Chapter 7 - Adult Criminal Case Procedures

Introduction

Criminal cases are proceedings brought by the Commonwealth (or a locality) for offenses violating state law or local ordinances. The two categories of crimes are felonies and misdemeanors.

Felonies, which can only be tried in circuit court, are punishable by fine or imprisonment in a penitentiary for one year or more or both a fine and term of imprisonment. Examples of felonies include murder, malicious or unlawful wounding (felonious assault), grand larceny, and rape. The district courts do not have jurisdiction to adjudicate felony cases, but they do have jurisdiction to conduct preliminary hearings in felony cases, in order to determine whether there is sufficient evidence to justify holding the defendant for a grand jury hearing and trial in circuit court.

Misdemeanors are punishable by a fine of up to $2,500 or a sentence not exceeding twelve months in jail, or a combination of a fine and a jail sentence. Examples of misdemeanors include simple assault, public intoxication, petit larceny, and shoplifting.

The burden of proof in all criminal cases is "beyond a reasonable doubt;" that is, the evidence must be so completely convincing toward the guilt of the defendant that there is no reasonable doubt of the defendant's guilt.

The district courts do not conduct jury trials; all cases are heard by a judge. Jury trials are held only in circuit court, as provided by the Virginia Constitution.

These procedures apply to cases in which adults are charged with committing criminal offenses, regardless of whether the case is tried in a general district court or in a juvenile and domestic relations district court. Normally, these provisions do not govern trials of juveniles charged with being delinquent unless the juvenile was previously tried and convicted in a circuit court as an adult under Va. Code §§ 16.1-269.1 *et seq.*, and commits a subsequent criminal offense. Va. Code § 16.1-271.

Of special consideration in criminal cases are the defendant's rights under the Sixth Amendment to the Constitution of the United States. The Sixth Amendment ensures the right to a speedy trial, to trial by jury, to be informed of the charge, to confront one's accuser, to subpoena witnesses in one's favor, and to have the assistance of a lawyer.

The presentation of criminal case procedures begins with a narrative description of the basic criminal case process. The narrative describes the flowchart of the criminal case process. Following the narrative, the detailed procedures are presented beginning with case initiation and ending with case closure.

Narrative Description

The criminal case process is generally initiated when a criminal offense is committed and reported to the police. The police or other law officer conducts an investigation to determine the facts of the case, identify likely suspects, and locate witnesses to the crime. In the course of the investigation, the officer may request issuance of a district court form DC-339, SEARCH WARRANT by presenting a district court form DC-338, AFFIDAVIT FOR SEARCH WARRANT to a judge, clerk, or magistrate, who then conducts a probable cause hearing on the request and will issue the search warrant if probable cause is found.

When the officer has identified the probable offender(s), the officer either issues a VIRGINIA UNIFORM SUMMONS or requests a district court form DC-312, WARRANT OF ARREST - FELONY, district court form DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE), district court form DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL) or district court form DC-319, SUMMONS from a judicial officer, usually a magistrate. A VIRGINIA UNIFORM SUMMONS is issued whenever a criminal misdemeanor occurs in the officer's presence, unless the defendant is charged with a jailable misdemeanor and the arresting officer believes that the defendant will disregard the summons or is likely to cause harm to himself or refuses to discontinue the unlawful act, or the defendant is charged with violating Va. Code § 18.2-407 (failing to disperse at the scene of a riot) or Va. Code § 18.2-388 (drunk in public). If a VIRGINIA UNIFORM SUMMONS is issued, the officer takes the defendant into custody. The officer will release them if they signs the promise to appear section on the VIRGINIA UNIFORM SUMMONS. If a VIRGINIA UNIFORM SUMMONS is not issued or the defendant refuses to sign the promise to appear, the officer takes the defendant before the magistrate who determines whether there is probable cause to believe that the defendant committed the offense. The judicial officer determines whether there is probable cause to believe that the individual may have committed the offense before issuing the Warrant of Arrest or Summons.

If probable cause is found, a district court form DC-312, WARRANT OF ARREST – FELONY, district court form DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE) or district court form DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL), or district court form DC-319, SUMMONS is issued by the magistrate, who then proceeds to set the date for the first court appearance. If not released on a summons, the magistrate determines bail, after which the defendant is released on recognizance, with or without additional terms. If the defendant is unable to meet the terms set for release, the defendant is committed to jail, pending the first court appearance.

If a warrant of arrest was initially issued, the officer arrests the defendant and brings them before a magistrate to set the date for first court appearance and to determine bail, after which the defendant is released on bail or is committed to jail. If authorized by the magistrate issuing a misdemeanor warrant, the arresting officer may release the defendant pursuant to the summons section of a warrant of arrest or on a VIRGINIA UNIFORM SUMMONS. All case-related papers are sent to the clerk's office. When an adult is taken into custody pursuant to a warrant

or detention order alleging a delinquent act committed when he was a juvenile, he may be released on bail or recognizance by a magistrate.
Va. Code § 16.1-247

Processing by the clerk's office begins with the receipt of the WARRANT OF ARREST, SUMMONS or VIRGINIA UNIFORM SUMMONS. The clerk's office assigns a case number to the warrant or summons and indexes the case in the automated system. The clerk's office assembles all case-related documents, which are filed by court appearance date. Prior to the court date, the clerk's office retrieves all of the cases from the pending file for that court date and prints a docket via JCMS, which contains all cases scheduled for a given day. The docket and cases are sent to court on the scheduled trial date.

For any defendant held in jail, the district court conducts an arraignment hearing on the next court day after arrest. At the arraignment, the court determines the status of the defendant's right to representation by an attorney, calls the defendant by name, reads the charges, asks for the defendant's plea, reviews the bail determination, and sets the next court date, if the defendant is not tried after arraignment.

For those not arraigned on the next court date, the court must determine the status of the defendant's right to representation by an attorney. If the defendant wishes the judge to appoint an attorney at public expense to represent them, the defendant must make a written request for such appointment and file a district court form DC-333, FINANCIAL STATEMENT - ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES with such request. In the alternative, the defendant may hire their own attorney or waive their right to be represented by an attorney. The court may try the defendant even if they have neither waived their right to legal representation nor hired an attorney, if the defendant is charged with a misdemeanor not punishable by a jail sentence, or if the judge states in writing before trial that, if the defendant is convicted, no jail sentence will be imposed. (*See* district court form DC-337, TRIAL WITHOUT COUNSEL.)

Preliminary hearings are held in all cases where the defendant is charged with a felony, unless the defendant waives the hearing. These hearings are conducted to determine if there is probable cause to believe that the defendant committed the felony charged. If so, the case is certified to the grand jury.

Upon certification of any felony offense the court shall also certify any ancillary misdemeanor offense to the clerk of the circuit court provided that the attorney for the Commonwealth and the accused consent to such certification. Any misdemeanor offense certified pursuant to this section shall proceed in the same manner as a misdemeanor appealed to circuit court pursuant to § 16.1-136.

Va. Code § 19.2-190.1 Representation by a court appointed attorney of a defendant with regard to an ancillary misdemeanor certified to circuit court along with a felony is eligible for

compensation of up to $330.00 for each misdemeanor. The court appointed attorney costs should be documented on the back of the warrant of ancillary misdemeanors certified to circuit court, $120.00 maximum plus allowable expenses.
Since the case has not reached conclusion, that portion of the representation for the ancillary misdemeanor is not eligible for further compensation under the waiver provisions of Va. Code § 19.2-163. Further, no other costs should be assessed because the case has not reached conclusion.

If probable cause is not found, but probable cause is found to believe that a misdemeanor, rather than a felony, has been committed, then the felony charges may be reduced to a misdemeanor and, after arraignment on the misdemeanor, may be disposed of in district court. If no probable cause is found, the case is dismissed.

On the scheduled trial date, the judge hears the case of the defendant who appears in court or, when permitted by law and the circumstances so warrant, tries the case in the absence of the defendant. Dispositions are reached based on the evidence presented and such dispositions are recorded on the docket and on the summons, warrant, or in a separate order. Continuances may be granted, in the judge's discretion, for cases not ready for trial. Should a defendant fail to appear at trial, the judge may order the issuance of a district court form DC-361, CAPIAS, district court form DC-360, SHOW CAUSE SUMMONS or district court form DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE) for failure to appear. If released on bond, the judge may initiate bond forfeiture proceedings. Continued cases are returned to the clerk's office for filing by new appearance date.

