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The Good, The Bad, and The Ugly: The Limitation of Defendants' Statutory Rights by Judicial Decisions and Legislative Revisions

Matthew S. T. Clark*

I. Introduction

When the Supreme Court of Virginia decided Commonwealth v. Baker,¹ the criminal defense bar rejoiced that the court was willing to read section 16.1-263(A) of the Code of Virginia in such a manner that favored criminal defendants.² The cheers quickly became jeers as the General Assembly of Virginia amended the statute, enacted a statute to limit Baker, and the Supreme Court of Virginia limited its previous ruling.³ This process of narrowing a criminal defendant’s rights, whether statutory or constitutional, is all too common of an occurrence during the past twenty years in the Commonwealth.

This article will trace the history of certain statutes, examine judicial treatment of these statutes, and discuss the General Assembly’s subsequent amendments of the statutes in response to the courts’ decisions. Part II will focus on Commonwealth v. Baker and its progeny, showing how juvenile defendants’ rights have diminished due to limited holdings and significant revisions of various sections of the Virginia Code. Part III will highlight the changes of Virginia Code section 19.2-187, dealing with the introduction of

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* J.D. Candidate, May 2001, Washington & Lee University School of Law; B.A., University of Virginia. Thank you to my parents for their love and teaching and to the rest of my family and friends for keeping me sane.
1. 516 S.E.2d 219 (Va. 1999).
certificates of analysis. In Part IV, the ever-changing definitions of words and phrases within Virginia Code Section 19.2-295.1, which describes the procedure that the Commonwealth must use to introduce prior criminal convictions during the sentencing phase, will be discussed. These analyses will reveal the limiting and confining nature of criminal law in Virginia and should cause us to question to what extent these limitations have redefined the burden on criminal defendants.

II. The Dwindling of Statutory Protection for Juveniles

A. Courts Acknowledge the Commonwealth’s Failure to Follow Its Own Rules

In Commonwealth v. Baker the Supreme Court of Virginia held that the Commonwealth’s failure to issue a summons to the juvenile defendant’s father voided the juvenile defendant’s convictions because the circuit court lacked authority to exercise subject matter jurisdiction. The court based its decision on section 16.1-263(A) of the Virginia Code, which at that time read in part as follows: “After a petition has been filed, the court shall direct the issuance of summonses, one directed to the juvenile, if the juvenile is twelve or more years of age, and another to the parents.”

The meaning of the statute appeared to be clear; it required the juvenile court to issue summonses to both parents in order for the court to transfer its subject matter jurisdiction to the circuit court.

In its one page opinion, the court noted that section 16.1-263(A) was “amended effective July 1, 1999 to provide for notice to ‘at least one parent.’” This point is of great interest because the Court of Appeals of Virginia had decided in favor of Baker on September 15, 1998. Thus, in less than one year, the General Assembly had sought to remedy the failure of the Commonwealth to adhere strictly to the juvenile transfer procedure set out in section 16.1-263 by amending the statute clearly to mean that a

8. Some exceptions to this mandatory phrasing were included in section 16.1-263 in its 1997 form. These exceptions included waiver of service by written stipulation or voluntary appearance by the parents and a certification on record by the judge that the identity of a parent was not “reasonably ascertainable.” See 1997 Va. Acts ch. 441.
10. See Baker v. Commonwealth, 504 S.E.2d 394, 399 (Va. Ct. App. 1998) (superseded by amendment to statute) (holding that notice of allegation that juvenile committed delinquent act must be given to both parents if their identity is reasonably ascertainable).
juvenile court need only notify one parent of the initiation of juvenile proceedings. However, the Supreme Court of Virginia ruled that "retrospective application" of the Baker holding was mandated by Gogley v. Peyton, thereby rejecting the Commonwealth's hope that the ruling be prospective only.  

