer an opportunity to confirm or dispel his reasonable beliefs that the suspect is engaging in felonious activity, or is carrying a concealed weapon. Zimmerman v. Commonwealth, 234 Va. 609, 363 S.E.2d 708 (1988).

In Florida v. Royer, -460 U.S. 491 (1983), the court defined a stop by holding that the "circumstances surely amount to a show of official authority such that 'a reasonable person' would have believed he was not free to leave." Id. at 502; See Limonja v. Commonwealth, 7 Va. App. 416, 375 S.E.2d 12 (1988) (whether detention equals more than necessary for investigative stop depends upon totality of the circumstances). The Court stated:

- (1) it is not a violation of the 4th Amendment for police to approach an individual and ask if he is willing to answer questions. INS v. Delgado, 466 U.S. 210 (1984);
- (2) a police officer identifying himself as an officer does not make an encounter a seizure;

(3) the individual can decline to speak to the officer and leave; and

(4) the person approached "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen to an answer does not without more, furnish those grounds."

(5) walking up to an individual and asking him/her a question does not constitute a stop and any information gained may be lawfully used for further investigation. United States v. Flowers, 912 F.2d 707 (4th Cir. 1990).

Note that on April 23, 1991 the United States Supreme Court ruled in California v. Hodari D., ___ U.S. ___ (No. 89-1632) that to constitute a seizure for purposes of the Fourth Amendment, there must be either an application of physical force, however slight, or when that is absent, submission to a police officer's "show of authority" to restrain his liberty. Thus, when an accused flees despite an officer's command to stop, there was no seizure until the officer tackled him. Therefore, the incriminating evidence thrown away by the accused while fleeing constitutes abandoned evidence and not the fruits of a seizure.

4. Reasonable Suspicion

The officer's reasonable suspicion does not have to amount to probable cause for arrest, but it must be more than a hunch. The suspicion must be based on specific facts which the officer will have to spell out at trial. Terry v. Ohio, 392 U.S. 1 (1968); Zimmerman v. Commonwealth, *supra*; Wells v. Commonwealth, 6 Va. App. 541, 371 S.E.2d 19 (1988).

Facts which might create a reasonable suspicion, although each might not be sufficient by itself, include:

a. the officer's personal observation of the suspect based on the officer's training and experience. Richards v. Commonwealth, 8 Va. App. 612, 383 S.E.2d 268 (1989); See Castaneda v. Commonwealth, 6 Va. App. 476, 370 S.E.2d 109 (1988) (officers subjective belief must be reasonable);

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b. specific information given by an informant; Alabama v. White, ___ U.S. ___ (1990) (anonymous tip coupled with facts which support the tip permit Terry stop); Cf. Hardy v. Commonwealth, ___ Va. App. ___, 7 VLR 1171 (Rec. No. 0792-88-2) (Dec. 18, 1990) (facts observed based on anonymous tip did not provide reasonable suspicion to stop).

c. the kind of area and so forth, see Adams v. Williams, 407 U.S. 143 (1972).

A stop may be made on the basis of a police flyer or bulletin so long as it was issued "on the basis of articulating facts supporting a reasonable suspicion that the wanted person has committed an offense." United States v. Hensley, 469 U.S. 221, 232 (1985).

5. Requirements for a Valid Stop

In order for the stop to be valid, the officer must act reasonably.

- a. He may detain the person for only a reasonably short time, usually only a few minutes unless probable cause to arrest develops.
- b. He may move the person only a reasonably short distance from the place of the stop, for example, to his car or to a nearby telephone.
- c. He may use only a reasonable amount of force. This would not include deadly force unless it is necessary for the officer's protection.

6. A valid stop may be based on a roadblock, provided the roadblock is conducted pursuant to a plan with a neutral criteria and limited officer discretion. Simmons v. Commonwealth, 238 Va. 200, 380 S.E.2d 656 (1989); Stroud v. Commonwealth, 6 Va. App. 633, 370 S.E.2d 721 (1988) (defendant's attempt to evade roadblock by making illegal turn provided officer with reasonable suspicion); Murphy v. Commonwealth, 9 Va. App. 139, 384 S.E.2d 125 (1989) (no reasonable suspicion to stop when defendant made legal turn away from roadblock).

7. When an officer has a hunch which does not amount to a reasonable suspicion to stop, but follows the suspect and observes a violation of the law, the stop will be

upheld. Limonja v. Commonwealth, 7 Va. App. 416, 375 S.E.2d 12 (1988) (police may use lawful traffic stop, or other arrest, to ask question regarding matters where probable cause does not exist); Bosworth v. Commonwealth, 7 Va. App. 567, 375 S.E.2d 756 (1988) (regardless of officer's motive to stop, the issue is whether there was lawful authority); James v. Commonwealth, 8 Va. App. 98, 379 S.E.2d 378 (1989).

8. Examples of a Valid Stop

a. Where police observed a car travelling erratically and at excessive speed and the car swerved off into a shallow ditch, the stop was valid. Michigan v. Long, 463 U.S. 1032 (1983); Cf. Zimmerman v. Commonwealth, supra, (no reasonable suspicion based on occupants of the car switching drivers).

b. A police officer saw two men on a street corner. Each of them in turn walked down the street, looked into a store window, and then returned to confer with the other. After this procedure continued for several minutes, the officer suspected that they were casing the store for an armed robbery. He stopped them and asked them their names. The stop was held to have been legal since the officer had a reasonable suspicion based on facts that the men were about to commit a felony. Terry v. Ohio, 392 U.S. 1 (1968); Richards v. Commonwealth, supra.

c. Border patrol officers found human footprints leading from Mexico over a fairly well-defined path to an isolated point on a U.S. highway used as a pickup point for illegal aliens. One recurring shoe print bore a distinctive and repetitive V-shaped design. Officers observed a passing pickup truck with a camper shell suitable for carrying sizable groups headed toward the pick-up point. When the truck returned, it was stopped and one passenger was wearing the shoes with soles matching the distinctive shoeprint. Defendant then voluntarily opened the camper door revealing illegal aliens.

Officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances must be taken into account. This

case recognizes that when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion. United States v. Cortez, 449 U.S. 411 (1981), reh. den., 455 U.S. 1008 (1982). See also United States v. LeFevre, 685 F.2d 897 (4th Cir. 1982).

d. A police officer was making a search of an apartment with a warrant. During the search defendant entered the apartment, wearing a brown shoulder bag. The officer had been previously told that defendant usually carried a concealed gun in his shoulder bag. The officer stopped the defendant and asked his identity. The stop was held to have been valid since the officer had a reasonable suspicion based on facts that defendant was committing a felony. United States v. Poms, 484 F.2d 919 (4th Cir. 1973).

e. A trooper activated radar; at that instant, the brake lights of the vehicle came on, and the trooper saw a cord hanging down from the mirror and the driver fumbling over the visor. These events gave the trooper a reasonable suspicion that the defendant was engaged in criminal activity. There was no violation of defendant's Fourth Amendment rights in stopping the car. Leeth v. Commonwealth, 223 Va. 335, 288 S.E.2d 475 (1982).

9. Examples of Invalid Stop

a. The limitations applicable to investigative detention of the person define the permissible scope of an investigative detention of the person's luggage: it is permissible under Terry on less than probable cause. However, detention of luggage for 90 minutes exceeds permissible limits. United States v. Place, 462 U.S. 696 (1983).

b. In the course of eight hours, a police officer saw defendant talking with drug addicts several times. He did not, however, see anything pass between them nor overhear their conversations. Suspecting that defendant possessed narcotics, the officer stopped him. The stop was held to have been invalid since the officer's suspicion was based on a mere hunch and not on facts. Sibron v. New York, 392 U.S. 40 (1968).

10. Detention After Stop

a. After a legitimate stop, it was proper for detectives to maintain the status quo by briefly stopping the defendant to check his driver's license and registration while awaiting more information in the form of a response to their request for a vehicle license check. United States v. Tate, 648 F.2d 939 (4th Cir. 1981); Wells v. Commonwealth, 6 Va. App. 541, 371 S.E.2d 19 (1988).

b. Where a car is stopped by an officer who has a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity, a suspect may be detained briefly for questioning. Leeth v. Commonwealth, 223 Va. 335, 288 S.E.2d 475 (1982). See Brown v. Texas, 443 U.S. 47 (1979); Depriest v. Commonwealth, 4 Va. App. 577, 359 S.E.2d 540 (1987) (length of investigative stop must be restricted to confirming or dispelling reasonable suspicion of criminal activity).

c. A vehicle suspected of being involved in a drug trafficking operation was stopped and detained by state police for 15 minutes until a DEA officer arrived. The court held that, in assessing whether a vehicle detention is too long in duration to be justified as an investigative stop, it is appropriate to examine whether police diligently pursued an investigation that was likely to confirm or dispel their suspicions quickly. A court in making that assessment should consider whether it is a swiftly-developing situation; it should not engage in unrealistic second-guessing. The court said that it would not consider a 20 minute detention unreasonable. United States v. Sharpe, 470 U.S. 675 (1985).

B. Frisk

1. Rule

Although an officer may have the basis to stop an individual to conduct investigation, there must be a separate belief, based on articulated facts that a frisk is necessary. There must be a belief that the suspect is armed. Lett v. Commonwealth, 7 Va. App. 191, 372 S.E.2d 195 (1988).

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A police officer cannot legally frisk anyone unless he has made a valid stop. Sibron v. New York, 392 U.S. 40 (1968). See A, supra.

If, after a valid stop, the officer reasonably believes that the person intends to do him bodily harm, the officer is permitted by § 19.2-83 to pat down his exterior clothing for a dangerous weapon. The officer may not initially search the person's inside clothing.

An officer may only frisk for dangerous weapons. He may seize something only if he feels something that he believes could reasonably be a weapon, e.g., a large hard object. The seizure is valid even if such an object turns out not to have been a weapon. See Sibron v. New York, 392 U.S. 40 (1968). An officer may also seize evidence other than what he reasonably believes to be a weapon if he finds it in plain view. United States v. Poms, 484 F.2d 919 (4th Cir. 1973).

If the officer validly seizes an illegally concealed weapon or any other evidence of a crime during a frisk of the person, he may arrest him. Only at that point may the officer make a full scale search of the person incident to the arrest and seize evidence which he could not have reasonably believed to have been a weapon. Adams v. Williams, 407 U.S. 143 (1972).

Exposure of luggage located in a public place to a trained canine did not constitute a "search" within the meaning of the Fourth Amendment. The manner in which the information is obtained and the content of the information revealed by the procedure is limited; the investigative technique is much less intrusive than a typical search. United States v. Place, 462 U.S. 696 (1983).

2. Examples of Valid Frisk

a. The defendant was stopped for operating an automobile with an expired license plate. The officer ordered the driver to get out of the car. He noticed a bulge under the driver's coat and a pat down revealed a concealed weapon. The court found no Fourth Amendment violation. The interest in the officer's safety outweighed mere inconvenience to the driver. Pennsylvania v. Mimms, 434 U.S. 106 (1977).

b. When an officer has "reasonable suspicion that an individual is carrying a concealed weapon, the officer may validly "stop and pat" the individual for weapons. United States v. Bull, 565 F.2d 869 (4th Cir. 1977), cert. denied, 435 U.S. 946 (1978).

c. In a pat-down by an officer, the controlling issue is whether the officer reasonably believed the object to be a weapon. Simmons v. Commonwealth, 217 Va. 552, 231 S.E.2d 218 (1977). It is irrelevant that the object is discovered to be something other than a weapon. Id.

d. A police officer stopped two men on suspicion of casing a store for armed robbery. He then patted down their exterior clothing and found guns. The frisk was held to have been valid since it was reasonable for the officer to believe that men contemplating armed robbery might intend to do him bodily harm. Terry v. Ohio, 392 U.S. 1 (1968).

e. A police officer stopped a man whom he had been told carried a gun in his shoulder bag. As a part of the frisk, the officer opened the bag and found in plain view both the gun and a clear envelope containing cocaine. The frisk for weapons was held to have been valid since the officer knew facts that supported a reasonable belief that the man might intend to do him bodily harm. The seizure of the cocaine was valid since it was found in plain view during a frisk. United States v. Poms, 484 F.2d 919 (4th Cir. 1973).

f. A police office was told that defendant had a concealed gun and heroin in his possession. After the officer stopped defendant, he frisked him and found the gun. The officer then arrested defendant for illegally carrying a concealed weapon. He made a full scale search incident to the arrest and found the heroin which he seized. The frisk was held to have been valid since the officer knew facts supporting a reasonable belief that defendant might intend to do him bodily harm. The seizure of the heroin was held to have been valid since it was found during the full scale search incident to arrest, the probable cause for which resulted from the finding of a concealed weapon during a valid frisk. Adams v. Williams, 407 U.S. 143 (1972).

g. Defendant entered the premises while a police

officer was conducting a large scale arrest. Reasonably believing he might be in danger, the police officer patted down defendant's exterior clothing and felt a large, hard object in defendant's pocket.

He pulled it out, but discovered that it was not a weapon but an illegally possessed device for smoking marijuana. The officer then made an arrest and, in his search incident to the arrest, found some marijuana in defendant's possession. The frisk was held to be valid since the officer reasonably believed that a person entering a place habitually used for drug abuse during a large scale arrest might intend to do him bodily harm. People v. Roach, 15 Cal. App. 3d 628, 93 Cal. Rptr. 354 (1971).

h. Acting on a tip that a chauffeur-driven limousine was carrying drugs, police stopped the car and made an initial search of the car's interior; a pat down of the occupants revealed drugs. Court held that the police action was an investigative stop and not an arrest and that such brief stops are permitted, if reasonable. United States v. Perate, 719 F.2d 706 (4th Cir. 1983).

3. Examples of an Invalid Frisk

a. A police officer stopped defendant on suspicion of drug possession after watching him for eight hours. The officer reached into defendant's pocket and pulled out an envelope containing heroin. The frisk was held to have been invalid. The officer knew no facts which would support a reasonable belief that defendant might intend to do him bodily harm. The officer, in addition, went beyond a pat down of defendant's exterior clothing and reached into defendant's pocket. And finally, the officer, after feeling the envelope, could not have reasonably believed that it was a dangerous weapon. Sibron v. New York, 392 U.S. 40 (1968).

XIV. SEARCHES FOR ORAL COMMUNICATION

Oral communication may be searched for and seized like any other physical object. The same rules apply for determining whether or not there has been a search.

It is unlawful to place a wiretap without a court order. Sections 19.2-61 et seq. (Read code section for proper guidelines.) See also Smith v. Commonwealth, 3 Va. App.

650, 353 S.E.2d 159 (1987).

A. Statements Openly Made to a Police Officer or Informant

In order for a search for an oral communication to exist, a police officer must pry about for a communication that has been concealed. There is no search if the communication is made openly and directly to a police officer or to an informant who then tells the officer the contents of the communication. Merely because someone mistakenly believes that his communication is not being directly made to an officer or to someone who later informs an officer does not mean that there has been a search. Hoffa v. United States, 385 U.S. 293 (1966), reh. den., 386 U.S. 940 and 386 U.S. 951 (1966).

1. Examples of statement made openly to a police officer or an informant:

a. Defendant made incriminating statements to an informant who then informed a police officer. It was held that there had been no search since the informant did not pry about for the communication, but rather the defendant relied on the informant's confidence. Hoffa v. United States, supra.

b. A made incriminating statements to B over the telephone while a police officer listened in on B's extension telephone with B's consent. Because there was no interception by the officer nor any prying on his part, it was held that there had been no search. Rathbun v. United States, 355 U.S. 107 (1957); Cogdill v. Commonwealth, 219 Va. 272, 247 S.E.2d 392 (1978).

2. A police officer monitored defendant's communications to an informant which were transmitted by a hidden radio transmitter located on the informant's body. Since the statement was made directly to the informant to the officer, it was held that there had been no search. It was no different than the informant telling the officer. United States v. White, 401 U.S. 745 (1971), reh. den., 402 U.S. 990 (1971).

B. Expectation of Privacy in Oral Communications

A search exists if a police officer discovers the contents of a concealed oral communication which a person has a reasonable expectation of keeping private. Katz v. United States, 389 U.S. 347 (1967).

It is not a reasonable expectation of privacy for someone to believe that the person he makes a communication to will never tell anyone else about it. If the communication is made directly to a police officer or if one of the parties to the communication informs the officer about the communication, there is no violation of one's reasonable expectation of privacy. United States v. DeVore, 423 F.2d 1069 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971).

If none of the parties to the communication tells a police officer the content of the communication, and the officer is forced to pry about to find out what was said, his action is a search because it violates the individual's reasonable expectation of privacy. Katz v. United States, supra.

C. Examples of Expectation of Privacy in Oral Communications

1. A disguised police officer made a recording of defendant's conversation with him while defendant was making an illegal sale of drugs. Since there was no reasonable expectation of privacy in a statement made directly to the officer without any prying about, it was held that there had been no search. United States v. DeVore, supra. See also Hoffa v. United States, supra.

2. A police officer, without a search warrant, bugged the outside of a public telephone booth in which defendant was communicating illegal betting information. The communication was held to have been made with a reasonable expectation of privacy since it was made neither to a police officer nor to an informant. Katz v. United States, 389 U.S. 347 (1967).

3. A police officer was standing in the hallway of an apartment house. Defendant was communicating illegal betting information over a telephone in defendant's apartment in such a loud voice that the officer could overhear him. The content of the communications was held to have been found without a search since there could be no reasonable expectation of privacy by one talking so loudly that anyone passing by could hear him. State v. Kuznitz, 105 N.J. Super. 33, 250 A.2d 802 (N.J. 1969); United States v. Jackson, 588 F.2d 1045 (5th Cir. 1979), cert. denied, 442 U.S.

941 (1979) (listening through door in motel).

Note: Slip opinions since the preparation of this chapter:

Boyd v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0254-89-2) (Coleman) (Apr. 2, 1991):

Search Warrant - Anonymous Tipster:

Where the informer is anonymous and no other basis exists in the affidavit for considering him honest, the quality and the character of the information provided, if detailed, may establish that the informer has personal knowledge of the facts about which he spoke. Thus, where the informer has provided the police officer with sufficient personal information from which he could be identified, where the informer has personally observed the illegal drug activity, and where the officers has verified the accuracy of the informer's information concerning the defendant's activities and living arrangements, even if some details are innocuous, then there existed a substantial basis, under the totality of the circumstances test, for a magistrate to conclude that probable cause existed to issue a search warrant.

Neustadter v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0377-88-4) (Willis) (Apr. 9, 1991):

Search and Seizure:

A hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978) is not required if all of the defendant's allegations about falsehood in the affidavits are assumed to be true and if, given those assumptions, there remains sufficient content in the affidavit to support a finding of probable cause.

Bethea v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0371-89-2) (Benton) (April 16, 1991):

SEARCH & SEIZURE:

Where the record showed that the defendant acted neither suspiciously nor belligerently toward the police and that the police had no reasonable basis to think the defendant either had committed a crime or was armed and dangerous, it was an unreasonable search and seizure for the police to ask

the defendant, who was a passenger, to get out of the car.

Meyers v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. #0104-89-4) (Moon) (April 30, 1991):

SEARCH AND SEIZURE:

Where the undercover police officer was admitted voluntarily, and as the door opened the officer announced that she had a search warrant, there is no violation of the "knock and announce" requirement for searches.

Moore v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0676-89-2) (Koontz) (April 30, 1991):

PAT DOWN

Where the only reason for the pat-down of the defendant was his nervousness and nothing else, there was no articulable facts that indicated the defendant was dangerous so as to justify the pat-down search.

Carson v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0541-89-3) (Barrow) (May 14, 1991):

Search and Seizure:

The police officer had a right to walk up to the defendant's car stopped in a public place. The officer satisfied the requirements of the plain view doctrine in seizing a cut-off straw from between the defendant's legs. The discovery of white powder residue on the straw gave the officer probable cause to search the trunk of the car.

California v. Acevedo, ___ U.S. ___ (No. 89-1690) (Blackmun) (May 30, 1991):

Search and Seizures:

In a search extending only to a container within an automobile, the police may search that container without a warrant where they have probable cause to believe that the container holds contraband or evidence, whether or not there is probable cause to search the entire vehicle. To the extent that the decisions in United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979) are to the contrary, they are overruled.

Jacques v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0261-90-4) (Willis) (June 4, 1991)

Search and Seizure:

The defendant's convictions for possession were affirmed. The Court of Appeals ruled that the officers had reasonable suspicion to stop the defendant's vehicle and investigate further and that the defendant had consented to the search of him and his car. The suspicion was based on the fact that the officer had received a radio dispatch to be on the lookout for a particular car having a certain color and being driven by certain described individuals. The officer was further justified in stopping the defendant because the defendant made an illegal turn. Before the officer could ask the defendant for his identification, the defendant said to the officers that they could search him and the car.

Florida v. Jimeno, ___ U.S. ___ (No. 90-622) (Rehnquist) (May 23, 1991):

Search and Seizure:

The accused's Fourth Amendment right is not violated when, after he gives the police permission to search his automobile, the officer opens a closed container (paper bag) found within the car that might reasonably hold the object of the search (drugs). The scope of a defendant's consent under the Fourth Amendment is that of "objective reasonableness", i.e., what would a reasonable person have understood by the exchange between the police and the accused.

ARREST

I. ARREST IN GENERAL

Since an arrest constitutes a seizure of the person for Fourth Amendment purposes, an arrest must conform to those standards set forth therein. Gerstein v. Pugh, 420 U.S. 103, 111 (1975). The United States Constitution protects against unreasonable seizures by requiring probable cause to arrest prior to any warranted or warrantless arrest. See U.S. Constitution, Amend. IV., Amend. XIV.

In addition to the constitutional requirements, there are applicable state statutory provisions that speak to arrest. Chapter 7 of Title 19.2 [§§ 19.2-71 to 19.2-83 of the Code of Virginia (1950, as amended)] speaks generally to the subject of arrest. A reprint of these Code provisions is provided at the end of this chapter. Since the focus of this chapter is specifically on criminal law enforcement, questions about civil liability are not addressed herein.

Usually, a criminal arrest occurs when a police officer formally places an individual under arrest and transports him to the police station. Terry v. Ohio, 392 U.S. 1, 16 (1967). However, the Fourth Amendment also governs less traditional arrests and "stops" under the broader concept of "seizure." Id. The test for whether a seizure has taken place sufficiently to engage Fourth Amendment protection is whether a reasonable person under the circumstances would have felt free to leave. United States v. Mendenhall, 446 U.S. 544, 554 (1980). If not, the person has been seized for Fourth Amendment purposes. Id. Factors to be considered include: what the police officer's purpose was when he approached the person, what the officer knew, and what the officer said and did. J. SHANE CREAMER, The Law of Arrest, Search and Seizure (1980).

On April 23, 1991, the U. S. Supreme Court ruled in California v. Hodari D., ___ U.S. ___ (No. 89-1632) (1991) that to constitute a seizure for purpose of the Fourth Amendment, there must be either an application of physical force, however slight, or when that is absent, submission to a police officer's "show of authority" to restrain his liberty. Thus, when an accused flees despite an officer's command to stop, there was no seizure until the officer tackled him. Therefore, the incriminating evidence thrown away by

the accused while fleeing constitutes abandoned evidence and not the fruits of a seizure.

II. REQUIREMENTS FOR A VALID ARREST

A. Upon a Warrant

1. Who may issue a warrant

The judge or clerk of any circuit court, general district court, or juvenile and domestic relations district court, or any magistrate may issue process for the arrest of any person charged with a criminal offense. Section 19.2-71, Code of Virginia (1950, as amended).

2. Circumstances required for issuance

An officer authorized to issue criminal arrest warrants may do so in two ways:

a. On complaint of a criminal offense to such officer, who shall examine on oath the complainant and any witnesses, and issue a warrant if there is probable cause to believe the accused has committed an offense. Section 19.2-72.

b. Even without formal complaint, an authorized officer who suspects that an offense punishable otherwise than by a fine has been committed may issue an arrest warrant if, after examination of witnesses, he finds probable cause to believe that the accused has committed such an offense. Id.

3. Contents of a complaint

A complaint shall consist of sworn statements of fact relating to the commission of the alleged offense. These statements shall be made upon oath before a magistrate empowered to issue arrest warrants. The magistrate may require the statements to be reduced to writing and signed. Va. S. Ct. R. 3A:3.

Conclusory statements are insufficient. Without substantive requirements, a complaint "would be of only formal significance, entitled to perfunctory approval" by the magistrate. Giordenello v. Unit-

ed States, 357 U.S. 480, 487 (1958). A complaint which states a mere conclusion that the accused has committed a specified crime, without affirmatively alleging that the affiant speaks from personal knowledge, without indicating the sources for his belief or setting forth other sufficient basis on which a finding of probable cause could be made, is insufficient for the issuance of an arrest warrant since it does not permit the magistrate to make an independent assessment of the probability that the accused committed the crime charged. Id. at 486-87. Common rumor or strong reason to suspect -- even though in good faith -- is inadequate to support a warrant for arrest. Henry v. United States, 361 U.S. 98, 101-02 (1959) (dictum).

The complaint or affidavit must include any supplementary facts presented to the magistrate which are required to establish probable cause. McCary v. Commonwealth, 228 Va. 219, 231, 321 S.E.2d 637 (1984). In McCary, the affidavit incorrectly stated that the affiant had personal knowledge of the facts contained therein. However, the affiant told the judge of the mistake, and that he had received the information from other officers. Id. at 230. The court upheld the warrant, noting that the Fourth Amendment does not require that the sworn statements supporting a finding of probable cause be reduced to writing. While Virginia Code § 19.2-54 does include such a requirement, it does not mandate disclosure of the source of the affiant's information. That can be verbal. Id. at 231.

If a defendant makes a substantial preliminary showing that a false statement was knowingly, intentionally or recklessly made by an affiant and the allegedly false statement was necessary to a finding of probable cause, then the Fourth Amendment requires a hearing to be held to establish the allegation by a preponderance of the evidence. If this burden is met and absent the false statement the warrant is insufficient, then the fruits of the search are inadmissible. Lanier v. Commonwealth, 10 Va. App. 541, 394 S.E.2d 495 (1990).

4. Contents of an arrest warrant

An arrest warrant shall be directed to an appropriate officer or officers, name the accused or set forth a description by which he can be identified with reasonable certainty, describe the offense charged with reasonable certainty, and command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city, or town in which the offense was committed. The warrant must also be signed by the issuing officer. Section 19.2-72; see also Va. S. Ct. R. 3A:4.

Under Rules 3A:4 and 3A:6(a), an arrest warrant must describe the offense charged, giving the accused notice of the nature and character of the offense. The requirements are the same as those for an indictment. Greenwalt v. Commonwealth, 224 Va. 498, 501, 297 S.E.2d 709, 710 (1982). As long as the offense is adequately stated, a misrecital of the relevant statutory provisions does not invalidate a conviction. Black v. Commonwealth, 223 Va. 277, 282, 288 S.E.2d 449, 451 (1982). However, if the statutory provision contained in the warrant is invalid and not merely misrecited, the warrant may be found not to state an offense, and therefore be insufficient to form the basis of a conviction. Mitchell v. County of Hanover, 1 Va. App. 486, 489, 340 S.E.2d 173, 175 (1986). In Mitchell, the Hanover County Code adopted by reference a Code of Virginia provision which was subsequently repealed and replaced. A reference to the new section was incorporated into the County Code without specific authorization by ordinance. Id. at 487-88, 340 S.E.2d at 174. The Court of Appeals thus found the County Code provision to be invalid. A different panel of the Court of Appeals subsequently refused to follow Mitchell. Walters v. Commonwealth, 8 Va. App. 262, 265, 379 S.E.2d 749, 751 (1989); But see, Commonwealth v. Burns, 240 Va. 171, 395 S.E.2d 456 (1990) (While § 17-116.02(c), Code of Virginia (1950, as amended, requires each panel to hear and determine each case independent of other panels, different panels are not free from principles of stare decisis and should depart from precedent only when a "flagrant error or mistake" is apparent).

Va. S. Ct. R. 3A:4 provides that a warrant may be issued by the magistrate if the accused fails to appear in response to a summons.

5. Summons as alternative to warrant

In any misdemeanor case, the magistrate or other issuing authority may issue a summons instead of a warrant when there is reason to believe the person charged will appear in the court having jurisdiction over the trial of the offense charged. Section 19.2-73. Additionally, whenever a person is detained by an arresting officer for a violation of a county, city, or town ordinance or a misdemeanor, the officer shall, except as otherwise provided, issue a summons to appear at a specific time and place. If the person gives his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if the arresting officer believes that the person is likely to disregard a summons or that the person is likely to cause harm to himself or any other person, he may arrest the person and bring him before a magistrate. Section 19.2-74.-A.1.

6. Validity of the Warrant

- a. A warrant must be based on probable cause. The magistrate issuing the warrant must decide that upon the evidence contained in the complaint, there is a probability that the accused has committed the crime described in the complaint. The decision should be based on common sense, given all the circumstances set forth in the complaint, including the informant's veracity, reliability, and basis of knowledge. Illinois v. Gates, 462 U.S. 213, 230 (1983).

Even under this "totality of the circumstances" approach, there are limits beyond which an issuing magistrate may not go. A statement that the affiant "has cause to suspect and does believe" that the suspect has committed a crime remains insufficient to establish probable cause. Id. at 239, [citing Nathanson v. United States, 290 U.S. 41 (19-]

33)]]. Similarly, a statement that "affiants have received reliable information from a credible person and do believe" is insufficient. Id. [citing Aguilar v. Texas, 378 U.S. 108 (1964)]. While an officer is entitled to rely on information received from an informant, that information must be reasonably corroborated. Id. at 242 [citing Jones v. United States, 362 U.S. 257, 269 (1960)].

Some information as to the informant's reliability remains particularly important where the warrant is based almost entirely on the informant's tip, *i.e.*, there is little corroboration. See United States v. Edwards, 798 F.2d 686, 689 (4th Cir. 1986). But see Alabama v. White, 496 U.S. ___, 110 S. Ct. 2412 (1990) (information from an anonymous tipster may provide the reasonable suspicion necessary for a Terry stop; reasonable suspicion is a less demanding standard than probable cause and can be established by information that is different in quantity and content and that is less reliable than that required to establish probable cause).

The totality of the circumstances approach was applied in Williams v. Commonwealth, 4 Va. App. 53, 354 S.E.2d 79 (1987). In that case, the affidavit was based on information from confidential informants. Independent police investigation corroborated certain aspects of the tips. Although the affidavit contained no information as to the informant's basis of knowledge or veracity, the magistrate could reasonably infer from the detail of the information that the sources had access to reliable information. Id. at 69. The court found that the warrant was supported by probable cause. Id.

- b. Article I, § 10 of the Constitution of Virginia provides, in part, that "general warrants, whereby an officer may be commanded to... seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not be grant-

ed." This comports with the Fourth Amendment of the U.S. Constitution, which provides in part, that no warrant shall issue unless "particularly describing... the persons... to be seized." U.S. Const. Amend. IV; see also Amend. XIV. The warrant itself must contain indications "leading to a reasonable degree of certainty, as to what the parties intended." Wells v. Jackson, 17 Va. (3 Munf.) 458, 477 (1811). When a warrant is so general or uncertain as to leave too much discretion in the officer to decide which suspect to arrest, such warrant may be unconstitutional, (even though the person arrested is the one actually intended). Id. at 481. See Wells at 461-63 (for contrasting examples of uncertain and sufficiently certain warrants).

- c. On the other hand, when the police, with probable cause to arrest one party, reasonably mistake a second party for the first party, the arrest of the wrong party nonetheless may be valid. See Hill v. California, 401 U.S. 797, 802-04 (1971) (warrantless arrest). If the police have a valid arrest warrant for one person and reasonably, but in good faith arrest another, arrest of the "wrong person" is valid. United States v. McEachern, 675 F.2d 618, 623 (4th Cir. 1982) [citing Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975)]. See also, Illinois v. Rodriguez, 110 S.Ct. 2793 (1990) (Even where former cotenant did not have common authority over defendant's premises, the warrantless entry by police was valid because they reasonably believed the cotenant had authority to consent.)

5. Execution of the Arrest Warrant

a. Arrest

A warrant shall be executed by the arrest of the accused. An officer may execute within his jurisdiction a warrant or summons issued anywhere in the state. Section 19.2-76. Generally, an arrest warrant issued in one state may not be lawfully executed in another.

er. Street v. Cherba, 662 F.2d 1037, 1039 (4th Cir. 1981).

Va.S.Ct.R. 3A:4(c) provides that if a warrant has been issued, but the officer does not have the warrant in his possession at the time of arrest, he shall:

(1) inform the accused of the offense charged and that a warrant has been issued, and

(2) deliver a copy of the warrant to the accused as soon thereafter as practicable.

b. Delivery of Process to Accused

When serving any process which has been issued against a person charged with a criminal offense, the officer shall leave one of two copies with such person, except as otherwise provided. Section 19.2-75.

The purpose of requiring a copy of a criminal process to be left with a defendant is to inform him of the specific charge made against him so that he may intelligently prepare his defense. Dorchincoz v. Commonwealth, 191 Va. 33, 36, 59 S.E.2d 863, 864 (1950); Hammer v. Commonwealth, 207 Va. 135, 150, 148 S.E.2d 878, 887 (1966) (quoting Dorchincoz).

However, failure to leave a copy of the warrant with the accused pursuant to § 19.2-75 is a procedural error which does not constitute reversible error unless the defendant was prejudiced thereby. Dorchincoz, 191 Va. at 36, 59 S.E.2d at 864 (dictum); Hammer, 207 Va. at 150, 148 S.E.2d at 887. Additionally, absent a showing otherwise, it will be presumed that the accused received process as required by § 19.2-75. Rose v. Commonwealth, 189 Va. 771, 774, 55 S.E.2d 33, 34 (1949).

An accused may have the "right to make reasonable resistance" when an officer fails to produce a warrant and refuses to explain the

nature of the charges to a peaceably submitting suspect. Bourne v. Richardson, 133 Va. 441, 458, 113 S.E. 893, 899 (1922); see also Love v. Commonwealth, 212 Va. 492, 184 S.E.2d 769 (1971) (while police have an affirmative duty to inform an accused of the charges against him, it is not necessary to do so until after he has submitted peaceably to the arrest). Cf. Banks v. Bradley, 192 Va. 598, 66 S.E.2d 526 (1951) (individual is entitled to resist an attempted unlawful arrest with such force reasonably necessary to repel the force being exercised by the officer).

c. Disposition of the Person Arrested Upon a Warrant

Generally, a warrant "commands the accused to be arrested and brought before a court of appropriate jurisdiction in the county, city, or town in which the offense was allegedly committed . . . without undue delay." Horne v. Commonwealth, 230 Va. 512, 518, 339 S.E.2d 186, 191 (1986) (citing § 19.2-72).

An officer may execute within his jurisdiction a warrant or summons issued anywhere in the state. A warrant shall be executed by the arrest of the accused. The officer executing a warrant shall make return thereof to a judicial official having authority to grant bail. Section 19.2-76.

Depending on where the arrest occurs and where the charge is to be tried, the arresting officer may dispose of the arrested person according to one of the three procedures outlined below:

(1) Arrest in contiguous jurisdiction: When the person is arrested in a county or city contiguous to the county or city where the charge is to be tried, the arresting officer may either "deliver the accused to the custody of an officer of a law enforcement agency having jurisdiction in the county or city in which the charge is to be tried," or "bring the accused before a judicial offi-

cer . . . authorized to grant bail in the county or city in which the accused is arrested [see below]." Id.

(2) Arrest in non-contiguous jurisdiction: When the person is arrested in a county or city other than, and not contiguous to, the county or city where the charge is to be tried, the arresting officer "shall bring the accused before a judicial officer authorized to grant bail in the county or city in which the accused is arrested." Id. The judicial officer shall either commit the accused to the custody of an officer for transfer forthwith to the county or city where the charge is to be tried, admit the accused to bail, or commit the accused to jail for transfer as soon as possible. Id. The judicial official is to endorse on the warrant the action taken. Id.

(3) Arrest where charge is to be tried : Unless the arresting officer issues a summons when making a warranted arrest in the city or county where the charge is to be tried, he "shall bring the arrested person without unnecessary delay before . . . a court of appropriate jurisdiction of the county or city in which the warrant is issued, or before an official having authority to grant bail." Section 19.2-80. The magistrate shall either admit the accused to bail or commit him to jail. Id. Where the accused is charged with a misdemeanor and the official is a judge of a district court having jurisdiction to try him for such misdemeanor, the official may instead proceed to trial if the accused consents and the Commonwealth does not object. Id.

Executing an arrest warrant "without undue delay" does not necessarily call for immediacy. United States v. Payne, 423 F.2d 1125, 1125-26 (4th Cir.), cert. denied, 400 U.S. 836 (1970). As long as the police use reasonable diligence in executing the warrant, and are within reasonable limits of time and place, the officers are entitled to consider

their other duties, work schedules and convenience...." Id. at 1126.

Additionally, in Virginia, a violation of the requirement that a suspect be taken before a magistrate without unnecessary delay does not necessarily require the exclusion of evidence. Horne v. Commonwealth, 230 Va. 512, 518-19, 339 S.E.2d 186, 191 (1986). Only in situations in which the delay in taking the suspect before a magistrate resulted in the loss of exculpatory evidence has the Virginia Supreme Court concluded that the defendant's due process rights were violated. Id.

d. Execution of misdemeanor warrants

When the offense charged is a misdemeanor, the chief-of-police of the city or county where the case is pending, or the county sheriff when such county has no police department, may notify the accused of the issuance of a warrant or summons, and direct him to appear at the specified time and place. Section 19.2-73.1. Failure to appear as specified will result in execution and return of the warrant, as provided by § 19.2-76. Id. Furthermore, the "issuing judicial officer may direct the execution of such process prior to any such notification." Id.

8. Return of the Warrant

Upon executing an arrest warrant, the arresting officer "shall endorse the date of execution thereon and make return thereof to a judicial officer having authority to grant bail." Section 19.2-76; see also § 19.2-80 (return made "[i]n any case in which an officer does not issue a summons pursuant to § 19.2-74 [See Section IIIA below] or § 46.1-178" [See "Motor Vehicle Violations," *infra*]).

9. Assistance in the Execution of the Warrant

Section 18.2-463 requires any person, "on being required by any sheriff or other officer" to assist him in the execution of his office in a criminal case. Refusal to render the required assis-

tance is punishable as a Class 2 misdemeanor. Va. Code Ann. § 18.2-463 (1988).

A citizen called to assist an officer is justified in doing whatever the officer might lawfully do. Byrd v. Commonwealth, 158 Va. 897, 902, 164 S.E. 400, 402 (1932); Bowman v. Commonwealth, 201 Va. 656, 662, 112 S.E.2d 887, 891 (1960). Section 18.2-463 does not apply to military authorities requesting aid from civilians (or from civilian authorities). Report of the Attorney General (1975-1976) at 87.