The return of the case file from the court initiates the disposition activities of the clerk's office. The clerk's office collects all fines and court costs required or prepares a commitment card to be transmitted to the jail or does both. If the defendant is found guilty and is fined, but is unable to pay this fine within ninety days of trial, the court shall place them on a deferred, modified deferred or installment payment plan. The clerk may set the terms and conditions of the deferred, modified deferred or installment payment plans, if authorized by and within guidelines set by the court. Va. Code § 19.2-354.

Alternatively, the judge may suspend the imposition of the sentence or fine in whole or in part, but may also require the use of probation after serving a portion of the sentence or the performance of community service to discharge the fine and/or sentence. If the case is dismissed or the court finds the defendant not guilty, the defendant is released and any bond security or other bail is returned.

For all disposed cases, the clerk's office updates JCMS, enters the disposition in the automated system and scans all case papers in JDIS. Ensure that all required reports statutorily required to be sealed have been sealed and placed in an envelope in the file.

The case may be appealed within the ten days allowed by law. For appealed cases, all fines and court costs are refunded, and the CCRE and all case-related materials are sent to the circuit court.

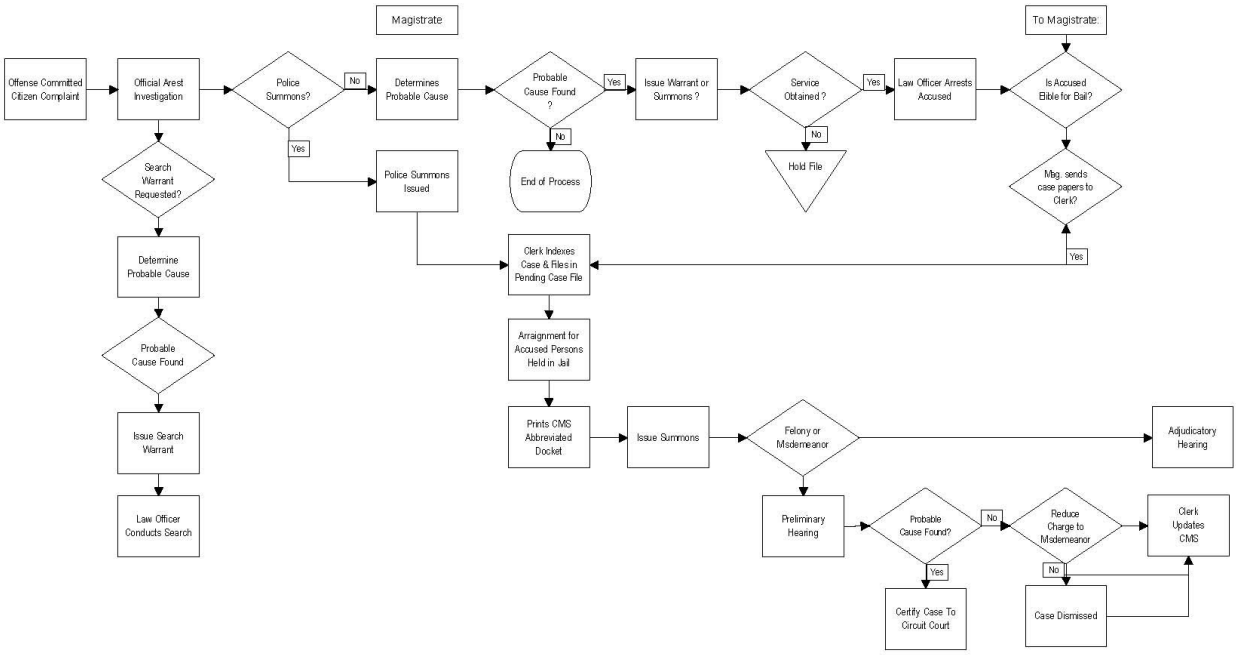
NOTE: The court shall not require any new bond for the release of such person pending appeal.

All case files (not appealed) are retained in the Filing System in the district court where the case was tried. Statistical reports of court activity are prepared monthly and electronically transmitted to the Office of the Executive Secretary.

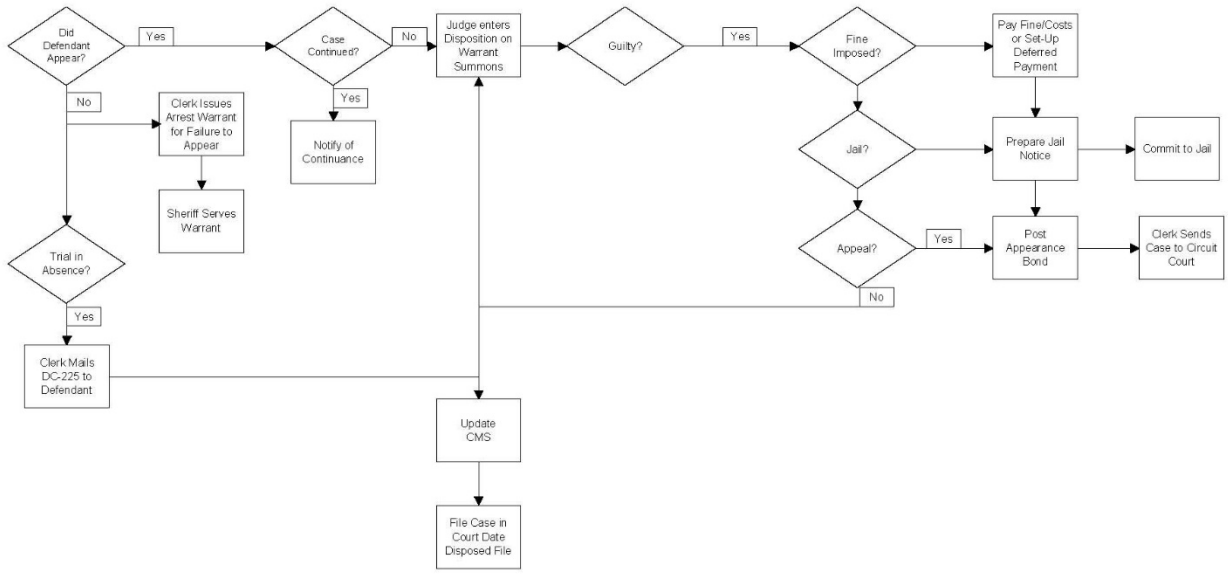
Copies of the forms and data elements are included in DISTRICT COURT FORMS MANUAL.

The flow chart and remaining portions of this section describe the existing procedures used by the court for processing criminal cases.

Pre-Court Procedures Flow Chart



Post Court Procedures



Case Initiation

A criminal case is initiated by citizen complaint of a criminal offense or by a law enforcement officer's observation of an offense in progress. As a result, there are two primary ways that a case is initiated in the court system:

- Arrest prior to the filing of a complaint.
- Pre-arrest issuance of a summons or warrant.

In each situation, there will be some form of official investigation to determine the facts of the case. A search warrant may be requested to search for evidence relating to the case such as stolen property. There are variations on the two ways of initiating a case, which are listed below.

Venue

Generally, a criminal case is prosecuted in the county or city in which the offense charged was committed. If an offense has been committed within the Commonwealth and it cannot readily be determined within which county or city the offense was committed, venue for the prosecution of the offense may be had in the county or city (i) in which the defendant resides or (ii) if the defendant is not a resident of the Commonwealth, in which the defendant is apprehended. or (iii) if the defendant is not a resident of the Commonwealth and is not apprehended in the Commonwealth, in which any related offense was committed. Va. Code § 19.2-244. Venue for the trial of a case may be

changed upon motion of the accused or the Commonwealth based on a finding of good cause. Va. Code § 19.2-251.

There are provisions creating special rules for venue for certain other offenses. For example, venue for trial of a person who is charged with committing or attempting to commit criminal assault (offenses contained in Article 7 of Chapter 4 of Title 18.2) against a person under the age of eighteen may be had in the county or city in which the offense is alleged to have occurred or if the place of occurrence cannot be determined, in the county or city where the person under the age of eighteen resided at the time of the offense. In addition, venue for the trial of an offense under the Virginia Computer Crimes Act may be had in a number of jurisdictions based on the circumstances of the individual case. Va. Code § 19.2-249.2. For other special venue provisions, see the specific offense in question.