B. The Court's Solution to the Commonwealth's Problem

After the court's holding in Baker, there came a flood of appeals by defendants who had been convicted as juveniles, most notably Steve Edward Roach and Douglas Christopher Thomas, both of whom had been convicted of capital murder. The Supreme Court of Virginia erected a dam with its ruling in Moore (Dennis) v. Commonwealth ("Moore I"). In this case the court held that section 16.1-269.1(E) cured the Commonwealth's failure to notify the defendant's father of the transfer hearing. The section reads in part as follows: "An indictment in the circuit court cures any error or defect in any proceeding held in the juvenile court except with respect to the juvenile's age." The court stated that this "curative statutory provision permitted the circuit court to exercise its subject matter jurisdiction and to try the defendant on the offenses set forth in the indictments." Although the court noted that the defendant did not raise this issue at trial or on direct appeal, the court's broad holding makes it appear as though section 16.1-269.1(E) would cure the defect despite a defendant's proper preservation of the issue. Given this case, the Commonwealth found relief from the flood of litigation caused by its failure to follow proper procedure in juvenile cases involving offenses committed after July 1, 1996.

13. See Roach v. Director, Dep't of Corrections, 522 S.E.2d 869, 872 (Va. 1999) (holding that defendant's mother received adequate notice); Thomas v. Garraghty, 522 S.E.2d 865, 868 (Va. 1999) (holding that defendant's biological father was not "parent" at time of transfer hearing).
15. Id. at 418; see 1996 Va. Acts chs. 755, 914.
17. Moore, 527 S.E.2d at 418.
18. See id. at 417.
In Moore (David) v. Commonwealth ("Moore II")\(^\text{19}\) the Supreme Court of Virginia held that section 16.1-269.6(E) "does not operate to cure or waive the initial defect in the juvenile court proceedings where, as here, the juvenile court fails to give the parental notice of the initiation of juvenile court proceedings as statutorily mandated."\(^\text{20}\) The section reads as follows: "Any objection to the jurisdiction of the circuit court pursuant to this article shall be waived if not made before arraignment."\(^\text{21}\) The Commonwealth argued that David Moore’s failure to object in a timely fashion procedurally barred him from raising an objection to the trial court’s jurisdiction at any future point.\(^\text{22}\) If the court had agreed with the Commonwealth’s argument, then juvenile defendants who failed to preserve the jurisdictional issue in cases involving offenses committed prior to July 1, 1996 would be precluded from raising the issue on appeal.\(^\text{23}\) The court expressly rejected this contention, however, ruling that the statute by its own terms addressed only defects in the transfer hearing, not the "initiation of the juvenile court proceedings."\(^\text{24}\) The court’s ruling did not remedy the failures of the Commonwealth to adhere to proper procedures for offenses committed prior to July 1, 1996, thereby allowing defendants convicted of such offenses to raise the issue of subject matter jurisdiction regardless of whether they properly preserved it.

C. The General Assembly’s Solution

Having found only partial relief via the court’s ruling in Moore I, the Commonwealth sought to end the appeals arising from convictions of juveniles for offenses committed prior to July 1, 1996. The General Assembly enacted section 16.1-272.1 in order to put an end to the effect of Baker.\(^\text{25}\) The statute reads in part as follows:

any claim of error or defect under this chapter, jurisdictional or otherwise, that is not raised within one year from the date of final judgment of the circuit court or one year from the effective date

22. Moore, 527 S.E.2d at 411.
23. In actuality, this argument was an attempt by the Commonwealth to extend the effect of Moore I to offenses committed prior to July 1, 1996, thus covering all cases in which the Commonwealth failed to follow statutory procedures. The Commonwealth apparently believed that section 16.1-269.6(E), at issue in Moore II, should be read in the same manner as section 16.1-269.1(E), at issue in Moore I.
24. Moore, 527 S.E.2d at 411 (emphasis added).
of this act, whenever is later, shall not constitute a ground for relief in any judicial proceeding.  

Thus, the Commonwealth has placed a time limit on the appealability of these matters, assuring that the appeals will cease and that defendants will lose the rights earlier granted to them by statute. The statute seems to adopt the court's view in Moore II that "[b]eyond question, the legislature has the authority to provide for a waiver of a defect in the transfer proceeding." And so it has done.

D. Juvenile Issues in Capital Murder Cases

The United States Supreme Court in Thompson v. Oklahoma held that the Eighth and Fourteenth Amendments prohibit execution of a person under sixteen years of age at the time of the offense. In 2000, the Virginia General Assembly amended section 18.2-10 to comply with the Thompson holding. The statute reads in pertinent part as follows:

The authorized punishments for conviction of a felony are: (a) For Class 1 felonies, death, if the person so convicted was sixteen years of age or older at the time of the offense, or imprisonment for life and . . . a fine of not more than $100,000. If the person was under sixteen years of age at the time of the offense, the punishment shall be imprisonment for life and . . . a fine of not more than $100,000.