10. State Police Authority to Arrest

a. "Power of Sheriff" in State Criminal Laws

Section 52-8 vests the State Police (including the Superintendent, his assistants, and police officers appointed by him) with the "powers of a sheriff for the purpose of enforcing all the criminal laws of this Commonwealth." Section 52-8 (1988). It is the duty of such state police "to use their best efforts" to enforce such laws. Id.

b. Execution of Warrants for Ordinance Violations

Section 52-22 authorizes the State Police "to execute warrants of arrest for violations of ordinances of counties, cities and towns when requested to do so by the county, city or town authorities." Section 52-22. The exercise of these powers is not confined to any one jurisdiction. Crowder v. Commonwealth, 213 Va. 151, 153, 191 S.E.2d 239, 240 (1972). However, the execution of any such warrant is entirely at the discretion of the Superintendent of State Police, and "no officer shall execute [such warrant] in any case where it will in any way interfere with, delay or hinder him in the discharge of his official duties." Section 52-22.

B. Without a Warrant

1. Probable Cause

a. Introduction

In addition to requiring that warrants shall be issued only on probable cause, the Fourth Amendment also forbids "unreasonable" searches and seizures. U.S. Const. Amend. IV. Since the requirements for warrantless searches and seizures "surely cannot be less stringent" than when a warrant is obtained, probable cause is also generally required in such circumstances. Wong Sun v. United States, 371 U.S. 471, 479 (1963).

The search and seizure provision of the Fourth Amendment protects against arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of the individual. Immigration & Naturalization Service v. Delgado, 466 U.S. 210, 215 (1984) [quoting U.S. v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)].

Although "[m]aximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest," the Supreme Court has expressly rejected that position, saying "such a requirement would constitute an intolerable handicap for legitimate law enforcement." Gerstein v. Pugh, 420 U.S. 103, 113 (1975). Accordingly, in 1976, the court endorsed the common law rule that police are authorized to make a warrantless arrest in public on probable cause that a felony has been committed by the person arrested, even though the arresting officer may have had ample time to obtain a warrant. United States v. Watson, 423 U.S. 411, 423 (1976); see also Crowder v. Commonwealth, 213 Va. 151, 191 S.E.2d 239 (1972). Additionally, an officer may make a warrantless arrest for a misdemeanor, if it was committed in his presence and the officer acted in good faith and with reasonable belief in the validity of the arrest. DeChene v. Smallwood, 226 Va. 475, 480, 311 S.E.2d 749, 751 (1984). If the misdemeanor was not committed in the officer's presence, he may not arrest the suspect

without obtaining a warrant. Durant v. City of Suffolk, 4 Va. App. 445, 448, 358 S.E.2d 732, 734 (1987).

Once the police officer has made an arrest based on his on-the-street evaluation of probable cause, "the Fourth Amendment requires a [subsequent] judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Gerstein, 420 U.S. at 113-14. Alternatively, of course, the arresting officer may obtain a warrant in advance from a neutral and detached magistrate upon showing of probable cause, "supported by oath or affirmation and particularly describing . . . the persons . . . to be seized." U.S. Const. Amends. IV and XIV; see also Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); United States v. Leon, 468 U.S. 897 (1984), reh. denied, 468 U.S. 1250 (1984).

In either situation probable cause requires more than a "mere suspicion." Henry v. United States, 361 U.S. 98, 101 (1959). In addition, the standards for determining probable cause for a warrantless arrest are at least as strict as those applied to a magistrate's decision as to whether a warrant should issue. Washington v. Commonwealth, 219 Va. 857, 862, 252 S.E.2d 326, 329 (1979); see also Smith v. Ohio, 494 U.S. , 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990); Whitely v. Warden, 401 U.S. 560, 566 (1971); Beck v. Ohio, 379 U.S. 89, 96 (1964); McKoy v. Commonwealth, 212 Va. 224, 183 S.E.2d 153, 155 (1971); Wong Sun v. United States, 371 U.S. 471, 479-80 (1963).

b. Probable Cause Defined

Probable cause exists where the facts and circumstances within the police officer's knowledge, which are based on reasonably trustworthy information, are sufficient in and of themselves to warrant a man of reasonable caution to believe that a crime has been or is being committed. Brinegar v. United

States, 338 U.S. 160, 175-76 (1949). A police officer making a warrantless arrest (like a magistrate issuing a warrant) determines whether probable cause exists by a practical assessment of the totality of the circumstances. United States v. Hummer, 916 F.2d 186 (4th Cir. 1990); United States v. Garcia, 848 F.2d 58, 60 (4th Cir. 1988) [citing Illinois v. Gates, 462 U.S. 213, 230-31 (1983)].

A later acquittal of the accused or dismissal of the charges is irrelevant to the question whether probable cause existed at the time of arrest. See Michigan v. DeFillippo, 443 U.S. 31, 37-38 (1979); Smith v. Swoope, 351 F. Supp. 159 (W.D. Va. 1972).

Probable cause may be established in a variety of ways; for example:

(1) by the arresting officer's own observation of the suspect's actions, United States v. Raborn, 872 F.2d 589, 593 (5th Cir. 1989);

(2) by the totality of the circumstances, Lansdown v. Commonwealth, 226 Va. 204, 212, 308 S.E.2d 106, cert. denied, 465 U.S. 1104 (1983) (where probable cause was based upon the officer's discovery of a stolen credit card in the defendant's shirt pocket after defendant had evaded police pursuit at high speed); and

(3) by information provided by an informant, which may be the most troublesome situation for the court to evaluate. See Illinois v. Gates, 462 U.S. 213 (1983) (where the Court established the totality of the circumstances test, i.e., the magistrate must simply make a practical decision whether, given all the circumstances including the veracity and basis of knowledge of person supplying hearsay information, probable cause exists to issue a warrant).

The Virginia Supreme Court has adopted generally the "totality of the circumstances" test

announced in Gates. See Garza v. Commonwealth, 228 Va. 559, 563, 323 S.E.2d 127, 129 (1984) (where the magistrate issued an arrest warrant based on the arresting officer's affidavit containing factual allegations within the officer's own knowledge from which the magistrate could reasonably find probable cause).

c. Examples of Probable Cause Established

(1) Where the police knew that a burglary had taken place, that a dark blue Valiant with North Carolina license plates had been placed at the scene at the time of the burglary, that ten minutes later a dark blue Valiant with North Carolina license plate LD6422 arrived at the home of a known fence, that the defendant who was driving the Valiant and was known to the police and suspected of other burglaries visited the fence for a short time, the police had probable cause to arrest the occupants of the Valiant. Schaum v. Commonwealth, 215 Va. 498, 211 S.E.2d 73, 75 (1975).

(2) Where the victim who was "bleeding profusely from a wound on his head, the blood on his face, the back of his neck, and his clothes," told police that, at a specific address he had been hit on his head with an object by a man named Fuller, and that a woman might be dead at the same address, police had "reasonable ground to believe that a felony had been committed...." Fuller v. Commonwealth, 201 Va. 724, 113 S.E.2d 667, 668, 671 (1960). The arrest of the defendant without a warrant was supported by probable cause and was therefore lawful. Id. at 671.

(3) Where the defendant was described by the rape victim as wearing a knit shirt and wide leather watchband, where the defendant was last seen with another participant in the rape who was positively identified by the victim, and where the defendant wearing such shirt and watchband gave a contradictory alibi to arresting officers, probable cause

existed for a warrantless arrest. Jones v. Superintendent, Va. State Farm, 360 F. Supp. 575, 578 (W.D. Va. 1973).

(4) Where a Detroit ordinance was subsequently found to be invalid on vagueness grounds, the arresting officer had probable cause to make a warrantless arrest for an observed violation of a presumptively valid ordinance. Michigan v. DeFillippo, 443 U.S. 31 (1979). The court in DeFillippo defined the issue as whether probable cause was lacking "simply because he should have known the ordinance was invalid and would be... judicially declared unconstitutional. The answer is clearly negative." Id. See also United States v. Le Fevre, 685 F.2d 897 (4th Cir. 1982).

(5) Where an officer issuing a speeding ticket noticed items in the car, in plain view, that had earlier that night been reported stolen, and then recognized that the occupants of the car fit the description of the suspects given by the victim, the officer had probable cause for a warrantless arrest (and probable cause for seizure of the items incident to the lawful arrest). Colorado v. Bannister, 449 U.S. 1, 3 (1980).

(6) Where officer had reasonable suspicion to conduct a Terry stop based on defendant's approach to a remote drop site where an extortion drop was scheduled to occur at approximately the same time and defendant veered away upon observing the officer and during the stop defendant made several suspicious statements and was wearing clothing similar to that worn by the individual previously observed fleeing from the officers, they had probable cause to arrest. United States v. Hummer, supra at 190.

d. Examples of Probable Cause Not Established

(1) Where the only information received was the informer's assertion that there were all sorts of gambling devices downstairs, and

where the officers made no attempt to establish informant's reliability, the police had no probable cause to believe that a crime was being committed. See Recznir v. City of Lorain, 393 U.S. 166, 169 (1968). But see Adams v. Williams, 407 U.S. 143 (1972).

(2) "Information from anonymous informants, or from those whose identity or reliability is unknown, or from informants who are known to be unreliable, may not of itself furnish a basis of probable cause for arrest. Such information, though it has within itself no badge of trustworthiness, may, however, form a basis of probable cause for arrest if it is corroborated in essential particulars or is verified in essential part by investigation before arrest." Katz v. Peyton, 334 F.2d 77, 78 (4th Cir. 1964), cert. denied, 379 U.S. 915 (1965), reh'g denied, 379 U.S. 984 (1965). See also Alabama v. White, 496 U.S. ___, 110 S. Ct. 2412 (1990).

(3) Where the arresting officer had never before observed the defendant behaving wrongfully, and the officer's brief surveillance of defendant's conduct revealed only that defendant walked toward several passenger lines at a bus terminal, the officer lacked probable cause for arrest on pickpocket charges. Moss v. Cox, 311 F. Supp. 1245, 1250-51 (E.D. Va. 1970).

(4) Where FBI agents investigating the theft and interstate shipment of whiskey were informed by an employer of one Pierotti, a friend of the defendant, that Pierotti was implicated with the interstate shipments, and where such agents subsequently observed, twice from 300 feet, Pierotti and the defendant leave a bar, get into a car, stop in an alley, go into a gangway leading into residential premises, return with several cartons and drive away; such agents did not have probable cause to arrest. Henry v. United States, 361 U.S. 98, 103-04 (1959).

The informant "never went so far as to tell the agent that he suspected Pierotti of any such thefts." Id. at 99. The Court deemed all of the defendant's acts overtly innocent, without the "mark of a fleeing man." Id. at 103.

(5) Where the arresting officer knew what the defendant looked like and carried a police picture and where such officer knew that the defendant had a criminal record of offenses connected with the crime for which he was arrested, no probable cause existed for the warrantless arrest. Beck v. Ohio, 379 U.S. 89, 93, 97 (1964). To hold that knowledge of either or both of the defendants' physical appearance or criminal record constituted probable cause "would be to hold that anyone with a previous criminal record could be arrested at will." Id. at 97.

2. Virginia Provisions for Warrantless Arrests

In addition to the constitutional requirements, § 19.2-82, Code of Virginia (1950, as amended) allows a uniformed police officer to arrest without a warrant, but such person arrested without a warrant "shall be brought forthwith before a magistrate or other issuing authority having jurisdiction who shall proceed to examine the officer making the arrest under oath." If the magistrate finds lawful probable cause to believe that a criminal offense has been committed, and that the person arrested has committed such offense, he shall issue either a warrant under the provision of § 19.2-72 or a summons under the provision of § 19.2-73."

Despite the requirement that the person arrested "be brought forthwith before a magistrate," delay does not necessitate reversal of a conviction unless that delay results in the loss of exculpatory evidence. Section 19.2-82 is a procedural requirement, not a constitutional one. Frye v. Commonwealth, 231 Va. 370, 376, 345 S.E.2d 267, 273 (1986).

In 1984, § 19.2-82 was amended to allow the term "brought before a magistrate or other issuing authority" to include appearance before such authority via two-way video or audio communication. Id.

Under § 19.2-81, an officer may make a warrantless arrest in the following situations:

a. when any person commits any crime in the presence of such officer.

b. when such officer has "reasonable grounds or probable cause to suspect [any person] of having committed a felony not in his presence."

c. upon reasonable grounds to believe, based on personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, an officer may arrest such person without warrant:

(1) at the scene of any accident involving a motor vehicle, watercraft, or motorboat. A police officer has authority to make a warrantless arrest for a motor vehicle misdemeanor committed out of his presence only if the arrest is made at the scene of the accident. Thomas v. Town of Marion, 226 Va. 251, 254, 308 S.E.2d 120, 122 (1983).

(2) at any hospital or medical facility to which any person involved in such accident has been transported. The term "any hospital or medical facility" has been interpreted to include all such facilities within the Commonwealth of Virginia. Opinion of the Attorney General (1986-1987) at 177 to the Hon. Robert E. Maxey, Jr., Sheriff of Campbell County (July 18, 1986). Such an arrest in a hospital is not limited to crimes committed in the arresting officer's presence. Paige v. City of Lynchburg, 10 Va. App. 162, 390 S.E.2d 524 (1990). See, e.g., Duck v. Commonwealth, 8 Va. App. 567, 383 S.E.2d 746 (1989) (fleeing suspect brought back and arrested for DUI at scene of accident) (conviction reversed on other grounds).

(3) in the apprehension of any person charged with the theft of any motor vehicle on any of the highways or waters of the Commonwealth.

- d. when any person is charged with a crime in another jurisdiction, upon receipt by such officer of a photocopy of a warrant, a telegram, a computer printout, a facsimile printout, or a radio, telephone or teletype message which [any of the above] gives the name or a reasonably accurate description of the person wanted, and the crime alleged.
- e. when such officer receives a radio message from his department or another law enforcement agency within the Commonwealth that a warrant for an alleged misdemeanor (not committed in his presence) is on file.
- f. when an alleged misdemeanor (not committed in the officer's presence) involves shoplifting (as prohibited by §§ 18.2-96 and 18.2-103), and a "reasonable complaint of the person who observed the alleged offense" gives probable cause for the arrest.
- g. for assault and battery when the officer has probable cause to arrest based upon the reasonable complaint of the person who observed the alleged offense.
- h. under § 46.2-882, when such officer has observed the registration of the speed of a motor vehicle by radar (or other electrical or microcomputer device), or when such officer has received a radio message from another officer who observed the registration of speed by radar; provided, however, that:

(1) the arresting officer is in uniform and displays his badge of authority.

(2) if the arrest is based on a radio message from another officer, then such radio message must have been dispatched immediately after the speed of the motor vehicle was registered, and it must have furnished the license number or other positive identifica-

tion of the vehicle and the registered speed.
Section 46.2-882.

- i. when any person certified for admission to a hospital but still in custody of a sheriff (or other person) escapes from custody [see § 37.1-75], or when any person involuntarily confined in any hospital escapes therefrom [see § 37.1-76]; provided that:
 - (1) a warrant has been issued under § 37.1-75 or § 37.1-76, and
 - (2) the arresting officer has been advised of such warrant by telegram, radio or teletype message, which message contains the name of the person wanted, directions for the disposition of the person apprehended, and a statement of the basis for the issuance of the warrant. Va Code Ann. § 37.1-77 (1990).
- j. by a written statement by a probation and parole officer setting forth that the parolee has, in the judgment of the officer, violated the conditions of his parole. Such arrest may be made by any probation and parole officer, or by any other officer with power of arrest deputized by a probation and parole officer. Section 53.1-162.
- k. by a correctional officer, as defined in § 53.1-1 [the arrest being made "in the same manner as provided in § 19.2-81"], for crimes involving:
 - (1) the escape of an inmate from a correctional institution. Section 19.2-81.1(a).
 - (2) assisting an inmate to escape from a correctional institution. Id. at § 19.2-81.1(b).
 - (3) delivery of contraband to an inmate in violation of § 18.2-474 or § 18.2-474.1. Id. at § 19.2-81.1(c).
 - (4) the commission of any offense which may contribute to the disruption of the safety,

welfare, or security of the population of a correctional institution. Id. at § 19.2-81.1(d).

1. when any person is found violating any of the fish or shellfish laws [see Title 28.1, generally], which arrest may be made by:
 - (1) the commissioner or any member of the Marine Resources Commission,
 - (2) all inspectors,
 - (3) police captains of boats, or
 - (4) other employees in the service designated by the Commissioner. Section 28.1-185.
- m. by any inspector of the Marine Resources Commission when any person commits in his presence:
 - (1) any larceny "upon or adjacent to the waters of the Commonwealth." Section 28.1-185.1(i).
 - (2) any violation of the provisions of the motorboats and water safety laws of Virginia [Title 62.1, Chapter 17, § 62.1-166 to § 62.1-186.24] (or any regulations pursuant thereto). Id. at § 28.1-185.1(ii).
 - (3) any violation of the "Protection of Aids to Navigation" [Title 62.1, Chapter 18, §§ 62.1-187 to 62.1-189]. Id. at § 28.1-185.1-(iii).
- n. when any person appears to the officer(s) of election to be hindering or tampering in any way with the voters "so as to prevent the casting of a secret ballot," provided, however, that such person, upon order by such election officer(s) to cease, has refused to desist; which arrest may be made by any person authorized by law to make arrests who has been ordered to do so "by the officers of election, or a majority of them." Section 24.1-104.

- o. when any person "conduct[s] himself in a noisy, riotous, or tumultuous manner at or about the polls, so as to disturb the election or insult or abuse an officer of election," any person authorized to make arrests may arrest him and bring him before the officers of the election, who may, "by warrant under their hands," commit him to jail for a period not exceeding 24 hours. Id.
- p. when a person is found "in the act of violating" any provisions of the hunting, trapping and inland fish laws. Section 29.1-205. Such arrest may be made by "all game wardens." Id. Sheriffs, sergeants, policemen and other peace officers of the state are ex officio game wardens. Id. at § 29.1-202.

C. With a Summons

Warrants and summons are generally alternate forms of arrest process. Report of the Attorney General (1977-1978) at 497.

1. Who may issue a summons

"[T]he magistrate or other issuing authority having jurisdiction may issue a summons instead of a warrant when there is reason to believe that the person charged will appear in the court having jurisdiction over the trial of the offense charged." Section 19.2-73.

For certain misdemeanor offenses (including traffic offenses), arresting officers, special policemen of the counties (as provided in § 15.1-144) and special policemen or conservators of the peace (as provided in §§ 19.2-12 to 19.2-25) may issue summonses pursuant to § 19.2-74. [See discussion of § 19.2-74 under section II(C)(2)(c) below] and §§ 46.1-178 and 46.1-179 [See discussion of these sections in II(C)(2), *infra*].

2. When a summons may be issued

Sections 19.2-73, 19.2-74, 46.1-179 and 46.1-179, provide for the issuance of summons in the following situations:

(a) Upon Complaint From Certain Officials

The magistrate or other authorized official [See Section II(C)(1) above] may issue a summons instead of a warrant "in any case involving complaints made by any State or local governmental official or employee having responsibility for the enforcement of any statute, ordinance or administrative regulation . . ." Va. Code Ann. § 19.2-73 (1983). However, the issuing official must have reason to believe the person charged will make his required court appearance. Id.

(b) In Any Misdemeanor Case - Magistrate Issues

The magistrate or other authorized official [See Section II(C)(1) above] may issue a summons instead of a warrant "[i]n any misdemeanor case or in any class of misdemeanor cases" when there is "reason to believe that the person charged will appear" at the designated place and time. Section 19.2-73. See id. at § 19.2-128 for penalties for failure to appear.

(c) Misdemeanors - Issued by Arresting Officer
(Procedure differs if no possibility of jail sentence.)

An arresting officer shall issue a summons (or otherwise notify the accused in writing) to appear at a time and place specified whenever any person is detained by or in the custody of an arresting officer for the following:

(1) a violation of any county, city or town ordinance, or any provision of the Code punishable as a Class 1 or Class 2 misdemeanor, or any other misdemeanor for which the accused may receive a jail sentence, except as otherwise provided in Title 46.1 of the Code (Motor Vehicles) or in § 18.2-266 (driving while intoxicated). Section 19.2-74(A)(1).

(2) "an arrest on a warrant charging an offense for which a summons may be issued...

when specifically authorized by the judicial officer issuing the warrant." Id.

(3) a violation of any county, city or town ordinance, or any provision of the Code punishable as a Class 3 or Class 4 misdemeanor or any other misdemeanor for which the accused cannot receive a jail sentence, except as otherwise provided in Title 46.2 of the Code or in § 18.2-388 (public drunkenness). Section 19.2-74(A)(2).

Anything in this subsection to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, then such person should be brought forthwith before a magistrate, and the procedure for warrantless arrest, pursuant to § 19.2-82 should be followed. Section 19.2-74 (A)(1).

NOTE: "Whenever" means "at whatever time," rather than "in any case." Funkhouser v. Spahr, 102 Va. 306, 310, 46 S.E. 378, 379 (1904); Report of the Attorney General (1977-1978) at 121. Therefore, this section of the Code (§ 19.2-74) "does not prohibit the issuance of a summons in lieu of a warrant simply because a period of time elapsed between the officer's cognizance of the offense and the subsequent detention of the accused." Id.

3. Contents of the Summons

The Rules of the Supreme Court of Virginia provide that the summons shall:

(a) name the accused or describe him so he can be identified with "reasonable certainty";

(b) describe the offense charged, specifying whether it is a violation of state, county, city or town law. See Williams v. City of Petersburg, 216 Va. 297, 302, 217 S.E.2d 893, 897 (1975) ["[M]is-

recital [of offenses] does not invalidate the conviction."));

(c) "command the accused to appear at a stated time and place before a court of appropriate jurisdiction, in the county, city or town in which the summons is issued"; and

(d) be signed by either the magistrate or the law enforcement officer, as the case may be. Va. S. Ct. R. 3A:4(b).

4. Disposition of the Accused

Significantly, when the offense is one for which a jail sentence is possible [as described in § 19.2-74(A)(1)], the arresting officer may, in his discretion, decide not to issue a summons and, instead bring the accused before a magistrate. Section 19.2-74(A)(1) (Paragraph 2). In contrast, § 19.2-74 provides no such discretion when the offense is one for which no jail sentence is possible [as described in Code § 19.2-74 (A)(2)]. In such offenses, "the arresting officer shall take the name and address of such person and issue a summons." If the accused gives a written promise to appear at the time and place specified, "the officer shall forthwith release him from custody." Id. at § 19.2-74(A)(2). However, the statute allows the officer to take the accused before a magistrate if he reasonably believes that the accused is likely to disregard the summons or to do injury to himself or others. Id. at § 19.2-74(A)(1).

In addition to excepting ("as otherwise provided") Title 46.2 (Motor Vehicles), § 19.2-74 specifically excepts the offense of public drunkenness, as defined in § 18.2-388. Section 19.2-74(A)(2). In an arrest for a violation, there is no need for a warrant, unless the arrested person requests that the charges be written in the form of a warrant. Id. at § 16.1-129.1. Section 19.2-74 controls the procedure for arrest for public drunkenness or profanity; therefore, the arresting officer may issue a summons to the accused rather than taking him into custody. See Report of the Attorney General (1980-81) at 14. Since the present §

19.2-74 (A)(1) gives an officer discretion to issue a summons or bring the accused before a magistrate when the officer believes the person is likely to disregard a summons or to harm himself or others, then a person charged with public profanity or drunkenness may be arrested and incarcerated for that offense if necessary. Id.

However, in all the above situations, when the arresting officer issues a summons and releases the accused from custody, the person arrested must, as a condition of his release, make a "written promise to appear at [the specified] time and place." Section 19.2-74(A)(1),(2). If such person refuses to give this written promise to appear, he "shall be taken immediately by the arresting officer or other police officer before a magistrate or other issuing authority having jurisdiction, who shall proceed according to the provisions of § 19.2-82 [procedure upon arrest without a warrant]. Id. at § 19.2-74(A)(3). Alternatively, if such person gives his written promise, but later "willfully violates" this promise, he shall be subject to the penalties of § 19.2-128 [guilty of a Class 1 misdemeanor in addition to original charge and possible forfeiture of pledged security]. Id. at § 19.2-74(A)(3).

However, when "any person [is] charged with committing any violation of § 18.2-407... [which proscribes riot or unlawful assembly, he] may be arrested and immediately brought before a magistrate who shall proceed as provided in § 19.2-82 [procedure upon arrest without a warrant]." Id. at § 19.2-74 (A)(3).

5. Execution of the Summons

An officer may execute within his jurisdiction a summons issued anywhere in the State by delivering a copy of the summons to the accused personally. Section 19.2-76.

6. Return of the Summons

After execution of the summons, the officer shall "make return" thereof by endorsing the date of execution onto the summons and returning the sum-

mons to the Court to which the summons is returnable. Id.

7. Failure to Comply With Summons

When a summons has been issued by a magistrate pursuant to § 19.2-73, failure to appear, after service of the summons, at the proper time and place will result in the penalties of § 19.2-128. Id. at § 19.2-73. One who willfully fails to appear shall be guilty of a Class 1 misdemeanor. Id. at § 19.2-128(B). Such person may also forfeit any security given or pledged for his release. Id. at § 19.2-128(A).

When the accused has been notified of a summons pursuant to § 19.2-73.1 and fails to appear, "then the... summons shall be executed and returned as provided by § 19.2-76 [execution and return of warrant or summons]. Id. at § 19.2-73.

For parking violation summonses, "[n]o proceedings for contempt or arrest of a person summoned by mailing shall be instituted for his failure to appear...." Id. at § 19.2-76.2.

D. Motor Vehicle Violations

1. Issuance of Summons

Whenever an officer detains an individual for a motor vehicle violation punishable as a misdemeanor or traffic infraction (contained in Title 46.2 or parallel local ordinance), the arresting officer shall issue a summons or otherwise notify the detainee in writing to appear at a specified time and place. Section 46.2-936. However, § 46.2-940 provides three exceptions to this general rule. [See Section II (D)(2) below.]

Section 46.2-936 also applies to arrests on a warrant. It allows an arrest warrant for a misdemeanor violation of the motor vehicle laws to be executed by the issuance of a summons. In contrast, § 19.2-74 permits an arresting officer to execute an arrest warrant by issuance of a summons only when the offense is one "for which a summons may be issued, and when specifically authorized by

the judicial officer issuing the warrant...."
Section 19.2-74(A)(1).

The summons shall specify a time for appearance "at least 5 days after the arrest..." unless the individual arrested demands an earlier hearing. Id. at § 46.2-936. That individual has a "right to an immediate hearing or a hearing within 24 hours at a convenient hour" and before the appropriate court in the county, city or town wherein the offense was committed. Id.

Section 46.2-945 provides for the acceptance of a motorist's written promise to appear at trial in lieu of bond when the motorist is either a Virginia resident or holds a valid driver's license from a party jurisdiction, i.e., "any jurisdiction which by its laws or written agreement with this State extends to residents of Virginia substantially the rights and privileges provided by this article." Id. at § 46.2-945(A). These qualified motorists shall receive a citation for all traffic violations unless they are accused of either:

(a) an offense for which, generally, issuance of a citation in lieu of either hearing or posting bond or collateral is prohibited by law, or

(b) an offense for which a conviction or forfeiture of collateral requires revocation of the driver's license. Id. at § 46.2-945(C).

2. Disposition of the Accused

Once the arrested person has given his written promise to appear at the specified time and place, the officer must "forthwith release him from custody." Id. at § 46.2-936. If, however, the arrested person refuses to make this written promise, the arresting officer or another officer shall take him "immediately . . . before a magistrate or other issuing officer having jurisdiction," who shall proceed according to" § 46.2-940. Similarly, § 46.2-945 provides that when a Virginia resident or a resident of a party jurisdiction refuses to give his written promise, "the officer shall proceed according to the provisions of § 46.2-940."

In contrast, when a motorist requests "to post collateral or bond in a manner provided by law," as is his right, no written promise to appear need be made. Section 46.2-945(A).

If the arresting officer believes that the accused either committed a felony, is likely to disregard a summons, or the accused refused to give his written promise to appear, the officer shall take the accused before a magistrate instead of releasing him from custody with a summons. Id. at § 46.2-940. In these instances, the magistrate (or other issuing authority) shall determine whether probable cause exists to believe the accused is likely to ignore the summons and may then issue either a summons or warrant as he shall see fit. Id.

3. Nonresident Motorist Statute

Traffic infractions are treated as non-jailable misdemeanors for arrest purposes. See Report of the Attorney General (1980-81) at 265. However, § 19.2-74, setting forth the procedures for the issuance of a summons in place of a warrant in misdemeanor cases, specifically excepts misdemeanors otherwise provided for in Title 46.2. § 19.2-74(A)(1),(2). Sections 46.2-936 and 940 generally track the provisions in § 19.2-74. Both require a written promise to appear (signature on the summons). As § 46.2-945 applies to both Virginia residents and residents of party jurisdictions, §§ 46.2-936 and 940 must then apply to nonresident motorists from non-party jurisdictions.

Accordingly, § 46.2-936 authorizes the arresting officer to bring the nonresident motorist from a non-party jurisdiction before a magistrate when he has refused to sign the summons. Furthermore, § 46.2-940 authorizes the arresting officer to bring the nonresident motorist from a non-party jurisdiction before a magistrate when the officer believes that the nonresident is likely to disregard the summons. Finally, no provision is made for the nonresident (non-party resident) motorist to post collateral or bond and to avoid the magistrate's hearing. See generally §§ 46.2-936, 940, 945. However, as previously discussed, the magis-

trate must first determine whether probable cause supports the officer's belief that the motorist is likely to disregard a summons and then issue either a summons or warrant as appropriate. Id. at § 46.2-940.

4. Failure to Comply with Summons

a. Issuance of Warrant

When the summoned motorist fails to comply with his promise to appear at the specified time and place, he shall be guilty of a Class 1 misdemeanor, and the court may order a warrant for his arrest. Id. at § 46.2-938.

When any motorist fails to comply with the terms of a traffic citation, the police officer or other official "shall report this fact to the Division of Motor Vehicles." Id. at § 46.2-945(D). This section does not provide for the issuance of an arrest warrant in the case of nonresidents. Id. The report to the DMV must "clearly identify the motorist, describe the violation, including the section of the statute, code or ordinance violated, indicate the location of the offense, give description of the vehicle involved, and show the registration or license number of the vehicle." It must be signed by the police officer or other official. Id. at § 46.2-945(D).

b. Return of Warrant

"The warrant shall be returnable to the court having jurisdiction of the offense" and the officer shall include a report which clearly identifies the person arrested, specifies the code section or ordinance violated, specifies the location of the offense, and describes the motor vehicle and its registration number. Id. at § 46.2-938.

c. Suspension of License

If the warrant is returned with the notation "not found" or the person named on the war-

rant fails to appear on the return date, the court shall send a certificate of non-service or nonappearance with the officer's report (above) to the Commissioner of the DMV "who shall forthwith suspend the operator's or chauffeur's license of such person." Id. at § 46.2-938. The suspension order shall specify the reason for the suspension, and the suspension shall continue until the accused appears before the court and the Commissioner is notified thereof. Id.

5. Parking Violations

Conditions Precedent to Issuance of Summons:

Before a summons shall issue for county, city or town parking ordinances, (1) "the violator shall have been first notified by mail at his last known address [or the address on record at the DMV] that he may pay the fine... within five days of receipt of notice," and (2) the officer who issued the ticket "shall be notified that the violator has failed to pay such fine within such time." Id. at § 46.2-941.

6. Driving While Intoxicated (This topic is dealt with in another chapter in the Commonwealth's Attorney's Handbook). Driving while intoxication is a Class I misdemeanor offense.

III. CONSEQUENCES OF AN ILLEGAL ARREST

An arrest executed without a valid warrant or sufficient probable cause violates the Fourth Amendment and is illegal.

A. No Bar to Prosecution

The United States Supreme Court has repeatedly held that an illegal arrest will not bar a subsequent prosecution nor invalidate an otherwise valid prosecution. United States v. Crews, 445 U.S. 463, 474 (1980); see also Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 444 (1886).

B. Exclusionary Rule

An illegal arrest will, however, operate to exclude evidence obtained from the defendant in any search resulting from that arrest. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

The United States Supreme Court first set forth the exclusionary rule for violations of the Fourth Amendment in Weeks v. United States, 232 U.S. 383, 398 (1914). In Weeks, the Court held that the Fourth Amendment bars the use of evidence secured through an illegal search or seizure in federal prosecutions. Id. at 398. The Court thereafter extended the exclusionary rule to all state violations of the Fourth Amendment because the "Fourth Amendment's right of privacy [is] enforceable against the states through the Due Process clause of the Fourteenth [Amendment]...." Mapp, 367 U.S. at 655.

But, in a kind of exception to the general exclusionary rule, the U.S. Supreme Court has held that the exclusionary rule should not be applied to bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate later found to be invalid in the prosecution's case-in-chief. United States v. Leon, 468 U.S. 897, 905 (1984). On the same day, the court held that a police officer is not required to disbelieve a judge who has just advised him that the warrant he possesses now authorizes him to conduct the search he has requested. Massachusetts v. Sheppard, 468 U.S. 981, 989-90 (1984) (where clerical changes were made by the court on a defective warrant form); see also McCary v. Commonwealth, 228 Va. 219, 232, 321 S.E.2d 637, 644 (1984) (embracing the "good faith" exception to the exclusionary rule as announced in Leon and Sheppard). The Supreme Court held in New York v. Harris, 110 S. Ct. 1640 (1990) that where the police have probable cause to arrest, the exclusionary rule does not bar the use of a statement made by the suspect outside his home, even though it was made after a warrantless and nonconsensual entry into his home.

In Thompson v. Commonwealth, 10 Va. App. 117, 390 S.E.2d 198 (1990), the Court of Appeals of Virginia held that when defendant is arrested for a misdemeanor in violation of § 19.2-81, a confession made during that period of an invalid arrest is admissible and that Virginia has not adopted the exclusionary rule for

violations of state law when no constitutional violation exists.

IV. TERRY STOP AND FRISK

A. In General

A "seizure" may also occur when a police officer does something less than formally arrest an individual. Terry v. Ohio, 392 U.S. 1 (1968). The U. S. Supreme Court recognizes a "seizure" only if a police officer restrains an individual's freedom to walk away by physical force, however slight, or a show of authority and that individual submits to such show of authority. California v. Hodari, ___ U.S. ___ (No. 89-1632) (Apr. 23, 1991). The Court has enunciated an objective test to determine whether a seizure has occurred - whether a reasonable person in these circumstances would feel free to leave, United States v. Mendenhall, 446 U.S. 544, 554, reh'g denied, 448 U.S. 908 (1980); however, satisfaction of this standard is only a necessary, but not sufficient, condition for seizure effected by a show of authority. Hodari, supra.

B. A Reasonable and Articulable Suspicion

1. Generally

In Terry, the Supreme Court approved limited investigative stops if based on a reasonable and articulable suspicion that "criminal activity may be afoot." Id. at 30. A Terry stop takes place "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Id. at 19.

For the investigatory stop to be reasonable and thus constitutional, it must be based upon a reasonable belief, supported by "specific and articulable facts" that the person stopped is or is about to be engaged in criminal activity. Id. In addition, the officer must identify himself and make reasonable inquiries.

At this point, if the officer believes the individual is "armed and presently dangerous" and if nothing "dispels his reasonable fear for his own or others safety" the officer may make a "carefully limited search of the outer clothing [patdown] to discover

weapons which might be used against him." Id. at 30. The search must be circumscribed by the exigencies which justify its initiation. Id. at 26. The suspicion of narcotics possession and distribution gives rise to an inference of dangerousness; it is not unreasonable to suspect that a dealer in narcotics might be armed. Dixon v. Commonwealth, 11 Va. App. ___, 399 S.E.2d 831 (1991). However, the officer may do no more than search the outer clothing for weapons; he may not seize or search objects which are not weapons or can not contain weapons. Harris v. Commonwealth, 241 Va. 146, 400 S.E.2d 191 (1991) (invalid search and seizure of a film canister containing cocaine during a Terry stop).

To illustrate: Terry involved a Cleveland detective who, while patrolling his customary beat during the early morning hours, observed two men standing on a street corner. As the detective watched, these men travelled back and forth in front of a store window about twenty-four times and periodically conferred with a third man at the corner. Based on his experience, the detective suspected that these men were casing the store. The detective approached these men, identified himself and asked their names. Terry mumbled a response. The detective spun him around, did a quick patdown, and found a gun. At that point, the detective ordered all three men into the store, removed Terry's gun, and conducted a patdown of the other two. All three were then arrested and taken to the station.

A "reasonable and articulable suspicion" of criminal activity may arise in a variety of circumstances, but it must be based on objective facts. Brown v. Texas, 443 U.S. 47, 51 (1979). In Terry, the detaining officer himself observed the suspicious behavior. However, the information upon which the officer bases his "reasonable suspicion" need not necessarily arise from his personal knowledge. In Adams v. Williams, 407 U.S. 143 (1972), the officer was tipped off by an informant that the suspect was carrying narcotics and a gun. An officer may also stop an individual based on a bulletin issued by other police, if it is based on articulable facts supporting a reasonable suspicion that the wanted person has committed an offense. United States v. Hensley, 469 U.S. 221, 232 (1985); Conway v. Commonwealth, 11 Va. App. 103, 397 S.E.2d 263 (1990); Servis v. Commonwealth, 6 Va. App. 507 371 S.E.2d 156 (1988).

Similarly, an investigative stop of a suspect's automobile is justified where the police already possess a search warrant for his residence which is based on probable cause. United States v. Taylor, 857 F.2d 210, 213 (4th Cir. 1988).

2. Reasonable Suspicion Established or Not

Flight from a police officer, where the suspects exhibited characteristics of a "drug courier profile," has been found to give rise to reasonable suspicion of criminal activity, justifying a Terry stop. United States v. Hays, 825 F.2d 32, 34 (4th Cir. 1987). Similarly, where the suspect reacted nervously to the officer's presence, matched a drug courier profile, and drove a Florida rental car, reasonable suspicion was found. Iglesias v. Commonwealth, 7 Va. App. 93, 107, 372 S.E.2d 170, 178 (1988); see also Castaneda v. Commonwealth, 7 Va. App. 574, 376 S.E.2d 82 (1989). Reasonable suspicion was also found to exist where an officer stopped a car that made a U-turn about 150 feet in front of a roadblock and drove off. Stroud v. Commonwealth, 6 Va. App. 633, 636, 370 S.E.2d 721 (1988); cf. Murphy v. Commonwealth, 9 Va. App. 139, 389 S.E.2d 125 (1989). (Stop unreasonable where car legally turned shortly before a roadblock).

When there had been a number of recent burglaries in the area, the defendant matched a description of the suspect, and he behaved suspiciously, the officer was justified in stopping him. Jones v. Commonwealth, 230 Va. 14, 18, 334 S.E.2d 536, 539 (1985).

If a stop was objectively reasonable, it does not matter if it was a pretext for investigating another more serious offense. The underlying intent or motivation of the officers involved is irrelevant. Limonja v. Commonwealth, 8 Va. App. 532, 537-38, 383 S.E.2d 476 (1989) (en banc), cert. denied, ___ U.S. ___, 110 S. Ct. 1925 (1990); see also Harris v. Commonwealth, ___ Va. App. ___, 6 VLR 1237 (1990).