Arrest Prior to the Filing of a Complaint

To initiate a criminal case prior to the filing of a complaint, the law enforcement officer will:

- Make an arrest.
- Issue a Virginia Uniform Summons if the offense is committed in their presence or is for shoplifting, or take the defendant before a judicial officer (usually a magistrate) for issuance of a district court form DC-319, SUMMONS, or district court form DC-312, district court form DC-314, or district court form DC-315, WARRANT OF ARREST.
- Return the executed summons to the clerk's office or return the executed warrant to the magistrate, who forwards it to the clerk's office after the bail hearing.

To initiate a criminal case by a summons or warrant prior to arrest:

- The complainant goes in person or, pursuant to Va. Code § 19.2-3.1, by two-way electronic video and audio communication, to a judicial officer (usually a magistrate) to swear out a district court form DC-310, CRIMINAL COMPLAINT (BAD CHECK) or district court form DC-311, CRIMINAL COMPLAINT. A district court form DC-614, AFFIDAVIT - DESERTION AND NON-SUPPORT may also be used to initiate the issuance of a Warrant of Arrest. *See* "Support" chapter in this manual.
- The judicial officer conducts a probable cause hearing and, *if probable cause is found*, issues the summons or warrant of arrest.
- A district court form DC-319, SUMMONS is issued in misdemeanor cases when the judicial officer has no reason to believe that the defendant will not appear for trial or that they will cause harm to themselves or others. If a SUMMONS is issued, it

must be served in person or by two-way electronic video and audio communication on the defendant, except for a SUMMONS for trash violations served by mail pursuant to Va. Code § 19.2-76.2. In certain counties, the county manager or his designee must send a specific type of notice by first class mail before a summons charging a violation of litter control ordinances may be issued. Va. Code § 15.2-733.

- An arrest warrant is mandatory in all felony cases and is issued in misdemeanor cases when a summons is not issued. If a warrant is issued, the officer arrests the defendant and takes them before a judicial officer to set bail (determine type of pre-trial release if eligible) or commit them to jail; if authorized by the magistrate issuing a misdemeanor warrant, the arresting officer may release the defendant on the summons section of a WARRANT OF ARREST. All felony warrants must be accompanied by a written complaint.

- Law enforcement officers may issue witness subpoenas in the investigation of Class 3 or 4 misdemeanors. The return of service shall be made within seventy-two hours after service to the appropriate court clerk. Va. Code § 19.2-73.2.

Release on Bail

A district court form DC-330, RECOGNIZANCE should be used to admit a person to bail. A bail hearing is conducted before a judicial officer either in person or by two-way electronic video and audio communication.

In bail proceedings, the following definitions are used:

- "Bail" means the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer.
- "Bond" means the posting by a person or his surety of a written promise to pay a specific sum, secured or unsecured, ordered by an appropriate judicial officer as a condition of bail to assure performance of the terms and conditions contained in the recognizance.
- "Criminal history" means records and data collected by criminal justice agencies or persons consisting of identifiable descriptions and notations of arrests, detentions, indictments, information or other formal charges, and any deposition arising there from.
- "Judicial Officer" means, unless otherwise indicated, any magistrate within his jurisdiction, any judge of a district court and the clerk or deputy clerk of any district court or circuit court within their respective cities and counties, any judge

of a circuit court, any judge of the Court of Appeals and any justice of the Supreme Court of Virginia.

- "Person" means any accused, or any juvenile taken into custody pursuant to Va. Code § 16.1-246.

- "Recognizance" means a signed commitment by a person to appear in court as directed and to adhere to any other terms ordered by an appropriate judicial officer as a condition of bail. Va. Code § 19.2-119.

Prior to conducting a bail hearing, the judicial officer shall obtain the person's criminal history to the extent feasible. The defendant shall be admitted to bail unless there is probable cause to believe that:

- the defendant will not appear at trial or hearing or such other time and place as directed, or
- the defendant will constitute an unreasonable danger to themself or the public if released on bail.

If the person is denied bail, the judicial officer shall inform the person of his right to appeal from the order denying bail or fixing terms of bond or recognizance. Va. Code § 19.2-120. *See* appendix on "Appeals" for step-by-step procedures.

If the defendant is eligible for bail, the judicial officer decides what terms are to be required which will be reasonably calculated to assure the presence of the defendant and to assure good behavior pending trial. The judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is currently charged with:

- An act of violence (as defined in § 19.2-297.1)
- Capital murder (§§ 18.2-31)
- First and second-degree murder (§§ 18.2-32)
- Felony murder (§§ 18.2-33)
- Voluntary manslaughter (§§ 18.2-35)
- Lynching (§ 18.2-40)
- Unlawful or malicious wounding by a mob (§§ 18.2-41)
- Abduction and kidnapping (§§ 18.2-47)
- Abduction with the intent to extort money or to defile, etc. (§ 18.2-48)
- Abduction by a prisoner (§ 18.2-48.1)
- Threatening, attempting, or assisting an abduction (§ 18.2-49)

- Withholding child out of state in violation of court order (§ 18.2-49.1(A)
- Malicious wounding or malicious bodily injury (§§ 18.2-51)
- Malicious wounding or malicious bodily injury to a law enforcement officer or a firefighter (§ 18.2-51.1)
- Aggravated malicious wounding or bodily injury (§ 18.2-51.2)
- Malicious bodily injury by means of a caustic substance (§ 18.2-52)
- Destroying or damaging a facility or equipment dealing with infectious biological substances with the intent of injuring another (§§18.2-52.1)
- Administering poison with the intent to kill or injure another person (§ 18.2-54.1)
- Adulterating food, drink, prescription, or over-the-counter medicine or cosmetic with the intent to kill or injure (§ 18.2-54.2)
- Robbery (§ 18.2-58)
- Carjacking (§ 18.2-58.1)
- Rape (§ 18.2-61)
- Forcible sodomy (§ 18.2-67.1)
- Object sexual penetration (§ 18.2-67.2)
- Aggravated sexual battery (§ 18.2-67.3)
- Marital sexual assault (§ 18.2-67.2:1) (repealed)
- Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery (§ 18.2-67.5)
- Third conviction of sexual battery, attempted sexual battery, consensual intercourse with a child, or indecent exposure (§ 18.2-67.5:1)
- Arson when the structure, boat, etc., burned was occupied (§ 18.2-77)
- Arson when meeting house, church, etc. was occupied (§ 18.2-79)
- Conspiracy to commit any of the above felonies (§ 18.2-22)
- Strangulation of family or household member (§18.2-51.6)
- A violation of § 18.2-355, 18.2-356, 18.2-357, or 18.2-357.1.

- An offense for which the maximum sentence is life imprisonment or death: (Crimes that already have been listed under another heading will not be included under this subparagraph):

  - Attempted capital murder (§18.2-25)
  - Burglary of dwelling house while armed with a deadly weapon (§ 18.2-89)
  - Burglary with the intent to commit murder, rape, robbery or arson while armed with a deadly weapon (§ 18.2-90).

- Burglary with the intent to commit larceny, a felony other than murder, rape, robbery or arson, or assault and battery while armed with a deadly weapon (§ 18.2-91)
- Burglary with the intent to commit a misdemeanor other than assault and battery or trespass while armed with a deadly weapon (§ 18.2-92)
- Bank robbery while armed with a deadly weapon (§ 18.2-93)
- Forgery or falsification of a do-not-resuscitate order of another causing the withholding of life support (§ 54.1-2989)
- Concealment of the revocation of a do-not-resuscitate order of another causing the withholding of life support (§ 54.1-2989)
- Damaging a utility facility causing the release of radioactive materials or ionizing radiation that results in the death of another from such exposure (§ 18.2-162)
- Treason against the Commonwealth (§ 18.2-481)
- Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence (§ 18.2-289)
- Possession or use of a sawed-off shotgun in the perpetration or attempted perpetration of a crime of violence (§ 18.2-300)

A violation of Va. Code §§ 18.2-248 (possessing with the intent to distribute, etc.), 18.2-248.01 (transporting controlled substance into the Commonwealth), 18.2-255 (distributing drugs to minors) or 18.2-255.2 (distributing drugs on school property, school bus community center, library, etc.) involving a Schedule I or II controlled substance if:

- the maximum term of imprisonment is ten years or more and the person was previously convicted of a like offense, or
- the person was previously convicted as a "drug kingpin" as defined in § 18.2-248.