The negative effect of the amendment is that it is proof that the General Assembly approves of the death penalty for sixteen year old defendants. Due in part to this show of approval, capital defense attorneys must expect that more juveniles will be charged with capital murder. Thus, attorneys must be fully cognizant of juvenile transfer issues like those in Baker, Moore I and Moore II so that timely objections can be raised in order to avoid procedural default and to protect the rights of juveniles who are charged with capital murder.

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26. Id.
27. Moore, 527 S.E.2d at 411.
31. Id. (emphasis in original showing amended language).
32. See Johnson v. Commonwealth, 529 S.E.2d 769, 776-77 (Va. 2000) (discussing Baker issue and other juvenile transfer issues in capital murder case of defendant who was sixteen years of age at time of offense). Although the Supreme Court of Virginia ruled that the Commonwealth followed the juvenile transfer procedures in this case, attorneys must remain diligent in ensuring that the Commonwealth abides by its own complex procedures when
III. Certificates of Analysis: From Strict Compliance / Presumed Prejudice to No Prejudice

A. Commonwealth Must Adhere Strictly to Statute

Over the past twenty years scientific testing in criminal cases has come to the forefront as the most important evidence in proving guilt, especially in drug-related offenses and cases involving fingerprint or DNA analysis. Due to the frequent use of such analyses in a growing number of cases, the Virginia General Assembly amended and reenacted section 19.2-187 in 1976 so that the Commonwealth need not produce the lab technicians at trial in order to present prima facie evidence of the analysis of the substance or fingerprint. The statute, at that time, read in part as follows:

In any hearing or trial of any criminal offense, a certificate of analysis of a person performing an analysis or examination, performed in [a laboratory in this specified list] when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided that the certificate of analysis shall be filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial.

The statute placed the mandatory burden on the Commonwealth (as its attorneys would receive the certificates) to file the certificate with the clerk at least a week in advance of trial, thus allowing the defendant's attorney access to it prior to trial. The statute placed no duties whatsoever on the defendant or his attorney.

This statute was at issue in Gray v. Commonwealth. In that case, the Commonwealth, pursuant to a discovery motion, gave a copy of the certificate of analysis to the defendant's attorney one month before trial. However, the Commonwealth did not file the certificate with the clerk of the circuit court until three days before the trial. Defense counsel objected to the admission of the certificate at trial based upon the Commonwealth's failure to adhere to the procedure set out in section 19.2-187; however, the

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34. Id. (emphasis added).
35. Id.
37. Id. at 706.
trial court allowed its introduction because the Commonwealth had supplied a copy to the defense, thus preventing any prejudice to the defendant. 38

The Supreme Court of Virginia held that "in the absence of the preparer of the certificate as a witness at trial, the failure of the Commonwealth fully to comply with the filing provisions of [sic] 19.2-187 renders the certificate inadmissible." 39 The court explained that the "statute deals with criminal matters, and it undertakes to make admissible evidence which otherwise might be subject to a valid hearsay objection. Thus, the statute should be construed strictly against the Commonwealth and in favor of the accused." 40 The court went on to emphasize this latter point, adding that the Commonwealth's act of providing the defense with a copy of the certificate did not meet the mandatory requirements of the statute and that the accused need not show any prejudice. 41 In his dissent, Judge Thompson noted that the trial court "concluded that the defendant had not been prejudiced." 42 While admitting that the trial court's ruling was erroneous, Judge Thompson stated that he did not believe that it constituted reversible error or called for a new trial because the defendant was not prejudiced. 43

The statute underwent some drastic changes between 1976 and 1984, all of which favored the defendant. 44 The 1984 amendment specified clearly that a certificate would be admissible provided that:

(i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial and
(ii) a copy of such certificate is mailed or delivered by the clerk to counsel of record for the accused at least seven days prior to the hearing or trial upon request of such counsel.