However, when a car pulled over to the side of the road and switched drivers after seeing a police officer, the officer did not have reasonable suspicion to stop the car. Although the first driver turned out to be driving illegally, such behavior most likely demonstrates innocent, lawful conduct, not criminal activity.

Zimmerman v. Commonwealth, 234 Va. 609, 612, 363 S.E.2d 708, 709-10 (1988).

Even when the police have a sufficiently reasonable suspicion to justify stopping a suspect, before they may frisk for weapons, they must have a reasonable suspicion that the suspect is armed and presently dangerous. Mere presence in premises subject to a search warrant is insufficient. Lett v. Commonwealth, 7 Va. App. 191, 194-95, 372 S.E.2d 195, 196-97 (1988) (construing Ybarra v. Illinois, 444 U.S. 85 (1979)).

Since the Terry decision, the U.S. Supreme Court has continued to shape the nature of the limited investigative stop as to duration, place and manner.

C. Duration of Stop

The court stated the general rule in Florida v. Royer, 460 U.S. 491 (1983), holding that an investigative detention must be temporary, lasting no longer than is necessary to effectuate its purpose. Any more specific rule has been expressly rejected; moreover, stops lasting from 20 minutes to 27 hours have been approved. See United States v. Sharpe, 470 U.S. 675 (1985); United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

In Sharpe, the Supreme Court determined that a 20-minute investigative detention did not amount to a de facto arrest. "In assessing whether a detention is too long in duration to be justified as a investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to conform or dispel their suspicion quickly during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second guessing.... The question is not simply whether the other alternative was available but whether the police acted unreasonably in failing to recognize or to pursue it." Sharpe, 470 U.S. at 1575-76.

In Montoya de Hernandez, supra, the court held that a 27-hour detention of the defendant at the U.S. border

prior to arrest was a reasonable stop, because the facts were sufficient for customs agents to believe that defendant was smuggling drugs in her alimentary tract. Montoya de Hernandez, 473 U.S. at 3311.

D. Place of Detention

Terry involved an on-the-street detention, but, as the split decision in Mendenhall indicates, it is far from clear what other type of investigative stops may constitute a seizure in the context of the Fourth Amendment. One certainty has been established -- when the police detain a suspect and remove him to the police station for any reason, the investigative stop becomes a de facto arrest and must be supported by probable cause rather than a reasonable suspicion. Hayes v. Florida, 470 U.S. 811, 816 (1985); Dunaway v. New York, 442 U.S. 200, 216 (1979).

In Hayes, the court held that when police without warrant or probable cause to arrest, forcibly remove a person from his home or any other place where he is entitled to be and transport him to the police station, the investigative detention at the station for fingerprinting violates that person's rights under the Fourth Amendment. The court went on to say that seizure for the sole purpose of fingerprinting may be permissible, if there is reasonable suspicion that a suspect has committed a crime and there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with the crime, but the procedure must be carried out with dispatch, i.e., on-site. Id. In addition, the court stated that on-site fingerprinting based upon a reasonable suspicion or probable cause would be an insufficient basis for police officers to make a warrantless entry into a person's home. Id.

The Hayes decision corresponds with the holding in Dunaway v. New York, supra, where the Supreme Court held that an individual, who was picked up at a friend's house and accompanied the police to the station for interrogation, was definitely seized in the Fourth Amendment sense, even though he was not told he was officially under arrest.

In fact, a seizure can take place in any location, at any time, as long as a reasonable person would not have

believed that he was free to leave. Mendenhall, 446 U.S. at 554. One important element appears to be whether the detainee is moved from the original site of the detention to another location for additional procedures. See Mendenhall, *supra*; Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 247 Ga. 445, 276 S.E.2d 617, *cert. denied*, 454 U.S. 883 (1981); People v. Bloyd, 416 Mich. 538, 331 N.W.2d 447 (1982).

E. Manner of Detention

In determining whether an investigative stop amounts to a seizure, the courts also take into account the conduct and attitude of the detaining officer(s). Again, the issue is whether a reasonable person would have felt free to leave under these circumstances. Mendenhall, 446 U.S. at 554. However, the U. S. Supreme Court has refused to extend the definition of a seizure beyond that of an arrest; thus, "[t]here can be no arrest without either touching or submission [to an assertion of authority]." Hodari, *supra*. Examples of conduct indicating a show of authority include the threatening presence of several officers, the display of a weapon by an officer, or the use of language or tone of voice indicating that compliance might be compelled. Mendenhall, 446 U.S. at 554.

In Reid v. Georgia, *supra*, a majority of the court found an unreasonable seizure took place where a Drug Enforcement Agency agent identified himself and asked two suspects to show him their tickets and identification. He then suggested that they return to the terminal for a search and tapped one suspect on the shoulder before obtaining their consent. Cf. Mendenhall (where, in substantially the same circumstances, there was no seizure, but also no physical contact between the police officer and the suspect).

A seizure also occurred in Florida v. Royer, *supra*, where the detaining officers informed the detainee that she was suspected of being a drug courier, and then retained her driver's license and airline ticket when they asked her to accompany them to the police room at the airport. 460 U.S. at 494. In United States v. Sokolow, 490 U.S. 1 (1989), the Supreme Court found that under the circumstances test that must be applied to police decisions to stop a suspect the following observations taken together established

reasonable suspicion that criminal conduct was underway: paying \$2,100 in cash for airline tickets from a roll of \$20 bills, travelling under an alias, and the unusual circumstances of a resident of Honolulu traveling 20 hours to Miami to spend 48 hours there. The Court further held that the reasonableness of an officer's decision to stop a suspect does not turn on the availability of less intrusive investigative techniques. Id. at 10.

Finally, there have been a few cases where the United States Supreme Court has granted government officials greater scope to detain private individuals, i.e., in situations arising near national borders and those involving immigration. See United States v. Ramsey, 431 U.S. 606 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); INS v. Delgado, 466 U.S. 210 (1984).

V. COLLATERAL ISSUES

A. Entry

At common law and today, the police have always been able to make a warrantless arrest in public on probable cause that a felony has been committed by the person arrested. United States v. Watson, 423 U.S. 411, 423 (1976). In Watson, the court held further that such public arrests for felonies may be made without a warrant, even though there may have been ample time to get a warrant. Id. at 423-24. The question then became: When could a police officer enter a private dwelling in order to make a warrantless arrest?

1. Within Suspect's Dwelling

In 1980, the United States Supreme Court held that when the suspect is in his home (i.e., not in public), police may not constitutionally arrest him without first obtaining an arrest warrant. Payton v. New York, 445 U.S. 573, 590 (1980). This general rule applies to a guest occupying a motel room. See Verez v. Commonwealth, 230 Va. 405, 410, 337 S.E.2d 749, 752 (1985) [citing Stoner v. California, 376 U.S. 483, 490 (1964)].

The general rule of Payton is subject to exceptions for exigent circumstances and consensual entry. Payton, 445 U.S. at 583, 590. The gravity of the suspected offense must be considered in determining whether exigency exists sufficient to make a warrantless arrest inside the suspect's home. In Welsh v. Wisconsin, 466 U.S. 740, 753 (1984), the court held that where a person is within the privacy of his own home and a police officer has probable cause to believe he has committed a minor offense, the exigent circumstances exception should rarely be sanctioned.

In United States v. Shelten, 737 F.2d 1292, 1295 (4th Cir. 1984), the court held that "hot pursuit" justified a warrantless entry into a bank robbery suspect's apartment and his subsequent arrest there. The court determined that the exigencies of the moment (the need to preserve safety and to prevent the destruction of evidence) required the warrantless entry and arrest. Id.

In contrast, where police officers lawfully enter a private place upon consent or warrant, they are subject to the same Fourth Amendment considerations attendant to contacts between police and individuals in public places. INS v. Delgado, 466 U.S. 210, 217 n.5 (1984).

2. Within the Home of a Third Person

In 1981, the Supreme Court held that, absent exigent circumstances, police cannot use an arrest warrant alone as authority to enter the home of a third person to make the arrest; instead both an arrest warrant and a search warrant are required by the Fourth Amendment. Steagald v. United States, 451 U.S. 204, 214-15 (1981).

Two separate interests are at issue here: the accused's interest in avoiding an unreasonable seizure, and the homeowner's interest in being free from an unreasonable search of his home. Id. at 213. An arrest warrant, standing alone, protects a suspect from unreasonable seizure, but it offers no protection to a third party whose home is entered because the police believe the suspect may be inside. Id.

Further, the court reasoned that, since a warrantless search of a home is unreasonable per se and therefore unlawful (Payton, 445 U.S. at 590), there is "no reason to depart from this settled course when the search of a home is for a person rather than an object." Steagald, 451 U.S. at 214. Any contrary conclusion, the court pointed out, would permit a police officer, armed solely with an arrest warrant to "search all the homes of [the suspect's] friends and acquaintances." Id. at 215.

"Close pursuit" cases fall within the exigent circumstances exception to the warrant requirements," lest the criminal be allowed to escape by taking refuge in a third party's home. Id. at 215-16.

B. Force

The use of deadly force to prevent the escape of a fleeing felon may constitute an unreasonable seizure under the Fourth Amendment. Tennessee v. Garner, 471 U.S. 1, 11 (1985). Although a police officer may have probable cause to arrest, he must still carry out that arrest reasonably. Id. at 1699. In Garner, the Supreme Court held that "where the suspect poses no immediate threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Id. at 1701. The pursuing officer may use deadly force to seize a fleeing felon where (1) the suspect has threatened the officer with a weapon or (2) the officer has probable cause to believe the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm. Id.

The Fourth Circuit temporarily extended the logic of Garner to the use of any excessive force during an arrest. See Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985). In Kidd, the defendant alleged that in attempting to arrest him the police beat, kicked, and maced him while he was handcuffed. Id. at 1253. The Court of Appeals there held that such police conduct may constitute a deprivation of Fourth Amendment rights. Id. at 1255. The court stated that "the use of any significant force, up to and including deadly force, not reasonably necessary to effect an arrest -- as

where the suspect neither resists nor flees or where the force is used after a suspect's resistance has been overcome or his flight thwarted -- would be constitutionally unreasonable." Id. at 1256-57.

The Fourth Circuit subsequently narrowed Kidd significantly, holding that, in determining whether a particular use of force is constitutionally excessive and constitutes an unreasonable seizure, the jury should be instructed to determine whether the force "shocks the conscience," and appears to have been applied "maliciously and sadistically for the purpose of causing harm." Justice v. Dennis, 834 F.2d 380, 383 (4th Cir. 1987). However, in 1989 the Supreme Court stated that "the 'reasonableness' inquiry in an excessive force case is an objective one . . . whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989).

C. Territorial Limitations

1. General Rule

A policeman has the power to make an arrest "within his city or within one mile of its corporate limits." Moore v. Oliver, 347 F. Supp. 1313, 1316 (E.D. Va. 1972), aff'd 519 F.2d 1399 (4th Cir. 1975); see also Banks v. Bradley, 192 Va. 598, 603, 66 S.E.2d 526, 529 (1951); Va. Code Ann. § 19.2-250 (1983). A sheriff may arrest within the corporate limits of his city and within one mile thereof. Id. at § 15.1-796.

A 1978 amendment to § 19.2-250 reduced the one-mile jurisdictional extension beyond the city's corporate limits to 300 yards in the following two instances:

- a. when the town is situated in a county having a density of population in excess of 300 inhabitants per square mile, the jurisdiction shall extend 300 yards beyond the town's corporate limits; and

- b. when the county is adjacent to a city (town) having a population of 175,000 or more, the jurisdiction of the county shall extend 300 yards within the city's (town's) corporate limits. Section 19.2-250.

Beyond those statutorily established limits, the policeman's status equals "that of any other private citizen," Moore, 347 F. Supp. at 1316, with one exception. See Opinion of the Attorney General (July 8, 1986). At common law, a private citizen may arrest without a warrant in a felony case, if the felony has actually been committed and he has reasonable grounds for believing that the person arrested was the one who committed it. "Thus an officer acting as a private citizen may arrest outside his territorial limits in the same circumstances. Moore, 347 F. Supp. at 1316, [cited with approval in Tharp v. Commonwealth, 221 Va. 487, 490, 270 S.E.2d 752, 754 (1980)]. In addition, a police officer may arrest an individual who is transported to any hospital or medical facility after a traffic accident, if the officer reasonably believes that the individual committed a crime related to the accident. Va. Code Ann. § 19.2-81 (1983); Opinion of the Attorney General (July 18, 1986).

2. Fleeing Suspects and Close Pursuit

An officer is authorized to pursue "anywhere in the state" either a person who has escaped from his custody, or a person fleeing from the officer's attempt to arrest him. When such an officer is "actually in close pursuit," he may arrest the person wherever he is found. Va. Code Ann. § 19.2-77 (1983). The officer must be pursuing the suspect with the intent to arrest him. Pursuit with the intent to apprehend for questioning is insufficient. Hall v. Commonwealth, ___ Va. App. ___, 6 Va.R 1730, (1990).

"Close pursuit" has been defined as "pursuit instituted immediately and with the intent to recapture or reclaim, as where a thief is fleeing with stolen goods." Reyes v. Slayton, 331 F. Supp. 325, 327 (W.D. Va. 1971). For example, when an officer initiated an unbroken search within min-

utes of a robbery and found clues at successive intervals indicating, not only the direction of the alleged robber, but ultimately his identity, and the arrest took place about fifteen minutes after the robbery, the officer was in close pursuit. Id. Therefore, it was not fatal to the validity of the arrest that the officers made the arrest outside their statutory territorial limits. Id.

"Close pursuit" is a relative term, and factors of time and/or distance may be relevant. Callands v. Commonwealth, 208 Va. 340, 342-43, 157 S.E.2d 198, 201 (1967); Reyes, 331 F. Supp. at 327. Where pursuit began "as quickly as the officer could turn around" and the arrest took place following a one-mile chase, the officers were in close pursuit and authorized to make the arrest although beyond their normal territorial limits. Callands, 208 Va. at 345.

The Code of Virginia also provides procedures for the arrest of a fleeing suspect. Sections 19.2-76, 19.2-77 (1983). Section 19.2-77 outlines two procedures:

a. arrests made within an adjoining county or corporation from whence the accused fled; where "the officer may forthwith return the accused before the proper officials of the county or corporation from which he fled;" and

b. arrests made outside the county or adjoining county from whence the accused fled; where the officer shall proceed according to the provisions of § 19.2-76, and if the arrest were warrantless, the officer shall procure a warrant from the magistrate of the county or corporation wherein the arrest was made. Id. at § 19.2-77.

But see Tharp v. Commonwealth, 221 Va. 487, 270 S.E.2d 752, 754 (1980) (holding that an officer's "failure to take defendant before a Virginia Beach magistrate as required by § 19.2-76 was a mere procedural violation . . . which did not prejudice defendant . . . and

which did not involve an error of constitutional dimension giving rise to an application of the exclusionary rule." The court distinguished cases involving lack of probable cause to arrest, coercion, bad faith, or inordinate delay in bringing the defendant before a magistrate).

D. Extradition

The U.S. Constitution requires that any person charged with a crime who flees to another state be delivered up to the state with jurisdiction of the crime upon demand of the executive authority of the state from which he fled. U.S. Const. Art. IV, § 2, cl. 2.

Virginia has adopted the Uniform Criminal Extradition Act, See §§ 19.2-85 to 19.2-118, Code of Virginia (1950, as amended). Section 19.2-86 states that, subject to the mandates of the U.S. Constitution, the Governor of Virginia shall have arrested any person charged in any other state with treason, a felony or other crime, who has fled from justice in that state and is found in Virginia. All three elements must exist before a person may be lawfully removed from one state to another by virtue of this provision. Pierce v. Creecy, 210 U.S. 387 (1980).

1. Arrest of the Accused

Three sections of the Code of Virginia deal with the arrest of an accused for extradition purposes:

a. Section 19.2-92, Issuance of Governor's Warrant of Arrest, provides that "[i]f the Governor decides that a demand for extradition . . . should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal and be directed to [any] sheriff or sergeant . . . [or to] any peace officer or other person whom he may think fit."

b. Section 19.2-99 Arrest Prior to Requisition, provides that whenever (1) a credible person within Virginia charges the accused under oath with the commission of a crime in another state, or (2) a credible person from another state complains by affidavit to any judge, magistrate or other offi-

cer in Virginia that the accused has committed a crime in that other state, then any judge, magistrate or other officer must issue a warrant directed to any sheriff or peace officer commanding him to apprehend the person named therein, wherever he may be found in Virginia, and to bring him before any judge convenient to the place of arrest to answer the charges made.

In addition, in both situations (a) and (b), (except in cases arising under § 19.2-91), the complaint must allege (1) that the person sought has either fled from justice, escaped confinement following conviction, or broken the terms of his bail, probation or parole, and (2) that he is believed to be in Virginia.

c. Section 19.2-100 Arrest without Warrant, authorizes "any peace officer or private person" upon reasonable information to make a warrantless arrest of one who... stands charged in the courts of a state with a crime... for which the punishment is more than one year imprisonment or death. In Virginia, such a crime would be a felony by definition. See §§ 18.2-10 and 18.2-11 (1988). For example, in Mullins v. Sanders, a Kentucky warrant charging the accused with a felony was held to constitute "reasonable information" to a Virginia sheriff that the accused stood charged with a crime as required by § 19.2-100. Mullins v. Sanders, 189 Va. 624, 629-30, 54 S.E.2d 116, 118 (1949). Therefore, the warrantless arrest of the Kentucky offender by the Virginia official was protected under the statutory provisions. Id.

2. Execution of an Arrest Warrant

a. Execution of Governor's Warrant of Arrest

When an arrest warrant has been issued by the governor according to § 19.2-92, the authorized officer may arrest the accused "at any time and at any place where he may be found within the state." Section 19.2-93. Before being delivered over to the executive authority demanding him, the person arrested must be taken before a judge of a circuit or general district court in this state, who shall inform the accused of the crime with which he is

charged, the extradition demand, and his right to obtain legal counsel. Id. at § 19.2-95.

b. Arrest Prior To Requisition

When an arrest warrant has been issued by a judicial officer, per § 19.2-99, "[a] certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant." Id. at § 19.2-99. The authorized officer may arrest the accused wherever he may be found in this State. Id. After the arrest, the accused shall be brought "before any judge who may be available in or convenient of access to the place where the arrest may be made to answer the charge of complaint and affidavit." Id.

c. Arrest without warrant.

An arrest may also be made without a warrant "upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year." Id. at § 19.2-100. The accused must be taken before a judge, magistrate or other officer authorized to issue criminal warrants in this state with all practical speed...." Id. A complaint under oath must then be made against him "setting forth the ground for the arrest," which must comply with the requirements of § 19.2-99. Id. The arrested person's answer "shall [then] be heard as if he had been arrested on a warrant." Id.

E. Juveniles

1. When and How a Child May be Taken into Custody

The Code of Virginia sets forth special procedures to govern the arrest and detention of juveniles. Section 16.1-246 provides that "no child may be taken into immediate custody except:

- a. upon a warrant issued by a magistrate (see § 16.1-256);

b. with a detention order issued by a judge, the intake officer (§ 16.1-228) or the clerk of a juvenile and domestic relations district court (when authorized by a judge);

c. when it is alleged that the child (a person under 18 years of age, § 16.1-228) is "in need of services" (§ 16.1-228) and, either "there is a clear and substantial danger to the child's life or health," or custody of the child is necessary to ensure his appearance before the court;

d. when a child commits "an act designated a [federal, state or local] crime" when such act is committed in the presence of the officer who makes the arrest, if such arrest or detention is believed by the officer to be "necessary for the protection of the public interest";

e. when a child commits a misdemeanor offense involving shoplifting and "the arrest is based on probable cause on reasonable complaint of a person who observed the alleged offense";

f. when a law enforcement officer has probable cause to believe that:

(1) the child has committed an offense which if committed by an adult would be a felony;

(2) a "person committed to the Department of Youth Services as a child has run away," or that a child has escaped from a jail or detention home;

(3) the child has run away from a child-caring facility or home in which one of the following has placed him: the court, the local department of public welfare, or a licensed child welfare agency;

(4) the child has run away from home;

(5) the child is left without adult supervision "at such hours of the night and under such circumstances that the law-enforcement officer reasonably concludes that there is a

clear and substantial danger to the child's welfare"; or

g. with a temporary detention order issued under § 37.1-67.1 [involuntary detention due to mental illness] by a special justice appointed pursuant to § 37.1-88 who shall receive no fee, or by a magistrate. Section 16.1-246.

2. Issuance of Warrants

"No warrant of arrest shall be issued for any child by a magistrate, except as follows:"

a. on appeal from a decision of an intake officer refusing to authorize a petition, if the magistrate finds probable cause to believe that an offense if committed by an adult would constitute a felony or a Class I misdemeanor. Id. at § 16.1-256(1).

b. "upon a finding or probable cause to believe that the child is in need of services or is a delinquent, when the court is not open, the judge, intake officer and clerk of the juvenile and domestic relations court are not reasonably available and the criteria for detention or shelter care set forth in Code § 16.1-248 have been satisfied." "[N]ot reasonably available" means that the judge, intake officer or clerk of the juvenile court "could not be reached after the appearance by the juvenile before a magistrate or could not arrive within one hour after he was contacted." Id. at § 16.1-256(3).

3. Filing of Petitions

"All matters alleged to be within the jurisdiction of the [juvenile] court shall be commenced by the filing of a petition, except as provided in subsection (E) herein and in § 16.1-259." Section 16.2-260(A). Section 16.1-260(E) provides that a petition shall not be necessary:

a. for violations of traffic laws, including offenses involving bicycles, hitchhiking, other pedestrian offenses, violations of the game and fish laws, violations of city ordinances regula-

ting surfing, curfews or animal control laws. In such cases, the court "may proceed with a summons issued by the officer investigating the violation in the same manner as provided by law for adults." Id. at § 16.1-260(E)(1).

b. in the case of issuance of a work permit pursuant to § 16.1-241(H). Id. at § 16.1-260-(E)(2).

Once the juvenile court service unit receives a complaint or warrant alleging facts which may be sufficient to invoke the juvenile court's jurisdiction, the unit's intake officer may (1) without filing a petition, proceed informally to "make such adjustment as is practicable," and (2) authorize the filing of a petition based on any complaint sufficient to establish probable cause. Id. at § 16.1-260(B). The intake officer handles complaints, requests and processing of petitions. Further, the Commonwealth's Attorney may file a petition on his own motion. Code § 16.1-260(A). A form describing the required content of a petition is set out in § 16.1-262.

4. Issuance of Summons after Petition Filed

After a petition has been filed "the [juvenile] court shall direct the issuance of summonses . . . one directed to the child, if the child is twelve or more years of age, and another to the parents, guardian, legal custodian or other person standing in loco parentis, and such other persons as appear to the court to be proper or necessary parties." Section 16.1-263(A). In any case, "the judge may endorse upon the summons an order directing the parents [or others with custody]... to bring the child to the hearing." Id. at § 16.1-263(C). A party other than the child may waive service of summons by written stipulation or by voluntary appearance at the hearing. Id. at § 16.1-263(D).

A copy of the petition must accompany each summons for the initial proceeding. Id. at § 16.1-263(B). If a party designated in § 16.2-263(A) to be served with a summons is within the Commonwealth and cannot be found, but his address is known or can be ascertained, service of summons may be made

by mailing a copy by certified mail return receipt requested. Likewise, if a party is without the Commonwealth but can be found or his address ascertained, service may be made in the same manner. Id. at § 16.1-264(A).

If, after reasonable effort, a party other than the juvenile cannot be found or his post office address cannot be ascertained, whether he is within or without the Commonwealth, the court may order service of the summons upon him by publication in accordance with the provisions of §§ 8.01-316 and 317. Id. at § 16.1-264(A).

5. Transportation of Juveniles

Id. at § 16.1-254 (1990). Furthermore, "[n]o child shall be transported with adults suspected of or charged with criminal acts." Id. The chief judge of the juvenile court shall designate the appropriate agency responsible for the transportation of children, not to include the state police. Id. See §§ 16.1-246, 247, 248.1, 254.

6. Detention of Juveniles

A child alleged to be delinquent may be detained pending a court hearing in a detention home or group home approved by the Department of Corrections. Id. at § 16.2-249(A)(3); see also § 16.1-249 (A)(1), (2) (listing of other proper places to detain a child once the court has "ordered that a child remain in detention or shelter care pursuant to § 16.1-248.1").

No child shall be confined or detained in any jail or other adult detention facility, except as specifically provided. Id. at § 16.1-249(B)(3). See §§ 16.1-249(D), (E), (E1) or (F).

F. Immunity from Arrest

The following individuals are immune from arrest or imprisonment in Virginia:

1. a minister or ambassador of any foreign country and any domestic servant of that ambassador

who is not a citizen of the United States. 22
U.S.C. §§ 252-253.

2. any person who enters Virginia or passes through the state in response to a summons directing him to attend and testify is not subject to arrest or service of process, either civil or criminal, in connection with matters which arose prior to his entry into the state. Section 19.2-280; but see Lester v. Bennett, 1 Va. App. 47, 333 S.E.2d 366 (1986) (holding that a non-resident ex-husband may not avoid valid service of process by his ex-wife in a suit for spousal support by having his own attorney subpoena him in his action for custody).

3. members of the General Assembly, their clerks and their assistants, during the legislative session and for five days before and after except for treason, felonies or breaches of the peace. Sections 30-6 and 30-7.

4. members of the Virginia National Guard, the Virginia State Defense Force and the Naval Militia while actually engaged in the performance of their duties except with the consent of their commanding officer and while going to, remaining at or returning from any place they are required to attend for military duty, except in felony or breach of the peace cases, § 44-97.

Additionally, § 8.01-327.2 allows the following persons to remain free from arrest, apprehension or detention under any civil process during the specific times set forth by statute:

1. the President of the United States and the Governor of the Commonwealth at all times during their terms of office;
2. the Lieutenant Governor of the Commonwealth during attendance of sessions of the General Assembly and while going to and from those sessions;
3. members of either house of the U.S. Congress during sessions, for fifteen days before and after each session, and during any time they are serving

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on any committee or performing any other service by order or request or either house of Congress;

4. a judge, grand juror or witness, required by lawful authority to attend any court or place, during that attendance and while going to and from such court or place;

5. members of the National Guard or Naval Militia while going to, attending or returning from any muster or court martial;

6. ministers of the gospel while holding religious services where a congregation is assembled and while going to and returning from those services; and

7. voters going to, attending and returning from an election, but only on the days of such attendance. (1977, c. 617)

CODE OF VIRGINIA (1950, As Amended)

CHAPTER 7

Of Title 19.2

Section 19.2-71 Who may issue process of arrest. - Process for the arrest of a person charged with a criminal offense may be issued by the judge, or clerk of any circuit court, any general district court, any juvenile and domestic relations district court, or any magistrate as provided for in Chapters 3 (§ 19.2-26 et seq.) and 4 (§ 19.2-49 et seq.) of this title.

Section 19.2-72 When it may issue; what to recite and require. - On complaint of a criminal offense to any officer authorized to issue criminal warrants he shall examine on oath the complainant and any other witnesses, or when such officer shall suspect that an offense punishable otherwise than by a fine has been committed he may, without formal complaint, issue a summons for witnesses and shall examine such witnesses. If upon such examination such officer finds that there is probable cause to believe the accuse has committed an offense, such officer shall issue warrant for his arrest the warrant shall (i) be directed to an appropriate officer or officers, (ii) name the accused or, if his name is unknown, set forth a description by which he can be identified

with reasonable certainty, (iii) describe the offense charged with reasonable certainty, (iv) command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the offense was allegedly committed, and (v) be signed by the issuing officer. The warrant shall require the officer to whom it is directed to summons such witnesses as shall be therein named to appear and give evidence on the examination. But in a city or town having a police force, the warrant shall be directed "To any policeman of such city (or town)," and shall be executed by the policeman into whose hands it shall come or be delivered.

Section 19.2-73 Issuance of summons instead of warrant in certain cases. - In any misdemeanor case or in any class of misdemeanor cases, or in any case involving complaints made by any state or local governmental official or employee having responsibility for the enforcement of any statute, ordinance or administrative regulation, the magistrate or other issuing authority having jurisdiction may issue a summons instead of a warrant when there is reason to believe that the person charged will appear in the courts having jurisdiction over the trial of the offense charged. Any person on whom such summons is served shall appear on the date set forth in same, and if such person fails to appear in such court at such time and on such date then he shall be treated in accordance with the provisions of § 19.2-128, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.

Section 19.2-73.1 Notice of issuance of warrant or summons; appearance; failure to appear. - In any misdemeanor case or in any class of misdemeanor cases, the chief-of-police of the city or county, or the sheriff of the county, if the county has no police department, in which the case is pending may notify the accused of the issuance of the warrant or summons and direct the accused to appear at the time and place directed for the purpose of the execution of the summons or warrant; provided, however, that the issuing judicial officer may direct the execution of such process prior to any such notification. If the accused does not appear, then the warrant or summons shall be executed or returned as provided by § 19.2-76.

Section 19.2-74 Issuance and service of summons in place of warrant in misdemeanor case; issuance of summons by special policemen and conservators of the peace. -

A.1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any

county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

2. Whenever any person is detained by or is in the custody of any arresting officer for a violation of any county, city, or town ordinance or of any provision of this Code, punishable as a Class 3 or Class 4 misdemeanor or any other misdemeanor for which he cannot receive a jail sentence, except as otherwise provided in Title 46.2, or to the offense of public drunkenness as defined in § 18.2-388, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving of such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.

3. Any person so summoned shall not be held in custody after the issuance of such summons for the purpose of complying with the requirements of Chapter 23 (§ 19.2-387 et seq.) of this title. Reports to the Central Criminal Records Exchange concerning such persons shall be made after a disposition of guilt is entered as provided for in § 19.2-390.

Any person refusing to give such written promise to appear under the provisions of this section shall be taken immediately by the arresting or other police officer before a magistrate or

other issuing authority having jurisdiction, who shall proceed according to provisions of § 19.2-82.

Any person who willfully violates his written promise to appear, given in accordance with this section, shall be treated in accordance with the provisions of § 19.2-128, regardless of the disposition of, and in addition to, the charge upon which he was originally arrested.

Any person charged with committing any violation of § 18.2-407 may be arrested and immediately brought before a magistrate who shall proceed as provided in § 19.2-82.

B. Special policemen of the counties as provided in § 15.1-14 and special policemen or conservators of the peace appointed under Chapter 2 (§ 19.2-12 et seq.) of this title may issue summonses pursuant to this section, if such officers are in uniform, or displaying a badge of office. On application, the chief law-enforcement officer of the county or city shall supply each officer with a supply of summons forms, for which such officer shall account pursuant to regulation of such chief law-enforcement officer.

C. The summons used by a law-enforcement officer pursuant to this section shall be in form the same as the uniform summons for motor vehicle law violations as prescribed pursuant to § 46.2-388.

Section 19.2-74.1: Repealed by Acts 181, c. 382.

Section 19.2-75 Copy of process to be left with accused; exception. - Except as provided in § 46.2-936, any process issued against a person charged with a criminal offense shall be in duplicate and the officer serving such process shall leave a copy with the person charged.

Section 19.2-76 Execution and return of warrant or summons; arrest outside county or city where charge is to be tried. - An officer may execute within his jurisdiction a warrant or summons issued anywhere in the Commonwealth. A warrant shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally, or, if the accused be a corporation, in the same manner as in a civil case. The officer executing a warrant shall endorse the date of execution thereon and make return thereof to a judicial officer having authority to grant bail. The officer executing a summons shall endorse the date of execution thereon and make return thereof to the court to which the summons is returnable.

Whenever a person is arrested upon a warrant in a county or city contiguous to the county or city in which the charge is to be tried, the officer making the arrest may deliver the accused to the custody of an officer of a law-enforcement agency having jurisdiction in the county or city in which the charge is to be tried, or he may bring the accused before a judicial officer to be dealt with as is provided hereinafter.

Whenever a person is arrested upon a warrant in a county or city other than that in which the charge is to be tried, or in a county or city contiguous thereto, the officer making the arrest shall bring the accused before a judicial officer authorized to grant bail in the county or city in which the accused is arrested. Such official shall either commit the accused to the custody of an officer for transfer forthwith to the county or city where the charge is to be tried, or admit the accused to bail or commit him to jail for transfer as soon as possible; and such official shall endorse on the warrant the action taken thereon.

Section 19.2-76.1 Submission of quarterly reports concerning unexecuted felony and misdemeanor warrants and other criminal process; destruction. - It shall be the duty of the chief law-enforcement officer of the police department or sheriff's office, whichever is responsible for such service, in each county, town or city of the Commonwealth to submit quarterly reports to the attorney for the Commonwealth for such county, town or city concerning unexecuted felony and misdemeanor arrest warrants, summons, capias or other unexecuted criminal process as hereinafter provided. The reports shall be submitted in writing no later than the tenth day of April, July, October, and January of each year, together with the unexecuted felony and misdemeanor warrants, or other unexecuted criminal process listed therein. Upon receipt of the report and the warrants listed therein, and after determining that an unexecuted felony or misdemeanor warrant, capias, summons or other unexecuted criminal process is unprosecutable due to lack of evidence, witnesses or other legal reason, the attorney for the Commonwealth may petition the circuit court of such county or city for the destruction of such county or city for the destruction of such unexecuted criminal process. The circuit court shall order the destruction of each unexecuted felony warrant, except felonies which charge capital murder and each unexecuted misdemeanor warrant, summons, capias and other criminal process. No arrest shall be made under the authority of any warrant or other process which has been ordered destroyed pursuant to this section. Nothing in this section shall be construed to relate to or affect the time within which a prosecution for a felony or a misdemeanor shall be commenced.

As used herein, the term "chief law-enforcement officer" refers to the chiefs of police of cities, counties and towns and sheriffs of cities and counties, unless a political subdivision has otherwise designated its chief law-enforcement officer by appropriate resolution or ordinance, in which case the local designation shall be controlling.

Section 19.2-76.2 Mailing of summons in certain cases. - Notwithstanding the provisions of § 19.2-76, whenever a summons for a violation of a county, city or town parking ordinance is served in any county, it may be executed by mailing by first-class mail a copy thereof to the address of the owner of the vehicle as shown on the records of the Department of Motor Vehicles. In addition, whenever a summons for a violation of a county, city or town trash ordinance punishable as a misdemeanor under § 15.1-11 is served in any county, city or town, it may be executed by mailing a copy by first-class mail to the person who occupies the subject premises. If the person fails to appear on the date of return set out in the summons mailed pursuant to this section, the summons shall be executed in the manner set out in § 19.2-76.3 of this Code.

No proceedings for contempt or arrest of a person summoned by mailing shall be instituted for his failure to appear on the return date of the summons.

Section 19.2-76.3 Failure to appear on return date for summons issued under § 19.2-76.2. - A. If any person fails to appear on the date of the return contained in the summons issued in accordance with § 19.2-76.2, then a summons shall be delivered to the sheriff of the county, city or town for service on that person as set out in § 8.01-296 of the Code.

B. If such person then fails to appear on the date of return as contained in the summons so issued, a summons shall be executed in the manner set out in § 19.2-76 of the Code.

C. No proceedings for contempt or arrest of any person summoned under the provisions of this section or under § 19.2-76 shall be instituted unless such person has been personally served with a summons and has failed to appear on the return date contained therein.

Section 19.2-77 Escape, flight and pursuit; arrest anywhere in Commonwealth. - Whenever a person in the custody of an officer shall escape or whenever a person shall flee from an officer attempting to arrest him, such officer, with or without a warrant, may pursue such person anywhere in the Commonwealth and,

when actually in close pursuit, may arrest him wherever he is found. If the arrest is made in a county or corporation adjoining that from which the accused fled, the officer may forthwith return the accused before the proper official of the county or corporation for which he fled. If the arrest is made beyond the foregoing limits, the officer shall proceed according to the provisions of § 19.2-76, and if such arrest is made without a warrant, the officer shall procure a warrant from the magistrate of the county or corporation wherein the arrest was made, charging the accused with the offense committed in the county or corporation from which he fled.

Section 19.2-78 Uniform of officer making arrest. - All officers whose duties are to make arrests acting under the authority of any law of this Commonwealth or any subdivision thereof, who shall may any arrest, search or seizure on any public road or highway of this Commonwealth shall be dressed at the time of make any such arrest, search or seizure in such uniform as he may customarily wear in the performance of his duties which will clearly show him to casual observation to be an officer.

Nothing in this section shall render unlawful any arrest, search or seizure by an officer who is not in such customary uniform.

Section 19.2-79 Arrest by officers of other states of United States. - Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this Commonwealth in close pursuit, and continues within this Commonwealth in such close pursuit, of a person in order to arrest him on the ground that he has committed a felony in such other state shall have the same authority to arrest and hold in custody such person as members of a duly organized state, county or municipal peace unit of this Commonwealth have to arrest and hold in custody a person on the ground that he has committed a felony in this State, if the sate from which such person has fled extends similar privileges to any member of a duly organized state, county or municipal peace unit of this Commonwealth.

If an arrest is made in this Commonwealth by an officer of another state in accordance with the provisions of the first paragraph of this section, he shall without unnecessary delay take the person arrested before a judge of a general district court, or of the circuit court, of the county or city in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the judge determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an

extradition warrant by the Governor. If the judge determines that the arrest was unlawful he shall discharge the person arrested.

The first paragraph of this section shall not be construed so as to make unlawful any arrest in this Commonwealth which would otherwise be lawful.

For the purpose of this section the word "State" shall include the District of Columbia.

Section 19.2-80 Duty of arresting officer; bail. - In any case in which an officer does not issue a summons pursuant to § 19.2-74 or § 46.2-936, an officer making an arrest under a warrant or capias shall bring the arrested person without unnecessary delay before and return such warrant or capias to a court of appropriate jurisdiction of the county or city in which the warrant or capias is issued, or before an official having authority to grant bail. Such court or official shall admit the accused to bail or commit him to jail. However, instead of admitting to bail or committing to jail, such official may, if the accused is charged with a misdemeanor and the official is a judge of a district court having jurisdiction to try him for such misdemeanor.

Section 19.2-80.1 When arrested person operating motor vehicle; how vehicle removed from scene of arrest. - In any case in which a police officer arrests the operator of a motor vehicle and there is no legal cause for the retention of the motor vehicle by the officer, the officer shall allow the person arrested to designate another person who is present at the scene of the arrest and a licensed driver to drive the motor vehicle from the scene to a place designated by the person arrested. If such a designation is not made, the officer may cause the vehicle to be taken to the nearest appropriate place for safekeeping.