- A violation of §§ 18.2-308.1, 18.2-308.2, or 18.2-308.4 and which relates to a firearm and provides for a minimum, mandatory sentence.
- Any felony, if the defendant has been convicted of two or more offenses considered acts of violence or offenses for which the maximum sentence is life imprisonment or death whether under the laws of the Commonwealth or substantially similar laws of the United States.
- Any felony committed while the defendant is on release pending trial for a prior felony under federal or state law or on release pending imposition or execution of sentence or appeal of sentence or conviction.
- An offense listed in subsection B of § 18.2-67.3 or conspiracy to commit an offense under that section or any other offense listed in subsection B of Va. Code § 18.2-67.5:2 or if a person had previously been convicted of an offense listed in Va. Code § 18.2-

67.5:2 or a substantially similar offense under the laws of any state or the United States and the judicial officer finds probable cause that the person committed the offense charged. The offenses listed in subsection B of Va. Code § 18.2-67.5:2 are:

- carnal knowledge of a child between thirteen and fifteen years of age in violation of § 18.2-63 if the offense was committed by the accused when the accused was over the age of eighteen; or
- carnal knowledge of minors as specified in § 18.2-64.1; or
- aggravated sexual battery in violation of § 18.2-67.3; or
- carnal knowledge of one's daughter, granddaughter, son, grandson, brother, sister, father, or mother by the anus or by or with the mouth in violation of subsection B of § 18.2-361; or
- adultery or fornication with one's child or grandchild in violation of § 18.2-366; or
- taking indecent liberties with a child in violation of §§ 18.2-370 or 18.2-370.1; or
- conspiracy to commit any of these sexual offenses in violation of § 18.2-22.

- A violation of § 18.2-46.2 (participation in street gangs), § 18.2-46.3 (recruitment of street gang members), § 18.2-46.5 (committing, conspiring and aiding and abetting acts of terrorism) or § 18.2-46.7 (bioterrorism against agricultural crops or animals).
- A violation of §§ 18.2-36.1 (involuntary manslaughter due to driving under the influence), 18.2-51.4 (maiming resulting from driving while intoxicated), 18.2-266 (driving while intoxicated), or § 46.2-341.24 (commercial driver driving while intoxicated) and the person has been convicted three times previously of any combination of these offenses in the previous five years.
- If the person is being arrested pursuant to § 19.2-81.6 (illegally present in the United States) the court shall consider the following factors, as well as any other the court deems appropriate, for the purpose of rebutting this presumption against bail and determining whether there are conditions of release which will reasonably assure public safety and the appearance of the defendant:

  - the nature and the circumstances of the offense charged;
  - the history and characteristics of the person, including character, mental and physical condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug

or alcohol abuse, criminal history, membership in a criminal street gang, and record concerning appearance at court proceedings; and

- the nature and seriousness of the danger to any person or the community that would be posed by the person's release. Va. Code § 19.2-120.

In fixing the terms of bail, the judicial officer shall take into account the following factors specified in Va. Code § 19.2-121:

- the nature and circumstances of the offense;
- whether a firearm is alleged to have been used in the offense;
- the weight of the evidence;
- the financial resources of the accused or juvenile and his ability to pay bond;
- the character of the accused or juvenile including his family ties, employment or involvement in education;
- his record of convictions;
- his appearance at prior court proceedings or flight to avoid prosecution or failure to appear at prior court proceedings;
- his length of residence in the community;
- whether the person is likely to obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness, juror or victim; and
- any other information available which the court considers is relevant to the determination of whether the accused or juvenile is unlikely to appear for court proceedings.

The judicial officer may impose one or more of the following conditions of release:

- Place the person in the custody and supervision of a designated person, organization or pretrial services agency which, for the purposes of this section, shall not include a court services unit established pursuant to Va. Code § 16.1-233. Va. Code § 19.2-123.
- Place restrictions on the travel, association or place of abode of the person during the period of release and restrict contacts with household members for a period not to exceed seventy-two hours.
- Require the execution of an unsecured bond.
- Require the execution of a secure bond that, at the option of the accused, shall be satisfied with sufficient solvent sureties, or the deposit of cash in lieu thereof. Only the actual value of the interest in real or personal property owned by the proposed surety must be used in determining the surety's solvency. The surety is deemed to be solvent if the actual value of the surety's equity in real or personal property meets or exceeds the

bond amount. Bondsmen (who charge fees for acting as sureties) must have a Property Bondsman Certificate or Surety Bondsman Certificate from any circuit court judge.

- If the person is arrested for a felony and (i) has been previously convicted of a felony, (ii) is on bond for an unrelated arrest in another jurisdiction or (iii) is on probation or parole, then they may be released only on a secured bond. This requirement may be waived only with the concurrence of the Commonwealth's Attorney (or the city, town or county attorney) and the judicial officer. Va. Code § 19.2-123.
- Require that the person do any or all of the following:

    - maintain employment or, if unemployed, actively seek employment;
    - maintain or commence an educational program;
    - avoid all contact with an alleged victim of the crime and with any potential witness who may testify concerning the offense;
    - comply with a specified curfew;
    - refrain from possessing a firearm, destructive device, or other dangerous weapon;
    - refrain from excessive use of alcohol, or use of any illegal drug or any controlled substance not prescribed by a health care provider;
    - submit to testing for drugs and alcohol until the final disposition of the case.

- Impose any other condition deemed reasonably necessary to assure appearance as required, and to assure good behavior prior to trial, including a condition requiring that the person return to custody after specified hours or be placed on home electronic incarceration pursuant to § 53.1-131.2 or, when the person is required to execute a secured bond, be subject to monitoring by a GPS (Global Positioning System) tracking device, or other similar device.

The bail provisions also apply to individuals arrested pursuant to a district court form DC-361, CAPIAS.

If a person admitted to bail is currently in jail, then the district court form DC-353, RELEASE ORDER should be issued and delivered to the jailer. Otherwise, upon satisfaction of the terms, the defendant shall be released forthwith.

Note: A defendant generally may not be incarcerated for failure to meet bail terms, if charged only with offenses not punishable by incarceration. *See* Pulliam v. Allen, 466 U.S. 522 (1984).

The clerk or magistrate may issue a bail piece pursuant to Va. Code § 19.2-134 to the defendant or to the sureties. In practice, the bail piece is almost always requested together with a surety's capias pursuant to Va. Code § 19.2-149 so that the surety can

surrender the defendant to the sheriff and be relieved from further liability. Upon application of the surety for a capias, the surety shall state the basis for which the capias is being requested. The district court form DC-331, SURETY'S CAPIAS AND BAILPIECE RELEASE should be prepared and issued. It is recommended that the clerk write the underlying Offense Tracking Number (OTN) on the district court form DC-331, SURETY'S CAPIAS AND BAILPIECE RELEASE.

If a bail bondsman on a bond in a recognizance surrenders the defendant for any reason other than the defendants failure to appear in any court, the bondsman shall deposit with the clerk or magistrate the greater of 10 percent of the amount of the bond or $50, which shall be made at such time the bondsman makes application for a capias. The deposit is receipted to the underlying case number into revenue code 501 and should be cash or certified check. The bondsman shall petition the court within 15 days from the surrender of the principal to show cause, if any can be shown, why the bondsman is entitled to the amount deposited. The bondsman will file the DC-318, PETITION FOR RETURN OF SURETY'S CAPIAS DEPOSIT. The petition is not entered into the case management system; the petition will become part of the criminal file just as the Surety's Capias. The judge may rule on the petition administratively; however, if the judge requires a hearing, enter the hearing date in the case management system on the original criminal case with the hearing type RG or RP. If the court finds that there was sufficient cause to surrender the principal, the court shall return the deposited funds to the bondsman. If the court finds that the surrender of the defendant by the bondsman was unreasonable, the deposited funds shall be returned to the payor. Remission of the funds shall not be issued by the court until the sixteenth day after the finding. The judicial decision regarding the return of the deposit is appealable. If appealed, utilize the DC-580, NOTICE OF APPEAL-CRIMINAL.

NOTE: If the bondsman does not petition the court for the return of the deposited funds within 15 days from the surrender of the defendant, the deposited funds shall be paid into the state treasury to be credited to the Literary Fund.

The deposit requirement does not apply to a private citizen who posted cash or real estate to secure the release of the defendant.

If a magistrate issues a capias, the magistrate shall transmit a copy of the capias to the court before which such principal's appearance is required by the close of business on the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed. Surety's Capias deposit funds from the magistrate must be receipted to the case with which it is associated. The deposit is receipted into revenue code 501.