The first proviso was a restatement of the previous statute. 46 The second proviso placed a mandatory duty on the clerk to mail or deliver a copy to defense counsel if the defense counsel requested it. 47

38. Id.
39. Id.
40. Id. (emphasis added).
41. Id.
42. Id. at 707 (Thompson, J., dissenting).
43. Id. (Thompson, J., dissenting).
45. Id.
47. See id. In addition, the statute added a complete paragraph which read as follows: The certificate of analysis of any examination conducted by the Division of Consolidated Laboratory Services relating to a controlled substance or mari-
This statute was in effect when the Court of Appeals of Virginia decided *Allen v. Commonwealth.* In *Allen*, the Commonwealth filed the certificates in the general district court for the preliminary hearing, but did not file them with the circuit court within seven days prior to trial. The Court of Appeals held that admission of the certificates was error because they had not been filed in the court that was hearing the case as mandated by section 19.2-187. "In the absence of strict compliance, the evidence was inadmissible and prejudice to the defendant is presumed." Thus it appeared that the court continued to follow its previous holdings that strict compliance by the Commonwealth was necessary.

The Court of Appeals of Virginia continued to favor strict compliance as is evident by its decision in *Nonnemacker v. Commonwealth.* The stamps that appeared on the certificates showed only that the certificates had been filed in the general district court; thus the defendant objected that the certificates were not timely filed in the court hearing the case. The trial court allowed two clerks to testify, over defense counsel’s vehement objections, that the Commonwealth had filed the certificates but that the clerks had failed to file them properly. The appellate court held that the certificates were inadmissible as evidence because they were not properly attested as required by section 19.2-187, nor was there any evidence of when the Commonwealth filed the copies with the clerk of the circuit court.

**B. The See-Saw of Burden-Shifting Begins**

Only three months after its decision in *Nonnemacker*, the Court of Appeals of Virginia began to show signs of retreating from its view that the Commonwealth must adhere strictly to section 19.2-187. In *Burns v. Com-
The certificates were filed with the clerk in a timely manner but, although they were "filed in the defendant's files, [they] were not filed in the correct ones." The court held that such a filing satisfied the statute because "the statute does not provide where in the clerk's office the certificates are to be filed," only that they be filed. The court also added that "the record does not reflect that the defendant was harmed in any manner by the way the certificates were filed." Although the court was correct in stating that the statute did not require the certificates to be filed correctly, its additional comment about lack of prejudice reveals that the court's attitude concerning "presumed prejudice" was beginning to change.

In Stokes v. Commonwealth the Court of Appeals of Virginia continued to back away from its early standpoint of strictly construing section 19.2-187 against the Commonwealth. In that case the court held that the Commonwealth was not required to show that it had fulfilled the requirements of the second paragraph of section 19.2-187, namely that "the attorney for the Commonwealth shall acknowledge receipt of the certificate [from the laboratory] on forms provided by the laboratory." In its ruling the court distinguished the first and second paragraphs as follows:

[The purpose of the provisos of the first paragraph] is to ensure that the certificate to be used in evidence is lodged timely in a secure and appropriate place, accessible to the accused, and available to him upon request. The second paragraph serves an entirely different purpose. It provides for the coordination of governmental agencies to facilitate the development of his case by the commonwealth's attorney.

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59. Id. (emphasis added).
60. Id.
61. Cf. Harshaw v. Commonwealth, 427 S.E.2d 733, 735 (Va. Ct. App. 1993) (holding that Commonwealth fully complied with statute although certificates were placed in file not related to the specific charge, but declining to address certificate's admissibility if it were filed in such a way that denied defendant statutory protections).
64. Id. at 454.
65. Id.
This reading of the court cannot be said to be construed strictly against the Commonwealth; it is a reading that justified the Commonwealth's failure to adhere to the procedures set out in section 19.2-187.

Given the appellate court's lax reading of the statute in the few years prior, its decision in *Petit Frere v. Commonwealth* is noteworthy. In that case the court held that "in order to be admissible as an exception to the hearsay rule, a certificate introduced under Code [section] 19.2-187 must bear the examiner's signature as part of an attestation clause included on the certificate." The court noted that the statute was ambiguous in that it could be read to favor either the Commonwealth or the defendant. In favoring the defendant's reading, the court re-asserted that the statute must be construed strictly against the Commonwealth and in favor of the defendant because it deals with criminal matters and evidentiary concerns. Thus, it appeared that the court was returning to its previous belief that the Commonwealth must adhere strictly to the statute in order for the certificates to be admissible.