Section 19.2-81 Arrest without warrant authorized in certain cases. - Members of the State Police force of the Commonwealth, the sheriffs of the various counties and cities, and their deputies, the members of any county police force, the members of any duly constituted police force of any city or town of the Commonwealth, the Commissioner, members and employees of the Marine Resources Commission granted the power of arrest pursuant to § 28.1-185, regular game wardens appointed pursuant to § 29.1-200, United States Coast Guard and United States Coast Guard Reserve commissioned, warrant, and petty officers authorized under § 29.1-205 to make arrests, and the special policemen of the counties as provided by § 15.1-144, provided such officers are in uniform, or displaying a badge of office, may arrest,

without a warrant, any person who commits any crime in the presence of such officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence. Any such officer may arrest without a warrant any person whom the officer has probable cause to suspect of operating a watercraft or motor boat while intoxicated in violation of § 29.1-738 B, in his presence, and such officer may thereafter transfer custody of the person suspected of the violation to another officer, who may obtain a warrant based upon statements made to him by the arresting officer.

Any such officer may, at the scene of any accident involving a motor vehicle, watercraft as defined in § 29.1-712 or motor-boat, or any hospital or medical facility to which any person involved in such accident has been transported, or in the apprehension of any person charged with the theft of any motor vehicle, on any of the highways or waters of the Commonwealth, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, apprehend such person without a warrant of arrest.

Such officers may arrest, without a warrant, persons duly charged with a crime in another jurisdiction upon receipt of a photocopy of a warrant, telegram, computer printout, facsimile printout, a radio, telephone or teletype message, in which photocopy of a warrant, telegram, computer printout, facsimile printout, radio, telephone or teletype message shall be given the name or a reasonably accurate description of such person wanted and the crime alleged.

Such officers may arrest, without a warrant, for an alleged misdemeanor not committed in his presence when the officer receives a radio message from his department or other law-enforcement agency within the Commonwealth that a warrant for such offense is on file. Such officers may also arrest without a warrant for an alleged misdemeanor not committed in his presence when the officer receives a radio message from his department or other law-enforcement agency within the Commonwealth that a warrant for such offense is on file. Such officers may also arrest without a warrant for an alleged misdemeanor not committed in their presence involving (i) shoplifting in violation of § 18.2-96 or § 18.2-103, (ii) carrying a weapon on school property in violation of § 18.2-308, (iii) assault and battery or (iv) destruction of property in violation of § 18.2-137, when such property is located on premises used for business or commercial purposes, when any such arrest is based on probable cause upon reasonable complaint of the person who observed the alleged

offense. The arresting officer may issue a summons to any person arrested under this section for a misdemeanor violation involving shoplifting.

Section 19.2-81.1 Arrest without warrant by correctional officers in certain cases. - Any correctional officer, as defined in § 53.1-1, may arrest, in the same manner as provided in § 19.2-81, persons for crimes involving:

- (a) The escape of any inmate from a correctional institution, as defined in § 53.1-1 of this Code;
- (b) Assisting an inmate to escape from a correctional institution, as defined in § 53.1-1 of this Code;
- (c) The delivery of contraband to an inmate in violation of § 18.2-474; and
- (d) Any other criminal offense which may contribute to the disruption of the safety, welfare, or security of the population of a correctional institution.

Section 19.2-81.2 Power of correctional officers and designated noncustodial employees to detain. - A. A correctional officer, as defined in § 53.1-1, who has completed the minimum training standards established by the Department of Criminal Justice Services, or noncustodial employee of the Department of Corrections who has been designated to carry a weapon by the Director of the Department of Corrections pursuant to § 53.1-29 of the Code and who has completed the basic course in detention training as approved by the Department of Criminal Justice Services, may, while on duty in or on the grounds of a correctional institution, or with custody of prisoners without the confines of a correctional institution, detain any person whom he has reasonable suspicion to believe has committed a violation of §§ 18.2-473 through 18.2-475, or of aiding or abetting a prisoner in violating the provisions of § 53.1-203. Such detention shall be for the purpose of summoning a law-enforcement officer in order that the law-enforcement officer can arrest the person who is alleged to have violated any of the above sections. B. Any employee of the Department of Correction having the authority to detain any person pursuant to subsection A hereof shall not be held civilly liable for unlawful detention, slander, malicious prosecution, false imprisonment, false arrest, or assault and battery of the person so detained, whether such detention takes place within or without the grounds of a correctional institution, provided that, in causing the detention of such person, the employee had at the time of the detention reasonable of such person, the employee had at the time of the detention reasonable suspicion to believe that the person committed a violation for which the detention was undertaken. C. It is the purpose and intent of this section to

ensure that the safety, stability, welfare and security of correctional institutions be preserved insofar as possible.

Section 19.2-82 Procedure upon arrest without warrant. - A person arrested without a warrant shall be brought forthwith before a magistrate or other issuing authority having jurisdiction who shall proceed to examine the officer making the arrest under oath. If the magistrate or other issuing authority having jurisdiction has lawful probable cause upon which to believe that a criminal offense has been committed, and that the person arrested has committed such offense, he shall issue either a warrant under the provisions of § 19.2-72 or a summons under the provisions of § 19.2-73.

As used in this section the term "brought before a magistrate or other issuing authority having jurisdiction" shall include a personal appearance before such authority or any two-way electronic video and audio communication, in order that the accused and the arresting officer may simultaneously see and speak to such magistrate or authority. If electronic means are used, a sufficient number of copies shall be transmitted in order to conform to the requirements of § 19.2-75. The original copy of the warrant of arrest and bail documents, if any, shall be affixed to the facsimile prior to being transmitted to the court.

If a warrant is issued the case shall thereafter be disposed of under the provisions of §§ 19.2-183 to 19.2-190, if the issuing officer is a judge; under the provisions of §§ 19.2-119 to 19.2-134, if the issuing officer is a magistrate or other issuing officer having jurisdiction. If such warrant or summons be not issued the person so arrested shall be released; provided, however, that this section shall not bar a judge of a district court from proceeding in accord with the provisions of § 16.1-129.1.

Section 19.2-83 Authority of police officers to stop, question and search suspicious persons. - Any police officer may detain a person in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or possesses a concealed weapon in violation of § 18.2-308, and may require of such person his name and address. Provided further, that such police officer may, if he reasonably believes that such person intends to do him bodily harm, search his person for a dangerous weapon, and if such person is found illegally to possess a dangerous weapon, the police officer shall take possession of the same and dispose of it as is provided by law.

Note: Slip Opinions since the preparation of this chapter:

Waugh v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0093-90-3) (Moon) (June 4, 1991):

Articulable and Reasonable Suspicion of Criminal Activity:

A police radio broadcast indicating that a person in a blue van was suspected of selling vacuum cleaners without a license and being very pushy in trying to gain entrance into persons' houses, was insufficient to give rise to an articulable and reasonable suspicion that criminal activity was afoot, warranting the officer's actions in pulling over the defendant's van for an investigatory stop. Therefore, the evidence obtained during the stop was inadmissible, and defendant's conviction of driving after having been declared an habitual offender was reversed.

EXTRAJUDICIAL CONFESSIONS

I. INTRODUCTION

1. "A confession is a statement by the accused that he engaged in conduct which constitutes a crime." 3 Torcia, Wharton's Criminal Evidence, Section 662, (416), (13th ed. 1973).
 - a. A confession is a direct acknowledgement of personal criminal guilt;
 - b. A confession is distinguished from an admission which is a statement tending to establish guilt.
2. Confessions are classified as judicial or extrajudicial.
 - a. Judicial confessions are made in the due course of a legal proceeding and are most frequently in the form of a guilty plea.
 - b. This chapter covers extrajudicial confessions which are made out of court normally to the interrogating or arresting officer.
3. The acquisition or use of confessions against a suspect or defendant must be evaluated by the constitutional right against self-incrimination. U.S. Const. Amend. V; Malloy v. Hogan, 378 U.S. 1 (1964) (5th Amendment right against self-incrimination applicable to the States through 14th Amendment).
4. The privilege against self-incrimination is subject to several LIMITATIONS:
 - 4-1. PERSONAL - It is a purely personal privilege and cannot be invoked for the benefit of a third party. Couch v. United States, 409 U.S. 322 (1973); Bellis v. United States, 417 U.S. 85 (1974). Further, a confession obtained through unlawful means does not violate the rights of an accused when the statement is not used against him. Smith v. United States, (4th Cir.) (No. 75-2072, decided June 10, 1976), (unpublished); Tingler v. Cox, 315 F. Supp. 871 (W.D. Va. 1970).
 - 4-2. TESTIMONIAL - This privilege protects an accused only from self-incrimination of a testimonial and communicative nature. Evidence which is not of a testimonial or

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communicative nature includes the following:

- (a) a blood sample, Schmerber, 384 U.S. 757 (1966); see also Farmer v. Comm., 10 Va. App. 175, 390 S.E.2d 775 (1990);
- (b) a voice identification, United States v. Dionisio, 410 U.S. 1 (1973);
- (c) a handwriting sample, United States v. Euge, 444 U.S. 707 (1980); Gilbert v. California, 388 U.S. 263 (1967);
- (d) a line-up or similar identification procedure, United States v. Wade, 383 U.S. 218 (1967);
- (e) the registration of a "sawed off" shotgun, Ford v. Commonwealth, 215 Va. 308, 208 S.E.2d 921 (1974);
- (f) automobile registration card, Cook v. Cox, 330 F. Supp. 1323 (W.D. Va 1971);
- (g) registration of foreign nationals (even though they may be enemy agents), United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980);
- (h) business records are not testimonial in nature. Anderson v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976). The act of producing corporate documents does not involve testimonial self-incrimination. Braswell v. United States, 487 U.S. 99 (1988). However, the Fifth Amendment privilege against self-incrimination is applicable to the act of producing business records where business is a sole proprietorship. U.S. v. Doe, 465 U.S. 605 (1984) (production of documents may be admission that documents exist, are in defendant's possession, and are authentic).

4-3. INDIVIDUAL - STATE RELATIONS - The privilege against self-incrimination only controls the relationship

between the state and the individual. A confession obtained in violation of this right may, under some circumstances, be admissible if elicited by a private individual and not by an agent of the state. See Section II (B)(1)(d) Police Interrogation.

- 4-4. IMMUNITY - Various sections of the Code of Virginia (1950), as amended, authorize the Commonwealth's Attorney to compel the self-incriminating testimony of witnesses regarding certain crimes; however, sufficient immunity must be given for such testimony. The Code provides for such immunity in specific instances, including: § 4.94 (testimony regarding violations of the Alcohol Control Act); § 18.2-437 (testimony regarding perjury); § 18.2-262 (drug offenses); § 18.2-445 (bribery); § 24.1-281 (grand jury investigation regarding election offenses); § 29-181 (violations of the Game, Inland, Fish and Dog Titles); § 48-15 (nuisances); § 52.1-9.10 (antitrust violations); § 60.2-628 (proceedings of the Virginia Employment Commission).

II. CONSTITUTIONAL WARNINGS - MIRANDA

A. Miranda v. Arizona

1. The United States Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966) established definitive procedural safeguards, in the form of specific warnings, to prevent the violation of a suspect's right against self-incrimination. These procedural safeguards are not rights in themselves, but are only "prophylactic devices".
2. The Court in Miranda held: When an individual
 - (a) is taken into custody, or otherwise deprived of his freedom by the authorities in any significant way and
 - (b) is subjected to questioning,
 - (c) the privilege against self-incrimination is jeopardized, UNLESS
 - (d) procedural safeguards, i.e., the so-called Miranda warnings, are implemented to notify the individual of his right of silence; these warnings include

notification to the individual that

- (1) he has the right to remain silent;
- (2) anything he says may be used against him in a court of law;
- (3) he has a right to the presence of an attorney during questioning;
- (4) if he cannot afford an attorney, one will be appointed for him before any questioning begins, if he so desires. See, Miranda, 384 U.S. at 478-79.

3. Miranda applies to felonies and misdemeanors alike -

- (a) Miranda explicitly states that "there can be no doubt that the Fifth Amendment privilege serves to protect all persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467 (emphasis added). As Miranda is designed to protect the Fifth Amendment privilege against self-incrimination, it would be illogical to protect the privilege in felony cases and deny it in misdemeanor cases. Id.
- (b) The Supreme Court has held that a person subject to custodial interrogation is entitled to the benefit of Miranda's procedural safeguards regardless of the nature or severity of the offense for which he is suspected or arrested. Berkemer v. McCarty, 468 U.S. 420 (1984).

4. An individual may waive his right, however

- (a) the waiver must be "knowing, intelligent, and articulated"
- (b) the government bears the burden of establishing the waiver
- (c) silence is not generally construed as waiver
- (d) without more, talking by the accused after hearing rights is not a waiver. See Section ---- on Waiver

B. APPLYING AND EXPLAINING MIRANDA

B -1. WHEN IS MIRANDA APPLICABLE - CUSTODY

1. Miranda applies whenever the suspect is subject to a custodial interrogation, i.e., he "is in custody or otherwise deprived of his freedom of action in some significant way so as to make such interrogation inherently compulsive." Miranda, supra at 478; see Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983) (the custodial nature of the interrogation, rather than the actual location, triggers the necessity of Miranda warnings). If suspect is not in custody, Miranda does not apply; any claim that suspect's right against self-incrimination was violated will be decided under traditional due process and voluntariness analysis

2. Is the suspect in custody (or otherwise deprived of freedom in any significant way)?

"Custody" for Miranda purposes can be defined as "formal arrest or the restraint on freedom of movement normally associated with formal arrest". California v. Beheler, 463 U.S. 1121 (1983).

3. FACTORS courts consider in determining whether suspect was in custody at time of the interrogation include:

(a) was suspect under arrest?

- (1) a suspect under arrest is always in custody

- (2) informing the suspect that he is not under arrest tends to establish that suspect was not in custody; however, without more, the lack of an arrest is not conclusive. Dunaway v. New York, 442 U.S. 200 (1979) (lack of arrest not dispositive on custody issue). See Davis v. Allsbrook, 778 F.2d 168 (4th Cir. 1985); Wass v. Commonwealth, infra.

- (b) was there intimidation (either by authorities or due to environment)?

- (c) was there the potential for compulsion?
- (d) was there a focus on the particular suspect?
 - (1) Miranda rejected the prior rule that the right to counsel attaches whenever a suspect becomes the "focus" of a police investigation [See Escobedo v. Illinois, 378 U.S. 478 (19-64)]; however, "custodial interrogation" may include those individuals who are "focal suspects". Miranda, 384 U.S. at ---n.4.
 - (2) Example - Miranda requirements are not triggered merely by an interview between police and accused, even if accused is a prime suspect in the investigation.
 - (3) Virginia courts follow Miranda and disregard the Escobedo focal suspect rule in determining when rights attach in custody cases. Smith v. Commonwealth, 219 Va. 455, 470, 248 S.E.2d 135, 144 (1978); Jordan v. Commonwealth, 216 Va. 768, 772, 222 S.E.2d 573, 577 n.1 (1976).
- (e) the location of the interrogation
 - (1) Police Vehicle or Stations, Jails - generally custodial
 - * Interrogation conducted in a police vehicle or station will normally be considered custodial, Johnson v. Commonwealth, 208 Va. 740, 160 S.E.2d 793 (1968); United States v. Pierce, 397 F.2d 128 (4th Cir. 1968). But see Lanier v. Commonwealth, 10 Va. App. 541, 394 S.E.2d 495 (1990) (suspect voluntarily entered vehicle of officer he knew; not in custody).
 - * However, if the accused voluntarily enters the police station upon request, the interview is deemed to be non-custodial. Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967); see also Oregon v.

Mathiason, 429 U.S. 492 (1977) (suspect agreed to meet police and went to the police station on his own); United States v. Kilbourne, 559 F.2d 1263 (4th Cir. 1977) (suspect at police station not in custody were not under arrest and free to leave); California v. Beheler, 463 U.S. 1121, (1983) (suspect voluntarily agreed to accompany police to police station); Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983).

- * Interrogations in jails are presumptively custodial. Mathias v. United States, 391 U.S. 1 (1968); Dean v. Commonwealth, 209 Va. 606, 166 S.E.2d 288 (1969); United States v. Redfield, 402 F.2d 454 (4th Cir. 1969). But see Beamon v. Commonwealth, 222 Va. 707, 284 S.E.2d (1981) (need to maintain order within prison allowed guard to question inmate who acted suspiciously without triggering or violating Miranda).

- (2) Homes - nature generally hinges on whether authorities took any additional measures to restrain suspect or created an atmosphere of compulsion or intimidation

- * examples of non-custodial interrogation in home: see Beckwith v. United States, 425 U.S. 341 (1976) (non-custodial interrogation by IRS agents despite duration of 3 hours; defendant conceded at trial he had not been in custody); United States v. Bagdasian, 398 F.2d 971 (4th Cir. 1968) (IRS interview over coffee in defendant's kitchen)
- * examples of custodial interrogation in home: see Orozco v. Texas, 394 U.S. 324 (1969) (defendant questioned at 4 am and police did not intend to allow him to leave); Johnson v. Commonwealth, 208 Va. 740, 160 S.E.2d 793 (1968) (suspect under arrest).

- (3) Suspect's Place of Employment - generally non-custodial. See United States v. Webb, 398 F.2d 553 (4th Cir. 1968) (statement signed by carrier while he was in his own office was not the subject of a custodial interrogation).
- (4) Third-Party Vehicles, Homes, Offices, Etc - generally non-custodial.
- * vehicles - See United States v. Montos, 421 F.2d 215 (5th Cir. 1970) (a postal employee who was questioned by a postal inspector in employee's car while blocked in by postal inspector's car was not custodial interrogation).
 - * Residence - See State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966), cert. denied, 386 U.S. 911 (1967) (confessions freely and voluntarily made to officer in private home).
- (5) On the Street - generally non-custodial. See United States v. Gibson, 392 F.2d 373 (4th Cir. 1968) (on the street routine investigative questioning not coercive or custodial interrogation and did not require prior Miranda warnings); see also Berkemer v. McCarty, 468 U.S. 420 (1984) (roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation"; is analogous to a Terry stop)
- (6) Prosecution Office - generally non-custodial
- Courts are fairly willing to regard interrogations in prosecutors' offices as non-custodial. See, e.g., Commonwealth v. O'Toole, 223 N.E.2d 87 (Mass. 1967), aff'd on habeas corpus sub nom O'Toole v. Scafatis, 386 F.2d 168 (1st Cir. 1968), cert. denied, 390 U.S. 385 (1968) (city manager's statements made in prosecutor's office admissible notwithstanding absence of Miranda warning); United States v. Jackson, 390 F.2d 317 (2nd Cir.

1968) (statement voluntarily made in prosecutor's office while on bail did not require prior Miranda warnings where petitioner not in custody and accompanied by counsel).

- f. did suspect objectively believe that he was not free to leave?
- (1) in practice, a "subjective/objective" test is usually used: Would a reasonable person, in the suspect's position, believe he was in custody and not free to leave? See, e.g., Berkemer, supra; Lanier v. Comm., 10 Va. App. 541, 394 S.E.2d 495 (1990); Taylor v. Commonwealth, 10 Va. App. 260, 391 S.E.2d 592 (1990).
 - (2) But see Addison v. Commonwealth, 224 Va. 713, 717, 299 S.E.2d 521, 523 (1983) which seemed to rely on the subjective intent of the interrogating officers (suspect was not in custody when he "never asked to leave, but in fact would have been permitted to depart at any time if he had indicated a desire to do so").

See, generally, Wass v. Commonwealth, 5 Va. App. 27, 359 S.E.2d 836 (1987). The court cited a number of factors to be considered: (1) whether the suspect is questioned in familiar or neutral surroundings; (2) the number of police present; (3) degree of physical restraint; (4) duration and character of interrogation; (5) whether or when probable cause to arrest existed and whether probable cause existed when the officer summoned the individual; (6) the language used by the officer to summon the individual. Not all of the factors listed may be relevant in each case. Id.

B-2. WHEN IS MIRANDA APPLICABLE - INTERROGATION?

1. definition - INTERROGATION

- (a) express questioning by authorities; BUT ALSO
- (b) the functional equivalent of express questioning,

i.e., words or actions on the part of authorities which are designed to elicit incriminating responses and which they should know are reasonably likely to elicit incriminating responses from a suspect, AND

- (c) which are not normally part of arrest and custody (i.e., request for name, age, fingerprints, photo). See, e.g., United States v. Morrow, 731 F.2d 233 (4th Cir. 1984).

See generally, Rhode Island v. Innis, 446 U.S. 291 (1980).

2. Parties Involved

- (a) Generally, an interrogation is not considered custodial within the purview of Miranda unless conducted or supervised by law enforcement officials or their agents;
- (b) Confessions in response to non-police interrogations where those conducting the interview are acting for their own purposes and independently of the police are admissible without any Miranda warnings. Williams v. Commonwealth, 211 Va. 609, 179 S.E.2d 512 (1971). Courts have held that such confessions are legal when made to
 - (1) an employer, United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970); United States v. Biggeerstaff, 383 F.2d 675 (4th Cir. 1967);
 - (2) to security guards, State v. Masters, 154 N.W.2d 133 (Iowa 1967);
 - (3) to cell mates, Stowers v. United States, 351 F.2d 301 (9th Cir. 1965); Thomas v. Cox, 708 F.2d 132 (4th Cir. 1983), cert. denied, 464 U.S. 910 (1983);
 - (4) to a polygraph expert employed by the suspect, Jones v. Commonwealth, 214 Va. 723, 204 S.E.2d 246 (1974), ;
 - (5) to a relative of the suspect, Williams, supra, and

- (6) to an I.R.S. official, Beckwith v. United States, 425 U.S. 341 (1976); U.S. v. Olmstead, 698 F.2d 224 (4th Cir. 1983).
- (c) However, police are not allowed to use private citizens or foreign officers as their agents in order to circumvent the Miranda warnings. See Estelle v. Smith, 451 U.S. 454 (1981); Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978) (psychiatrist's testimony as to admissions of defendant during court-ordered mental examination inadmissible at penalty phase); United States v. Henry, 447 U.S. 264 (1980) (paid informer acting under instructions).
3. Volunteered or "threshold" confessions, i.e., those statements which are not made in response to direct questioning or under the compulsion of a police officer are not affected by Miranda. Miranda, supra at 478; Massie v. Commonwealth, 211 Va. 429, 177 S.E.2d 615 (1970); Smith v. Peyton, 295 F. Supp. 1379 (W.D. Va. 1968); United States v. Hart, 619 F.2d 325 (4th Cir. 1980); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979); Labonte v. Commonwealth, 217 Va. 677, 232 S.E.2d 738 (1977). See also United States v. Peoples, 748 F.2d 934 (4th Cir. 1984) (voluntary statements may occur during interrogation; spontaneous comments unelicited by officer).
- (a) an officer is under no duty and should not interrupt such "volunteered" confessions to inform the suspect of his constitutional rights. Miranda, supra at 478; Durham v. Commonwealth, 208 Va. 415, 158 S.E.2d 135 (1967).
- (b) The officer may try to clarify such confessions by asking follow-up questions. If such questions are neutral in character and intended to clarify but not expand the scope of the statement, no Miranda warnings are required. People v. Sunday, 79 Cal.-Rptr. 752 (C.A. Cal. 1969); Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979); see, e.g., Bradshaw v. Commonwealth, 228 Va. 484, 323 S.E.2d 567 (1984) (shotguns seized by police, suspect told police "That's not the one that did it", police asked suspect if he wanted to talk about "it"; not interrogation).

- (c) A suspect may be confronted with incriminating evidence if such confrontation does not amount to coercion. Rogers v. Richmond, 365 U.S. 534 (19-61); Toliver v. Gathright, 501 F. Supp 148 (E.D. Va. 1980).
 - (1) For example, he may be confronted with existing evidence against him, the confession of an accomplice, or with the amount of time he is subject to serving. Brown v. Cox, 311 F. Supp 81 (E.D. Va. 1970).
 - (2) The police may also falsely represent evidence to the suspect, i.e., that an accomplice has confessed, Frazier v. Cupp, 394 U.S. 731 (1969); Griffith v. Peyton, 284 F. Supp 650 (E.D. Va. 1968).
- 4. Miranda is not applicable to "scene of the crime" or general questioning. Miranda, supra, at 478.
- 5. The U.S. Supreme Court has recognized a PUBLIC SAFETY EXCEPTION to Miranda. Miranda warnings are unnecessary prior to questioning reasonably prompted by a concern for public safety. New York v. Quarles, 467 U.S. 649 (1984).
 - (a) objective standard: would a reasonable officer believe that a threat existed?
 - (b) defendant can still show that his statements were compelled and not voluntary
- 6. Miranda Not Applicable in Grand Jury - Miranda warnings need not be given to a grand jury witness called to testify about criminal activities in which he may have been personally involved. United States v. Mandujano, 425 U.S. 564 (1976) (warnings re: right to counsel if indigent and right to stop questioning need not be told).
 - (a) grand jury investigations take place in a setting wholly different from custodial police interrogations. A person in police custody has an absolute right to decline to answer any and all questions but a grand jury witness is under a duty to answer

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all questions subject only to a valid Fifth Amendment claim. See also, United States v. Perrod, 609 F.2d 1092 (4th Cir. 1979) (for Fifth amendment purposes, there is no difference between oral testimony given to a grand jury and documents presented to a grand jury pursuant to a subpoena).

- (b) It is necessary to advise defendant if an indictment has been returned before a confession will be considered voluntary. United States v. Clements, 713 F.2d 1030 (4th Cir. 1983).

C. ARE THE WARNINGS GIVEN ADEQUATE?

1. The standard used in deciding whether the warnings given were adequate is: Did the warnings reasonably notify the suspect of his rights as required by Miranda? California v. Prysock, 451 U.S. 1301 (1981) (a fully effective equivalent is sufficient).
 - (a) There is no strict formula which must be followed; warnings need only convey to a suspect his rights. See Duckworth v. Eagan, 492 U.S. 195 (1989) (informing a suspect that an attorney would be appointed for him "if and when [he] went to court" does not render Miranda warnings inadequate).
 - (b) However, all elements of the warnings as specified in Miranda must be conveyed; failure to do so renders any confession inadmissible.
2. Miranda does not require that suspect be told of any additional information or be given any additional warnings, beyond what is specified in the decision.
 - (a) Miranda does not specifically require that the suspect be told the subject matter of the questioning, and so the failure to inform suspect as to the nature of the offense for which he is under suspicion is not fatal. See, Carter v. Garrison, 656 F.2d 68 (4th Cir.), cert. den., 455 U.S. 952 (1981). See also, Colorado v. Spring, 479 U.S. 564 (1987) (knowledge of subject matter not relevant to determining the voluntary nature of the confession).
 - (b) Miranda does not require that a suspect be in-

formed that he has the right to the immediate appointment of counsel; the failure to advise of this right does not render the Miranda warning defective. Poyner v. Comm., 229 Va. 401, 329 S.E.2d 815 (1985).

- (c) Miranda does not require that suspect be informed of the jurisdiction of his questioners. Shell v. Commonwealth, 11 Va. App. 247, 397 S.E.2d 673 (1990).

- 3. The crucial test is whether the words used by the officers convey a clear understanding to the accused of his rights in view of his age, intelligence and demeanor during the interrogation. Penn v. Commonwealth, 210 Va. 242, 169 S.E.2d 615 (1970). See also, section ---, WAIVER

- (a) Where applicable these warnings must be given to everyone regardless of the individual's legal acumen or experience. Miranda, supra at 469.
- (b) Miranda warnings must be tailored to the subjective condition of the suspect; e.g., simple warnings may not be sufficient if the accused is in an extremely nervous, emotional or detached condition. Commonwealth v. Lapka, 429 N.E.2d 1029 (Mass. 1982).
- (c) Miranda warnings given in English may be insufficient where defendant is not versed in the English language. United States v. Wong, 431 U.S. 174 (1977).

- 4. Even if oral warnings given are defective, a confession following adequate written warnings is constitutionally sufficient. Poyner v. Comm., 229 Va. 401, 329 S.E.2d 815, cert. den. 474 U.S. 865 and 474 U.S. 888 (1985).

III. ASSERTION OF RIGHTS

A. RIGHT TO REMAIN SILENT

- 1. Only the suspect may assert his right to counsel. See section --- above (personal privilege)
 - (a) suspect's inability to answer questions does not

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indicate his intent/desire to remain silent. See Mayo v. Commonwealth, 10 Va. App. 335, 391 S.E.2d 888 (1990) (in response to questions, suspect only replied "I don't know what you're talking about", "you've asked me a question I can't answer", etc)

2. If the suspect asserts his right to remain silent, the questioning authorities must scrupulously honor suspect's desire to stop the questioning. See Michigan v. Mosley, 423 U.S. 96 (1975).
3. The authorities may resume questioning ONLY
 - (a) after the passage of a significant period of time, AND
 - (b) after "new" Miranda warnings are given. Michigan, supra. Cf. Westover v. United States, 384 U.S. 436 (1966) (after change in questioners, new warnings not given; confession invalid).

B. RIGHT TO COUNSEL

1. Only the suspect may assert his right to counsel. Moran v. Burbine, 475 U.S. 412 (1986) (where suspect was unaware that an attorney had been retained for him and was present in the police station, but suspect did not assert his right to an attorney, attorney could not assert right on suspect's behalf).

statements such as "I guess I'll get a lawyer" are insufficient to assert right to counsel, Terrell v. Commonwealth, ___ Va. App. ___, (Rec. No. 1181-89-3) (April 9, 1991).
2. Suspect's assertion to right of counsel is determined by his initial responses. Questioners cannot ask suspect again if he wants an attorney present. Smith v. Illinois, 469 U.S. 91 (1984).
3. Authorities may not resume questioning until an attorney has been provided, Edwards v. Arizona, 451 U.S. 482 (1981), UNLESS
 - (a) suspect initiates further communication or conversation himself relating directly or indirectly to the proceedings against him; See, e.g. Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815,

cert. den., 474 U.S. 865 and 474 U.S. 888 (1985); Kelly v. Commonwealth, 8 Va. App. 359, 382 S.E.2d 270 (1989) (defendant's confession improperly obtained after police initiated conversation and obtained waiver of right to counsel after the defendant had invoked right to counsel at a prior court appearance);

- (1) some conversation or requests are so routine that do not initiate the necessary discussion (i.e., request for water, request to use the phone)
 - (2) Any confessions or statements acquired through police initiated interrogation of the defendant after the right to counsel has been asserted are invalid. Michigan v. Jackson, 475 U.S. 625 (1986) (invocation of the right to counsel by a defendant at a judicial arraignment barred further interrogation of the suspect by the police until the defendant has an opportunity to consult with an attorney).
 - (3) The Fourth Circuit has held that Michigan v. Jackson creates a binding presumption that if police initiate interrogation after the defendant's assertion of the right to counsel at any arraignment, any waiver of that right for that police initiated interrogation is invalid. Wilson v. Murray, 806 F.2d 1232 (4th Cir. 1986), cert. denied, 484 U.S. 870 (1987); and
- (b) suspect knowingly waives his rights, given the totality of the circumstances. See, e.g., Jackson, supra, (no valid waiver of the defendant's right to counsel and therefore the confessions obtained by the police were inadmissible even though the defendant had acquiesced to the questioning by the police). See also section ---- (Waiver)

See generally, Murphy v. Holland, 845 F.2d 83 (4th Cir. 1988); Correll v. Comm., 232 Va. 454, cert. den. 482 U.S. 931 (1987).

4. Once a suspect cuts off custodial interrogation by invoking his right to counsel, he may not be questioned

about any offense, including an offense wholly unrelated to the original interrogation. Arizona v. Roberson, 486 U.S. 675 (1988).

5. The police may not subvert the requirements of Edwards by utilizing agents (informants) to secure information, from a suspect held in custody, that the police could not obtain directly because of the suspect's exercise of his constitutional rights.
 - (a) agent must actively seek the incriminating evidence, at the instigation of the authorities. See, e.g., Maine v. Moulton, 474 U.S. 159 (1985) (deliberate action of an informant in eliciting incriminating statements from the accused, after the accused had asserted the right to consult counsel, violates constitutional right to counsel). See also Arizona v. Fulminante, ___ U.S. ___ (March 26, 1991) (paid informant).
 - (b) where the informant merely is a passive listener, there is no constitutional violation. See, e.g., Kuhlmann v. Wilson, 477 U.S. 436 (1986) (police placed an informant in a cell with an accused and the informant did no more than listen, rather than stimulate conversation regarding the crime charged, there was no violation of the right to counsel).

IV. WAIVER OF MIRANDA RIGHTS

A. IN GENERAL

1. The accused may voluntarily, knowingly and intelligently waive his Miranda rights. See Tague v. Louisiana, 444 U.S. 469, 471 (1980) (erroneous admission of an inculpatory statement made by accused; no evidence proving accused's waiver of his Miranda rights was knowingly or intelligently made); United States v. Smith, 608 F.2d 1011 (4th Cir. 1979); Taylor v. Commonwealth, 212 Va. 725, 187 S.E.2d 180 (1972); Land v. Commonwealth, 211 Va. 223, 176 S.E.2d 586 (1970); Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979); Harris v. Commonwealth, 217 Va. 715, 232 S.E.2d 751 (1977). Penn v. Commonwealth, 210 Va. 213, 169 S.E.2d 409 (1969).

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- (a) waiver need not be the best or wisest choice that the accused can make. Harris v. Riddle, 551 F.2d 936 (4th Cir. 1977).
- (b) fact that the accused is young, mentally ill, sick, or intoxicated does not necessarily indicate that a waiver is invalid IF it can be shown that the suspect understood his rights and waived them voluntarily, knowingly and intelligently.

See generally, Simpson v. Comm., 227 Va. 557, 318 S.E.2d 386 (1984) (defendant's relatively low intelligence and defective education are factors to consider but not conclusive). See also, Colorado v. Connelly, 479 U.S. 157 (1986) (delusional person came up to officer and confessed); United States v. Smith, 608 F.2d 1011 (4th Cir. 1979); Toliver v. Gathright, 501 F. Supp. 148 (E.D. Va. 1980); Harris v. Commonwealth, 217 Va. 715, 232 S.E.2d 751 (1977).

- (c) whether the waiver of rights is knowing and intelligent at time of confession depends upon the particular facts and circumstances surrounding the case. Bunch v. Comm., 225 Va. 423, 304 S.E.2d 271, cert. den., 464 U.S. 977 (1983).

- 2. There is a very strong presumption against the waiver of one's Miranda rights. Edwards v. Arizona, 451 U.S. 477 (1981); Moore v. Ballone, 658 F.2d 218 (4th Cir. 1981) (gov't bears heavy burden).

The burden of proof, to be shown by a preponderance of the evidence, rests upon the government. Brewer v. Williams, 430 U.S. 387 (1977); United States v. Grant, 549 F.2d 942 (4th Cir. 1977); Toliver v. Gathright, 501 F.Supp. 148 (E.D. Va. 1980); Moore v. Ballone, supra.

- 3. IMPLIED WAIVER - A waiver may be implied in certain instances, but only if the accused was first fully informed of his Miranda rights. Courts may recognize an implied waiver after application of a two-part test:
 - (a) suspect indicated that he understood rights after Miranda warnings were given, AND
 - (b) suspect's conduct was consistent with an intent to relinquish his rights.

See, generally, North Carolina v. Butler, 441 U.S. 369 (1979); Cheng v. Commonwealth, 240 Va. 26, 393 S.E.2d 599 (1990); Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990).

4. Examples of implied waiver:

- (a) A waiver was implied when the accused, once given his rights, made a phone call, and then began answering questions, United States v. Hayes, 385 F.2d 375 (4th Cir. 1967),
- (b) A waiver was implied when the defendant made a statement but refused to sign anything until he contacted his attorney, Taylor v. Commonwealth, supra,
- (c) An arrested suspect, who initiated a conversation with policeman, and accepted suggestion that he take a polygraph test, was held to have waived his right to counsel during interrogation. Oregon v. Bradshaw, 462 U.S. 1039 (1983).

- 5. QUALIFIED WAIVER - a suspect may waive his right to counsel for some purposes and not for others. See, e.g., Connecticut v. Barrett, 479 U.S. 523 (1987) (suspect would not make a written statement without counsel present, but would talk and answer questions)
- 6. Mere silence, without more, does not imply a waiver, Miranda, supra at 475, but it may be possible to imply a waiver from the actions of the accused. See IMPLIED WAIVER, supra. See generally, McFadden v. Commonwealth, 225 Va. 103, 300 S.E.2d 924 (1983); Wyrick v. Fields, 459 U.S. 42 (1982).
- 7. Once the suspect has validly waived his Miranda rights the waiver "will be presumed to continue in effect throughout subsequent custodial interrogations until the suspect manifests, in some way which would be apparent to a reasonable person, his desire to revoke it." Shell v. Commonwealth, 11 Va. App. 247, 397 S.E.2d 673 (1990); Washington v. Commonwealth, 228 Va. 535, 548, 323 S.E.2d 577, 586 (1984), cert. denied, 471 U.S. 1111 (1985). See, e.g., Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986) (a twelve minute interruption in the interrogation of a capital murder

suspect did not invalidate the Miranda waiver, where the suspect never manifested any desire to revoke the initial waiver when questioning resumed, and the police officer reminded the suspect of "the rights we gave to you before.")

8. The validity of a waiver of Miranda rights is a factual determination and, if supported by evidence, will not be reversed on appeal. Goodwin v. Commonwealth, 3 Va. App. 249, 349 S.E.2d 161 (1986).

B. FORM OF WAIVER

1. A written waiver is preferable but oral waivers are sufficient and confessions will not be invalidated because of a refusal to sign the waiver. Connecticut v. Barrett, 479 U.S. 523 (1987); Taylor, supra; Hodge v. United States, 392 F.2d 552 (5th Cir. 1968); United States v. Robinson, 593 F.2d 573 (4th Cir. 1979); Blackmon v. Blackledge, 541 F.2d 1070 (4th Cir. 1976).
2. An explicit statement of waiver is unnecessary as there is no per se rule. North Carolina v. Butler, 441 U.S. 369 (1979). Id., at 375 n.5 for collection of supporting courts of appeals decisions.

The "no per se rule of waiver" also applies to cases involving juveniles. Fare v. Michael C., 442 U.S. 707 (1979); Green v. Commonwealth, 223 Va. 706, 292 S.E.2d 605 (1982); Harris v. Commonwealth, 217 Va. 715, 232 S.E.2d 751, 755 (1977).

C. REVOCATION OF WAIVER

1. The accused may revoke his waiver and refuse to answer questions at any point during the interrogation. Upon revocation the questioning must cease. Miranda, supra at 445.
2. A revocation of waiver must be clearly expressed by the accused
 - (a) once a knowing and intelligent waiver has been executed, such waiver will be presumed to continue in effect until the accused's desire to revoke it is manifested in a manner which would be apparent to a reasonable person. Washington v. Common-

wealth, 228 Va. 535, 323 S.E.2d 577 (1984); Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986).

(b) example - interrogators were not in error when they continued to question a defendant who merely asked, "Do I have to talk about it now?" Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975).

3. Questioning may be resumed regarding the same or a different crime if there is a reasonable lapse of time and proper warnings are given to insure that the accused's right to cut off questioning is "scrupulously honored." Michigan v. Mosley, 423 U.S. 96 (1975); Hunt v. Cox, 312 F. Supp. 637 (E.D. Va. 1970); Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 28 (1979).