Commitment to Jail

A person who is arrested may be committed to jail for any one of the following reasons:

- There is probable cause to believe they will not appear for trial.
- Their liberty is thought to constitute an unreasonable risk to themself or the public.
- They are unable either to provide surety for or post their bond, if a bond is required, or to meet other bail conditions.

The district court form DC-352, COMMITMENT ORDER should be used to commit a defendant to jail or home/electronic incarceration. The form contains a written order addressed to the jailer stating the date, name of the defendant, the offense charged, the amount of bail, if any, and should be signed by the judicial officer indicating the jurisdiction.

When requested by the chief judge of the circuit court, general district court, or juvenile and domestic relations district court, the sheriffs and jail superintendents are required to provide to all trial courts a semi-monthly list of jailed persons awaiting trial in that trial court. The list should be used to assist the trial court in expediting trials of persons in jail and in avoiding problems with speedy trial requirements.

Search Warrants

In the process of investigating a case, law enforcement officers frequently must obtain a district court form DC-339, SEARCH WARRANT to search for and seize specific physical evidence related to a criminal offense or to search for a defendant who is charged with an offense and who is hiding in a place controlled by a third party. Also, a law-enforcement officer may apply for a search warrant from a judicial officer to permit the installation and use of a tracking device using DC-341, SEARCH WARRANT FOR TRACKING DEVICE. Any clerk, magistrate or judge within the proper jurisdiction may be called on to issue a district court form DC-339, SEARCH WARRANT. The clerk, judge or magistrate, when issuing a search warrant will:

- Request that the officer seeking the warrant make a complaint under oath, stating the purpose of the search.
- Request that the officer support the complaint with a written district court form DC-338, AFFIDAVIT FOR SEARCH WARRANT or a videotaped affidavit containing:

- a statement of the offense involved.
- description of the place, thing or person to be searched.
- description of items or persons to be seized.
- facts detailed to constitute probable cause.
- a statement that the object, thing or person searched for constitutes evidence of the crime.

The statement of the offense involved must define a specific criminal offense and tell how the items to be seized (tool, weapon, instrumentality or evidence of the crime or stolen property or contraband) relate to the crime. The description of the place, thing or persons to be searched must be detailed enough to provide the searching officer with sufficient information to specifically identify the place to be searched, without confusion or excessive effort. The description of items or persons to be searched for must identify all property (except contraband) and people to be seized as clearly and distinctly as possible, including serial numbers, identification marks or a general physical description when possible. The statement of facts detailed to constitute probable cause must set out facts (not opinions, conclusions or suspicions) sufficient to establish probable cause (a reasonable determination that seizeable items are located in the place to be searched). Absolute certainty is not required, only a reasonable belief is demanded.

The United States Supreme Court has held that a determination of probable cause for issuance of a search warrant involves a two-step process with two distinct determinations:

- That the facts in the affidavit logically indicate the presence of seizeable items.
- That the facts in the affidavit are reliable.

A determination of what facts indicate reliability will vary with each situation. The following factors correspond to general principles that are typically applied in a determination of reliability:

- The source (or observer) of the facts is a police officer.
- The source (or observer) of the facts has been reliable in the past.
- The source (or observer) of the facts has committed a crime and reveals information in the form of a confession.
- The source (or observer) of the facts is an eyewitness of the crime.
- The source (or observer) of the facts personally appears before the judicial officer.

- The source (or observer) of the facts has been corroborated as to some of the facts reported.

If the judicial officer has assured themself that the affidavit contains all of the necessary information, then execution of the warrant should not require the setting forth of added details.

Note: Only a circuit court judge may issue a search warrant for the search of the premises, or its contents, belonging to or under the control of any licensed attorney-at-law in order to search for evidence of a crime solely involving a client of such attorney. Va. Code § 19.2-56.1.

The SEARCH WARRANT must include:

- the name of the affiant;
- the offense in relation to which the search is to be made;
- the name or a description of the place to be searched;
- a description of the property or person to be searched for;
- a recitation that the magistrate has found probable cause to believe that the property or person constitutes evidence of a crime (identified in the warrant) or tends to show that a person (named or described therein) has committed or is committing a crime; and
- date and time of issuance

In addition, the SEARCH WARRANT requires that an inventory of the property, persons and/or objects seized be filed in the court having jurisdiction over the offense unlike the SUBPOENA *DUCES TECUM* which may require that the items be delivered to the court or clerk's office and/or the custodian of such items appear before the court.

Any search warrant not executed within fifteen days of issuance must be returned to and voided by the officer who issued the search warrant.

Under federal law, substance abuse treatment records are confidential and may not be disclosed except under certain circumstances. The four exceptions outlined in 42 U.S.C. 290dd-2 are (1) consent of the patient; (2) disclosure to medical personnel to the extent necessary to meet a bona fide medical emergency; (3) disclosure of records, with non-patient-identifying information to qualified personnel for the purpose of research, audits, or program evaluation; and (4) if authorized by an appropriate order of a court of competent jurisdiction, granted after application showing good cause therefore, including the need to avert a substantial risk of death or serious bodily harm. In deciding whether to authorize disclosure under exception (4), a court of competent jurisdiction must weigh the public interest and the need for disclosure against the injury to the patient, to the

physician-patient privilege, and to the treatment services. Further information on the requirements for disclosure can be found in 42 C.F.R. Part 2.

Although magistrates are authorized to issue search warrants, a magistrate does not qualify as a "court of competent jurisdiction" under 42 U.S.C. 290dd-2 to issue search warrants for substance abuse treatment records. Therefore, only a judge may issue a search warrant for these types of records.

The MAGISTRATE'S MANUAL describes the procedures for the two-step determination described above and provides examples to illustrate the procedures. Clerks who issue search warrants should obtain a copy of this manual from the Office of the Executive Secretary.

Request for Victim Confidentiality

Crime victims have the right to request that law enforcement agencies, the Department of Corrections, the Commonwealth's Attorney and the court not disclose, except among themselves, the residential address, telephone numbers, email addresses or place of employment of the victim or a member of the victim's family. Va. Code § 19.2-11.2. There are exceptions to this right of non-disclosure when the disclosure is (i) of the crime site, (ii) required by law or the Rules of Supreme Court of Virginia, (iii) necessary for law-enforcement purposes or preparation for court proceedings, or (iv) permitted by the court for good cause. Witnesses in criminal prosecutions under Va. Code § 18.2-46.2 (participation in criminal street gang) or Va. Code § 18.2-46.3 (recruitment of criminal street gang members) are also entitled to request confidentiality under these provisions.

For the purposes of this section, the Code of Virginia defines a "victim" as "(i) a person who has suffered physical, psychological or economic harm as a direct result of the commission of a felony or of assault and battery in violation of § 18.2-57 or § 18.2-57.2, stalking in violation of § 18.2-60.3, sexual battery in violation of § 18.2-67.4, attempted sexual battery in violation of § 18.2-67.5, maiming or driving while intoxicated in violation of § 18.2-51.4 or § 18.2-266, (ii) a spouse or child of such a person, (iii) a parent or legal guardian of such a person who is a minor, (iv) for the purposes of subdivision A 4 of this section only, a current or former foster parent or other person who has or has had physical custody of such a person who is a minor, for six months or more or for the majority of the minor's life, or (v) a spouse, parent, sibling or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide; however, "victim" does not mean a parent, child, spouse, sibling or legal guardian who commits a felony or other enumerated criminal offense against a victim as defined in clause (i)." Va. Code § 19.2-11.01 (B).

The district court form DC-301, REQUEST FOR CONFIDENTIALITY BY CRIME VICTIM may be filed by a crime victim with either the magistrate or the clerk. If filed with the magistrate, the

magistrate records the time/date filed, attaches district court form DC-301 to the unexecuted warrant or summons to be delivered to the clerk when executed. If the district court form DC-301 is filed with the court, the clerk places the DC-301, REQUEST FOR CONFIDENTIALITY BY CRIME VICTIM in a DC-392, SEALED ENVELOPE. The clerk updated JCMS to indicate filing of district court form DC-301 and scans the document into JDIS as 'Confidential'.

The clerk should place any court paper containing protected information regarding the crime victim or a member of the victim's family in a DC-392, SEALED ENVELOPE. It is recommended that the document placed in the envelope and the envelope attached to the warrant or summons.

It is extremely important that the clerk and the chief magistrate implement the following routine procedures in *all* cases:

- Magistrate should not list residential address, telephone number, or place of employment of any victim on the WARRANT OF ARREST, SUMMONS, or CRIMINAL COMPLAINT.