Later in 1995, the Court of Appeals of Virginia continued to enforce the statute when it reversed the trial court in *Bottoms v. Commonwealth*. The defendant requested a copy of the certificate of blood analysis from the clerk of the circuit court. The defendant did not receive a copy before trial and objected when the Commonwealth moved for a continuance so that defense counsel could read it. Again the defendant objected to the continuance, citing that it would prejudice his case. The trial court overruled the objections and allowed the Commonwealth to introduce the certificate. The Virginia Court of Appeals held that the certificate was inadmissible because the Commonwealth failed to comply strictly with section 19.2-187.

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68. *Id.* at 686.
69. *Id.* at 685.
70. *Id.*
73. *Id.* at 796. Note that the court mentioned that the defendant did not notify the Commonwealth's attorney of the request, although nothing in section 19.2-187 at that time required such notice.
74. *Id.* at 797.
75. *Id.*
76. *Id.*
The court noted that a "continuance of any length after the trial had begun would not have remedied the Commonwealth's non-compliance" because "19.2-187(ii) requires that the certificate be mailed or delivered to counsel 'at least seven days prior to . . . trial.'"

Another case in favor of strict compliance with the statute was Hughes v. Commonwealth. The clerk failed to mail a copy of the certificate to defense counsel prior to the trial. The court granted the Commonwealth a brief recess and the trial resumed with the testimony of the officer who had filled out the breath test analysis. Over defendant's objection, the court admitted the certificate into evidence. The appellate court held that the certificate was inadmissible because the clerk did not mail a copy of the certificate to defense counsel. Thus, the officer's testimony was hearsay and could not render the certificate admissible.

In less than one year, however, the appellate court returned to its broad reading that gave deference to the Commonwealth's failures to comply fully with the statute. In Coleman v. Commonwealth, the defendant asked for a copy of the certificate pursuant to a discovery motion. He signed an order acknowledging that he would appear at the Commonwealth's Attorney's office at a certain date and time to effect all discovery for the case. Neither the defendant nor his counsel appeared for that meeting. The court admitted the certificate into evidence over the defendant's objection that he did not receive a copy of it.

The Court of Appeals of Virginia held that defendant's endorsement of the discovery order bound him to the order "for all matters of discovery, including the request in appellant's discovery motion for any certificate of analysis." Justifying its ruling, the court stated that the defendant "never made a direct request for the certificate of analysis under Code [section]

77.  Id.
80.  Id., at *1.
81.  Id., at *2.
82.  Id.
85.  Id. at 462.
86.  Id.
87.  Id. at 464-65.
which specifically provides that the request be made to the clerk of the circuit court or to the attorney for the Commonwealth. The defendant's discovery motion, filed in the circuit court, read in part as follows: "Pursuant to Section 19.2-187 of the Code of Virginia, the defendant further requests that he be provided a copy of any certificate of analysis which the Commonwealth intends to introduce at trial." According to the court's ruling, this request was not enough to comply with the statute. However, the court noted three ways for the defendant to obtain the certificate:

[The defendant] could have: (1) requested it under the terms of Code [section] 19.2-187(ii) directly from the clerk of the circuit court or from the attorney for the Commonwealth; (2) made a motion for discovery under Rule 3A:11 to the court to order the Commonwealth to permit him to inspect and copy or photograph designated documents, including scientific reports; and (3) called upon the Commonwealth to produce the exculpatory evidence under Brady v. Maryland.

This statement by the court nullified the mandatory language of section 19.2-187. Thus, the see-saw had again teetered to the side of the Commonwealth when the court read the statute in such a way that favored the Commonwealth instead of the alternate reading which would have favored the defendant.

C. The General Assembly Finalizes the Burden-Shift

On April 3, 2000, the General Assembly approved an amendment to section 19.2-187. The amendment added the following to the second proviso of the first paragraph: "The request [by defense counsel] shall be in writing at least ten days prior to trial and shall clearly state in its heading 'Request for Copy of Certificate of Analysis.' Given this addition, the burden to obtain a copy of the certificate of analysis now completely rests on the shoulders of defense counsel. Without making the specific request for the certificate with the specific heading laid out in the statute, the

88. Id. at 464.
89. Id. at 462.
90. Id. at 463; see Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that prosecutorial suppression of evidence material to guilt or punishment violates due process).
91. The court noted that the defendant did not "claim that the certificate was not timely filed in the circuit court." Coleman, 501 S.E.2d at 463 n.1. This statement implies that the Commonwealth failed to file a copy of the certificate with the clerk.
93. Id.
defense will not be entitled to the protections originally contemplated by this statute. This amendment no longer resembles section 19.2-187 as it was known in 1976. The earlier version placed no burden whatsoever on the defense; the new version places the entire burden on the defense.