V. ADMISSIBILITY OF CONFESSIONS

A. CONSTITUTIONAL REQUIREMENT - "VOLUNTARINESS"

1. The Fifth Amendment privilege against self-incrimination coupled with the fundamental fairness, due process guarantee of the Fourteenth Amendment dictate that no confession is admissible in court unless it was made voluntarily. Witt v. Commonwealth, 215 Va. 670, 212 S.E.2d 293 (1975); Thompson v. Commonwealth, 61 Va. (20 Gratt.) 724 (1870); Grades v. Boles, 398 F.2d 409 (4th Cir. 1968); Purpura v. United States, 262 F.2d 473 (4th Cir. 1919).

No distinction can be drawn between statements which amount to an "admission" of part or all of an offense; the privilege against self-incrimination protects the accused from incriminating himself in any manner. Miranda v. Arizona, 384 U.S. 436 (1966).

2. A confession obtained during custodial interrogation will always be found to be involuntary if made in the absence of proper Miranda warnings or if it is in any way coerced or forced by the police. Miranda, 384 U.S. at 479. See also United States v. Renda, 567 F. Supp. 487 (E.D. Va.), aff'd 758 F.2d 649 (4th Cir. 1983) (if confession is product of custodial interrogation, and no Miranda warnings given, then confession is inadmissible regardless of how voluntary)

- (a) Failure to give any of the proper Miranda warnings renders any statement received inadmissible for the purposes of proving the defendant's guilt. Miranda, supra at 468.
 - (b) Once a suspect has asserted the right to counsel, no valid waiver of constitutional rights can occur in cases of police - initiated interrogation, even where different law enforcement authorities are involved. Arizona v. Roberson, supra.
 - (c) But see Oregon v. Elstad, 470 U.S. 298 (1985) (statement of suspect made while in custody but prior to being advised of Miranda rights held not to taint later confessions voluntarily made after being advised of Miranda rights and executing a valid waiver of those rights).
3. The court will look to the totality of circumstances in determining "voluntariness." Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Lunneerman v. Peyton, 281 F. Supp. 986 (W.D. Va. 1968), opinion on remand, 310 F. Supp. 323 (W.D. Va. 1970), aff'd, 440 F.2d 774 (4th Cir. 1971); United States v. Dodier, 630 F.2d 232 (4th Cir. 1980); Moore v. Ballone, 488 F. Supp. 798 (E.D. Va. 1980); U.S. v. Olmstead, 698 F.2d 224 (4th Cir. 1982) (assess maturity, intelligence and knowledge of accused, and circumstances of interrogation); Vance v. Bordenkircher, 692 F.2d 978 (4th Cir. 1982), cert. denied, 464 U.S. 833 (1983).
4. The central question the court faces in determining voluntariness is whether the will of the suspect was over-borne. United States v. Olmstead, 698 F.2d 224 (4th Cir. 1983) (confession should be product of an essentially free and unrestrained choice); United States v. Smith, 608 F.2d 1011 (4th Cir. 1979) (intoxication and police comment "that it would be best to cooperate" did not effect voluntariness).
5. In determining voluntariness, a number of factors shall be considered including:
- (a) the number of investigators,
 - (b) the length of questioning,
 - (c) the setting in which the interrogation occurs,

- (d) the age, experience and mental capacity of the accused,
 - (e) suspect's background & experience with criminal justice
 - (f) purpose and intensity of any police misconduct. Ashcraft v. Tennessee, 327 U.S. 279 (1946) and Mundy v. Comm., 390 S.E.2d 525 (Va. App. 1990)
6. Special consideration and a more rigorous degree of proof will be given to those who are young, of weak intellect, or who for any reason may be easily overcome by an experienced interrogator. Gallegos v. Colorado, 370 U.S. 49 (1962); In Re Gault, 387 U.S. 1 (1967); Williams v. Peyton, 404 F.2d 528 (4th Cir. 1968); Toliver v. Gathright, 501 F. Supp. 148 (E.D. Va. 1980); Moore v. Ballone, 488 F. Supp. 798 (E.D. Va. 1980), aff'd 658 F.2d 218 (4th Cir. 1981); Harris v. Commonwealth, 217 Va. 715, 232 S.E.2d 751 (1977).

For examples see -

- (a) Vance v. Bordenkercher, 692 F.2d 978 (4th Cir. 1982), cert. den. 464 U.S. 833 (1982) (defendant 15 years old, mental age of nine, IQ of 62)
 - (b) Gilreath v. Robinson, 544 F. Supp. 569 (E.D. Va.), aff'd 705 F.2d 109 (1982) (suspect allegedly insane)
 - (c) Washington v. Commonwealth, 228 Va. 535, 323 S.E.-2d 877, cert. den. 471 U.S. 1111 (1984) (defendant of relatively low education and defective education)
 - (d) Goodwin v. Commonwealth, 3 Va. App. 249, 349 S.E.-2d 161 (1986) (defendant suffering from mild retardation)
5. Examples of Voluntary Confessions-
- (a) Confession given in the sheriff's office at a time when no probable cause to arrest existed. Addison v. Commonwealth, 224 Va. 713, 299 S.E.2d 521 (19-83).
 - (b) Confession contained facts known only to the petitioner and improper interrogation could not put these words in the mouth of petitioner. Gilbreath

v. Mitchell, 705 F.2d 109 (4th Cir. 1983).

- (c) Defendant's confession not involuntary merely because it is the product of mental disease that prevents the confession from being of the defendant's free will - some official compulsion or coercion must have occurred. Colorado v. Connelly, 479 U.S. 157 (1986)
 - (d) The influence of prescription drugs, or promises of special treatment do not effect voluntariness, Stockton v. Commonwealth, 227 Va. 124, 314 S.E. 2d 371, cert. denied, 469 U.S. 873 (1984)
 - (e) Intoxication does not make statements per se involuntary absent evidence that will was "overborne". Yarborough v. Commonwealth, 217 Va. 971, 234 S.E.2d 286 (1977); see also Boggs v. Bair, 892 F.2d 1193 (4th Cir. 1989).
7. The prosecution cannot select portions of a confession and exclude those parts which tend to mitigate, justify, or excuse the offense charged. Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407, cert. den. 475 U.S. 1031 (1986); Pierce v. Comm., 2 Va. App. 383, 345 S.E.2d 1 (1986).
- (a) The defendant cannot object to portions of his confession on the grounds that they are inflammatory. Boggs, supra.
 - (b) Irrelevant portions of confession entered. Pierce, supra.
8. Portions of confession which tend to implicate defendant in crimes other than that for which he is on trial are also admissible. McFadden v. Garrahty, 820 F.2d 654 (4th Cir. 1987).

B. INVOLUNTARY CONFESSIONS

- 1. Any conviction based solely on an involuntary confession will be vitiated. Haynes v. Washington, 373 U.S. 503 (1963); Spano v. New York, 360 U.S. 315 (1959).
- 2. An involuntary confession, however, will not render the conviction invalid if there exists other convincing evidence of defendant's guilt. See Milton v. Wain-

wright, 407 U.S. 371 (1972) (where an error in the admission of a challenged confession was harmless in light of three unchallenged confessions and strong corroborative evidence of petitioner's guilt); Harrington v. California, 395 U.S. 250 (1969) (where illegal use of co-defendant's confessions did not vitiate conviction because such confessions were merely cumulative in the light of overwhelming incriminating evidence); Pearson v. Commonwealth, 221 Va. 936, 275 S.E.2d 893 (1981) (where admission was "harmless error" as examination of evidence lawfully admitted at trial proved defendant's guilt beyond a reasonable doubt).

C. TAINTED CONFESSIONS

1. Any confession which results from an unconstitutional violation of criminal procedure by the police will not be admitted into evidence. Wong Sun v. United States, 371 U.S. 471 (1963); See also Brown v. Illinois, 422 U.S. 590 (1975) (tainted confession not admissible under both Fourth and Fifth Amendments).
 - (a) examples - Taylor v. Alabama, 457 U.S. 687 (1982) (confession obtained through custodial interrogation after illegal arrest, held excluded where intervening events did not break causal connection between illegal arrest and confession); Lanier v. South Carolina, 474 U.S. 25 (1985) (fact that a confession is voluntarily given is insufficient to remove the taint of an illegal arrest). See also Boggs v. Comm., *supra* (confession not suppressed in absence of evidence that prior arrest or search were unlawful).
2. Once an illegal confession is obtained it raises the presumption that any subsequent confession is invalid. Bunting v. Commonwealth, 208 Va. 309, 157 S.E.2d 204 (1967). But see McFadden v. Garraghty, *supra*, (initial confession, unlawfully obtained, did not taint subsequent confessions when defendant was not in continuous custody, was interrogated only after passage of time, in different place by different officers).
 - (a) The U.S. Supreme Court has not consistently held that one illegal confession taints subsequent confessions. See, e.g., Michigan v. Tucker, 417 U.S. 433 (1974) (during interrogation accused revealed the name of alibi witness who was called by

the prosecution and gave inculpatory information leading to the accused's conviction; held, such use was admissible and justified; Court distinguished between the privilege against self-incrimination and the prophylactic standards laid down in Miranda; Oregon v. Elstad, 470 U.S.298(1985) (statement of suspect made while in custody prior to Miranda warnings held not to taint later confessions voluntarily made after the suspect was advised of his Miranda rights and a valid waiver was executed).

- (b) This presumption is rebuttable upon proof of an intervening element which removes the "taint of the original confession." Bunting, supra.
 - (c) A proper warning and reasonable length of time may remove the taint of an illegal search and seizure or of a prior illegal confession. Matthews v. Commonwealth, 207 Va. 915, 153 S.E.2d 238 (1967); United States v. Clark, 499 F.2d 802 (4th Cir. 1974); Hunt v. Cox, 312 F. Supp. 637 (E.D. Va. 1970); See also Reese v. Commonwealth, 220 Va. 1035, 265 S.E.2d 746 (1980) (confession admissible where product of an afternoon good-faith inventory search that was not tainted by morning pretextual search).
3. A violation of a Virginia Rule pertaining to criminal procedure does not necessarily render incriminating statements or voluntary confessions of an accused inadmissible or "tainted" material.
- (a) an unnecessary delay in getting suspects before a magistrate violated state law, but not defendants' due process rights; exclusion of voluntary confession warranted only in the event delay resulted in the loss of exculpatory evidence. Horne v. Commonwealth, 230 Va. 512, 339 S.E.2d 186 (1986); Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986)
 - (b) even if defendant was arrested without a warrant in violation of statute, a confession obtained during this invalid arrest was not subject to exclusion where probable cause existed at time of arrest, there was no deprivation of constitutional rights, and no evidence of bad faith. Thompson v.

Commonwealth, 10 Va. App. 117, 390 S.E.2d 198 (1990).

D. COERCED CONFESSIONS

1. Even if the proper Miranda warnings are given, a confession will be considered involuntary if it is the product of illegal coercion or developed from the promise of any benefit. Mincey v. Arizona, 437 U.S. 383 (1978); Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361, cert. den. 484 U.S. 1020 (1988); Grades v. Boles, 398 F.2d 409 (4th Cir. 1968).
 - (a) this coercion may be mental as well as physical. Miranda, supra at 478; Griffin v. Peyton, 284 F. Supp. 650 (W.D. Va. 1968); Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977).
 - (b) But see Mundy v. Commonwealth, ___ Va. App. ___, 390 S.E.2d 525 (1990) (5th amendment not concerned with moral and psychological pressure from source other than official coercion). Similarly, general appeals to the moral or religious benefit of telling the truth will not make a subsequent confession inadmissible. Townes v. Commonwealth, 214 Va. 683, 204 S.E.2d 269 (1974).
2. A confession is coerced when the behavior of the state's law enforcement officials is such as to "overbear the [accused's] will to resist and bring about a confession not freely self-determined." Rogers v. Richmond, 365 U.S. 534, 544 (1961); Mincey v. Arizona, 437 U.S. 385 (1978); United States v. Smith, 608 F.2d 1011 (4th Cir. 1979); Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977).
3. Examples of Coercion
 - (a) Use of force to obtain confessions - Brown v. Mississippi, 297 U.S. 278 (1936); White v. Texas, 310 U.S. 530 (1940); Sims v. Georgia, 389 U.S. 404 (1967).
 - (b) Threats of violence against the accused or his family - Rogers v. Richmond, 365 U.S. 534 (1961); Lynum v. Illinois, 372 U.S. 528 (1963); Tipton v. Commonwealth, 224 Va. 256, 295 S.E.2d 880 (1982).

- (c) Harsh interrogation measures - Davis v. North Carolina, 384 U.S. 737 (1966) (accused held incommunicado); Clewis v. Texas, 386 U.S. 707 (1967); Greenwald v. Wisconsin, 390 U.S. 519 (1968) (accused deprived of food, sleep and medication); Darwin v. Connecticut, 391 U.S. 346 (1968) (confession obtained following 37 hours of prolonged intermittent interrogation); Sims v. Georgia, 389 U.S. 404 (1967) (illiterate defendant held for eight hours without food and denied access to family, friends and counsel); Moore v. Ballone, 658 F.2d 218 (4th Cir. 1981) (questioning lasted at least five hours prior to giving of Miranda warnings, petitioner was questioned by three different police officers simultaneously, and sheriff knew of petitioner's prior hospitalization for mental disorders).
- (d) Promises - See Bram v. United States, 168 U.S. 532 (1897) (promises in general); Hammer v. Commonwealth, 207 Va. 135, 148 S.E.2d 878 (1966) (promise not to prosecute accused's family); People v. Brommel, 364 F.2d 845 (9th Cir. 1961) (threatened to put liar on transcript and to make it rough if he didn't confess); Walker v. State, 233 N.E.2d 483 (1968) (promise of immunity); Witt v. Commonwealth, 215 Va. 670, 212 S.E.2d 293 (1975) (promise to refrain from prosecuting family); Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977) (accused reasonably believed he had received promise from prosecutor to release his girlfriend if he confessed); Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (1987), cert. denied, 108 S.Ct. 733 (1988) (confession inadmissible where induced by hope of gain of some advantage or to avoid some evil in reference to proceeding against the defendant).
- But see United States v. Clayton, No. 79-5005 (4th Cir., Sep. 12, 1979) (unpublished) (spontaneous confession after defendant had read complaint charging him and implicating his son held valid). See also Rogers v. Commonwealth, 227 Va. 605, 616, 318 S.E.2d 298, 304 (1984) (a lie and a promise of leniency merely circumstances to be considered: a totality of circumstances test was used).
- (e) Use of drugs - Although a confession is not auto-

matically invalid if made under the influence of drugs or alcohol, it will be suppressed if such methods are used by the police unfairly to obtain a confession. Townsend v. Sain, 372 U.S. 293 (1963); Beecher v. Alabama, 408 U.S. 234 (1972). Similarly, a confession obtained by hypnosis is inadmissible. Leyra v. Denno, 347 U.S. 556 (1954).

- (f) Confessions obtained by trick - The police are allowed to use reasonable interrogation methods in order to obtain a confession. However, if the methods used are deceptive and are deemed to be coercive, the confession will be suppressed. Such coercion was held to taint defendant's confession in Rogers v. Richmond, 365 U.S. 534 (1961) where police tricked defendant's wife by calling her and ordering that she be brought into custody.

- 4. Under the "harmless-error" doctrine, a coerced confession may be admissible if the state can establish beyond a reasonable doubt that the admission of the confession was harmless to defendant. Arizona v. Fulminante, ___ U.S. ___ (March 26, 1991).

- (a) such a confession may then be considered quantitatively in the context of other evidence presented;
- (b) question of whether there was sufficient evidence, apart from confession, to allow for conviction

E. COLLATERAL USE OF INADMISSIBLE STATEMENTS

- 1. Statements made by the defendant in violation of Miranda warnings may be used collaterally to impeach the credibility of his direct trial testimony, Harris v. New York, 401 U.S. 222 (1971), and on cross-examination, United States v. Havens, 446 U.S. 620 (1980); James v. Illinois, 493 U.S. 307 (1990) (only against defendant; not against any and all defense witnesses); EXCEPT
 - (a) if involuntary or coerced, Mincey v. Arizona, supra;
 - (1) it is unclear what effect, if any, Arizona v. Fulminante, supra, will have on the admissi-

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bility of coerced confessions to impeach
credibility

- (b) testimony before a grand jury compelled by grant of immunity, New York v. Portash, 440 U.S. 450 (1979).
- 2. This rule extends to statements made after the warnings were given but before the arrival of the requested lawyer. Oregon v. Hass, 420 U.S. 714 (1975).
- 3. Silence may be used - in certain instances - to impeach credibility on the theory that a reasonable, innocent person would have said something to establish his innocence:
 - (a) suspect/defendant testifies, AND EITHER
 - (b) his silence occurred prior to an arrest and prior to notification of Miranda warnings, Jenkins v. Anderson, 447 U.S. 231 (1980) (theory that no government action induced silence), OR
 - (c) his silence occurred after an arrest and no warnings were given, Fletcher v. Weir, 455 U.S. 603 (1982).
- 4. When a Miranda warning has been given, however, silence is usually ambiguous and having little probative force as a prior inconsistent statement, United States v. Halex, 411 U.S. 171 (1975).
 - (a) thus, silence after a Miranda warning cannot be used to impeach credibility. Doyle v. Ohio, 426 U.S. 610 (1976) (accused within his rights, of which he was informed, to remain silent); Faer v. Commonwealth, 10 Va. App. 450, 393 S.E.2d 634 (1990).

VI. PROVING CONFESSIONS VOLUNTARY

A. BURDEN OF PROOF

- 1. The Commonwealth has the burden of proving that a confession was made voluntarily. Spano v. New York, 360 U.S. 305 (1969); Bunting v. Commonwealth, 208 Va. 309, 157 S.E.2d 204 (1967).

- (a) That burden is constitutionally met by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157 (1986); Lego v. Twomey, 404 U.S. 477 (1975); Witt v. Commonwealth, 215 Va. 671, 212 S.E.2d 29 (1975); United States v. Johnson, 495 F.2d 378 (4th Cir. 1974); United States v. Wyatt, 561 F.2d 1388 (4th Cir. 1977); Toliver v. Gathright, 501 F. Supp. 198 (E.D. Va. 1980); Green v. Commonwealth, 223 Va. 706, 292 S.E.2d 605 (1982); Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371 (1984).

B. PRE-TRIAL SUPPRESSION HEARING

1. The voluntariness of any challenged confession shall be determined by the presiding judge in a pre-trial hearing on a motion to suppress the evidence. Jackson v. Denno, 378 U.S. 368 (1964); Acosta v. Turner, 666 F.2d 949 (5th Cir. 1982); see also Allen v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990) (admissibility determined by trial judge).
 - (a) the court should have all pertinent evidence before it. Tipton v. Commonwealth, 224 Va. 256, 295 S.E.2d 880 (1982).
2. In Virginia, the Court must make the determination of voluntariness out of the presence of the jury. Witt, supra at 670; Noe v. Commonwealth, 207 Va. 849, 153 S.E.2d 248 (1967); Fant v. Peyton, 303 F.Supp. 457 (W.D. Va. 1969); Griggs v. Commonwealth, 220 Va. 46, 255 S.E.2d 475 (1979).
 - (a) this decision must be apparent in the record. See Goodwin v. Commonwealth, supra, (trial judge properly delineated as many specific findings of fact as possible for Court of Appeals review).
3. The trial judge's determination has the same weight as a finding of fact and the jury may consider voluntariness only insofar as it affects the weight and credibility of the confession. Townes v. Commonwealth, 214 Va. 683, 204 S.E.2d 269 (1974). In that regard the accused may testify as to the voluntariness of his confession without waiving his Fifth Amendment privilege. Washington v. Commonwealth, 214 Va. 737, 204 S.E.2d 266 (1974). See also Crane v. Kentucky, 476 U.S. 683 (1986) (where failure to allow defendant to

present evidence regarding the credibility or reliability of a voluntary confession deprived defendant of a fair trial).

[Note: The Fourth Circuit follows the "Massachusetts" or "humane" rule. Under that rule the jury will independently determine voluntariness only after the trial judge has decided the issue against the accused. To aid the jury in its determination the court will instruct the jury on the law and caution them that they must be satisfied by a preponderance of the evidence that a confession was voluntary before they should consider it in determining guilt. See United States v. Johnson, 495 F.2d 378 (4th Cir. 1974) (where the "preponderance of the evidence" standard was adopted). See also Lego v. Twomey, 404 U.S. 477, 487 (1972) (comment on the "Preponderance" Rule); Witt, supra at 670 (which affirms the use of the "preponderance standard" in Virginia)].

4. The defendant, upon his request, has a constitutional right to a hearing in order to determine the validity of the voluntariness finding.
 - (a) a judge's opinion is presumed correct thereby shifting the burden to the defendant. LaVallee v. Rose, 410 U.S. 690 (1973).
 - (b) factual findings of voluntariness will not be disturbed on review unless "plainly wrong" or "clearly erroneous." Witt, supra; United States v. Lewis, 528 F.2d 312 (4th Cir. 1975); Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977); Allen v. Commonwealth, supra.
 - (c) there is no constitutional requirement that a hearing be held if it is not requested by the defense. Wainwright v. Sykes, 433 U.S. 72 (1977).
5. On appeal, the issue of voluntariness is a question of law subject to the court's independent review of the entire record. Miller v. Fenton, 474 U.S. 104 (1985); Kauffman v. Commonwealth, 8 Va. App. 400, 382 S.E.2d 279 (1989).

VII. UNCORROBORATED CONFESSION

1. The corpus delicti of a crime cannot be proved by an uncorroborated extrajudicial confession, Canaday v. Commonwealth, 214 Va. 331, 200 S.E.2d 575 (1973), and such a confession must be suppressed. See also, Watkins v. Commonwealth, 238 Va. 341, 385 S.E.2d 50 (1989).
 - (a) But a confession is competent evidence tending to prove the corpus delicti. Reid v. Commonwealth, 206 Va. 464, 144 S.E.2d 310 (1965); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979).
 - (b) Once the accused has confessed to commission of the crime, only "slight corroborative evidence" is required. Clozza v. Commonwealth, 228 Va. 124, 321 S.E.2d 273 (1984), cert. denied, 105 S.Ct. 1233 (1985). See, e.g., Jefferson v. Commonwealth, 6 Va. App. 421, 369 S.E.2d 212 (1988) (quality of corroborating evidence not rendered deficient due to staleness)

Further, an initial unwarned confession does not automatically vitiate the admissibility of a subsequent confession made after the suspect was given his Miranda warnings. Oregon v. Elstad, 470 U.S. 298 (1985); Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied, 106 S.Ct. 208 (1985); Bacigal, Annual Survey of Virginia Law, Criminal Procedure, 19 U.Rich. L. Rev. 697 (1985).

Note: Slip opinions since the preparation of this chapter:

Terrell v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 1181-89-3) (Moon) (Apr. 9, 1991):

Miranda:

The evidence supports the trial court's ruling that the defendant's statements about requesting counsel were equivocal and that the defendant had waived his right to counsel.

Confession:

The fact that the police misrepresented some facts to the defendant during his interrogation is just another factor to be considered in determining whether the defendant's confession was involuntary in light of the totality of the circumstances. Here, the confession was ruled voluntary in light

of all the circumstances.

Venable v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0744-90-1) (Moon) (April 23, 1991):

CONFESSION:

Where the defendant had been in shock because of the influence of drugs, and had returned to normal while in the hospital, his confession, given to the police after the police had the approval of the attending physician to conduct the interrogation, was not involuntary in light of the totality of the circumstances.

Johnson v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec No. 1050-89-1) (Baker) (April 30, 1991):

CONFESSION:

The record supported the trial court's rulings that the 15 year old defendant's confession was voluntary and his waiver of his Miranda rights was voluntary.

McNeil v. Wisconsin, ___ U.S. ___ (No. 90-5319) (June 13, 1991)- (Scalia):

Right to Counsel and Interrogation:

The defendant's request for counsel pursuant to his Sixth Amendment in a preliminary hearing on one criminal charge does not constitute invocation of the defendant's right, under the Fifth Amendment, to counsel derived from Miranda v. Arizona, 384 U.S. 436 (1966). The Sixth Amendment right is offense specific whereas the Fifth Amendment is non-offense specific. The assertion of the Sixth Amendment right cannot be construed as the assertion of Miranda. Therefore, statements about another offense made by the defendant to the police after the defendant had obtained appointed counsel in a preliminary hearing with respect to another charge are not rendered inadmissible by Miranda.

CONSPIRACY

I. WHAT IS A CONSPIRACY?

A. **Definition:** Conspiracy is an agreement between two or more persons by some concerted action to commit an unlawful act. Johnson v. Commonwealth, 8 Va. App. 34, 377 S.E.2d 636 (1989); Amato v. Commonwealth, 3 Va. App. 544, 352 S.E.2d 4 (1987). Conspiracy is committed when an agreement to commit an offense is complete, whether or not any overt act in furtherance of the commission of the substantive offense is initiated. Ramsey v. Commonwealth, 2 Va. App. 265, 343 S.E.2d 465 (1986). **NOTE:** Although an overt act is not generally required, some specific statutory conspiracy prohibitions do require proof of an overt act. See, e.g., § 29.1-505.1, Code of Virginia (1950, as amended).

B. **Virginia Code Sections:**

1. **Generally:** Section 18.2-22 is applicable to agreements to commit felonies.
2. **Drug Offenses:** Section 18.2-256 is applicable to both misdemeanor and felony violations of Virginia's drug trafficking laws.

§ 18.2-256. **Conspiracy.** - Any person who conspires to commit any offense defined in this article or in the Drug Control Act (§ 54.1-3400 et seq.) is punishable by imprisonment or fine or both which may not be less than the minimum punishment nor exceed the maximum punishment prescribed for the offense, the commission of which was the object of the conspiracy.

II. ELEMENTS

A. **Mens Rea:**

1. Intent to commit an unlawful act and intent to agree to act together in carrying out the common purpose.

B. **Acts:**

1. An agreement, and

2. a concerted act in furtherance of agreement. (See discussion below, III. B. 1.)

C. Object:

1. Commission of a felony, or
2. commission of any drug violation.

III. PROOF OF ELEMENTS

A. Generally:

1. Elements of conspiracy may be proved by circumstantial evidence. The common purpose and plan may be inferred from the development and collocation of circumstances. Brown v. Commonwealth, 10 Va. App. 73, 390 S.E.2d 386 (1990); Johnson, supra. Conspiracy can be found even where the planned crime was not consummated. Amato, supra.

B. Intent:

1. Commonwealth must prove beyond a reasonable doubt that an agreement existed to engage, by concerted action, in the proscribed act. Reed v. Commonwealth, 213 Va. 593, 194 S.E.2d 746 (1973) (distribution of drugs); Graves v. Commonwealth, 234 Va. 578, 363 S.E.2d 705 (1988) (conviction for conspiring to commit a felony required proof of amount of drug to be distributed).
2. Guilty knowledge must be proved against each conspirator but it need not extend to all details, identity and role of each conspirator or division of spoils. Knowledge of the essential nature of the common scheme is sufficient to find intent. Amato, supra.
3. To establish conspiracy, as opposed to aiding and abetting, Commonwealth must prove additional element of pre-concert and connivance. Zuniga v. Commonwealth, 7 Va. App. 523, 375 S.E.2d 381 (1988).

B. Act:

1. Some cases seem to require that an overt act in furtherance of the conspiracy be shown, while

others suggest it is not necessary to prove an overt act in furtherance of "the commission of the substantive offense." Compare, Poole v. Commonwealth, 7 Va. App. 510, 375 S.E.2d 371 (1988) and Barber v. Commonwealth, 5 Va. App. 172, 360 S.E.2d 888 (1987); Ramsey, supra. In Hodge v. Commonwealth, 7 Va. App. 351, 374 S.E.2d 76 (1988) the Court of Appeals held that an overt act was not a necessary element of proof but useful in proving the conspiracy. However, the court refrained from deciding definitively "whether under Virginia law the absence of proof of an overt act to effect the object of the conspiracy is fatal to the prosecution for conspiracy to possess and distribute cocaine." Hodge, supra. Whether these cases are reconcilable under a theory that there is a distinction between an overt act in furtherance of the agreement and one in furtherance of the substantive crime is unclear.

2. Conspiracy is committed when the agreement to commit an offense is complete, therefore, initiation of an overt act in furtherance of the commission of the substantive offense is not required. Barber v. Commonwealth, 5 Va. App. 172, 360 S.E.2d 888 (1987).
3. In some circumstances existence of agreement can be inferred from overt conduct. However, mere proof of overt acts is not sufficient to prove conspiracy since agreement must be proved. Insufficient evidence of a conspiracy was found where statements of an unidentified participant were corroborated only by police observations of a 15 to 20 second encounter between two men whose hands met for 3 seconds. Poole v. Commonwealth, 7 Va. App. 510, 375 S.E.2d 371 (1988).
4. Evidence that defendants travelled from one state to another to meet, negotiate and consummate the sale of cocaine to an undercover officer was sufficient to establish an overt act in furtherance of the agreement. Hodge v. Commonwealth, 7 Va. App. 351, 374 S.E.2d 76 (1988).
5. Constructive possession of cocaine is probative of the object of the conspiracy. Id.

IV. EVIDENCE

1. Admissible:

- a. Co-conspirator statements: When the evidence establishes a prima facie case of conspiracy, that an agreement to commit a crime exists, any declaration of a conspirator made during and in furtherance of such conspiracy is admissible, in a prosecution for the target crime, as substantive evidence against any co-conspirator on trial. Berger v. Commonwealth, 217 Va. 332, 228 S.E.2d 559 (1976).
- b. Evidence of acts of co-conspirators is also admissible. Barber, supra.
- c. Evidence of other crimes is admissible if it is relevant to an issue or element of the case, such as intent, knowledge or motive, and is connected with the offense currently charged. Barber, supra. Proof of other crimes is also admissible where they constitute part of the general scheme of which the crime charged is a part of and the two are so closely related that proof of one tends to establish the other. Morton v. Commonwealth, 227 Va. 216, 315 S.E.2d 224 (1984). The legitimate probative value of the evidence of other crimes must outweigh the prejudice to the defendant. Barber, supra.
- d. Testimony of undercover police officer, which included hearsay evidence about officer's efforts to purchase cocaine from a suspect, during which transaction the suspect implicated the defendant as his source, was admissible under the co-conspirator exception to the hearsay rule. Rabeiro v. Commonwealth, 10 Va. App. 61, 389 S.E.2d 731 (1990).

2. Inadmissible:

Incriminating extrajudicial declarations of a co-conspirator made without the knowledge of the accused after the conspiracy has ended are inadmissible against anyone other than the declarant. Berger, supra; Jones v. Commonwealth, 11 Va. App. 75, 396 S.E.2d 844 (1990).

V. PUNISHMENT

- A. General Conspiracy: Punishment is less severe for conspiracy than for the substantive crime.
- B. Drug Related Conspiracy:
 - 1. Imprisonment or fine or both within the parameters of the penalty prescribed for the offense which was the object of the conspiracy.
 - 2. A single agreement to commit several drug-related crimes can form the basis of multiple violations and convictions under § 18.2-256. The legislature has determined that all drug conspiracies are not the same and by providing that the conspiracy is to be punished according to the penalty for the object offense(s) it intended for conspiracies with multiple objectives to be punished more severely. Wooten v. Commonwealth, 235 Va. 89, 368 S.E.2d 693 (1988).

VI. ADDITIONAL CONSIDERATIONS

A. Venue

- 1. Venue is proper in any district in which an act in furtherance of the conspiracy was committed. Venue may be proper in more than one place. Barber, supra; Henry v. Commonwealth, 2 Va. App. 194, 342 S.E.2d 655 (1986).
- 2. Venue is proper where the agreement was made and all conspirators, even without knowledge of a particular act, may be tried where any acts were performed. Zuniga, supra.

B. Double Jeopardy

- 1. Defendant may be convicted of conspiracy and the underlying substantive offense if both are tried together. Defendant may not, however, be convicted of conspiracy in a subsequent trial after an earlier conviction for the substantive offense. Boyd v. Commonwealth, 236 Va. 346, 374 S.E.2d 301 (1988).

2. It was error for trial court to allow a defendant to be tried for conspiracy after the underlying substantive charges had been dismissed for lack of a speedy trial. Clark v. Commonwealth, 4 Va. App. 3, 353 S.E.2d 790 (1987).
3. Section 18.2-23.1 precludes conviction of defendant for conspiracy after having been previously convicted for substantive offense, but does not bar prosecution for conspiracy charges that did not involve the particular acts upon which the substantive conviction was based. However, defendant could not be convicted of a second conspiracy based on those particular acts where his conduct during the applicable period constituted one overall conspiracy. Bowman v. Commonwealth, 11 Va. App. 259, 397 S.E.2d 886 (1990).

C. Wharton's Rule

1. When conspiracy is a necessary element of a substantive offense it cannot be a separate offense as well, e.g. distribution of a controlled substance.
2. Third party exception: a conspiracy charge may be brought where the agreement involves more participants than necessary to complete the substantive offense. Stewart v. Commonwealth, 225 Va. 473, 303 S.E.2d 877 (1983).

D. Single versus Multiple Conspiracies

In determining whether a single or multiple conspiracies exists the court should consider:

1. The time period in which the activities occurred,
2. statutory offenses charged,
3. places where the activities occurred,
4. persons acting as co-conspirators and
5. the overt act or other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted.

E. Joint Trial for Multiple Conspirators

Co-conspirators may only be tried together if:

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1. They consent and
2. the charges are based on the same act or transaction or two or more that are connected or constitute part of the common scheme.

Section 19.2-263.

Note: Slip opinions since the preparation of this chapter:

Fortune v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 1523-89-2) (Benton) (June 11, 1991):

Conspiracy to Distribute:

For § 18.2-256, there can be no conspiracy between the defendant, a police officer and his informant who is working as an agent of the officer. In order for a conspiracy to exist, there must be a bilateral meeting of the mind between two or more persons. Therefore, the conviction for conspiracy to distribute drugs is reversed and dismissed.

CONFIDENTIAL INFORMANTS

By

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Introduction

The intent of this chapter is to describe the legal and tactical ramifications of using a confidential informant (hereinafter, CI) in prosecuting drug cases. Setting up a network of confidential informants and using CI's are police matters and beyond the scope of this chapter. (See Mount, Harry A., Jr.: "Criminal Informants: An Administrator's Dream or Nightmare", FBI Law Enforcement Bulletin, pp. 12-16, Dec. 1990). The prosecutor's interest in a CI is twofold: (1) whether CI information can establish probable cause for issuance of a search warrant or justify an arrest; and (2) whether a CI's identity can be protected against defense discovery motions and in the courtroom.

CI as Probable Cause for Search Warrant

The value of CI's in supplying probable cause for the magistrate to issue a search warrant cannot be overstated. Frequently, this takes the form of the CI under police observation actually purchasing drugs with police buy money from a suspected drug house. The street analysis of the substance is solid probable cause for a search warrant. Tamburino v. Commonwealth, 218 Va. 821, 241 S.E.2d 762 (1978). The CI may also simply supply information, which when combined with police observations corroborating the CI's observations may rise to the level of probable cause. [See Thims v. Commonwealth, 218 Va. 85, 235 S.E.2d 443 (1977)]. Where the CI acts only as a tipster and takes no active role in the criminal event with which a suspect is later charged, the CI identity is privileged and need not be revealed in later proceedings against the defendants. Lanier v. Commonwealth, 10 Va. App. 541, 394 S.E.2d 495 (1990).

The Courts have accorded tips of persons who wish to remain anonymous a sort of foundation status if they are corroborated by police observations or knowledge to build upon that foundation up to a level of legal probable cause. See Alabama v. White, 110 S. Ct. 2412 (1990) (While an anonymous informant's tip could not alone justify a Terry stop and frisk of suspect, when informant's

information was corroborated by police observations, reasonable suspicion was established). Cf., Hardy v. Commonwealth, ___ Va.App. ___, 7 VLR 1171 (Rec. No. 0792-88-2) (Dec. 18, 1990) (Police corroboration of innocent details supplied by anonymous tip may not be sufficient to provide probable cause for stop and search of suspect).

Even anonymous Crime Line tips could support probable cause for an arrest (or, presumably, issuance of a search warrant) when corroborated in part by police. However, when crime line tips are used to establish probable cause, the search warrant affidavit should include specifics as to how the crime line CI knew what he reported, when the CI saw it, and why the police affiant thinks the CI is reliable and believable.

CI Provides Probable Cause for Arrest

CI information may stand alone as reasonable suspicion for a Terry-type stop or, when corroborated by police, as probable cause for a warrantless arrest. See Draper v. United States, 358 U.S. 307 (1959) (Warrantless arrest justified by CI information and police observations); Illinois v. Gates, 462 U.S. 213 (1983) (Whether probable cause for arrest exists will be judged by the "totality of circumstances"). As in supporting an affidavit for a search warrant, details are critical. When did the CI see the suspect, where was it, why does the CI believe a crime was committed (or that the substance was narcotics, the property was stolen, etc.), and how the CI knows what he reports (i.e., his own observations, boasting by the suspect, etc.). It is imperative that police officers become sensitive to the need for specificity, or the prosecutor at trial may find an arrest or search warrant is indefensible even though at the time of the event more detail was available which would have supported probable cause if only the right questions had been asked.

Protection of CI Identity

It is imperative to make every effort to protect the identity of the CI, who often risks his personal safety to come forward and give information to the police. One's credibility as a prosecutor and the trust the CI places in the police are in question whenever the CI's identity is revealed. "If the public becomes aware of the dual role played by an informant, the informant becomes useless to the police, and persons who might otherwise provide information are discouraged from rendering assistance." Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157

(1987).

The identity of one providing criminal information to the prosecution is generally considered privileged, to further effective public law enforcement. Webb v. Commonwealth, 137 Va. 833, 120 S.E. 155 (1923); Roviaro v. United States, 353 U.S. 53 (1957). A defendant's need to learn the identity of the CI must be weighed by the court against the government's need to maintain confidentiality in the particular case, taking into account the crime charged, the relevance of the CI's prospective testimony, and other factors. It is a case by case analysis. See Roviaro, supra.

The identity of Crime Line CI's is also privileged. The caller's right to anonymity even if a reward is paid has been upheld in jurisdictions considering the question. See Ballentine v. State, 707 P.2d 922 (Alaska App. 1985) (In camera inspection of crime stoppers program records found that continued anonymity did not substantially impair defendant's right to fair trial, while disclosure might jeopardize program); Betolotti v. State, 476 So. 2d 130 (Fla. 1985) (Cooperating citizen's receipt of \$1,000 "crime watch" program reward did not make citizen a police agent).

On a constitutional level, the defendant's inability to confront his accuser or learn his identity by discovering the CI's identity has been held not to deny the defendant his 6th Amendment right of confrontation nor to deny him 5th Amendment due process. McCray v. Illinois, 386 U.S. 300 (1967).