- When a warrant or summons is issued, the Magistrate should request that the complainant complete (1) a district court form DC-325, REQUEST FOR WITNESS SUBPOENA for the victim and any family member witnesses and (2) a separate district court form DC-325, REQUEST FOR WITNESS SUBPOENA for all other witnesses.

- All district court DC-325, REQUEST FOR WITNESS SUBPOENA forms should be attached to the unexecuted warrant or summons and delivered to the clerk after the warrant or summons has been served on the defendant.

Clerks should issue separate district court form DC-326, SUBPOENA FOR WITNESS processes for victim/family members and non-victim/non-family member witnesses. The reverse of the district court form DC-326, SUBPOENA FOR WITNESS contains information about services that may be available to victims of certain crimes.

The clerk maintains the warrant/summons with an attached envelope containing any court documents with protected information itemized above in the appropriate file.

Once a district court form DC-301, REQUEST FOR CONFIDENTIALITY BY CRIME VICTIM has been filed, the clerk shall not disclose the documents containing protected information that are located in the DC-392, SEALED ENVELOPE, except upon order of the court. The filing of district court form DC-301 is an administrative action by the clerk and is not docketed.

The clerk should stamp the front of the envelope as follows:

CONFIDENTIAL

"Pursuant to Virginia Code § 19.2-11.2, the information contained herein is not subject to disclosure and you are therefore forbidden to inspect the contents contained herein."

Date/time/signature

Procedure to be used for an individual requesting access to sealed documents containing protected information:

- Once a district court form DC-301, REQUEST FOR CONFIDENTIALITY BY CRIME VICTIM has been filed with the clerk, any person requesting access to documents containing protected information may file a petition for disclosure with the clerk of the court who acted upon the request and sealed the documents.

- In the Juvenile and Domestic Relations District Courts, a Petition for Disclosure is not indexed. The hearing on the petition is docketed as a hearing in the underlying case. No civil fees should be assessed for the filing of the case. Disposition of the Petition for Disclosure may be appealed pursuant to Va. Code § 16.1-132.

Note: The clerk of the court wherein the Petition for Disclosure is filed should issue a district court form DC-512, NOTICE OF HEARING to the victim who filed the district court from DC-301, REQUEST FOR CONFIDENTIALITY BY CRIME VICTIM.

Case Pre-Trial Procedures

This portion of the Adult Criminal Case Procedures section describes functions or activities that are completed after case initiation, but before the actual trial date. Pre-trial proceedings in which the defendant is required to appear may be conducted either with the defendant appearing personally in court, or by two-way electronic video and audio communication. Va. Code § 19.2-3.1.

Case Indexing and Filing

Upon receipt of the executed summons or warrant the clerk's office of the district court must perform a number of functions prior to the court date to prepare the case for court. To prepare the case for court the clerk's office will:

- Assign a case number.
- Enter the number and the hearing date on the summons or warrant.

- File the case papers by hearing date (all case-related papers should be filed with the summons or warrant).
- Request printing of the docket of pending cases prior to the respective court date.

Docket Preparation

In general, to prepare for a pending court date, the clerk's office will:

- Retrieve all cases from the files for a given hearing date.
- Request printing of docket via JCMS or addendum docket. Place the cases in the order in which they appear on the docket.
- Include additional cases on the docket as they come to the clerk's office.

Prepayment Processing

For certain misdemeanors punishable by a fine not to exceed $500 and which are not punishable by incarceration, or equivalent local offenses, a court appearance can be waived provided the defendant reads, or is read, and signs a district court form DC-324, NOTICE - APPEARANCE, WAIVER AND PLEA, or a similar waiver on the defendant's copy of the VIRGINIA UNIFORM SUMMONS and prepays the appropriate fine and costs. The list of applicable local offenses is prepared by the chief circuit court judge and a list of applicable state offenses is found in Supreme Court Rule 3C:2. Localities may have their own prepayment schedules. Va. Code §§ 3.2-6543; 15.2-730; 15.2-2209; 36-106.

Advisement of Right to Counsel/Review of Bail Determination

Whenever a person who is charged with an offense which may result in death or confinement is not free on bail, a hearing must be held on the next court date after the defendant is charged and held in jail. At this hearing, the defendant is informed of the amount of his bail and his right to counsel. Va. Code § 19.2-158. Although a defendant may be represented by counsel whom they have chosen and paid whenever they appear before a court, a defendant who is charged with an offense which may result in death or confinement has a legal right to representation. The defendant should be advised of this right the first time they appear in court if not accompanied by counsel. Courts have implemented a number of different mechanisms for handling the advisement and appointment of counsel to avoid last minute postponement of trials due to the need to appoint an attorney.

Following advisement of the right to counsel, the defendant may:

- hire his own attorney

- waive his right to legal representation
- have an attorney appointed by the judge to represent the defendant at public expense if:

    - the defendant meets the statutory eligibility requirements, and
    - the defendant files a written request together with a financial statement, and
    - the judge has not decided to try the eligible defendant charged with a misdemeanor without an attorney by stating in writing prior to trial that, if convicted, no jail sentence will be imposed.

If the defendant expresses the desire to hire his own attorney, tell the defendant to have his attorney notify the clerk's office that the attorney will be representing the defendant. The defendant also should be advised that if an attorney is not retained by a particular date (which should be before the trial date), the defendant should return to the court to tell the judge what efforts have been made to retain a lawyer so that the judge can decide what should be done regarding the defendant's right to counsel.

If the defendant wishes to waive the right to legal representation, the defendant and the judge execute the waiver section of district court form DC-335, TRIAL WITHOUT A LAWYER after conducting a hearing and making the findings required by the waiver form. Va. Code § 19.2-160.

A defendant who has neither retained counsel, requested the appointment of counsel, nor waived counsel may nonetheless be tried for a misdemeanor punishable by incarceration if the court, upon the motion of the Commonwealth's Attorney or its own motion, states in writing prior to the commencement of the trial that a sentence of incarceration will not be imposed upon conviction. Va. Code § 19.2-160. The district court form DC-337, TRIAL WITHOUT COUNSEL should be used to record this. In this context, the bar on the imposition of a jail sentence on this uncounseled defendant means that the court cannot impose either an active jail sentence or a suspended jail sentence. *See* Alabama v. Shelton, 122 S.Ct. 1764, 152 L.Ed. 2d 888, 2002 U.S. LEXIS 3564 (May 20, 2002).

If the defendant asks for a court-appointed attorney:

- Determine if the defendant *may* be eligible for representation by a court-appointed attorney. To be potentially eligible for a court-appointed attorney, the defendant:

    - must be charged either with a felony or with a misdemeanor for which a jail sentence *may* be imposed, *AND*
    - must not have hired their own attorney, *AND*
    - has not waived their right to legal representation by an attorney, *AND*

- is claiming to be indigent. An indigent person is one who, at the time of requesting a court-appointed attorney, is unable to provide for full payment of an attorney's fee without undue financial hardship.

- If potentially eligible, ask the defendant to prepare and sign:

  - District court form DC-334, Request for Appointment of a Lawyer *and*
  - District court form DC-333, FINANCIAL STATEMENT - ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES

    Note: Some defendants may experience a measure of difficulty in completing the latter form. The chief judge should determine who will provide assistance to such defendants and how and when such assistance will be delivered. *See* COURT APPOINTED COUNSEL GUIDELINES & PROCEDURES MANUAL for details.

- Determine if the defendant meets statutory eligibility requirements through judicial review of documents provided by the defendant, and/or information from other sources, including optional oral examination of the defendant. In-person examination is no longer mandatory. Va. Code § 19.2-159. *See* COURT APPOINTED COUNSEL GUIDELINES & PROCEDURES MANUAL for details.
- Decide whether to appoint counsel.