**D. The Role of Forensic Evidence in Capital Murder Cases**

The use of forensic evidence in capital murder cases does not differ significantly from the use of such evidence in non-capital cases. Capital defense attorneys must follow the procedures set out in section 19.2-187 in order to object timely to any improper introduction of test results into evidence. Although no reported capital murder case at present deals specifically with section 19.2-187 at the appellate level, the Supreme Court of Virginia in *Johnson v. Commonwealth* noted that:

under Code [section] 19.2-187.01, an attested report of analysis from the Division of Forensic Science is prima facie evidence of custody from the time a sample is received by the laboratory until it is released after testing. Johnson presented no evidence to overcome the Commonwealth’s introduction of this prima facie evidence, or the direct evidence of actual custody of the blood sample.

Like section 19.2-187, section 19.2-187.01 favors the Commonwealth in that the defendant must overcome the presumption that the Commonwealth has established a chain of custody with regards to forensic evidence. Due to the damning effect of this type of evidence, capital defense attorneys must be ready to argue against its introduction and can only do so by overcoming the high hurdle of section 19.2-187.

**IV. Procedure for Sentencing in Non-Capital Felonies**

**A. Mandatory Language Interpreted as Precatory Language**

In 1994 the Virginia General Assembly enacted section 19.2-295.1. Prior to this statute the Commonwealth could argue for a sentence within

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95. 529 S.E.2d 769 (Va. 2000).
97. *Johnson* involved a “cold DNA hit,” meaning that the Commonwealth compared DNA evidence from an old crime with DNA evidence on file at Virginia’s DNA Data Bank and matched blood and other evidence from the crime scene with Johnson. *Id.* at 774-75. These “cold hit” cases will only grow in number as the data bank increases in volume so defense attorneys must recognize the importance of section 19.2-187 and all other procedures involving the introduction of forensic evidence at trial.
statutory guidelines provided that the conviction was based solely on guilt.\textsuperscript{99} By enacting this statute the Commonwealth made "more information available to the jury and [enlarged] its traditional role in ascertaining punishment."\textsuperscript{100} The additional information consisted of the defendant’s prior criminal convictions. The statute read in pertinent part as follows:

In cases of a trial by jury, upon a finding that the defendant is guilty of a felony, a separate proceeding limited to the ascertaining of punishment shall be held as soon as practicable before the same jury. At such proceeding, the Commonwealth shall present the defendant’s prior criminal convictions by certified, attested or exemplified copies of the record of conviction... The Commonwealth shall provide to the defendant fourteen days prior to trial photocopies of certified copies of the defendant’s prior criminal convictions which it intends to introduce at sentencing.\textsuperscript{101}

Although the statute favored the Commonwealth by permitting the introduction of the defendant’s convictions, the plain language of the statute placed the burden on the Commonwealth to provide the defense with copies of the convictions that the Commonwealth intended to introduce during the sentencing proceeding.\textsuperscript{102}

This statute was in effect when the Court of Appeals of Virginia decided \textit{Evans v. Commonwealth}.\textsuperscript{103} The defendant objected to the introduction of a record of conviction pursuant to section 19.2-295.1.\textsuperscript{104} The record was in reality a copy of the front side of an arrest warrant related to a previous charge of which the defendant had been convicted. The trial court admitted it into evidence because it gave the defendant notice that the Commonwealth intended to introduce that prior conviction during sentencing.\textsuperscript{105} The appellate court not only agreed with the trial court’s ruling, but also bolstered it, holding that section 19.2-295.1 was procedural in nature and that precise compliance was not essential provided that the defendant

\textsuperscript{99} See Martinez v. Commonwealth, 403 S.E.2d 358, 360 (Va. 1991) (holding that Commonwealth’s request for a specific sentence during closing argument was not improper as it was within statutory guidelines and conviction was based solely on guilt).

\textsuperscript{100} \textsc{John L. Costello, Virginia Criminal Law and Procedure} § 63.1 (2d ed. 1995).