The degree of protection available to shield a CI's identity varies directly with the CI's participation in the crime he reports against the suspect. Where the CI acts as a mere tipster, and is neither an instigator nor a participant either in the crime or at the scene of the crime when the suspect is arrested, the CI enjoys substantial protection. See Roviaro, supra; Lanier, supra.

However, where the CI is a more active participant in planning the crime, or is present when the suspect is "busted", you may expect more rigorous and successful challenges to his identity. The defense attorney is likely to argue he must know the CI's identity because the CI may have information valuable to establishing an entrapment defense and is in any event a material witness to the events implicating his client. Keener v. Commonwealth, 8 Va. App. 208, 308 S.E.2d 21 (1989); United States v. Price, 783 F.2d 1132 (4th Cir. 1986); McLawhorn v. North Caroli-

na, 484 F.2d 1 (4th Cir. 1973) (Disclosure of informant's identity is required where informant is an actual participant in the crime.). A CI who is at the scene of the crime charged against the defendant is in a precarious position. If at all possible, plan with your officers to avoid "taking down" the defendant when the CI is present. But the CI's mere presence at the scene of the crime charged against the defendant is not sufficient to deem the CI a "participant" and void the prosecution's privilege against disclosure. Miller v. United States, 273 F.2d 279 (5th Cir. 1959); United States v. Brinkman, 739 F.2d 977, 981 (4th Cir. 1984) (District Court did not abuse its discretion by refusing to order government to reveal CI identity where CI in case was somewhere between a mere tipster and a participant and did not witness the actual crime.)

Defense attorneys sometimes seek to learn the name of a key CI in a case because they know the Commonwealth will usually nolle prosequi the case rather than "give up" the CI. This is seldom stated overtly, but is usually a transparent purpose where the defense attorney beseeches the court judge to overrule the Commonwealth's objections to his pointed cross-examination questions of police officers as he tries to learn more and more about the CI, protesting that "this person (CI) is a material witness in my client's case". Of course, the last thing he wants is for the CI to appear and testify.

The initial countermeasure of the prosecutor is to argue a long line of cases supporting the government's right to confidential, privileged sources. See Roviaro, *supra*; Lanier, *supra*. If the defense attorney probes for particulars of the CI's identity where the CI acted as tipster in an affidavit for a search warrant, one's objection should be that only a "totality of circumstances" yielding probable cause for a magistrate to issue the search warrant is relevant under Illinois v. Gates, 412 U.S. 213 (1983). Conceivably, the CI could have been mistaken or even lying, yet if the police officer obtaining the search warrant presented the information in good faith, the search warrant is still valid. United States v. Leon, 468 U.S. 897 (1984); McCrary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637 (1981). Therefore, questions regarding the CI's identity become beside the point.

The prosecutor should force the defense attorney to assume the burden as the moving party to show the court that disclosure of the CI's identity and activities is merited. The prosecutor should use the following criteria:

- 1) Applying a balancing test, is the defendant's need to know the CI's identity greater than the govern-

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ment's need to protect the CI and the flow of information from all potential CI's? (See Rovi-aro, supra; Lanier, supra).

- 2) At what stage is the case prosecution? Because there is no absolute rule requiring disclosure, is guilt or innocence at stake or does some other reason justify revelations regarding the CI? There should be little reason, for example, to reveal the CI identity at a preliminary hearing where only probable cause is at issue. (See Lanier, supra).
- 3) Has defendant shown that the CI information would be relevant and helpful to his case, or is he merely on a fishing expedition and trying to sabotage the government's informant network? In the case law, "helpful" means more than interesting or useful, and borders on exculpatory. (See Lanier, supra).
- 4) The more recent cases from the Virginia Court of Appeals suggest that the court reviews convictions involving nondisclosure of a CI's identity by analyzing whether or not a defendant may have suffered prejudice from the nondisclosure in preparing or presenting his defense. Contrast Keener, supra, where a finding of prejudice from nondisclosure caused reversal with Moreno v. Commonwealth, 10 Va. App. 408, 392 S.E.2d 836 (1990) (Conviction affirmed because defendant could not show that late disclosure of exculpatory CI information during trial had prejudiced his case.)

Still, standard defense attacks in cross examination on the particulars of an affidavit may reveal particulars of a CI's identity. The prosecutor must be ever vigilant to prevent these revelations, countering with objections to the questions based on the aforementioned strategies. The defendant is present during all stages of a trial and has little to do after a hearing but return to his cell and painstakingly review search warrant testimony, trying to remember how many people fitting the CI's profile he recalls selling drugs to or telling particulars of his crime.

Be alert for seemingly innocuous questions which might reveal the CI's identity, such as the following:

- 1) What time of day was the CI there to buy drugs?
[Most affidavits say "within the last 48 hours" rather than 10:47 a.m." for obvious reasons].

- 2) what was the CI wearing when he saw the defendant/saw the police affiant? [The defendant may have only seen one person with a green jacket that day].
- 3) what was the defendant wearing when the CI saw him? [Conceivably, the defendant may have Just showered and have been wearing a robe, which would pinpoint a time.]
- 4) How long did the CI stay?
- 5) How many other people were in the room with the CI and the defendant?
- 6) From your description officer, was the CI a female [or even more cleverly put, "carrying a purse"]
- 7) How much drugs did the CI buy? [Or, how much money did the CI pay?]

An accused may be deemed to have waived his right to disclosure by failing to demand production of a CI identity. In United States v. Cansler, 419 F.2d 952 (7th Cir 1969), cert. denied, 397 U.S. 1029 (1970), the court refused to order disclosure of the CI's identity because, among other reasons, the defendant had made no pretrial demand for production of the informant. Where the CI is an active participant or witness to the crime charged, some courts have held the prosecution must either reveal the CI's identity or in lieu of that make reasonable efforts to locate him prior to trial for interview by the defense upon defense demand. United States v. Barnes, 486 F.2d 776 (8th Cir. 1973).

If the rulings go against the prosecution, the choice is whether to reveal the CI's identity or to nolle prosequi the case. Your police officer's advice in this decision is imperative. The officer will know whether the CI can be revealed without danger, is still in the area, has family, or expects to be protected.

Rarely, you may decide after carefully weighing all factors that revealing the CI's identity is justified. Be aware that such an action spreads through the criminal informant community like wildfire. Your single revelation may affect future and present cooperation of CI's with the police. Make every effort to minimize the impact of the revelation. For example, ask the court's permission to write the CI's name on a piece of paper to be given to defense counsel, rather than announce the name in

open court on the record. The Court may agree to an in camera revelation of the CI's identity and particulars of his cooperation, incentives, and activities rather than forcing the prosecutor to reveal these things in open court. [See United States v. Kerris, 748 F.2d 610, 614 (11th Cir. 1984)]

Once the CI is revealed, your immediate duty is to be sure the CI is informed of that action. The CI may ask for physical protection. Most local prosecutors' officers lack the resources to do this in any meaningful way. If your case is important enough, you may be able to tap the greater resources of the state Attorney General. If your state case charges a significant crime under federal law, you may persuade the federal authorities to adopt it, and thereby give your CI the benefit of the very extensive federal witness protection and relocation programs.

Note: Slip Opinions since the preparation of this chapter material:

Boyd v. Commonwealth, 11 Va. App. ___, ___ S.E.2d ___ (Rec. No. 0254-89-2) (Coleman) (Apr. 2, 1991):

Search Warrant - Anonymous Tipster:

Where the informer is anonymous and no other basis exists in the affidavit for considering him honest, the quality and the character of the information provided, if detailed, may establish that the informer has personal knowledge of the facts about which he spoke. Thus, where the informer has provided the police officer with sufficient personal information from which he could be identified, where the informer has personally observed the illegal drug activity, and where the officers has verified the accuracy of the informer's information concerning the defendant's activities and living arrangements, even if some details are innocuous, then there existed a substantial basis, under the totality of the circumstances test, for a magistrate to conclude that probable cause existed to issue a search warrant.

IMMUNITY DOCTRINES

A. IMMUNITY - GENERAL PRINCIPLES

1. Definition:

- a. Transactional immunity - protects witness from prosecution for any aspect of a criminal event as to which a witness testifies. Kastigar v. United States, 406 U.S. 441, 453, reh'ing den. 408 U.S. 931 (1972); Caldwell v. Comm., 8 Va. App. 86, 89, 379 S.E.2d 368, 369 (1989).
- b. Use Immunity (also testimonial immunity) - protects witness from prosecution based on testimony given by the witness or evidence derived from such testimony. Kastigar, supra, at 449 - 53; Caldwell, supra, 8 Va. App. at 88, 379 S.E.2d at 369.

Note: The government bears the burden of establishing that evidence was not derived from accused's testimony under a grant of immunity. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

2. Purposes/Benefits of Immunizing Witness -
[from COSTELLO, VIRGINIA CRIMINAL LAW AND PROCEDURE, ch. 44]

- a. provides prosecution with valuable information and enhances chance of success in important trial;
- b. provides witness with incentive to share information with prosecution and testify;
- c. allows defendant to confront and cross-examine witness. See also, Cunningham v. Comm., 2 Va. App. 358, 344 S.E.2d 389 (1986) (noting benefits to witness, accused, and the system).

B. IMMUNITY AND PRIVILEGE AGAINST SELF-INCRIMINATION

- 1. Under both the federal and Virginia constitutions, a witness may assert the privilege against self-incrimination and refuse to testify. U.S. CONST., Amend. 5,

and VA. CONST., Art. 1, sec. 8.

- a. failure to assert this privilege constitutes waiver. Roberts v. United States, 445 U.S. 552 (1980).
- b. the defendant may willingly waive this privilege and testify in his own behalf, see Va. Code § 19.2-268. If a defendant does so, he is subject to cross-examination. See, e.g., Woody v. Comm., 214 Va. 296, 199 S.E.2d 529 (1973).

Note: Having waived his privilege, a defendant may not testify only about those factors which tend to support his defense, and suppress any information which tends to incriminate him. United States v. Rylander, 460 U.S. 752 (1983); Johnson v. Riddle, 222 Va. 428, 281 S.E.2d 843 (1981). See also, Sims v. Slayton, 333 F. Supp. 246 (W.D. Va. 1971).

2. In Virginia, no statement made by a witness under legal examination may be used as evidence against that witness, unless witness was examined in his own behalf. Va. Code § 19.2-270. A defendant who testifies in his own behalf waives this statutory grant of immunity along with his privilege against self-incrimination. Thaniel v. Comm., 132 Va. 795, 111 S.E.259 (1922); Smith v. Comm., 136 Va. 773, 118 S.E. 107 (1923). See also, Harbaugh v. Comm., 209 Va. 695, 167 S.E.2d 329 (1969).
3. A defendant may make a partial waiver so as to testify about collateral matters (e.g., motions for continuance, qualifications of jurors, change in venue, validity of search and seizure); the defendant will not be subject to cross-examination on the merits. Enoch v. Comm., 141 Va. 411, 126 S.E. 222 (1925).
4. Relationship Between Immunity and the Privilege Against Self Incrimination:

The privilege against self-incrimination exists only when a witness reasonably believes that his testimony could be used in a criminal prosecution against him or might lead to evidence which could be used against him. Kastigar, supra, 406 U.S. at 445. A grant of transactional immunity, protecting the witness from prosecution for the criminal events as to which he testifies,

eliminates the privilege against self-incrimination entirely. However, the Supreme Court, in Kastigar, held that this full immunity from prosecution provides the witness with unnecessarily broader protection than the privilege against self-incrimination. Kastigar, supra, at 453. The Court held that use immunity is coextensive with the scope of the privilege against self-incrimination, and is sufficient to compel testimony over a claim of the privilege. Id.

C. VIRGINIA LAW - IMMUNITY

1. There is no clear authority allowing the Commonwealth's Attorney to grant immunity. Op. Atty. Gen. 462 (1970-71) (stating a Commonwealth Attorney is without legal authority to offer an accused "immunity from prosecution in consideration of his testifying in behalf of the Commonwealth.")

Virtually the same effect may be reached by means of a plea agreement between the Commonwealth and a witness. BACIGAL, VIRGINIA CRIMINAL PROCEDURE, §§ 7-14 (2d ed. 1989). However, an offer of immunity does not require court approval or detrimental reliance by either party; a plea agreement does. Id.

2. There is no general immunity statute in Virginia, except for the unique testimonial immunity provided by Va. Code 19.2-270 which states, "In a criminal prosecution, other than for perjury, or in an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, in a criminal or civil action, unless such statement was made when examined as a witness in his own behalf."

Other jurisdictions have held that such immunization cures any possible prejudice to the defendant because he is able to cross-examine the witness. Cunningham v. Comm., 2 Va. App. 358, 344 S.E.2d 389 (1986).

3. Virginia does, however, allow compelled testimony and grant immunity to witnesses testifying about specific offenses -
 - a. Gambling - Va. Code § 18.2-337 - provides transactional immunity, i.e., witness is protected from

prosecution for offense as to which he is compelled to testify; failure of witness to cooperate is punishable as contempt.

- b. Perjury - Va. Code § 18.2-437 - provides transactional immunity for the offense as to which witness is compelled to testify; failure of witness to cooperate is punishable as contempt.
- c. Bribery - Va. Code § 18.2-445 - transactional immunity for the offense as to which witness is compelled to testify; failure to cooperate is punishable as contempt.
- d. Bribery of a Public Servant or Party Official - Va. Code § 18.2-450 - transactional immunity for the offense as to which witness is compelled to testify; failure to cooperate is punishable as contempt.
- e. Drug Offenses - Va. Code § 18.2-262 -
 - (1) use immunity against the statements or evidence derived from such statements when witness is called on behalf of the Commonwealth;
 - (2) transactional immunity as to the offense for which witness is compelled to testify.

See also, Caldwell v. Comm., 8 Va. App. 86, 89, 379 S.E.2d 368, 370 (1989) (use immunity extended to all prosecutions against witness; transactional immunity only as to offense for which witness testifies)

- f. Testimony Before a Multi-Jurisdictional Grand Jury - Va. Code § 19.2-215.7 - use immunity against use of compelled testimony or derivative evidence except in prosecution for perjury.
- g. Elections - Va. Code § 24.1-281 - transactional immunity extending to all offenses against election laws. See also, Stanley v. Comm., 116 Va. 1028, 82 S.E. 691 (1914); Flanary v. Comm., 113 Va. 775, 75 S.E. 289 (1912)

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- h. House of Prostitution - Va. Code § 48-15 - unclear whether transactional or use immunity; provision merely authorizes Commonwealth "to grant immunity to any witness called to testify in behalf of the prosecution." There are no cases to be found interpreting this section.

NOTE - IN ALL CASES, THE WITNESS MUST BE COMPELLED TO TESTIFY ABOUT AN OFFENSE UNDER THE CHAPTER GRANTING IMMUNITY (e.g., a witness claiming immunity under Va. Code § 18.2-262 must have been compelled to testify about a drug offense under the chapter or the Drug Control Act. See, Caldwell, supra.)

D. LIMITATIONS ON IMMUNITY

1. A grant of immunity specified in the Code does not withdraw subject matter jurisdiction from the court; it merely creates a defense of immunity against prosecution which may be waived if not raised before prosecution begins. See, e.g., Evans and Smith v. Comm., 226 Va. 292, 308 S.E.2d 126 (1983).
2. In creating a plea agreement promising immunity to a witness, the Commonwealth Attorney should take great care in using precise and accurate wording. If the Commonwealth's Attorney intends only to grant either use or transactional immunity, or if the Attorney intends to preclude prosecution in one particular region, these intentions must be clearly expressed as limitations on the government's general obligations.

Example: "The Government agrees that defendant will not be prosecuted in [region]; OR, The Government agrees that defendant will not be prosecuted by the office of the Commonwealth's Attorney for the [region]. It is insufficient to merely identify the contracting party without greater clarification. See United States v. Harvey, 791 F.2d 294 (1986) (agreement by the Eastern District of Virginia not to prosecute did not limit the government's general obligations as far as place of prosecution, etc, concerned, only identified party; plea agreement precluded South Carolina from prosecuting witness).

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THE USE OF THE GRAND JURY SYSTEM IN DRUG INVESTIGATIONS AND PROSECUTIONS

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Pursuant to Virginia Code Sections 19.2-191 through 19.2--215.11, a grand jury system has been set out for use in criminal proceedings. However, within those sections lie three (3) very different investigative tools: the regular grand jury, the special grand jury, and the multi-jurisdiction grand jury. Each has strengths and limitations, and an evaluation of their similarities and differences is instructive. Although it will be clear that the multi-jurisdiction grand jury has the broadest utility in drug cases, both the regular and special grand juries may be used to complement the multi-jurisdiction investigation or in its place if no such tool is available.

The following outline sets forth the statutory provisions regarding the multi-jurisdiction grand jury, its creation and use and includes discussions of the regular and special grand jury provisions. The comparison shows the tremendous value of the multi-jurisdiction grand jury.

I. The Preliminary Steps

- A. PRIOR TO THE Supreme Court application (infra) for a multi-jurisdiction grand jury (MJGJ), those Commonwealth's attorneys whose jurisdictions initially are to be included in the scope of any investigation must create a written plan of action:
 - 1. setting out the goals for this grand jury;
 - 2. determining the type(s) of cases to be investigated by this grand jury;
 - 3. selecting the attorney who will direct the grand jury proceedings and determining his duties and responsibilities to the grand jury and to the participating Commonwealth's attorneys;
 - 4. deciding on the role the participating Commonwealth's attorneys will play in grand jury investigations and proceedings and determining their duties and responsibilities to the attorney di-

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recting the grand jury proceedings; and

5. deciding on a system of information exchange among the Commonwealth's attorneys and the attorney directing the grand jury.

B. ALSO PRIOR TO the application, the Commonwealth's attorneys must meet with the law enforcement heads of the participating jurisdictions (e.g., sheriffs and police chiefs) and agencies (e.g., state police) to make a written agreement regarding:

1. the number of officers assigned to work on grand jury investigations;
2. the officers' relationship with the special counsel;
3. the person(s) to whom these officers report and the authority of the person(s) over the action and inaction of the officers;
4. the type of investigations to be made by the grand jury and thus the type of cases to be handled by these officers; and
5. the system of information exchange among the law enforcement heads, the Commonwealth's attorneys, and the special counsel.

C. SPECIAL INVESTIGATIVE PERSONNEL are not provided for in the MJGJ provisions. It is only the special grand jury which may have investigators assigned to it. (Section 19.2-211). Some jurisdictions have argued successfully that this cited provision should be used to allow investigators to be assigned to the MJGJ. There are two advantages:

1. These officers are sworn to the same secrecy by the Court as are the grand jurors.
2. These officers can give all their time to the grand jury investigations.

D. NEITHER ARE SPECIAL investigators provided for in the regular grand jury provisions. Rather, the statutes

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make it the duty of every commissioner of the revenue, sheriff and other officers to tell the Commonwealth's attorney of any violations of the law. (Section 19.2-201)

II. The Empaneling and Selection

- A. THE APPLICATION FOR a MJGJ first must be approved by the Virginia Attorney General's office. (Section 19.2-215.2) (Appendix A). The application must:
 - 1. be signed by at least two of the Commonwealth's attorneys whose jurisdictions initially are to be included in the planned scope of investigations;
 - 2. state which specific jurisdictions those are;
 - 3. specify in which jurisdiction the grand jury is "requested" to convene;
 - 4. name the Commonwealth's attorney(s), and any assistant(s), who will serve as special counsel to the grand jury;
 - 5. name the one special counsel from the above list who actually will direct the grand jury proceedings; and
 - 6. notify all concerned Commonwealth's attorneys of the application.
- B. THE APPLICATION, TOGETHER with the Virginia Attorney General's approval, then must be submitted to the Supreme Court of Virginia.
- C. WITHIN TWENTY (20) DAYS, the Chief Justice or his designate will order the empaneling of the grand jury. (Section 19.2-215.3) (Appendix B).
 - 1. The initial term is twelve (12) months from the date of the Supreme Court Order.
 - 2. Additional terms of six (6) months each will be granted upon petition of a majority of the sitting grand jurors "provided that such" petition is filed and Order of extension entered "prior to" the expiration of the present grand jury term. (Appendix C).

Note: It has been suggested that eighteen to twenty-four (18-24) months be the limit for the same panel of grand jurors. Serving is an infringement upon a juror's life and livelihood; some also may become bored with investigations.

- D. A SPECIAL GRAND jury, by comparison, requires no such lengthy and formal procedure. One may be empaneled on motion of the Court or by vote of a majority or minority or regular grand jurors. (Section 19.2-206). Perhaps one also may be empaneled on motion of a Commonwealth's attorney. (See Section 19.2-210).
1. The initial term of a special grand jury is only six months; however, the Court may extend this if the jury is making progress and needs additional time. (Section 19.2-213.1).
- E. A REGULAR GRAND jury, by comparison, is empaneled automatically each term unless otherwise ordered. In fact, more than one panel may be selected to sit at the same time or at another time during the term. (19.2--193). This is determined by the number of cases to be considered.
- F. THE PRESIDING JUDGE of a MJGJ as named by the Supreme Court, next must choose the grand jurors from the present regular grand jury list. Certain considerations follow:
1. As a practical matter, since each participating jurisdiction must be represented by at least one juror (Section 19.2-215.4), the presiding judge may request recommendations from the various circuit court clerks.
 2. Investigation should be made in each jurisdiction as to the particular juror's background to rule out any connection to drugs or related criminal activity. A check with investigators in each area should suffice. Often court clerks are unaware of criminal involvement by otherwise "blue ribbon" persons.
 3. The best practice would seem to be empaneling the maximum number--eleven (11)--of grand jurors permitted to allow for jurors who do not attend on

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occasion due to sickness or other reason or who opt to drop off the panel before an investigation is completed or before the panel is discharged by the presiding judge.

4. The judge should be encouraged to empanel the jurors in a closed court proceeding to protect the jurors' identities. The circuit court clerk who issues the initial subpoenas for the grand jurors should be asked to record them in such a way that the purpose of the subpoena is not obvious.
5. The attorney directing the proceedings should ensure that the jurors are questioned at empaneling as to their required residency of one year in the Commonwealth and six (6) months in the particular jurisdiction represented by the juror.
6. The judge should determine at the time of empaneling who the foreperson of the jury should be.

Note: Rapport of the directing special counsel with the presiding judge cannot be overemphasized, particularly in the pre-empaneling stage of the proceedings, when decisions must be made by the court as to the many technical details not covered directly in the statute. (See infra.)

- G. CHOOSING REGULAR GRAND jurors is done the same, as they must come from the list prepared each term by the Judge. (Section 19.2-194). However, the statute is not as clear with respect to special grand jurors.
1. Clearly if members of a regular grand jury panel request a special grand jury, any of those members who wish to serve may do so; and the remainder are selected from a list "prepared by the court." This does not say from the regular grand jury list. (Sections 19.2-200 & 207).
 2. Also if a special grand jury is empaneled on motion of the court or Commonwealth's attorney, this list prepared by the court would appear to come into play. (Section 19.2-207).
- H. THE COURT REPORTER choice also is an important step. Although this decision generally is made by the presiding judge, the directing special counsel also should

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ensure that this person's background is investigated to rule out any connections to drugs or related criminal activity. (In at least one jurisdiction, a court reporter has been tied to illegal drug use with potential grand jury targets.)

1. Although no provision is made for a reporter in a regular grand jury, one is provided for in the special grand jury statutes. (Section 19.2-212).

III. The Scope

- A. THE SOLE PROVINCE of the multi-jurisdiction grand jury is to investigate violations of illegal drug and drug paraphernalia possession and distribution laws and conspiracies to commit same. (Section 19.2-215.1).
 1. Only indictments for such offenses may be considered by the grand jury.
 2. In the event other crimes are revealed during investigations, this evidence, even if in the form of grand jury testimony, may be given to a Commonwealth's attorney or U.S. attorney for use in prosecution. (Section 19.2-215.1). This would appear to include grand jury transcripts and items received pursuant to grand jury subpoenas.
- B. PERHAPS THE GREATEST value of the regular and special grand juries lies here: using them to complement the work of the MJGJ.
 1. A regular grand jury may be used to indict individuals for crimes revealed in the MJGJ which do not fall under the statutory guidelines, e.g., breaking and entering, larceny, and murder.

NOTE: The issue has arisen in at least one jurisdiction about whether the MJGJ has the power to indict for a felony murder related to drug dealing, as an overdose which resulted from a distribution. The statute leaves this unclear, as it states that the MJGJ shall investigate "any condition which involves or tends to promote violations of," Sections 18.2-257 et seq. and 18.2--265.1 et seq. and shall consider indictments "which allege an offense enumerated" in that preceding section. (Section 19.2-215.1).

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2. A special grand jury could be called to investigate a particular jurisdiction's drug-dealing area or drug organization, which has been revealed in the MJGJ. This would allow the MJGJ to go forward with other investigations while concentration could be placed in the particular jurisdiction.

IV. The Secrecy

- A. **SECRECY IS DEMANDED** of all MJGJ proceedings (Sections 19.2-215.4 and 19.2-192), but there are holes in the requirements and other considerations for the directing special counsel.

1. Secrecy is demanded only as to that which occurs during grand jury sessions and is demanded only of the grand jurors, the directing special counsel, and the court reporter, not of a witness or his counsel. (Sections 19.2-215.9, 19.2-215.4 and 19.2-192). Arguably also all special counsel would be included, as no person can reveal the contents of the notes, tapes, and transcriptions of the proceedings. (Section 19.2-215.9).
2. In fact special counsel, apparently including the attorney directing the proceedings, are required to file a motion with the presiding judge for permission to review and duplicate any grand jury evidence and are required to maintain the secrecy of same. (Appendix D).
 - a. This presents a practical problem: divulging grand jury testimony and other evidence to the investigators working the case. Two solutions have been used:
 - (1) Having all investigators and their supervisors sworn to secrecy by the presiding judge. Note: There is no authority for this under the multi-jurisdiction grand jury statute, but some courts have accepted the argument that Section 19.2-211, regarding special grand juries, applies to allow officers and their supervisors to be privy to the material as "specialized personnel for investigative purposes." This was

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discussed hereinabove.

- (2) Arguing to the presiding judge (a) that the officers work under the supervision of the directing special counsel and must be privy to the information from the grand jury to effectively continue investigating the case and (b) that the special counsel, by statute, is ultimately responsible for maintaining the secrecy of the material. Also Section 19.2-215.9, cited hereinabove, may be of help. This still does not allow supervisors access to grand jury proceedings; but this may be a benefit, depending upon the particular jurisdiction. Note: If this avenue is used successfully, a locking fireproof file cabinet is a good investment.
 3. An interesting issue is whether items received in response to grand jury subpoenas duces tecum prior to the time they are introduced into evidence before the grand jury are deemed to be secret.
 - a. The statute would seem to indicate that they would not be secret if not yet made a part of "grand jury proceedings." However, if there is reason to believe that leaks are occurring in an investigation, this provides a method of maintaining the secrecy of all such items of potential evidence.
 4. However this question of access to grand jury transcripts and other evidence is resolved, it must be done prior to the first meeting of the grand jury.
- B. REGULAR AND SPECIAL grand jurors are subject to the same secrecy requirement: They cannot reveal to any person what occurred in the grand jury room. (Section 19.2-192) .
1. One exception exists: A regular grand juror can testify in a subsequent perjury trial of any grand jury witness. (Section 19.2-192). Whether this exception extends to jurors of special or multi-jurisdiction grand juries is unclear.

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- C. SPECIAL GRAND JURY provisions mirror MJGJ provisions with respect to the secrecy of the notes, tapes and transcriptions of the proceedings. (Section 19.2-212).
1. Access to these transcriptions by the special counsel or Commonwealth's attorney is not specifically provided for as in the MJGJ statutes. However, since a prosecutor would need to see the report of the grand jury, which also is sealed, it is arguable that he could have access to the transcriptions as well. (Sections 19.2-212 & 213).
 2. Also provision is made for access to transcriptions by both the prosecutor and defense attorney if any witness is charged with perjury. (Section 19.2-212).

V. The Initial Proceeding

- A. THE FIRST MEETING of the MJGJ should be upbeat and educational. It is a time to introduce these citizens of the Commonwealth, who hopefully have no "usable and ongoing" experience in these matters, to the world of illegal drugs and drug dealing.
1. Suggestions for those who might appear and speak to the grand jurors include:
 - a. The officers who will be investigating grand jury cases and thus who likely will be appearing before the grand jury.
 - (1) Certain officers may introduce the grand jurors to ongoing investigations which will be brought to them.
 - b. The sheriffs, chiefs of police, and other supervisors (e.g., state police special agent in charge) of these officers.
 - c. State laboratory personnel who can present actual drugs and explain their makeup and propensities.
 - d. Any other drug investigator, perhaps one or more of the above, who can educate the grand jurors about actual drug usage and dealing on

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the street, drug organizations, drug terminology and methodology, and investigative techniques. Slide presentations generally are effective eye-openers.

2. The directing special counsel needs to introduce himself to the grand jury and give the jurors an overview of what their work will be and the purpose of that work. The concept of a multi-jurisdiction grand jury and its function are not easily understood by laymen--and perhaps not by legal eagles either. It is a unique investigative technique in Virginia.
3. At this initial meeting also, the grand jurors should decide to keep a diary of their meetings, including:
 - a. the number of jurors present at each meeting;
 - b. the names of those jurors present;
 - c. the witnesses who appeared and notes about their testimony; and
 - d. the numerical vote taken on each indictment.

NOTE: The above suggestions may work well also for beginning a special grand jury investigation into drugs. Obviously some are not applicable to such investigation, due to statutory provisions. However, many are, especially those with respect to educating the jurors about drugs and to deciding who will take notes at each session.

VI. The Subpoena Process

- A. THE SUBPOENA POWER of the MJGJ is statewide and available for persons and inanimate objects, a tremendous asset. (Section 19.2-215.5). Many issues arise concerning subpoenas, issues unresolved by this statute:
 1. No subpoena format is provided; thus it is up to the directing special counsel to design one. (Appendix E). Triplicate copies are suggested.
 2. No provision is made to seal the subpoenas upon return or to keep the person subject to a subpoena duces tecum from disclosing its contents to others (including a target).

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- a. Original subpoenas, showing service, may be kept by the directing special counsel in a locked file, thus available for production to the presiding judge but out of the purview of the public eye. There is no statute regarding this, but it has been done in several jurisdictions without problem.
- b. The presiding judge may be willing to enter an Order prohibiting the person subject to a subpoena duces tecum from revealing its contents to any other person. This can be attached to all such subpoenas. (Appendix F).

Note: This seems to satisfy telephone companies and banks, who feel a need to advise their customers when records are subpoenaed. Such an Order has worked, even in the face of company policies providing for such notification.

3. No provision specifically states who must sign a subpoena, but authority is given only to the grand jury to issue subpoenas.
 - a. The directing special counsel should ask the grand jury to delegate to him the authority to issue subpoenas and to accept pre-appearance compliance with same. (Appendix G).
 - (1) The foreman does not have to be contacted each time a subpoena is desired.
 - (2) The directing special counsel can use pre-appearance compliance to (a) obtain documents and other items for review and investigative use prior to introduction before the grand jury and (b) obtain information from previously reluctant persons by continuing their appearance in exchange for debriefing interviews.
4. The subpoena provision fails to specify what witness expenses are reimbursable or from what fund any reimbursement comes. According to 19.2-215.5, "Mileage and such other reasonable expenses as are approved by the presiding judge shall be paid out of funds appropriated for such purpose."

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- a. Other statutes concerning payment of a witness' expenses may be looked to for guidance: 14.1-189-194 and 19.2-329-332. Specifically 19.2-332 may assist in determining what expenses are reimbursable to the subject of a subpoena duces tecum, a topic of contention.
 - (1) In one jurisdiction, costs of complying with a subpoena duces tecum must be shown on the DC-40 form and filed with the presiding judge, who then determines the reimbursable amount. Any disagreement with that amount then must be settled by a hearing. Note: Generally an attorney becomes involved, and he files the form and any motion for a hearing. If the hearing is public, however, this could compromise a grand jury investigation.
 - (2) This form then is forwarded by the circuit court clerk to the Virginia Supreme Court for payment out of state funds.
- 5. Although individual persons subpoenaed to testify before the grand jury always should be served personally with a subpoena, persons subpoenaed pursuant to their positions as custodians of records generally can be served by mail (unless expected to be uncooperative).
 - a. It works best if the special counsel or the officer requesting the subpoena personally telephones the custodian before the first request for records is made to a particular company. This alerts the custodian to the forthcoming subpoena and, more importantly, lends credibility to that subpoena. Many companies simply are uneducated about investigative grand juries.
- B. THE SUBPOENA POWER of a special grand jury is provided in Section 19.2-208. It is not described as being statewide, and perhaps a localized investigation would not need statewide powers. However, it is certainly arguable that the special grand jury subpoena would reach statewide. After all, any regular Virginia subpoena may be served anywhere in the state.

VII. The Grand Jury Witness

- A. EVERY WITNESS BEFORE the MJGJ is entitled to have counsel present when he testifies, but that counsel is not permitted to participate in any fashion in the proceedings. (Section 19.2-215.6).
1. When this section is compared with the similar provision under the special grand jury statute (Section 19.2-209), it would appear that counsel does not have even the right to consult with the witness in the grand jury room. Although this is not clear, it has been suggested that counsel and witness be separated so that communication is difficult. The witness himself must make the request to talk with his counsel outside the grand jury room.
 2. It does appear clear that any exercise of the witness' right to refuse to testify, without immunity, must be the witness' assertion alone.
- B. EVERY WITNESS BEFORE the MJGJ must be administered an oath by the foreperson and must be advised:
1. of his right not to answer any question which would tend to incriminate him and
 2. of the fact that he later may be called upon to testify in any case that results from the grand jury proceedings. (Section 19.2-215.7).
- Important Note: The witness, at the same time, should be advised of his right to counsel in the grand jury room. This ensures that he understands this right and that his testimony in lieu of such representation is voluntary and informed.
- C. ALL THREE WARNINGS of rights may be given by the foreperson at the same time the oath is administered. (Appendix H).
1. It has been suggested that these rights be stated in a form appended to each subpoena served or provided to the individual in a separate letter at the time of subpoena service. This would tend to prevent any delay due to a witness' exercising his right to counsel after he is present before the

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grand jury. (See United States Attorneys' Manual, Section 9-11.150.) (Appendix H-1).

- D. ALL THREE WARNINGS are required in the special grand jury statutes to be given to each witness. (Section 19.2-209). Again these rights should be provided to the witness when he is served with a subpoena.
- E. NO SUCH PROVISIONS appear in the regular grand jury statutes. Of course generally the only persons who testify before a regular grand jury are officers, as there is no prosecutor present to ask questions.
- F. EVERY ATTENDING WITNESS must answer all questions put to him by the special counsel or grand jurors. His only ground for refusal is his right against self-incrimination, and he must expressly invoke this. [Section 19.2-215.7(b)(c)].
 - 1. If the witness refuses to testify on this ground, he then must be brought before the presiding judge.
 - 2. Generally the grand jurors, court reporter and special counsel must move from the grand jury room into a private and locked courtroom.
 - 3. The judge then must determine whether the witness' assertion is bona fide, and to this end, the judge generally will have the special counsel repeat the line of questioning.
 - 4. The judge then will instruct the witness that he must testify or be held in contempt of court and jailed until he does testify.
 - a. The judge must determine on the record whether the witness' assertion of his right against self-incrimination is bona fide, for if it is, any testimony he is compelled to give or any information gained as a result of that testimony cannot be used against that witness except in a perjury proceeding.
- G. THE IMMUNITY ISSUE [Section 19.2-215.7(C)] thus becomes important. The special counsel must be prepared for this immunity to be granted to a witness so compelled to testify. If prosecution of that person is desired,

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consideration should be given as to whether even to call that person as a witness.

H. SEVERAL ADDITIONAL POINTS concerning this immunity issue are important:

1. An individual who is the target of an investigation or who otherwise is expected to be charged as a result thereof should not be brought before the grand jury unless:
 - a. a waiver of immunity is obtained (Appendix I) after a subpoena is issued, or
 - b. he requests to tell his story to the grand jury (in which event such waiver still should be obtained); and
 - c. the investigation is completed and the evidence sealed so no allegations can be made that the target's testimony or information derived from it was used to prosecute him (in the event an immunity waiver is not upheld).
2. A letter of cooperation/immunity is an effective method of handling many persons questioned in an investigation. (Appendix J). This gives the special counsel control over the person at all stages of questioning, whether it be in debriefing interviews, questioning before the grand jury, or testifying at any trial.
3. Another method of handling witnesses who may be charged because of their level of involvement is to do a pre-indictment agreement. In this, for example, the witness would agree to plead guilty to a particular charge and cooperate with the grand jury in exchange for a particular sentence.
4. Should it become desirable to prosecute a witness (who did not accept a letter of cooperation/immunity but who did not assert his right against self-incrimination and who did not enter into any pre-indictment agreement) on the basis of testimony given or other evidence produced before the grand jury, this would appear to be acceptable. [Section 19.2-215.9(C)].

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- a. Pursuant to the above-cited statute, a witness who was not compelled to testify does not receive immunity from prosecution (transactional immunity) automatically, by virtue of his testifying or producing evidence before the grand jury. Such testimony or other evidence produced is admissible, however, only for purposes of impeachment.
 - b. This Code section should be compared to 18.2-262, which specifically provides transactional immunity to witnesses in drug cases (18.2-248 et seq. and 54.1-3400 et seq.). However, it has been argued that 19.2-215.9 overrides 18.2-262, as (1) the latter is a general provision while the former is a specific provision, limited to multi-jurisdiction grand jury situations and (2) the former was enacted after the latter. (See Multi-jurisdiction Grand Jury Outline prepared by John R. Alderman, Senior Trial Assistant Commonwealth's Attorney, Henrico County, in materials from Commonwealth's Attorneys' Spring Institute, March, 1989.)
 - c. Yet another consideration is whether 18.2-262 also is overridden by 19.2-215.7, which provides use and derivative use immunity but not transactional immunity for witnesses compelled to testify. The same rationale has been applied to argue that 18.2-262 is overridden.
- I. SPECIAL GRAND JURY immunity is provided in Section 19.2-208. Unfortunately this section only complicates the immunity issue for special grand jury witnesses, as it states that all provisions of the Code regarding immunity of witnesses are applicable.
 - J. NO PARTICULAR IMMUNITY is provided to regular grand jury witnesses. Thus other immunity provisions of the Code would need to be looked to if this became an issue.

VIII. The Contempt Issue

- A. FAILURE TO TESTIFY may be more than the obvious abso-

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lute refusal to answer questions.