  - If "yes," notify the defendant that counsel will be appointed and notify the attorney appointed. The defendant should also be advised that the costs of such court-appointed counsel may have to be paid by the defendant if convicted. After July 1, 2005, an attorney appointed to represent a defendant must be from the appropriate list of qualified attorneys maintained by the Virginia Indigent Defense Commission. If no attorney who is on the list maintained by the Indigent Defense Commission is reasonably available, the court may appoint as counsel an attorney not on the list who has otherwise demonstrated to the court's satisfaction an appropriate level of training and experience. The court shall provide notice to the Commission of such appointment by sending a copy of the district court form DC-334, Request for Appointment of a Lawyer. There is no statutory requirement as to the frequency of mailing such notices, therefore: it is recommended to send in copies at least once a month. Copies may be mailed to:

    Virginia Indigent Defense Commission
    1604 Santa Rosa Road, Suite 109
    Richmond, VA 23229
    Attn: ATTORNEY CERTIFICATION SECTION

The defendant should be instructed that they should promptly contact their court-appointed attorney. A copy of the district court form DC-334, Request for Appointment of a Lawyer with the order of appointment portion completed should be transmitted to the court-appointed counsel together with the forms that counsel will need to prepare (time sheet, etc.). Public defenders may be appointed only for cases in the courts of the jurisdictions set out in Va. Code § 19.2-163.04.

- If "no," advise the defendant of the decision and allow the defendant to hire their own attorney or waive his right of legal representation.

If the defendant refuses to indicate whether they will hire an attorney, waive the right to representation, or ask the judge to appoint an attorney and, after being offered an opportunity to rescind the refusal, continues to do so, the judge then executes the "Certificate of Refusal" section of district court form DC-337, TRIAL WITHOUT COUNSEL.

On occasion, an attorney will be appointed to represent a defendant who claims to be indigent, and after the attorney is appointed, a change of circumstances will cause the defendant to be no longer indigent. The defendant should then notify the court of the change, whereupon the defendant will be granted a reasonable continuance to employ an attorney with private funds. Once an attorney has been retained, the court-appointed attorney is relieved of further responsibility and is compensated for his services, on a pro rata basis, according to the statutory allowance of costs of court-appointed attorneys. Upon conviction or deferral, the cost of the court-appointed attorney should be assessed against the defendant.

Arraignment

The arraignment hearing in district court is used to notify the defendant of the charges against them and to determine how the defendant will plead. The hearing must be held in open court. The Code of Virginia does not require that this hearing be held at a particular time. Therefore, the time at which this hearing is held varies by court. The arraignment may be waived by:

- the defendant
- the defendant's counsel in misdemeanor cases
- failure of the defendant to appear at the arraignment in misdemeanor cases.

Crossover Arraignments

"§ 19.2-158. When person not free on bail shall be informed of right to counsel and amount of bail.

Every person charged with an offense described in § 19.2-157, who is not free on bail or otherwise, shall be brought before the judge of a court not of record, unless the circuit court issues process commanding the presence of the person, in which case the person shall be brought before the circuit court, on the first day on which such court sits after the person is charged, at which time the judge shall inform the accused of the amount of his bail and his right to counsel. If the court not of record sits on a day prior to the scheduled sitting of the court which issued process, the person shall be brought before the court not of record. The court shall also hear and consider motions by the person or Commonwealth relating to bail or conditions of release pursuant to Article 1 § 19.2-119 *et seq.*) of Chapter 9 of this title. Absent good cause shown, a hearing on bail or conditions of release shall be held as soon as practicable but in no event later than three calendar days, excluding Saturdays, Sundays, and legal holidays, following the making of such motion.

No hearing on the charges against the accused shall be had until the foregoing conditions have been complied with, and the accused shall be allowed a reasonable opportunity to employ counsel of his own choice, or, if appropriate, the statement of indigence provided for in § 19.2-159 may be executed."

Note: Judicial designation is not required for crossover arraignments.

In accordance with Va. Code § 19.2-158 above, the lower courts may handle arraignments for circuit court when the circuit court is not in session. JDR Courts only hold cross-over arraignments for adult cases. The case is not indexed in JCMS.

Forms

Various numbers	Original Warrant
DC-333	FINANCIAL STATEMENT - ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES
DC-334	REQUEST FOR APPOINTMENT OF A LAWYER
DC-335	TRIAL WITHOUT LAWYER
DC-355	ORDER FOR CONTINUED CUSTODY

References

Va. Code 19.2-158

Preliminary Hearings

Preliminary hearings, unless waived, are held in all cases where the defendant is charged with a felony. In preliminary hearings for offenses charged under Va. Code §§ 18.2-361, 18.2-366, 18.2-370 or 18.2-370.1 (crimes involving sexual misbehavior with children), the court may, on its own motion or at the request of the Commonwealth, the complaining witness, the defendant, or their counsel, exclude from the courtroom all persons except

officers of the court and persons whose presence, in the judgment of the court, would be supportive of the complaining witness or the defendant and would not impair the conduct of a fair hearing. Va. Code § 18.2-67.8.

Before conducting the hearing, the court must determine whether an attorney will represent the defendant. *See* "Advisement of Right to Counsel/Review of Bail Determination" in this chapter. If charged with capital murder, *See* also the COURT APPOINTED COUNSEL GUIDELINES & PROCEDURES MANUAL and Va. Code §§ 19.2-163.7 and 19.2-163.8.
The defendant in writing using the back of the district court form DC-312, WARRANT OF ARREST - FELONY may waive the preliminary hearing. Preliminary hearings may also be continued to another date. At the preliminary hearing, the court will:

- Determine if there is probable cause to believe the defendant committed the felony charged; if probable cause is found or if the defendant has waived the preliminary hearing, the case is then certified to the grand jury using the back of the district court form DC-312, WARRANT OF ARREST - FELONY.
- Upon certification of any felony offense the court shall also certify any ancillary misdemeanor offense to the clerk of the circuit court provided that the attorney for the Commonwealth and the accused consent to such certification. Va. Code § 19.2-190.1 Any misdemeanor offense certified pursuant to this section shall proceed in the same manner as a misdemeanor appealed to circuit court pursuant to § 16.1-136.
- Reduce the charge to a misdemeanor, if probable cause is not found on the felony charge but the evidence will support a probable cause finding on a misdemeanor.
- Dismiss the case if probable cause is not found as to any charge.

Subpoenas, Witness Summoning

The Sixth Amendment to the United States Constitution provides for the right to subpoena witnesses on one's behalf. The procedures used by the clerk's office for issuing and processing subpoenas for witnesses and other parties to a case are described below. When following the procedures described below, it is important to keep in mind the procedures necessary when a crime victim has requested nondisclosure of certain protected information. Va. Code § 19.2-11.2.

When reviewing a district court form DC-325, REQUEST FOR WITNESS SUBPOENA the clerk's office will:

- Verify that a form has been correctly completed for each action.

- Review the district court form DC-325, REQUEST FOR WITNESS SUBPOENA to assure that the proper court and court division is noted (i.e., the same as the court appearance location) and that the court date is correct.
- Obtain telephone numbers, where possible, to aid the clerk or parties in contacting witnesses in the event of a pre-trial resolution of the case or a continuance.

Note: Date of filing of request and issuance of subpoenas. Rule 7A:12(a) of the RULES OF SUPREME COURT provides that requests for subpoenas should be filed at least ten days prior to trial; requests not timely filed may not be honored except when authorized by the court for good cause. These rules impose time restrictions on filing requests for subpoenas and subpoena *duces tecum*. Clerks may not impose their own time restrictions on requests for witness subpoenas. Va. Code § 8.01-407. Magistrates receiving a district court form DC-325, REQUEST FOR WITNESS SUBPOENA may issue subpoenas or forward the district court form DC-325, REQUEST FOR WITNESS SUBPOENA to the clerk's office for issuance.

Subpoenas can only be issued by a clerk or magistrate (or by a Commonwealth's Attorney, or City or County Attorney or defense attorney, in certain cases, by the arresting law enforcement officer in criminal cases), but the district court form DC-326, SUBPOENA FOR WITNESS may be prepared for issuance by the party requesting issuance. For issuance of a subpoena, the clerk's office will:

- Require that subpoenas be prepared as per instructions for completing the district court form DC-326, SUBPOENA FOR WITNESS (*See* DISTRICT COURT FORMS MANUAL) including requirement that a separate set of forms for each witness be prepared.
- Distribute copies of the subpoenas to the sheriff for service with sufficient time being allowed for return of service of process.
- Attach form DC-325, REQUEST FOR WITNESS SUBPOENA (if used), and the return copy of the district court form DC-326, SUBPOENA FOR WITNESS to the originating case papers.

Testimony of Child Victims and Witnesses

The testimony of an alleged victim who was 14 years old or younger at the time of the alleged offense and is 16 or younger at the time of trial, as well as the testimony of any witness who is 14 or younger at the time of trial, may be given via two-way closed-circuit television or other securely encrypted two-way audio-video technology, as permitted under Virginia Code § 18.2-67.9, upon proper application and order of the court.