\textsuperscript{101} \textsc{1994 Va. Acts chs. 828, 860, 862, 881}. \\


\textsuperscript{104} \textit{Id.}, at *1.

\textsuperscript{105} \textit{Id.}
received notice that the Commonwealth intended to introduce the previous conviction.\textsuperscript{106} The copies of arrest warrants were not records of conviction, but the court's holding shows that the court gave no meaning to the plain language of the statute.\textsuperscript{107}

In 1995 the General Assembly amended section 19.2-295.1.\textsuperscript{108} The amendment added more responsibilities to the Commonwealth. It read in part as follows:

The Commonwealth shall provide the defendant fourteen days prior to trial notice of its intention to introduce evidence of the defendant's prior criminal convictions. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was had, and (iii) each offense of which he was convicted.\textsuperscript{109}

This amendment enumerated clearly that the Commonwealth's notice to the defendant must be specific and complete.\textsuperscript{110}

This version of the statute was at issue in the case of \textit{Lebedun v. Commonwealth}.\textsuperscript{111} In this case, the Commonwealth sent notice to the defense that it would seek to admit prior convictions of the defendant from Maryland during the sentencing phase. The notices, however, contained incorrect dates of the prior convictions.\textsuperscript{112} The trial court permitted the Commonwealth to introduce these prior convictions pursuant to 19.2-295.1.\textsuperscript{113}

The Court of Appeals of Virginia held that "[t]he Commonwealth's failure to strictly comply with the procedural requirements of Code [section] 19.2-295.1 violated no substantive right and did not prejudice Lebedun's ability to contest the validity of the convictions."\textsuperscript{114} In so holding, the court reiterated that this section is procedural, not substantive, and its "notice provisions are merely directory."\textsuperscript{115} Thus, although the 1995 amendment added mandatory provisions listing the items that the Commonwealth's notice must contain, the court refused to read "shall" as man-

\textsuperscript{106} \textit{Id.}  
\textsuperscript{107} \textit{See infra} part IV(B) for cases concerning "record of conviction."  
\textsuperscript{109} \textit{Id.}  
\textsuperscript{110} Note that the three subsections are joined by "and."  
\textsuperscript{112} \textit{Id.} at 436.  
\textsuperscript{113} \textit{Id.} at 437.  
\textsuperscript{114} \textit{Id.}  
\textsuperscript{115} \textit{Id.}
Likewise the court did not mention what it would hold if the incorrect dates contained in the notice would have prejudiced the defendant, such as causing him to be unable to recall those specific convictions in order to obtain more information about them.

**B. The Changing Definition of “Record of Conviction”**

“The Commonwealth shall present the defendant’s prior criminal convictions by certified, attested or exemplified copies of the record of conviction, including adult convictions and juvenile convictions and adjudications of delinquency.” This phrasing of section 19.2-295.1 has not changed since its inception in 1994. However, the section does not define “record of conviction.” Therefore, no complete guidelines existed for the Commonwealth to follow with regards to its notification to the defendant.

The Court of Appeals of Virginia confronted the issue of how to define “record of conviction” in [Davis v. Commonwealth] (1996 Va. App. Jan. 23, 1996) (unpublished opinion). In this case the appellant argued that “his prior sentences and the fact he was in custody at the time of his prior convictions should have been redacted from the conviction orders submitted to the jury during the sentencing phase.” The appellate court affirmed the trial court’s decision to submit all of this information to the jury. The court stated that “[i]n Virginia, the record of conviction is the trial court’s sentencing order. The entire order, including the sentence imposed, is the record of conviction.” While the court’s broad definition of “record of conviction” did not favor this appellant, it did seem to draw a bright-line rule for what constituted a “record of conviction” and forecasted that the court would apply this rule in future cases.

The definition became more murky due to the appellate court’s decision in [Folson v. Commonwealth] (1996 Va. App. Jan. 23, 1996) (unpublished opinion). In that case, the Commonwealth introduced documents that it received from Maryland concerning previous charges of the defendant. The documents included a copy of an indictment, a document entitled “docket entries,” and a “commitment record.” The

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118. See 1996 Va. Acts 664 (the last date of amendment of this statute).