1. A witness was jailed for contempt when he claimed a loss of memory due to his past drug use where the judge, through questioning, determined he remembered other past events.
2. A more difficult call, however, may come when the witness "lies"--does not admit--to the grand jury about facts the special counsel specifically knows from the investigation. Then the question is whether to ask the judge for a contempt holding or to attempt a perjury prosecution. This, arguably, is perjury, but there are some considerations in pursuing a perjury charge against each witness who fails to admit certain known facts.
 - a. There is no question that every witness who lies to the grand jury should be prosecuted for perjury.
 - b. At the time of the known perjury, counsel generally feels strongly inclined to pursue a perjury charge. This, however, becomes a new and separate investigation, to which manpower must be committed. An evaluation must be made as to the return on this investment, so to speak. Part of this evaluation must be based upon the strength of the evidence that will be used to convict the witness, e.g., whether there are specific, provable facts, and not just hearsay, to prove the witness' involvement in the activity he denied and whether the evidence and witnesses are credible.
 - c. This is a reason to have grand jury witnesses cooperating ahead of time and to know as much as is possible about what that witness knows, or should know, rather than to subpoena just every person believed to have information. A grand jury can be used in the latter fashion, but the wrong message may be broadcast when liars are not prosecuted; and certainly not each one will or can be.

IX. The Culmination and Indictment

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- A. UNLIKE A SPECIAL grand jury, the MJGJ has the power to return indictments rather than only issue a report to the presiding judge. (Sections 19.2-213 & 215.8).
1. Indictments are prepared by the special counsel---generally the one directing the proceedings--and must conform to the usual requirements for indictments set forth in the statutes and in case law. (See, e.g., Section 19.2-219 et seq.).
 2. Only indictments charging violations of the illegal drug, and drug paraphernalia, possession and distribution statutes specifically delineated in Section 19.2-215.1 can be presented and returned by the grand jury. (However, see discussion in Part III hereinabove.).
- B. DIRECTING SPECIAL COUNSEL must ensure that the case is ready for prosecution when the indictment(s) is/are presented.
1. A thorough and complete chronology of events constituting the illegal act(s) must be done by the officer in charge, generally with the assistance of the special counsel, before any indictment is sought.
 - a. This ensures all the necessary elements are present and weak areas, if any, are known.
 - b. Most importantly, however, this chronology can become the extensive bill of particulars needed to enable the special counsel to argue against grand jury transcripts being made available to defense counsel. [Section 19.2-215.9(B)]. This must be prevented if at all possible.
- C. VENUE OR VENUES of the offense charged must be shown in the indictment. (Appendix K).
1. The presiding judge selects the venue for the trial of the offense if more than one is proper.
 2. The suggested practice is to have a venue Order prepared for the judge to enter when the indictment is returned.

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D. THE RECORD SHOULD reflect that the necessary number of jurors:

1. were present to consider the indictment (no less than seven) and
2. voted it a "true bill."

Note: This can be done when the indictment is returned in the courtroom. Either the presiding judge or the directing special counsel can question the foreperson to ensure these qualifications have been met. Special counsel also should move for the sealing of any indictment and for a capias to issue.

E. THE ARRESTED DEFENDANT initially is returned to the court in which the multi-jurisdiction grand jury sits, and the presiding judge:

1. sets bond, if any, and
2. transfers the indictment to the court of proper jurisdiction.

Note: This ends the role of the presiding judge with respect to a particular indictment except for any motion by defense counsel to discover the grand jury transcripts. This motion must be filed in the presiding judge's--and grand jury's--court. [Section 19.2--215.9(B)].

F. ALL NOTES, TAPES, transcriptions, and other evidence are to be turned over to the presiding judge for safekeeping. The statute makes this the foreperson's responsibility, but the directing special counsel needs to ensure this is done. [19.2-215.9(A)(B)].

1. The diary kept by the grand jury (supra) also should be turned over to the presiding judge for safekeeping in the event any matter contained therein would be needed to be produced.

Note: It is advisable that while the investigation is ongoing, all of these items should be given to the court clerk to be locked in the court's vault after each grand jury meeting.

G. DISCHARGE OF THE grand jury may occur once indictments are returned in an investigation or at any other time

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during any term, original or extended, of the MJGJ. (19.2-215.11).

1. Thus there is no magic time at which a particular grand jury panel should, or may, be discharged.
 2. Consideration must be given, however, to many factors, including:
 - a. the length of time a panel has served (supra);
 - b. the interest the panel has taken in the investigation(s) before it;
 - c. the overall ability of the jury panel; and
 - d. the continuing nature of an investigation, even though indictments may have been returned.
 3. These same considerations apply in deciding whether to seek a successive term for the same grand jury panel.
 4. If the panel is strong but some wish to resign, the panel still can continue as long as there are seven (7) members who will be attending each session.
 5. Consideration must be given also to the fact that the presiding judge on his own may determine to discharge the grand jury.
- H. THE TERM OF a special grand jury is up to six months initially; however, if the jury is making progress, the court may permit it to continue. The statute does not fix a definite ending time, except that the jury must issue a report when its investigation is completed. (Section 19.2-213 & 213.1).
- I. THE TERM OF a particular regular grand jury is limited by the term of court, which is one quarter. Along with the many other limitations of such grand jury, this factor additionally makes using this grand jury as an investigative panel unworkable. (Sections 19.2-193 & 194). Other factors include:
1. The name of each witness must be listed on the indictment.

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2. No court reporter is provided; thus there is no transcript of any witness' testimony.
3. No prosecutor can be present to question witnesses and guide the proceedings.

X. The Summary

- A. THERE IS LITTLE, if any, existing case law in Virginia on multi-jurisdiction grand juries. The statutory provisions have been in place a relatively short time and thus have not been used widely or frequently. As prosecutors make their own interpretations where the statutes are unclear, which is a frequent circumstance, and as decisions are appealed, more guidance will appear.
- B. THE A.L.R. ANNOTATIONS indexed in the A.L.R. Digest to A.L.R.'s 3d, 4th, and Federal provide some guidance for prosecutors working with grand juries. Although the federal provisions are different, much of the argument in the cases can be applied at the state level.
- C. A RECENT FEDERAL decision needs to be discussed here, as there is more and more crossover prosecution between the state and federal governments in drug investigations. It is troublesome but is necessary reading.

In U.S. v. Belcher, No. 89-00156-B (D.Va. filed Mar. 13, 1991), the United States District Court for the Western District of Virginia was faced with a situation wherein a Commonwealth's Attorney, who was cross-designated as a Special Assistant United States Attorney, attempted to prosecute two brothers federally for drug violations.

The state drug charge against the one brother had been dismissed after an evidentiary hearing. Thereafter the other brother moved for a similar ruling, as the same evidence was involved. While the hearing was pending, the Commonwealth's Attorney, in his federal capacity, obtained indictments against the two brothers based upon the same incident as were the state charges. Then he nolle prossed the one state charge against the second brother.

Several issues were advanced by the Defendants: double

jeopardy, selective prosecution, vindictive prosecution, collateral estoppel, due process, and the Petite doctrine, which prevents a federal prosecution on the same set of facts as an ended state prosecution. After a lengthy discussion of these various issues, the Court ended by dismissing all charges against both Defendants. Although finding no basis for the double jeopardy or selective prosecution claims, the Court did find that the prosecution of the one brother was vindictive, that the prosecution of the other brother would be barred by collateral estoppel, and that both prosecutions would be barred on due process grounds, as the evidence (marijuana) had been destroyed and was not available for trial.

The most troublesome aspect of the decision was the wording of the opinion. The Court referred to the cross-designated attorney as "the pre-eminent prosecutor" in ruling that one brother's prosecution would be barred as being vindictive. Id. at 6. Then calling the other brother's second prosecution "a sham and a cover" for the first, the Court dismissed it. Id. at 9. The Court also stated that "the kind of power [the CA] possesses here is inconsistent with the concepts of federalism implicit in the Constitution." Id. at 8. In closing the Court referred to the United States Attorney's application of the Petite doctrine in this case, in allowing the prosecution to occur at all. Although the Court acknowledged that its decision could not be based on this internal policy of the Justice Department, it did not hesitate to state its opinion that the Doctrine had been misapplied. This case bears reading--and watching.

EXPERT TESTIMONY IN CRACK COCAINE CASES

By

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As prosecutors, we should use our experience with drug prosecutions to educate the public about the differences among drugs. Crack cocaine is a different drug than marijuana, heroin, methamphetamine, and for that matter, powder cocaine. Crack is used and sold differently from powder cocaine. The reason cocaine powder is converted to cocaine freebase or "crack" is simple -- money. The driving force behind the alarming increase in the availability of crack is financial profit.

Each crack cocaine case is an opportunity for the prosecutor to educate the public, i.e., jurors, bailiffs, clerks, judges, etc., about crack. The public needs to understand what crack is, how it is sold, and why it is directly responsible for the increase of violence and thefts in some neighborhoods. Furthermore, the public needs to recognize the indirect impact crack sales have upon the entire State. Prosecutors who learn about crack are equipped to educate the public during motions hearings, trials, sentencing and during "off-duty" discussions.

Expert testimony is critical to a successful prosecution of a person charged with possessing cocaine (crack) with the intent to distribute. Effective direct examination of an expert hinges upon the prosecutor's understanding of crack. To underestimate the importance of experts in drug cases may result in a lost case, and will result in a lost opportunity to educate the public about crack.

I. Possession With the Intent to Sell Cocaine (Crack)

A. Proof

1. Possession - Model Jury Instructions, Vol. I, No. 23.330.
 - a. To knowingly and intentionally possess a controlled substance means that a person is aware of the presence and character of the substance and has actual physical possession or constructive possession. Actual physical

possession means that the substance is found on the person. Constructive possession means that the person has dominion and control over the substance. Mere proximity is not enough. Possession need not be exclusive; it may be shared with another. The length of time of the possession is not material. Ownership or occupancy of the premises in which a controlled substance is found does not create a presumption that the owner or occupant either knowingly or intentionally possessed such substance. Such ownership or occupancy is a fact which may be proved by acts, declaration or conduct of the defendant from which it may fairly inferred that he is aware of the presence and character of the substance at the place found. (Emphasis added).

2. Intent - M.J.I., Vol. I, No. 23.350.

- a. To possess with intent to distribute requires both possession and intent. In determining whether possession is with such intent, you may consider all the evidence and circumstances which relate to that point including but not limited to: the quantity possessed; the manner of Packaging; the location at which the substance was possessed; and evidence of use of the substance by persons other than the defendant at the time it was seized. (Emphasis added).
- b. Facts bearing on intent
 - 1. Quantity
 - 2. Money, drug proceeds
 - 3. Sale prices for individual items
 - 4. Sale price for total volume
 - 5. Amount typically sold on the street
 - 6. Purity
 - 7. Packaging
 - 8. Packaging materials
 - 9. Manufacturing process - production of crack
 - 10. Method of Use
 - 11. Use paraphernalia
 - 12. Record books associated with defendant
 - 13. Beepers

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14. Fingerprints on drug container, packaging materials, etc.
15. Prior drug sales
16. Surveillance activity

c. Other facts to consider in case preparation and possible cross-examination:

1. method of sale on the street;
2. method of import of locality;
3. "buffer zones" between suppliers and street level dealer;
4. organization of street level groups;
5. violence associated with drug sales

II. Expert Witnesses - Threshold Considerations

A. Role of Experts

1. Assist prosecutor with theory of case
2. Educate jury or judge

The expert should explain the significance of complex evidence in easily understood language.

* He should answer the jurors unspoken " questions about crack (Remember law school).

3. Provide ammo for closing argument

The closing argument should paint a clear picture incorporating facts described by the expert.

4. Develop prosecutor's presence and credibility

B. Types of Experts in Drug Cases

1. Chemist
2. Narcotics Agent
3. Fingerprints/Forensics
4. Handwriting Analyst

C. Opinion Testimony

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1. Opinion testimony of lay witnesses is generally inadmissible. Bond v. Commonwealth, 226 Va. 534, 311 S.E. 2d 269 (1984).
2. Expert testimony is always admissible when the subject matter of a relevant inquiry is not within the range of common experience.

Expert opinion and testimony are admissible where 'the jury, or the court trying the case without a jury, is confronted with issues which require scientific knowledge or experience in order to be properly understood, and which cannot be determined intelligently merely from deductions made and inferences drawn on the basis of ordinary knowledge, common sense, and practical experience gained in the ordinary affairs of life.' Compton v. Commonwealth, 219 Va. 716, 723, 257 S.E.2d 749, 755, (1979).

3. Expert testimony may not be received if jurors are competent to draw their own conclusions. Patterson v. Commonwealth, 3 Va. App. 1, 348 S.E.2d 285 (1986).

III. Pre-Trial Preparation

A. Educate the Expert

1. "Carefully prepare your own experts, making them teachers who can simply and convincingly explain complex technical matters to the jury." The Litigation Manual, "Experts: Chief Fundamentals," Peter I. Ostroff.
2. The expert should exude competency and credibility
 - a. Avoid rigidity
 - b. Speak simply
 - c. Admit uncertainty
3. Review testimony with the expert
 - a. Charts, graphs, diagrams, pictures, etc.
 - b. Consider all positions that may be the sub-

ject of cross-examination.

B. Order of Witnesses

1. Intelligible -- the experts' testimony must make sense to the jury.

The chemist must tell the jury what crack is before the narcotics detective shows the jury how crack is packaged and sold.

2. Conclude your case-in-chief with your strongest expert.

- a. Narcotics detective

- b. Suggested witness order in search warrant or vehicle stop case:

1. Detective/officer observing facts placing the defendant in possession. This is often the "seizing" detective in a search warrant case.

2. Custody witnesses

3. Chemist

4. Fingerprints/handwriting expert, if necessary

5. Narcotics expert

- c. Prepare jury instructions opening and closing argument with expert testimony in mind.

IV. Qualifying Experts

A. Legal Requirements

1. Who is an Expert?

The witness must have "sufficient knowledge of his subject to give value to his opinion." Norfolk and W. Ry. v. Anderson, 207 Va. 567, 571, 151 S.E.2d 628, 631 (1966).

2. Declaring a witness an expert lies within the

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sound discretion of the trial court and "will not be reversed unless it clearly appears that the witness is not qualified." Jordan v. Commonwealth, 207 Va. 591, 151 S.E.2d 390 (1966).

B. Practical Approach

1. The jury should know enough about the expert's background to make the expert's testimony persuasive.
2. Avoid summary/narrative approach to expert's qualifications
 - a. The lawyer appears uninterested in the expert's qualifications.
 - b. It's awkward to talk about yourself.
 - c. Break your chemists and other experts of the "autobiographical attitude".
3. Qualifying the expert is an opportunity to develop courtroom presence.
 - a. Tailored qualifications:
 - Q - Do you have an opinion about X?
 - A - Yes.
 - Q - What training and experience do you have which qualifies you to give an opinion about X?

V. Basis of Expert Opinion

A. Facts in Evidence.

1. An expert witness "may give an opinion based upon his own knowledge of facts disclosed in his testimony or he may give an opinion based on facts in evidence assumed in a hypothetical question." Walrod v. Matthews, 210 Va. 382, 388, 171 S.E.2d 180, 185 (1969). See Patterson v. Commonwealth, 3 Va. App. 1, 348 S.E.2d 285 (1986). Simpson v. Commonwealth, 227 Va. 557, 318 S.E.2d 386 (1984).
2. The expert may rely on data customarily relied upon in his field and not prepared solely for the purpose of arriving at a specific opinion. Kern v.

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Commonwealth, 2 Va. App. 84, 341 S.E.2d 297 (19-86).

The standard described in Kern is limited to civil actions and is not applicable in criminally actions where an expert may only base his opinion on facts in evidence. Simpson v. Commonwealth, 227 Va. 557, 318 S.E.2d 386 (1984).

B. Hypothetical Questions

1. Expert's opinion must not be based on incorrect or incomplete information. Waitt v. Commonwealth, 207 Va. 230, 148 S.E.2d 805 (1966).
2. The expert cannot speculate. Spruill v. Commonwealth, 211 Va. 475, 271 S.E.2d 419 (1980).
3. Cantrell v. Commonwealth, 229 Va. 387, 329 S.E.2d 22 (1985).

Cantrell was convicted of first degree murder. The defendant was denied the opportunity to present expert testimony concerning the relations between blows to the head and visible external injury. The Supreme Court held that it was error to deny defendant the opportunity to present such expert testimony.

Hypothetical questions are unnecessary where he testifies from his own knowledge of the facts disclosed in his testimony, Walrod v. Matthews, 210 Va. 382, 388, 171 S.E.2d 180, 185 (1969), or, since 1982, where he renders an opinion 'from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial,' Virginia Code § 8.01-401.1 (1982 Acts, c. 392). Cantrell, 229 Va. at 395.

4. Hypotheticals in Drug Cases
 - a. number of "hits" from crack rock - inadmissible. (calls for speculation).
 - b. Absence of fingerprints of unusual - admissible.
 - c. factual situation resembles drug transaction

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- admissibility uncertain in Va. See U.S. v. Young, 745 F.2d 743 (2nd Cir. 1984), cert. denied, 70 U.S. 1084 (1985).

C. Weight of Expert Testimony

1. Conflict in expert's opinion to be resolved by jury. Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (1987).
2. Credibility of expert within the province of the jury. Horsley v. Commonwealth, 2 Va. App. 335, 343 S.E.2d 389 (1986).
3. Validity of reasoning process relied on by an expert is a matter for the jury. Madison v. Commonwealth, 224 Va. 713, 299 S.E.2d 521 (1983).

VI. Experts in Drug Cases -- Basic Testimony.

A. Applicable principles

1. Expert testimony is admissible when the subject matter of the inquiry is not within the range of common experience. Compton v. Commonwealth, 219 Va. 716, 257 S.E.2d 749 (1979).
2. During direct examination, tailor the expert's qualifications to the crack case.

B. Chemist

1. Jurors need to be educated about cocaine and crack in order to make a reasonable and intelligent decision about defendant's intent to distribute.
 - a. Reasonable and intelligent decisions cannot be made in a vacuum. Jury must know what it is the defendant is charged with intending to sell.
 - b. Satisfy statutory offense elements.
 1. Expert's Opinion- "Commonwealth's Exhibit 1 is cocaine."

avoid detailed discussion of testing procedures. Focusing on the testing

procedures detracts from the force of the Chemist's testimony that the substance in question is crack cocaine.

2. Expert's Opinion: Commonwealth's Exhibit 1 is X grams of cocaine."
3. In some cases - "Commonwealth's Exhibit 1 is 98% pure."

In such a case, the chemist should explain the adulteration process (cutting coke) and the purity of the drug should be worked into closing argument.

2. What is Crack?

a. Production Process

1. From coca leaf to cocaine freebase. (smokable form).
2. Explains use of seized evidence such as baking soda, ammonia, etc.

b. Method of use

1. The presence or absence of use paraphernalia is a factor to be considered in determining defendant's intent to distribute. The jury cannot be expected to appreciate the significance of use paraphernalia unless they understand how crack is used.
2. Crack is smoked in glass pipes or objects capable of heating at high temperatures. Cocaine powder cannot be effectively smoked with a crack pipe.

c. Type of drug

1. Stimulant; e.g. coffee
2. Crack is converted into gas by heating. The gas enters the bloodstream through the lungs and acts upon the central nervous system. The admissibility of

testimony concerning the effects of crack use is discussed in Section VII. A. 3. below.

d. Amount Used Per Hit

1. Relevant to demonstrate speed and ease of use.
2. Affected by several factors including:

User's lung capacity (user's conditioning to drug);

Efficiency of smoking apparatus used to burn crack.
3. Testimony may be objectionable on the grounds that it calls for speculation. Thorpe v. Commonwealth, 223 Va. 679, 292 S.E.2d 323 (1982); Spruill v. Commonwealth, 211 Va. 475, 271 S.E.2d 419 (1980).
4. However, chemist can generally testify with a reasonable degree of certainty that one rock will provide more than one hit.

e. Amount generally smoked to get high.

1. Objectionable: speculative opinion

depends upon degree of user's addiction, efficiency of smoking apparatus, purity of crack, combination with other substances, definition of "high", etc.
2. Evidence will rarely support relevant hypothetical question to chemist. Waitt v. Commonwealth, 207 Va. 230 (1966); See Simpson v. Commonwealth, 227 Va. 557, 318 S.E.2d 386 (1984); Patterson v. Commonwealth, 3 Va. App. 1, 348 S.E.2d 285 (1986).

3. Effect of Crack on User

- a. Crack use causes a rapid, but short-lived "high." The user generally experiences a peak "high" and a valley "low" within twenty to thirty minutes. The intensity of the high is responsible for the extremely addictive nature of crack. An addict will do anything to get another high, including lie, cheat, steal and kill.
- b. Relevance: The jury is charged with determining whether the defendant intended to distribute X amount/X rocks of crack. This decision presupposes that a market exists for the sale of crack. The fact that persons are easily addicted to crack points to a strong seller's market. The seller can expect to sell large numbers of crack rocks quickly and easily. This information about crack is clearly relevant -- it tends to prove the reason (or motivation) for defendant's possession of X number of crack rocks.
- c. Prejudice to defendant: Testimony regarding behavioral effect of drug use on user is inadmissible.

Smith v. Commonwealth, 223 Va. 721, 292 S.-E.2d 362 (1982).

Facts: Smith was charged and convicted of selling LSD.

Expert testimony: The Court asked the Commonwealth's expert what effect LSD had on the human body. Over the defendant's objection, the expert testified substantially as follows:

In my opinion LSD is a very potent drug. Most drugs are given in milligram amounts. With LSD the concentration that you need to take is one, is micrograms, that's one/billionth of an ounce. That is 100 times more potent than most of your drugs right off the bat.

The effect that it actually does, it is called a hallucinogenic and it causes your

senses to become very distorted. It can make you do some very erratic things and it's quite unpredictable in its effects.

You may do some very bizarre things. The effects of LSD has been reported to cause a person from, or hallucinogenics in general, I should say, have been, have made people go as far as to tear their eyes right out of their sockets, chew off an arm, jump out of windows, do some really bizarre things. Smith, 223 Va. at 723.

Held: The Supreme Court considered the expert's testimony irrelevant and prejudicial.

This classification having been made and the range of punishment established, the jury should not concern itself with background information on the substance, but should make an objective finding of guilt or innocence based on the relevant evidence and punish the guilty within the limits fixed by statute. To permit evidence respecting extreme horrors which may result from the use of illegal substances diverts the jury from its principal inquiry and it injects an element of passion into the trial prejudicial to the accused. Smith, 223 Va. at 364.

Dissent: Justice Russell criticized the majority decision and contended that the chemist's testimony was relevant and the proper subject of attack on cross-examination. He further noted:

Few would argue that all of the drugs in Schedule I are equal in their dangerousness. If they were, there would be little purpose in the wide range of penalties provided by the General Assembly. The relative peril to the community presented by the drug itself, along with the quantity involved, and the relative age and sophistication of the victims, should all be considered by the jury in determining the appropriate sentence. Smith, 223 Va. at 365.

4. See the whole picture

- a. The prosecutor must be prepared to take advantage on redirect examination of "open--doors" created by defendant's cross-examination of Commonwealth witnesses.
- b. The prosecutor must know about the effects of crack on a user to be fully prepared for cross-examination of defense witnesses.

C. Narcotics Expert

1. Qualifying Narcotics Expert

"Based upon your training and experience with the investigation of crack cocaine cases, are you familiar with the way crack is used, packaged and sold?"

2. Narcotics Expert's testimony will vary depending upon the facts of a case. In a typical crack possession with the intent to distribute case, the defendant is charged with intending to sell x number of crack rocks. The defendant may have money in small denominations on his person or under his control, and the evidence may show a connection between the defendant and packaging materials used in the distribution of crack.

The following is a list of facts to be developed through the expert.

- a. Use of crack
 1. Paraphernalia associated with use
 2. "Shaving" rocks
- b. Sale of Crack -- Information about Market
 1. Where is crack sold?
 - open-air markets
 2. How is crack sold?
 - one rock at a time

3. How much does it cost? - Profit motive

- price per rock versus price for total volume or quantity
- compare with price for similar quantities of powder
- "\$500 package" versus individual rock prices

4. Why is crack wrapped in aluminum foil?

- packaged for sale

5. Packaging materials - search warrant or vehicle stop case

missing corners, plastic baggie corners, ties, heat sealer, scissors in proximity, plastic "perfume sampler" vials, etc.

6. Production materials

Narcotics expert should be trained in methods of producing crack.

Baking soda, ammonia, test tubes, beakers, blowtorch, lighters, packs of matches completely burned. mirror, razor blade, etc.

7. Record books or notes

Expert can explain to the jury the significance of names, numbers, words and calculations on seized documents. Nichols v. Commonwealth, 6 Va. App. 426, 369 S.E.2d 218 (1988).

8. Beepers

Expert should arguably be permitted to testify about the role beepers play in drug distribution chains.

c. Conspiracy Cases/Cross-Exam/Redirect

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1. Buffer Zones in open-air markets
2. Hotels used for production and packaging

d. Quantities

1. The expert may give an opinion concerning whether possession of cocaine is consistent or inconsistent with personal use. See Section VIII below for complete discussion of ultimate issue in fact problems.

D. Fingerprint Expert

Often necessary to testify that lack of fingerprints on plastic surface is not unusual.

Educates jury about difficulty of obtaining positive latent print.

E. Handwriting Analyst

1. Record books compared with defendant's writing samples.
2. Indicia of ownership: letters, papers, etc. containing defendant's handwriting.

VII. Expert Testimony on Ultimate Issue in Fact

A. Narcotics Experts should be permitted to testify that possession of a particular quantity of crack is inconsistent with personal use.

1. Quantity possessed is a factor bearing on defendant's intent to sell.
 - a. Monroe v. Commonwealth, 4 Va. App. 154, 355 S.E.2d 336 (1982); See Adkins v. Commonwealth, 217 Va. 437, 229 S.E.2d 869 (1976); Hunter v. Commonwealth, 213 Va. 569, 193 S.E.2d 779 (1973).
 - b. Therefore, testimony about quantity is relevant to intent issue.
2. The significance of possessing a particular quantity is outside the juror's range of common experience.

rience.

Expert testimony is admissible to explain facts outside the common range of understanding relevant to the jury's determination of the intent issue. See Wells v. Commonwealth, 2 Va. App. 549, 347 S.E.2d 139 (1986) (Expert permitted to testify that possession of a particular quantity of marijuana is "unusual to find for personal use, but not totally inconsistent with personal use over time").

B. Factual vs. Legal Conclusions

1. Avoid legal conclusions by the experts.

- a. See Friend, Law of Evidence, Third Edition, Sec. 219.
- b. Compare Bond v. Commonwealth, 226 Va. 534, 311 S.E.2d 269 (1984), with Patterson v. Commonwealth, 3 Va. App. 1, 348 S.E.2d 285 (1986).

1. Bond v. Commonwealth, 226 Va. 534 (1984).

Facts: The victim died as the result of a fall from the outside balcony of her fourth-floor apartment in which she lived with her son and the defendant.

Expert testimony: Dr. Presswalla testified as the Commonwealth's expert witness that 'I made a determination that [the victim's] death was as a result of a homicide.' Asked if victim could have tripped over the threshold of the balcony door and fallen accidentally, Dr. Presswalla replied, 'No, it is my opinion that she did trip and fall over, but that the force which caused her to trip was a push, based on the other evidence.' Bond, 226 Va. at 537.

Held: The Supreme Court declined to adopt the majority rule of other states and the Federal Rule permitting expert

testimony on an ultimate issue of fact. Instead, the Court held,

The ultimate question was whether the decedent jumped intentionally, fell accidentally, or was thrown to her death. The facts and circumstances shown by the testimony of lay witnesses was sufficient to enable a jury to decide that question. The expert's opinion was based largely, if not entirely, upon the same facts and circumstances. Reaffirming unbroken precedent, we hold that Dr. Presswalla's opinion was inadmissible. Bond, 226 Va.. at 539.

2. Patterson v. Commonwealth, 3 Va. App. 1 (1986).

Facts: Defendant was charged with embezzlement.

Expert testimony: The Commonwealth's accounting expert testified that certain bookkeeping transactions were "irregular."

Held: The Court of Appeals considered defendant's argument that such testimony went to the ultimate fact in issue. In denying defendant's appeal, the Court held that:

The fact that transactions were 'irregular' is not synonymous with their being illegal, or amounting to embezzlement. Indeed Nossen highlighted the fact that his use of the term 'irregular' concerned normal bookkeeping procedures, not the legality or illegality of the transactions. When asked why the entries were 'irregular,' he replied: "Because it - it doesn't conform to proper bookkeeping and accounting procedures." Seen in this light, we find that the trial court did not err in permitting Nossen to testify as he did. Patterson, 3 Va. App. at 12.

3. Conclusion:

As in Patterson, a narcotics expert's opinion that a certain quantity of drugs is inconsistent with personal use is based upon the way the drug is normally used and sold. The expert provides the jury with an opinion derived from his experience with narcotics. Although this testimony is damaging to defendant, it places the quantity of the drug in an intelligible context for the jury. The jurors are educated about the relative significance of possessing X quantity of drugs, and they are not forced to consider that fact in a vacuum.

2. The following question form is suggested to obtain opinion testimony from the Narcotics Expert that does not violate ultimate issue rule:

"Based upon your experience, training, etc., is possession of X grams or X rocks of crack cocaine consistent with personal use?"

- a. Expert answered in the form of a factual, rather than legal conclusion.
- b. The answer does not express an opinion on the weight of the evidence or the credibility of witnesses. The expert provides the jury with a context within which to assess the relative significance of all factors, including quantity, bearing on proof of intent. See Cartera v. Commonwealth, 219 Va. 716, 250 S.E.2d 784 (1978). Cartera is briefly discussed under paragraph 4 below.

3. Factual conclusion cases -- testimony ruled admissible.

- a. Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982).

Facts: Defendant was charged with capital murder in Chesterfield County. The victim was robbed, raped and mutilated. The evidence indicated that the defendant had ingested

several drugs, including LSD, prior to attacking the victim.

Held: Jurors are not familiar with the affect drug use would have on a person's ability to form intent. Therefore, prosecution expert is permitted to testify, in response to a hypothetical question, that ingestion of various quantities of LSD, tranxene and beer could not cause a person to commit certain specified acts of violence or render a person incapable of forming the intent to commit such acts. Fitzgerald, 223 Va. at 6.

- b. Freeman v. Commonwealth, 223 Va. 301, 228 S.E.2d 461 (1982).

Facts: Defendant took sexually explicit photos of a five year old girl. He attempted to sell the pictures to victim's mother. He was prosecuted for "making sexually explicit visual material which has as a subject a person less than 18 years of age."

Expert testimony: Over defendant's objection, the Commonwealth's clinical psychologist testified as follows:

Q: In your opinion, do those photographs appeal to the prurient interests of children as determined by the experience of children in the contemporary community?

A: It is my opinion and my experience with children in this community it would so appeal to their prurient interests.

Q: In your opinion . . . do these photographs lack literary, artistic, political and scientific value for children?

A: They have no such value as far as I would judge. Freeman 223 Va. at 3.

Held: The Virginia Supreme Court held that the ultimate issue was "whether the pictures were 'obscene for children'. This determina-

tion involved a three-part test:

1. Do the pictures appeal to the prurient interests of children?
2. Do the pictures have any socially redeeming value?
3. Do the pictures affront contemporary standards of adults as to what is suitable for children?

The Court held that the expert testimony was admissible because it considered only two of the three questions to be resolved by the jury. *Freeman*, 223 Va. at 3.

Note: The expert testimony that the pictures had no socially redeeming value was held inadmissible on the ground that the clinical psychologist was not qualified as an expert in that field. This error was held harmless due to the jurors qualifications to "judge a picture from a child's viewpoint and decide what effects it may have upon whether it has any redeeming social values to the average juvenile community." *Freeman*, 223 Va. at 3.

- c. *Payne v. Commonwealth*, 223 Va. 460, 357 S.-E.2d 500 (1987).

Facts: Defendant was charged with capital murder for burning to death a fellow inmate in the inmate's cell. The jury sentenced the defendant to death based on the vileness of the crime, not defendant's future dangerousness. However, the Supreme Court did consider whether the expert properly testified regarding defendant's future dangerousness.

Held: The expert's testimony that defendant did pose a future dangerousness to society was not an expression of opinion on the sentence defendant should receive. The expert properly considered the defendant's past history since age 10, previous convictions, related difficulties with the law, and the circumstances of the present crime before

submitting his opinion. Payne, 223 Va. at 4.

- d. Compton v. Commonwealth, 219 Va. 716, 257 S.-E.2d 749 (1979).

Facts: Defendant was charged with murdering his alleged fiancée in the kitchen of their trailer home. The victim was shot at close range with a shotgun.

Expert testimony: The primary issue facing the jury was whether the shooting was accidental or intentional. The Commonwealth's expert testified that the victim was sitting or crouching at the time she was shot. Defendant testified that the victim was standing and staggering towards him.

Held: the expert properly testified on the basis of his investigation and experience that the victim was sitting at the time of the shooting. Although his testimony directly bore on defendant's credibility, the expert did not testify that defendant intended to kill the victim. Compton, 219 Va. at 7.

- e. U.S. v. Young, 745 F.2d 733 (2d cir. 1984), cert.denied, 470 U.S 1084 (1985).

Defendant engaged in narcotics transaction.

4. Legal Conclusion Cases - Testimony Ruled Inadmissible

- a Coppola v. Commonwealth, 222 Va. 243, 257 S.E.2d 797 (1979).

Facts: Defendant charged with capital murder for the beating death of an elderly woman during a robbery.

Held: The trial Court properly excluded expert testimony that a Commonwealth witness was lying or could not be believed due to her personality disorder. Expert testimony concerning the witnesses' personality disorder was properly received, but inferences to be drawn from that opinion were to be drawn by

the trier of fact. Coppola, 222 Va. at 2.

- b. Cartera v. Commonwealth, 219 Va. 516, 248 S.E.2d 784 (1978).

Facts: Defendant was charged with raping two young girls.

Held: The doctor may properly testify concerning victim's physical and emotional conditions based upon examination. He may also offer medical conclusions based upon examination. However, the expert improperly testified that victim was raped. Cartera, 219 Va. at 5.

- c. Wayne v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979).

Defendant's expert properly permitted to testify concerning personality traits bearing on "diminished capacity" to form intent to commit murder in capital murder case. However, expert testimony that killing was not deliberate and premeditated was properly ruled inadmissible. Wayne, 219 Va. at 6.

- d. Ramsey v. Commonwealth, 200 Va. 245, 105 S.E.2d 155 (1958). In an arson case, expert may not testify that fire was of incendiary origin. In this particular case, the hypothetical question and expert's answer pointed directly to defendant as criminal agent.

- 5. The following cases involve embezzlement or similar offenses from banks and should be contrasted with Patterson:

- a. Webb v. Commonwealth, 204 Va. 24, 129 S.E.2d 22 (1963).
- b. Mitchell v. Commonwealth, 141 Va. 541, 127 S.E.2d 368 (1925).
- c. Thornton v. Commonwealth, 113 Va. 736, 73 S.E.2d 481 (1912).

HANDLING OF CERTIFICATES OF ANALYSIS AND USE OF EXPERTS

I. PRIMA FACIE ELEMENTS

A. Section 19.2 - 187 renders certificates of analysis admissible in evidence as evidence of the facts therein stated (including results) provided:

1. The certificate of analysis is filed with the clerk of the court at least seven days prior to the hearing or trial, and
2. A copy of such certificate is delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at least seven days prior to the hearing or trial upon request of such counsel.

This statute also requires that (for drug analyses only), the Division of Forensic Science must mail the certificate of analysis (original) to the attorney for the Commonwealth, who "shall acknowledge receipt of the certificate on forms provided by the laboratory".

Therefore, prompt filing of this certificate and acknowledgment of receipt to the Division of Forensic Science are important first steps in the successful prosecution of drug cases.

B. Section 19.2-187.01 is another important statute which permits the certificate of analysis to act as "prima facie evidence ... as to the custody of the (evidence)" while in the possession of the Division of Forensic Science.

Both of these statutes are intended to minimize the number of court appearances of the chemists so they are better able to maintain a rapid turnaround on their drug analyses. Be sure the laboratory is aware of any hearing dates so they can prioritized their work.

II. General

A. When you receive the certificate of analysis, examine it carefully for completeness and any inconsistencies. Make sure all relevant items of evidence were analyzed; by

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policy, the Division of Forensic Science chemists do not analyze items with residues where bulk quantities of a controlled substance are present in other items of evidence. [Include DIRP memo]

- B. If quantitative analysis (concentration of the drug) is necessary be sure you have asked the laboratory to do so. They do not perform quantitative analyses except upon request of the Commonwealth's Attorney and then only if adequately justified as to the need for successful prosecution.
- C. Whenever possible, try to elicit a stipulation from defense counsel as to the identity of the substance and the chain of custody, to eliminate the need for subpoenaing the chemist.
- D. If it appears necessary for the chemist to testify, subpoena as soon as possible; forensic drug chemists often have other court commitments, and they must honor the first subpoena served.
- E. If it is necessary for the drug chemist to testify, it is advisable to have a pre-trial telephone discussion. Chemists are aware of specific recent defenses used in drug cases of which you may not be aware, and you may have information which will help the chemist prepare you for their testimony. Do not assume that because of their expertise no conference is needed. It will benefit both you and the chemist and make the presentation in court much smoother.
- F. When you find the chemist is not needed, please have your secretary notify them as soon as possible. It will allow the chemist to honor other court commitments or plan their work schedule more efficiently. If your court is physically proximate to one of the Forensic laboratories, allow them to be "on call" for a case.
- G. If you have a problem finding a drug in the Drug Control Act, or any questions about drugs, please call the Division of Forensic Science Drug Chemistry Section. Some of the drugs are listed under older chemical names or the chemical names are hard to find. The chemists will be happy to help you. The phone numbers for each laboratory are:

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Richmond Lab - 804-786-4704

Northern Virginia Lab - 703-764-4600

Roanoke Lab - 703-857-7192

Tidewater Lab - 804-683-8327



COMMONWEALTH of VIRGINIA

*Department of General Services
Division of Consolidated Laboratory Services*

BUREAU OF FORENSIC SCIENCE

1 NORTH 14TH STREET
POST OFFICE BOX 999
RICHMOND, VIRGINIA 23208

NOTICE

YOU MAY NOTE THAT SOME OF THE ITEMS IN THIS CASE MAY HAVE BEEN REPORTED AS "NOT ANALYZED". THIS IS THE RESULT OF OUR NEWLY INSTITUTED DRUG ITEM REDUCTION PROGRAM.

IN THE INTEREST OF PROVIDING MORE TIMELY SERVICE TO THE CRIMINAL JUSTICE SYSTEM IN THE FACE OF EVER INCREASING DEMANDS, THIS PROGRAM IS AIMED AT ANALYZING ONLY THE MOST IMPORTANT ITEMS IN TERMS OF QUANTITY AND SCHEDULE.