120. Id., at *1.

121. Id.

122. Id. (internal citations omitted).

defendant objected to the admission of the documents, arguing that they were not "records of conviction." 124

The appellate court held that "'record of conviction' means a 'record' evidencing the fact of conviction." 125 It added that "[w]hile a final order of conviction may be the most expedient means of establishing a 'record of conviction,' we do not find Code [section] 19.2-295.1 limited to such evidence." 126 Using this definition, the Court of Appeals of Virginia upheld the trial court's ruling that the documents introduced at sentencing were "records of conviction." 127 Although Davis is unpublished and is not binding authority, the change in attitude by the court in the ten months between Davis and Folson cannot be overlooked. 128

C. The Merging of Non-Capital Felonies and Capital Murder

A large number of capital murder defendants also face charges of underlying felonies in the same case. Thus, capital defense attorneys must be able to cope with the added complexities of sentencing for both capital and non-capital offenses during the sentencing phase. 129 For purposes of capital sentencing, the Commonwealth may introduce evidence of the defendant's unadjudicated prior criminal conduct pursuant to Virginia Code section 19.2-264.3:2. 130 The statute provides that

the attorney for the Commonwealth shall give notice in writing to the attorney for the defendant of such intention. The notice shall include a description of the alleged unadjudicated criminal conduct and, to the extent such information is available, the time and place such conduct will be alleged to have occurred. The court shall specify the time by which such notice shall be given. 131

124. Id. at 317-18.
125. Id. at 318.
126. Id.
127. Id.
128. The Court of Appeals of Virginia does recognize some limit to the expansion of what constitutes a "conviction" and a "record of conviction." See Webb v. Commonwealth, 524 S.E.2d 164, 166 (Va. Ct. App. 2000) (holding that a finding of guilt without an entry of final sentence was not admissible during sentencing as a "record of conviction"); see also Byrd v. Commonwealth, 517 S.E.2d 243, 245-46 (Va. Ct. App. 1999) (holding that admission of evidence concerning nolle prossed charges during sentencing phase was error, but harmless).
129. See VA. CODE ANN. § 19.2-264.3 (Michie 2000) (setting out sentencing procedure in capital cases and noting that § 19.2-295.1 controls sentencing of non-capital convictions).
131. Id.
This notice provision bears a resemblance to the original version of section 19.2-295.1 in that it places the burden on the Commonwealth to give notice to the defense. In order to ensure that the Commonwealth fully complies with the notice provision set forth in section 19.2-264.3:2, capital defense attorneys should move the trial court in a pre-trial motion to instruct the Commonwealth to provide notice of any unadjudicated criminal conduct that the Commonwealth intends to introduce during the capital sentencing phase. The defense attorney must also decide whether she should move the court to change the order of sentencing of capital and non-capital felonies so that the jury cannot consider unadjudicated criminal conduct before sentencing the non-capital felonies. Above all, the lessons of the evolution of the notice provision of section 19.2-295.1 should alert capital defense attorneys to the fact that the notice provision of section 19.2-264.3:2 may be construed in a manner detrimental to defendants.

V. Conclusion

As this article demonstrates, the past twenty years in the Commonwealth have consisted of a continuous process of the narrowing of a criminal defendant’s statutory rights, the same rights that the Commonwealth itself had guaranteed defendants. The courts have interpreted statutes broadly in favor of criminal defendants and then have regressed, gradually shifting the burdens to the defendants. The General Assembly has sought to amend statutes in reaction to and in conjunction with the courts’ narrowing interpretations. The combination has been effective. Battling this two-headed juggernaut is an uphill battle for defense attorneys. They must strive to stay well-informed about the ever-changing statutes and standards while simultaneously coping with the current statutes and case law. As mentioned earlier, subtle changes in statutes or new statutes can nullify previous statutes that guaranteed rights to defendants. Advocacy and ethics demand that attorneys are not only familiar with such statutes, but also that the attorneys comply with mandates of the statutes so that their clients do not suffer the consequences. All of the statutes discussed in this article have been and will continue to be at issue in capital cases. Thus, capital defense attorneys have the added burden of being fully conversant not only with those statutes that we consider quintessential to capital murder trials, but also with any statute generally applicable.

132. See supra note 101 and accompanying text.
133. Capital defense attorneys may contact the Virginia Capital Case Clearinghouse for aid in these sentencing issues.
134. See supra parts IV(A)-(C).
135. See supra notes 25-27 and accompanying text.