THERE ARE OTHER ADVANTAGES AND OPTIONS OF THIS PROGRAM IN ADDITION TO THE BENEFIT OF IMPROVED TURNAROUND TIME:

1. IF, DURING THE PRETRIAL PROCESS, IT BECOMES APPARENT THAT ITEMS NOT ANALYZED WILL IN FACT REQUIRE ANALYSIS FOR SUCCESSFUL PROSECUTION, THEN UPON RE-SUBMISSION, THAT ITEM WILL RECEIVE TOP PRIORITY AT THE LABORATORY.
2. IT STILL PROVIDES FOR ALL OF THE EVIDENCE IN A CASE TO BE KEPT TOGETHER FOR SIMPLICITY IN MAINTAINING CHAIN OF CUSTODY.
3. THE POLICE OFFICER OR COMMONWEALTH'S ATTORNEY CAN STILL CONSULT WITH THE CHEMIST IN SPECIAL CASES.
4. OFFICERS CAN INDICATE SIGNIFICANT ITEMS ON THE REQUEST FOR LABORATORY EXAMINATION (RFLE) FORM WHICH THEY FEEL MIGHT NOT BE READILY APPARENT TO THE CHEMIST.
5. LAW ENFORCEMENT AND LABORATORY PERSONNEL AVOID UNNECESSARY HANDLING OF SYRINGES WHICH GENERALLY ARE FOUND NEGATIVE FOR RESIDUES ANYWAY, AND ALSO CONSTITUTE SERIOUS HEALTH HAZARDS AS A CONSEQUENCE OF THE HIGH RISK POPULATION GROUP USING THEM.

WE APPRECIATE YOUR COOPERATION AND UNDERSTANDING OF THIS PROGRAM AND ITS GOAL TO HELP OUR LABORATORY STAFF PROVIDE BETTER SERVICE TO OUR CLIENTS IN THE CRIMINAL JUSTICE SYSTEM.

DATE AND TYPE OF OFFENSE: Possession of Herion, Possession of Marijuana,
BRIEF STATEMENT OF FACT AND EXAMINATIONS REQUESTED: Possession of Paraphernalia

COURT DATE 5-31-88

JURISDICTION OF OFFENSE:

HENRICO

Items recovered during search warrant at 5509 Bloomingdale Ave. Items #14 and #15 were recovered in toilet bowl when suspect tried to flush evidence. Check item #8 for marijuana. Check the remaining items for heroin.

This evidence is being submitted in connection with a criminal investigation and has not been examined by another laboratory

If a previous submission to us in this case has been made please give our FS lab # _____

Specify manner of return of evidence: _____ Mail XY Personal Pick-up

EVIDENCE SUBMITTED: (Itemize and describe)

- No 1 - WCK-1 - Syringe, lighter, tin foil, eye drops, 2 Q-tips
- ? 2 - WCK-2 - Bottle cap
- ? 3 - WCK-3 - Clothes pin, Medicine bottle with clear liquid
- No 4 - WCK-5 - Peannut can with foil and clothes pin
- No 5 - WCK-7 - Foil
- No 6 - WCK-9 - Syringe
- No 7 - WCK-10 - 2 Revco bags cotaining 6 Syringes, one tin spoon, tin foil, nylon stocking
- ✓ 8 - WCK-11 - Green plant substance with seeds
- No 9 - WCK-13 - Small piece of plastic
- No 10 - WCK-14 - Foil, plastic, paper towel
- No 11 - WCK-15 - Spoon, tissue with blood, small pieces of plastic
- No 12 - WCK-16 - Approx. 10 small pieces of plastic
- No 13 - WCK-17 - Baggie with ashes and pieces of plastic inside
- ✓ 14 - WCK-18 - Small packet of white powder
- ? 15 - WCK-19 - Plastic bags containing water from toilet and suspected heroin

DATE AND TYPE OF OFFENSE: 5/7/83 Possession of drug paraphernalia
BRIEF STATEMENT OF FACT AND EXAMINATIONS REQUESTED:

COURT DATE 6/16/83

JURISDICTION OF OFFENSE:

HENRICO

Items found on suspects person. Examine for evidence of controlled substances.

This evidence is being submitted in connection with a criminal investigation and has not been examined by another laboratory

If a previous submission to us in this case has been made please give our FS lab # _____

Specify manner of return of evidence: _____ Mail _____ Personal Pick-up

EVIDENCE SUBMITTED: (Itemize and describe)

One brown manila envelope containing:

- No Item # 1: Thirteen (13) syringes, orange and white in color, in plastic bag.
- No Item # 2: plastic bag containing one prescription bottle which contains seven syringe needles.
- Item # 3: plastic bag containing one rubber figure, orange in color, and numerous white paper blotters.

DATE AND TYPE OF OFFENSE: 4/15/88 POSSESSION OF COCAINE w/INTENT
BRIEF STATEMENT OF FACT AND EXAMINATIONS REQUESTED:

COURT DATE 5/25/88

DRUG EXAMINATION

JURISDICTION OF OFFENSE:
PETERSBURG

This evidence is being submitted in connection with a criminal investigation and has not been examined by another laboratory
If a previous submission to us in this case has been made please give our FS lab # _____
Specify manner of return of evidence: _____ Mail XXX Personal Pick-up

EVIDENCE SUBMITTED: (Itemize and describe)

ONE SEALED BROWN EVIDENCE BAG CONTAINING:

- No ~~1~~ ITEM#1-A SEALED CLEAR EVIDENCE BAG CONTAINING SEVERAL PLASTIC BAGGIES WITH RESIDUE OF A BROWNISH-GREEN PLANT LIKE MATERIAL.
- ✓ ITEM#2-A SEALED CLEAR EVIDENCE BAG CONTAINING ONE SANDWICH BAG CONTAINING-TWO ADDITIONAL SANDWICH BAGS WITH ONE CONTAINING 31 VIALS (RED CAPS) THAT CONTAINS A WHITE ROCK LIKE SUBSTANCE AND THE OTHER BAG CONTAINING 25 VIALS (BLUE CAPS) THAT CONTAINS A WHITE ROCK LIKE SUBSTANCE. (BAG WITH BLUE VIALS IS DAMP WITH A "FOUL ODOR").
- No ITEM#3-A SEALED CLEAR EVIDENCE BAG CONTAINING A BROWN PAPER BAG THAT CONTAINS CLEAR BAGGIES AND A BROWNISH-GREEN PLANT LIKE RESIDUE ALONG WITH STEMS.
- ? ITEM#4-A SEALED CLEAR EVIDENCE BAG CONTAINING A MED. SIZE ZIP LOCK BAG THAT CONTAINS ABOUT 76 SMALLER ZIP LOCK BAGGIES WITH A BROWNISH-GREEN PLANT LIKE RESIDUE
- ✓ ITEM#5-A SEALED CLEAR EVIDENCE BAG CONTAINING A VIRGINIA'S DRIVERS LICENSE OF DORETHA WINFIELD ALONG WITH A MED. SIZE ZIP LOCK BAG THAT CONTAINS A BROWNISH-GREEN PLANT LIKE MATERIAL.
- No ITEM#6-A SEALED CLEAR EVIDENCE BAG CONTAINING A SANDWICH BAG WITH A SMALL AMOUNT OF A BROWNISH-GREEN PLANT LIKE MATERIAL AND ANOTHER ZIP LOCK BAG ALSO WITH RESIDUE OF BROWNISH-GREEN PL.

DATE AND TYPE OF OFFENSE: 04-26-88 Distribution of Cocaine, Possession of Marijuana
BRIEF STATEMENT OF FACT AND EXAMINATIONS REQUESTED:

COURT DATE 06-02-88

Stopped above for traffic violation, subject was suspended and arrested, search of person revealed drugs.. Vehicle seized and inventoried. Additional drug items found.

JURISDICTION OF OFFENSE:
Henrico

Test for presence of scheduled substances and marijuana.

This evidence is being submitted in connection with a criminal investigation and has not been examined by another laboratory
If a previous submission to us in this case has been made please give our FS lab # _____
Specify manner of return of evidence: _____ Mail X Personal Pick-up

EVIDENCE SUBMITTED: (Itemize and describe)

- ✓ #1 (2) individual packets of white powder
- ✓ #2 (3) packaged items of greenish-brown plantlike material
- No #3 (1) gram-scale containing white powder residue
- No #4 Assorted quantity of plastic bags (new and without corners)
- No #5 Strainer contained in JC Penny plastic bag with white powder residue
- No #6 Strainer (1) and Spoons (2) contained in plastic bag
- No #7 (1) black make-up purse containing baggies and white powder residue
- ✓ #8 (1) plastic bag containing white powder substance
- No #9 (1) knife with red-handle
- No #10 (2) metal "Sucrets" boxes (1) containing razor, (1) partially burnt roach, (1) plastic smoking mouthpiece

DATE AND TYPE OF OFFENSE: 4-9-88 Possession of cocaine with intent,
BRIEF STATEMENT OF FACT AND EXAMINATIONS REQUESTED:

COURT DATE _____

Test for controlled substance

JURISDICTION OF OFFENSE:

City of Richmond

This evidence is being submitted in connection with a criminal investigation and has not been examined by another laboratory

If a previous submission to us in this case has been made, please give our FS lab # _____

Specify manner of return of evidence: _____ Mail XXXXX Personal Pick-up

EVIDENCE SUBMITTED: (Itemize and describe) Sealed bag containing the following:

- ✓ Item #1 Plastic bag containing 11 baggie corners with white powder in same, packaged in seal envelope.
- No { Item #2 Sealed envelope containing a plastic bag corner with white powder residue in same.
Item #3 Sealed envelope containing a razorblade with residue on same.
Item #4 Sealed envelope containing a razorblade with residue on same.
Item #5 Sealed envelope containing a mirror with residue on same.
Item #6 Sealed envelope containing a glass test tube.
Item #7 Sealed envelope containing a box labeled baking soda.
Item #8 Sealed envelope containing a glass pipe with residue.
Item #9 Sealed envelope containing a metal screen.
Item #10 Sealed envelope containing a cotton ball.
Item #11 Sealed envelope containing a glass pipe with residue in same.
Item #12 Sealed envelope containing plastic bag corners with residue in same.
Item #13 Sealed envelope containing a plastic bag with yellowish liquid in same. ?
Item #14 Sealed envelope containing a syringe.
Item #15 Sealed envelope containing a razorblade with residue on same.

DATE AND TYPE OF OFFENSE: 1. Poss. of heroin/int. 2. & 3. Poss. of heroin, cocaine COURT DATE Unk.
BRIEF STATEMENT OF FACT AND EXAMINATIONS REQUESTED: and drug para.

JURISDICTION OF OFFENSE:

A search warrant was executed and the above mentioned persons were found to have the below listed items in thier possession or under thier controll. Test for substance.

RGDC CD I

This evidence is being submitted in connection with a criminal investigation and has not been examined by another laboratory

If a previous submission to us in this case has been made please give our FS lab # _____

Specify manner of return of evidence: _____ Mail XXX Personal Pick-up

EVIDENCE SUBMITTED: (Itemize and describe)

One large yellow envelope containing the following items:

- Marked item 1. ✓ A). yellow envelope containing oge plastic bag corner of white powder.
✓ B). yellow envelope containing one knotted plastic bag corner of white powder.
✓ C). yellow envelope containing a NEW PORT cigarette wrapper containing a clear plastic bag with twelve (12) foil packs of white powder.
✓ D). & E). yellow envelope containing one plastic bag corner of white powder and one clear plastic bag with Two-(2) McNeil Tylenol-3 Codeine inside.
No F), G), H), I), & J). yellow envelope containing; Two-(2) bottle capped cookers with residue and blood, Three-(3) used capped syringes with residue and blood, One-(1) arm tie, One-(1) plastic bag corner with a white powder residue and One-(1) piece of foil with residue.

NAME OF SUSPECT(S): [REDACTED]

AGE 36 RACE B SEX F

DATE AND TYPE OF OFFENSE: 4/30/88 (1) POSSESSION OF COCAINE w/INTENT
(2) POSSESSION OF HEROIN w/INTENT
(3) POSSESSION OF MARIJUANA
(4) POSSESSION OF DRUG PARAPHERNALIA COURT DATE 5/30/88

BRIEF STATEMENT OF FACT AND EXAMINATIONS REQUESTED:

DRUG EXAMINATION

JURISDICTION OF OFFENSE:
PETERSBURG

This evidence is being submitted in connection with a criminal investigation and has not been examined by another laboratory

If a previous submission to us in this case has been made please give our FS lab # _____

Specify manner of return of evidence: _____ Mail XXX Personal Pick-up

EVIDENCE SUBMITTED: (Itemize and describe)

ONE LARGE BROWN EVIDENCE BAG CONTAINING THE FOLLOWING:

- ☒ ITEM#1-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A BROWN PAPER BAG WITH ABOUT 82 EMPTY VIALS WITH RESIDUE AND SEVERAL SMALL PLASTIC ZIP LOCK BAGGIES.
- ☒ ITEM#2-ONE SEALED CLEAR EVIDENCE BAG CONTAINING 2 FULL VIALS OF A WHITE "ROCK" LIKE MATERIAL.
- ☒ ITEM#3-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A BLACK KEY POUCH WITH 7 PACKETS CONTAINING A WHITE POWDER SUBSTANCE AND A FOIL PACKET THAT CONTAINS A WHITE POWDER SUBSTANCE.
- ☒ ITEM#4-ONE SEALED CLEAR EVIDENCE BAG CONTAINING FOUR SYRINGES-NEEDLES BROKEN OFF-(3 FILLED WITH LIQUID, 1 EMPTY)-4a, TWO GLASS TUBES WITH RESIDUE-4b, AND ONE EMPTY VIAL-4c.
- ☒ ITEM#5-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A SANDWICH BAG THAT CONTAINS AN AMOUNT OF A WHITE POWDER SUBSTANCE.
- ☒ ITEM#6-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A SEALED WHITE ENVELOPE THAT CONTAINS A RAZOR BLADE WITH A WHITE POWDER RESIDUE.
- ☒ ITEM#7-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A WHITE SUBSTANCE TAKEN FROM SUSPECT'S MOUTH.
- ☒ ITEM#8-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A "AMES" BAG THAT CONTAINS A RAZOR BLADE A TORN SANDWICH BAG WITH A WHITE POWDER SUBSTANCE.
- ☒ ITEM#9-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A SMALL BAGGIE OF A BROWNISH-GREEN PLANT LIKE MATERIAL AND A PACK OF ROLLING PAPER.
- ☒ ITEM#10-ONE SEALED CLEAR EVIDENCE BAG CONTAINING 10a-TWO NEEDLE TOPS, 10b-A FOIL WRAPPER CONTAINING A WHITE POWDER SUBSTANCE, AND 10c-SEVERAL VIALS WITH RESIDUE.
- ☒ ITEM#11-ONE SEALED CLEAR EVIDENCE BAG CONTAINING THREE VIALS-2 WITH RESIDUE AND 1 EMPTY.
- ☒ ITEM#12-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A BAG WITH A POWDERY SUBSTANCE.
- ☒ ITEM#13-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A FOIL PACKET THAT CONTAINS A WHITE POWDER SUBSTANCE.
- ☒ ITEM#14-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A BROWN PAPER BAG THAT CONTAINS A WHITE POWDER SUBSTANCE.
- ☒ ITEM#15-ONE SEALED CLEAR EVIDENCE BAG CONTAINING 15a-A BROKEN GLASS PIPE WITH RESIDUE, AND 15b-TWO HANDROLLED CIGARETTE BUTTS (ROACHE) WITH RESIDUE.
- ☒ ITEM#16-ONE SEALED CLEAR EVIDENCE BAG CONTAINING A GLASS SMOKING DEVICE WITH POSSIBLE RESIDUE.

LAST ITEM

VOIR DIRE

1. What is your name?
2. What is your occupation? Who do you work for?
3. How long have you been so employed?
4. What are your duties in this occupation?
5. What education and training do you possess that qualifies you to perform your duties?
6. What specific courses have you taken that are directly related to drug analysis?
7. How are these courses related? For example, what did you learn in your general chemistry course that aids you in the analysis of drugs?
8. Do you consider yourself an expert in the analysis of drugs?
9. What is the definition of an expert witness?
10. Is the university/college you graduated from accredited, and if so, by whom?
11. Who conducted your training?
12. What are his/her/their qualifications?
13. What literature do you read relating to your job?
14. How many analyses have you done on suspected drugs (or controlled substances)?
15. Do you belong to a recognized society attesting to your qualifications as a drug chemists?
16. Have you written any articles or published materials dealing with your work?

PROSECUTING DRUG CASES IN FEDERAL COURT

By

Robert B. Wilson
Assistant Commonwealth's Attorney for the City of Hampton
and Special Assistant United States Attorney

I. ADVANTAGES OF USING THE FEDERAL SYSTEM

- A. National reach of the federal Court and Grand Jury
- B. "Fear Factor"
- C. Bail Reform Act (18 U.S.C. 3142 et seq.):
 - 1. a. Raises rebuttable presumption that bail should be denied if there is probable cause to believe that defendant committed the crime and that crime has a maximum punishment of 10 years or more in violation of the Controlled Substances Act (21 U.S.C. 801 et seq.).
 - b. Burden shifts to DEFENDANT to prove he should be released once showing in (a) has been made.
 - 2. This burden shifting and pre-trial detention is constitutional, United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).
 - 3. Contrasts strongly with Virginia Bail Statute, Code of Virginia § 19.2-190:
 - a. Requires release on bail unless there is probable cause to believe that the defendant will flee or be an unreasonable danger.
 - b. Bail can be denied, Heacock v. Commonwealth, 228 Va. 235, 321 S.E.2d 645 (1984), but burden is on prosecution and does not shift.
 - c. 1) In Federal Court, either party may appeal results of bond hearing. 18 U.S.C. 3145.

- 2) In Virginia, only a defendant can appeal the bond hearing. Code of Virginia § 19.2-124.
- d.
 - 1) Failure to appear in Federal Court after release on bail can be punished by up to 10 years depending on nature of underlying offense. 18 U.S.C. 3146.
 - 2) In Virginia, failure to appear is a Class 1 Misdemeanor if underlying charge is a misdemeanor and a Class 6 Felony if underlying charge is a felony. Section 19.2-128.

D. Indictments

1. Federal: Defendants may be joined in a single indictment if they are alleged to have participated in the same act or series of acts, but all defendants need not be charged in each count. Rule 8, F.R. Crim.P.
2. State: No such provision in Virginia. See Rule 3A:6.

E. Joinder of Defendants

1. Federal: Court may order two or more defendants tried together if they could have been or were indicted in a single indictment. Rule 13, F.R.Crim.P.

Court may order severance of defendants if joinder is prejudicial. Rule 14, F.R.Crim.P.

Severance is rarely ordered.
2. State: Severance of defendants is defendant's right on demand. Rule 3A:10.

This stymies large conspiracy prosecutions with a probable separate trial for each defendant.

(C.A. Drug Prosecution Manual)

Exposes witnesses at first trial. (In Norfolk, this procedure has resulted in three witnesses killed!).

F. Depositions

1. Federal: With certain requirements, depositions are allowed in any criminal case. Rule 15, F.R.Crim.P.
2. State: No provision for depositions in criminal cases except a rape victim. Westry v. Commonwealth, 206 Va. 508, 144 S.E.2d 427 (1965).

G. Sentencing

1. Federal:
 - a. All federal crimes are now governed by sentencing guidelines pursuant to 18 U.S.C. 3551 et seq. and 28 U.S.C. 991-998.
 - b. Specific sentencing ranges are set up for each offense taking into account defendant's history and specifics of the crime.
 - c. Sentencing judge may not go outside the range without stating reasons.
 - d. Either side can appeal on issue of punishment if guideline range is exceeded or not reached.
 - e. NO PAROLE!
 - f. Good time credit has been substantially reduced so that a defendant can expect to serve no less than 80-90% of the stated sentence.
 - g. Guidelines are constitutional and binding. Mistretta v. United States, ___ U.S. ___, 109 S.Ct. 647, 57 U.S.L.W. 4102 (1989).
2. Virginia
 - a. Parole and good time credits abound.

II. DISADVANTAGES OF FEDERAL SYSTEM

A. Speedy Trial Act

1. 18 U.S.C. 3161 et seq.

- a. Indictment must come within 30 days of an arrest.
 - b. Trial must be within 70 days but no sooner than 30 days of service of indictment.
 - c. Defendant must be tried within 90 days of arrest in any event.
 - d. No preliminary hearing is necessary, though, if defendant is indicted within 10 days of arrest.
- 2.
- a. Practical impact is that your case must be ready to go before defendant is arrested or indictment handed down.
 - b. Possible advantage, though, is to keep a defense attorney from dragging case out.
 - c. In Eastern District of Virginia, Norfolk and Newport News Divisions, continuances are few and far between.

3. Virginia

a. Sec. 19.2-243

- 1) Commonwealth has five months after a preliminary hearing to try a defendant who is held in jail and nine months for one not held in jail continuously.
- 2) Allows more time to prepare case but also allows abuse by defense attorneys waiting to be paid by their clients.

B. Discovery

1. Federal Court

- a. Four types of material must be handed over to defendants.

1) Exculpatory

- a) Brady v. Maryland, 373 U.S. 83 (1963).
- b) Matters material to guilt or pun-

- ishment that are within the knowledge or control of the Government or its agents.
 - c) Must be turned over immediately upon receipt whether or not defendant asks for it or not.
- 2) Discovery by Rule
- a) Rule 16, F.R.Crim.P.
 - b) Statements of Defendant:
 - 1) Written or recorded statements.
 - 2) The substance of any oral statement which the Government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent.
 - 3) Recorded testimony of a defendant before a grand jury which relates to the offense charged.
 - c) Documents and tangible objects:
 - 1) Material to the preparation of the defendant's case.
 - 2) Intended for use by the government as evidence in chief at trial.
 - 3) Documents and tangible objects which were obtained from or belong to the defendant.
 - d) Defendant's prior record
 - e) Reports of examinations and tests
 - f) Disclosure of evidence by the defendant, Rule 16 (b), F.R.Crim.P.
 - g) Continuing duty to disclose.
 - h) Defendant must ask for this type of

material before he can get it.

3) Jencks Act:

- a) 18 U.S.C. 3500; Jencks v. United States, 353 U.S. 657 (1957).
- b) Production of any statement of a witness in the possession of the United States which relates to the subject matter as to which the witness will testify.
- c) "Statement" defined
 - 1) A written statement made by the witness and signed or otherwise adopted or approved by him.
 - 2) A stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of the oral statement.
 - 3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.
 - 4) DEFENSE WILL GET YOUR POLICE REPORTS IF THE OFFICER TESTIFIES.
- d) Disclosure of JENCKS by the defendant. Rule 26.2, F.R.Crim.P.
- e) Disclosure is made just prior to trial usually, although Rule does not require it until after the witness has testified.

4) Impeaching

- a) United States v. Giglio, 495 U.S.-

.150 (1972)

- b) Prior records, plea agreements, money paid, drug/psychiatric treatment, promises, consideration for cooperation which may affect the credibility of witnesses.
- c) Disclosure made with the Jencks material.

2. Virginia

- a. Discovery governed by Rule 3A:11
 - 1) Discovery of witness statements and police reports is prohibited.

III. GENERAL DIFFERENCES

A. Statutory Schemes

1. Federal

- a. Punishments are dictated by the quantity of drug involved as well as the Schedule of the drug.
 - 1) Simple possession of cocaine-up to three years and \$25,000 for a repeat offender. First offense is a misdemeanor.
 - 2) Manufacture, distribution or possession with intent to distribute cocaine: 5 kilograms or more-10 years to life, \$4,000,000 fine; 500 grams or more-5 years to 40 years, \$2,000,000 fine; less than 500 grams-up to 20 years, \$1,000,000 fine. 21 U.S.C. 841.
 - 3) Sentences go up for repeat offenders.
 - 4) Court CANNOT suspend any part of such sentence nor is probation allowed.
- b. Attempts:

(C.A. Drug Prosecution Manual)

- 1) In federal system they are punished the same as the completed act. 21 U.S.C. 846.
- 2) In Virginia, punishment for an attempt is generally quite a bit less than for the completed crime. Section 18.2-26, 2-7, 28 (general crimes) and 18.2-257 (drug crimes).

c. Conspiracy:

- 1) Punishment is the same as that prescribed for the completed act in both U.S. and Virginia courts in drug cases. 21 U.S.C. 846; § 18.2-256.
- 2) Federally, conspiracy can be prosecuted independently and later than underlying acts that are object of conspiracy.
- 3) In Virginia, conspiracy cannot be prosecuted if defendant has already been convicted of the completed substantive offense. § 18.2-23.1.
 - a) DOES NOT bar simultaneous trial of conspiracy and completed offense. Boyd v. Commonwealth, 236 Va. 346, 374 S.E.2d 301 (1988).

d. Appeals:

- 1) Federally, appeals to the Circuit Court of Appeals are briefed and argued by the Assistant U.S. Attorney who prosecuted the case.
- 2) Solicitor General only argues cases when they reach U.S. Supreme Court.
- 3) You must be admitted to the bar of the Circuit Court of Appeals to argue the case or file a brief. This is a separate admission with fee from admission to the U.S. District Court.

e. Forfeitures:

- 1) Federal
 - a) If property is personal and worth more than \$1,000 (\$2,500 if automobile) and less than \$100,000, forfeiture can be administratively handled by DEA or FBI.
 - b) Standard is probable cause.
 - c) Defendant can post bond and get civil hearing in U.S. District Court.
 - d) If real property or property of any kind worth more than \$100,000, must be heard in U.S. District Court.
 - e) Adoptive forfeiture law is strong weapon to use until Virginia constitution is changed.
 - f) Assets seized and forfeited this way are returned (90%) to the seizing agency. Law requires that money or property must be used exclusively for law enforcement. Only limit is that it cannot be used to pay salaries.

IV. CROSS-DESIGNATION

A. What it is

1. Allows a local prosecutor to be appointed as Special Assistant United States Attorney.
 - a. Full powers of regular assistant except that you cannot sign a transportation order (order to produce). Nobody knows the reason for this limitation.
 - b. You remain a Commonwealth's Attorney or an Assistant Commonwealth's Attorney.
 - c. Must be prepared to document life's history for security check.

(C.A. Drug Prosecution Manual)

- 1) They really want to know every address you ever occupied.
 - 2) There is provision for a temporary 6 month appointment without the background check.
- B. For more information, contact the United States Attorney in your district.
1. Eastern District of Virginia
Henry E. Hudson, 1101 King Street, Suite 502,
Alexandria, Virginia 22314, (703) 557-9100.
 2. Western District of Virginia
John P. Alderman, P.O. Box 1709, Roanoke, Virginia
24008, (703) 982, 6250.

ASSET FORFEITURES

By

Robert B. Wilson, V
Assistant Commonwealth's Attorney for the City of Hampton

Note: This lecture will focus mainly on the Virginia and federal laws relating to the forfeiture and disposition of assets seized in drug investigations. There are many other bases for forfeiture in the laws of both jurisdictions too numerous to be covered here.

I. Definition and Attributes

A. Forfeiture is the loss of an estate in consequence of the doing or omission of some act. Pence v. Tidewater Townsite Corp., 127 Va. 447 (1920).

1. Forfeiture is not a penalty for a crime, in general. It is civil in nature except in certain Federal prosecutions. (See 21 U.S.C. 848, Continuing Criminal Enterprise, for example).
2. In civil forfeitures, the property itself is the defendant and therefore is not a criminal proceeding even though the action is founded on the use of the property in violation of criminal statutes. Commonwealth v. One 1970, 2 Door, Hard Top Lincoln Automobile, 212 Va. 597 (1972).

The property itself is proceeded against under the legal fiction that the property is "guilty". See, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

3. The forfeiture "related back" to the instant of the violation giving rise to the action and vests title immediately in the government even though title is not perfected without the court proceeding of forfeiture. Therefore, any subsequent sale is void at the government's option. Tri-Pharmacy, Inc. v. United States, 203 Va. 723 (1961); United States v. Grundy, 7 U.S. (3 Cranch) 337 (1806). See Section 19.2-386.8 Code of Virginia, for examples of exercise of government's option.

B. Civil Forfeitures

1. Completely independent of the underlying criminal action. The Palmyra, 25 U.S. (12 Wheat) 1 (1827); Section 19.2-386.10(B) Code of Virginia.
2. Civil discovery rules apply to both sides.
3. There is no collateral estoppel should government lose criminal case. United States v. One Assortment of 89 Firearms, 464 U.S. 354 (1984).
4. Federally, burden of proof on government is probable cause. See 19 U.S.C. 1615; One Lot of Emerald Cut Stones v. United States, 409 U.S. 232 (1972). In Virginia, the Commonwealth must prove its case by a preponderance of the evidence. Section 19.2-386.10(A).
5. Forfeitures of attorneys fees already paid to the attorneys can be forfeited under the Sixth Amendment if the attorneys knew or had reason to know that the funds were forfeitable. United States v. Caplin & Drysdale, Chartered, _____ U.S. _____, 109 S.Ct. 2646 (1989).
6. Right to the property is declared as against the whole world. In other words, civil forfeiture gives good title. Van Oster v. Kansas, 272 U.S. 465 (1926). Criminal forfeiture only extinguishes the criminal defendant's rights to the property.

II. The Present (and soon to be "OLD") Virginia Law

A. Valid until July 1, 1991.

1. Sections 18.2-249, 19.2-369 through 19.2-386.11 presently applicable.
2. Declares forfeitable any and all personal and real property of any kind or character used in substantial connection with a violation of Section 18.2-248 or 18.2-248.1 (Manufacture, sale or distribution). CAVEAT - Real Property cannot be so forfeited unless the underlying criminal violation has a minimum punishment of five years.

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3. Forfeits everything of value furnished or intended to be furnished in exchange for a controlled substance. This applies to a "reverse sting".
4. Forfeits any real or personal property traceable to an illegal exchange of drugs. For example, buy a house with drug profits and you lose it.
5. Property can be seized up to three years of the date of actual discovery by the Commonwealth or the last act giving rise to the forfeiture. Section 19.2-386.1.
6. Agency seizing property prior to an information being filed must notify the Commonwealth's Attorney "forthwith". Commonwealth then has 21 days to file a notice of seizure with the Circuit Court. An information then has to be filed within 90 days of the actual seizure. Section 19.2-386.3. These time limits are mandatory and jurisdictional. Haina v. Commonwealth, 235 Va. 571 (1988).
7. Pending forfeiture, an agency seizing property can:
 - a. "Post" the property as seized; or
 - b. remove the property to a storage area for safekeeping or deposit money and negotiable instruments in an interest bearing account; or
 - c. remove the property to a place designated by the Circuit Court in the county or city where seized. i.e. your forfeiture action filed in Hampton but property found and seized in Roanoke; or
 - d. provide for another custodian or agency to take custody of the property and remove it to an appropriate location in jurisdiction where seized or action filed. Section 19.2-386.4.
8. The Commonwealth's Attorney can release the property if he subsequently finds it to be exempt from forfeiture. Section 19.2-386.5.
9. Owner, whether innocent or not, can get the property back by posting a bond equal to the property's value. Section 19.2-386.6.

10. Even though the property is forfeitable, the General Assembly has carved out eight exemptions:
 - a. conveyance as a lawfully certified common carrier unless the owner knew of the illegal conduct; or
 - b. if the perpetrator was in illegal possession of the property; or
 - c. innocent owner; or
 - d. a bona fide purchaser for value without notice and;
 - e. the illegal conduct was without his knowledge or connivance; or
 - f. innocent lien holder; or
 - g. lien holder held lien and perfected it prior to seizure; and
 - h. same as e. Section 19.2-386.8.
11. Appearance by owner or lien holder must be by answer and under oath. Section 19.2-386.9.
12. Trial shall be by jury unless waived by all parties. Section 19.2-386.10.
13. When you win -
 - a. any cash goes to the Literary Fund;
 - b. all property other than motor vehicles, boats and aircraft must be sold and the proceeds go to the Literary Fund;
 - c. motor vehicles, boats and aircraft may be used for law enforcement purposes if the Court finds the agency really needs the conveyance for law enforcement purposes. The Court must limit the time the agency can have the conveyance. At the end of that time, the item must be sold and the proceeds go to the Literary Fund. Sections 19.2-386.11 and 12.

14. Any party can appeal a final judgment or order just as in a civil law (not chancery) case. Section 19.2-386.12.

III. The Law of the Future (Virginia)

A. Takes effect July 1, 1991.

1. Amends old Sections 19.2-386.1, 386.3, 386.4, 386.9, 386.10, 386.11, 386.12 and adds Section 19.2-386.14.
2. Section 19.2-386.1 will add the requirement that trustees of a deed of trust be notified of a seizure, and deleted the service by publication provisions formerly in this section.
3. Section 19.2-386.3 sets forth the requirements for service of process.
4. Section 19.2-386.4 will require the filing of certain reports with DCJS regulations.
5. Section 19.2-386.9 allows an owner or lien holder 30 days to respond to the notice after service.
6. Section 19.2-386.10 has significant changes. Allows for petition within 21 days of judgment to DCJS for remission of the property. DCJS shall remit if an exemption under subdivisions 2, 3 or 4 of 19.2-386.8 is established. Also changes procedure re: jury to requirement that jury be demanded before you get it. Burden of preponderance stays the same.
7. Section 19.2-386.11 will allow for returning property to participating agency.
8. Section 19.2-386.12 contains only minor amendments.
9. Section 19.2-386.14 is the BIGGIE. Will allow for sharing of forfeited drug assets.
 - a. everything that is ordered forfeited is turned over to DCJS.
 - b. DCJS will deduct ten percent for administration.

(C.A. Drug Prosecution Manual)

- c. the 90 percent left will be available to federal, state and local agencies to promote law enforcement in accord with DCJS regulations.
- d. these regulations have not been formulated yet.
- e. any agency or office that participated in the investigation leading to the seizure can petition DCJS for an equitable share of the 90 percent.
- f. the seizing agency can still get a boat, motor vehicle, aircraft or any tangible personal property, but it must petition DCJS, not the Court, for it.

Note: The emergency regulations to implement these statutory changes were not available at the time this chapter was prepared.

IV. Federal Forfeiture and Asset Sharing Procedure

A. Governed by Tariff Act of 1930 and Admiralty and Maritime Claims Rules.

- 1. Burden of proof, 19 U.S.C. 1615, is on the defendant-claimant provided that the government first demonstrates probable cause.
- 2. Property must be seized and forfeiture proceedings instituted no more than five years after discovery of the alleged offense. 19 U.S.C. 1621 and 28 U.S.C. 2462.
- 3. The FBI and DEA are authorized to seize property federally for drug law violations. 21 CFR 1316.72.
- 4. If the value of the property seized is less than \$100,000 and a claim and a bond are not filed by defendant within 20 days of notice, the DEA or FBI can simply declare the property forfeited. This is known as administrative forfeiture. 28 U.S.C. 509 and 510; 21 U.S.C. 871 and 881(d).
- 5. If the value of the property is \$100,000 or more or if a claim and bond are filed, forfeiture must be

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handled by the U.S. Attorney's Office in U.S. District Court. 19 U.S.C. 1610.

6. If a claim and bond are filed or the property is worth more than \$100,000, the case is tried just as any civil case is tried except for the lessened burden of proof.
7. This means all civil discovery rules apply.
8. Should a defendant fail to testify at the forfeiture proceeding, his silence can be held against him.
9. If a defendant does testify, his answers can be used in a later criminal trial as admissions.
10. A petition must be filed within 30 days of notice of seizure. 21 CFR 1316.80.
11. A petition for restoration of proceeds of sale must be made within 90 days of sale. 21 CFR 1316.80.

B. Adoptive Seizure (See the Attorney General's Guidelines on Seized and Forfeited Property)

1. Refers to the federal adoption and forfeiture of property seized exclusively through the efforts of state and local agencies.
2. Investigative bureaus empowered by statute or regulation (FBI and DEA) may adopt such seized property for forfeiture where the conduct giving rise to the seizure is in violation of federal law.
3. Forfeitures of seized property accepted in this manner have the same effect as if the property had originally been seized by the investigative bureau.
4. Presently, in the Eastern District of Virginia, by policy, the DEA will accept adoptive seizures in drug cases when the minimum value of the property is \$1,000, except motor vehicles must be worth at least \$2,500.

C. Asset Sharing or "Equitable Transfer"

1. Pursuant to 21 U.S.C. 881(e)(1), the Attorney

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General has the authority to equitably transfer forfeited property and cash to state and local agencies that directly participate in the law enforcement effort leading to the seizure and forfeiture of the property. Requests for sharing must be made in writing on Form DAG 71.

2. Generally

- a. all equitable shares are based on the net proceeds of the forfeiture.
- b. prosecutors as well as state and local police may participate in sharing.
- c. shared property and income from shared property must be used for the law enforcement purposes specified in the DAR 71.
- d. an agency may share if it can demonstrate that it participated directly in the law enforcement effort that resulted in the forfeitures.
examples: a prosecutor can write the search warrant or direct the investigation.
- e. requests for sharing must be filed within 60 days of the seizure. In Norfolk, the DEA prefers 30 days.
- f. assets will be shared only if they will not supplant existing resources. This means that the board of supervisors or the Compensation Board cannot cut your budget by the amount of forfeiture sharing you got last year.
- g. the share you receive must bear a reasonable relationship to your degree of direct participation in the law enforcement effort resulting in the forfeiture.

3. Factors governing the amount of sharing

- a. whether the seizure was adopted or a result of a joint federal, state or local effort.
- b. the degree of the direct participation of the requestor including any related prosecution of the offense leading to the forfeiture.

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- c. who originated the case and was it the result of a long investigation or a lucky tip.
 - d. the measure of any unique or indispensable assistance.
 - e. the amount of any state law seizure, if any.
 - f. whether the state or local agency could have achieved forfeiture under state law, with favorable consideration given to an agency which could have forfeited the assets on its own but joined forces with the United States to make a more effective investigation.
- COOPERATION IS REWARDED!

4. Sharing Percentages

- a. in adoptive seizures that are forfeited administratively or in uncontested judicial proceedings, the U.S. keeps 15% for a handling type fee.
- b. in contested adoptive seizures, the U.S. will keep 20 percent.
- c. in non-adoptive cases the U.S. will keep at least 15 percent but maybe more based on the factors previously outlined.

5. Decision - Making Authority

- a. administrative forfeitures valued at less than \$1,000,000 - the head of the seizing agency (FBI-DEA).
- b. judicial forfeitures of less than \$1,000,000 - the U.S. Attorney.
- c. seizures of \$1,000,000 or more and multi-district cases - the U.S. Attorney consults with the seizing agency and recommends dispositions to the Deputy Attorney General.
- d. if you want to keep real property rather than sell it, the Deputy Attorney General must approve it and title must revert to the U.S. if the property is ever used for purposes other

than those specifically agreed to.

6. The U.S. Marshal's Service administers the Justice Assets Forfeiture Fund and safeguards seized property.
 - a. monies from the Fund can be used to pay awards for specific information or instances of assistance.
 - b. can pay for purchase of evidence pursuant to 28 U.S.C. 524(c)(1)(G).
 - c. fund generally pays expenses required to forfeit property.

V. Conclusion

Nobody knows what the DCJS regulations are going to be and how they are going to be used. Right now, the U.S. Department of Justice is your best friend in getting more money to fight drug crime. The U.S. Attorney's Office in Virginia wants to help. It may be that even after July 1 the federal route will remain the best way to forfeit property.

Get to know the U.S. Attorneys and their assistants in your area as well as the FBI and DEA people. They are good people and are more than willing to help.