Extradition Hearing

If a person is arrested on a warrant issued by a magistrate or judge in which the defendant is charged with being a fugitive from justice in another state, the defendant may be held

for up to thirty days pending the arrival of a Governor's Warrant of Extradition requested through the judge by the Commonwealth's Attorney, warden or sheriff. At arraignment, the defendant may be released on bail or kept in jail through the use of the same bail criteria that is applied in other criminal cases. In the event that the Governor's Warrant of Extradition does not arrive within the time limit set in the warrant or bond (up to thirty days), the judge may discharge the defendant or either release the defendant on bail or recommit the defendant for up to sixty additional days pending the arrival of the Governor's Warrant of Extradition. Any electronically transmitted facsimile of a Governor's Warrant shall be treated as an original document provided the original is received within four (4) days of receipt of the facsimile.

In all extradition cases, the defendant is brought before a judge for an arraignment hearing, even if the defendant wishes to waive the extradition proceedings. If the defendant wishes to waive the extradition proceedings as provided in Va. Code § 19.2-114, the defendant must be advised by the district court judge prior to execution of the waiver that they have the right to the issuance and service of a Governor's Warrant of Extradition and a right to challenge extradition through a writ of habeas corpus. If the defendant still wishes to waive the extradition proceedings, then the waiver and consent to extradition on the district court form DC-375, WAIVER OF EXTRADITION PROCEEDINGS are executed before the judge, after which a copy of the waiver and consent to extradition is sent to the Governor, and the defendant is held for delivery to an authorized agent of the demanding state.

If the defendant does not waive extradition proceedings, the court advises them of their right to counsel, their right to the issuance and service of a Governor's Warrant of Extradition, and their right to seek a Writ of Habeas Corpus to test the legality of the arrest (which is tried in circuit court). If the above rights are not exercised, the court shall re-bail or recommit the defendant pending arrival and service of the Governor's Warrant of Extradition.

Upon service of the Governor's Warrant of Extradition on the defendant, another hearing is held. If no Writ of Habeas Corpus is filed and the judge finds that the defendant is the person identified in the Governor's Warrant of Extradition, the judge orders that the defendant be held for delivery to the authorized officer from the demanding state.

Request for a Reduction or Change of Bail (Bond Hearing)

A defendant held in jail, or his attorney, may make a motion for reduction of the amount of bail set by the magistrate. The Commonwealth may request a change or revocation of bail and the Commonwealth (not the court) is required to notify the defendant and any surety on the bond of such a request (but failure to notify the surety will not prohibit the court from proceeding with the bond hearing). Va. Code § 19.2-132. The judge considers the motion and may order that bail be reduced, increased (subject to limitations in Va.

Code § 19.2-132 (B)), remain unchanged, or be revoked. After the judge's decision, if the defendant can immediately meet the terms of bail, the clerk's office (not the magistrate) should take the following action:

- If bail is reduced or changed and the defendant can meet its conditions, prepare the district court form DC-330, RECOGNIZANCE for completion by the defendant and their sureties. In addition, if the defendant was being held in jail, complete a district court form DC-353, RELEASE ORDER for the defendant to take back to jail to effect their release.
- If bail is changed and the defendant cannot meet its new conditions, return the defendant to jail using a district court form DC-355, ORDER FOR CONTINUED CUSTODY or, if the defendant was not in jail, commit the defendant to jail using a district court form DC-352, COMMITMENT ORDER. When the defendant is able to meet the bail terms, the magistrate should process the defendant's release. Subject to approval by the sheriff, the judge (not the magistrate) may assign the defendant to home/electronic incarceration pending trial.

The court granting or denying such bail, ordering any increase or ordering new or additional sureties may, upon appeal thereof, and for good cause shown, stay execution of such order for so long as reasonably practicable for the party to obtain an expedited hearing before the next higher court. No such stay may be granted after any person who has been granted bail has been released from custody on such bail. Va. Code § 19.2-124

If the defendant fails to appear at the hearing, a district court form DC-360, SHOW CAUSE SUMMONS (CRIMINAL), a district court form DC-361, CAPIAS, or a WARRANT OF ARREST charging the defendant with failure to appear, in violation of Va. Code § 19.2-128, may be issued. The court will determine whether to forfeit the bond.

Prior to trial, the bail decision may be appealed to circuit court. (*See* appendix on "Appeals".)

Mental Condition of Defendant

The Code of Virginia provides for mental evaluation and/or treatment of the defendant, including:

Evaluation of Competency to Stand Trial. Va. Code § 19.2-169.1.

If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant lacks substantial capacity to understand the proceedings against

them or to assist their attorney in their own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who is qualified by training and experience in (i) has performed forensic evaluation evaluations; (ii) has successfully completed forensic evaluation training recognized by the Commissioner of Behavioral Health and Developmental Services; (iii) has demonstrated to the Commissioner competence to perform forensic evaluations; and (iv) is included on a list of approved evaluators maintained by the Commissioner.

- The judge may order a competency evaluation to be performed on a local outpatient basis, unless an outpatient evaluator determines that an inpatient evaluation is necessary or if the defendant is already in the custody of the Department of Behavior Health and Developmental Services, in which case a competency evaluation on an inpatient basis is ordered.

- An evaluator should be selected from the DIRECTORY OF MENTAL HEALTH PROFESSIONALS WITH TRAINING IN FORENSIC EVALUATION that is distributed by the Department of Behavioral Health and Developmental Services (DBHDS). DBHDS sets qualifications for persons who conduct evaluations of criminal defendants where there is an issue of sanity or competency to stand trial.

- If inpatient evaluation is to be used, the evaluating facility is selected by the Commissioner of the Department of Behavioral Health and Developmental Services to ascertain to which hospital the defendant should be transported. The length of stay is determined by the director of the hospital based on the director's determination of the time necessary to perform an adequate evaluation, but not to exceed thirty days. *See* "Coordination with DBHDS" at end of this section.

- The judge shall require the Commonwealth's Attorney to provide the evaluator with (1) a copy of the warrant, (2) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant and the judge ordering the evaluation, (3) information about the alleged crime, and (4) a summary of the reasons for the evaluation request. The defendant's attorney must provide the evaluator with any available psychiatric records or other information that is deemed relevant. The Commonwealth's Attorney and the defendant's attorney have ninety-six hours in

which to submit information to a competency evaluator following the court order for evaluation.

- The clerk will prepare and (after signature by the judge) distribute district court form DC-342, ORDER FOR PSYCHOLOGICAL EVALUATION and, if needed, district court form DC-354, CUSTODIAL TRANSPORTATION ORDER after which the sheriff will be notified of the need for transporting the defendant.

- **Important:** The clerk shall also complete district court form DC-343, TRACKING DOCUMENT FOR SENDING OR RECEIVING EVALUATION OR TREATMENT ORDER UPON ENTRY, attach a copy of district court form DC-342, ORDER FOR PSYCHOLOGICAL EVALUATION and fax the order and tracking document to the evaluator or to the director of the community services board, or hospital by close of business on the next business day after the order was entered. The evaluator or director shall acknowledge receipt of the order no later than close of business on the next business day after the order is received using district court form DC-343, TRACKING DOCUMENT FOR SENDING OR RECEIVING EVALUATION OR TREATMENT ORDER UPON ENTRY**.** The clerk shall also email the order for evaluation or treatment to the Central Office for the Department of Behavioral Health and Developmental Services at courtorders@dbhds.virginia.gov.

- If the defendant is found guilty or if the case is certified to circuit court, the cost of the evaluation is assessed back to the defendant as part of court costs. The cost of the evaluation is assessed to revenue code 113.

Competency Evaluation

Upon completion of the evaluation, the evaluators shall promptly submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity to understand the proceedings against them; (ii) the defendant's ability to assist their attorney; and (iii) the defendant's need for treatment in the event they are found incompetent but restorable, or incompetent for the foreseeable future; and (iv) if the defendant has been charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128, whether the defendant should be evaluated to determine whether they meet the criteria for temporary

detention pursuant to § 37.2-809 in the event they are found incompetent but restorable or incompetent for the foreseeable future. If a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether inpatient or outpatient treatment (community-based or jail-based) is recommended. Outpatient treatment may occur in a local correctional facility or at a location determined by the appropriate community services board or behavioral health authority.

If the judge finds that the defendant is incompetent to stand trial and that treatment is required to restore the defendant to competency, then the judge shall enter district court form DC-345, ORDER FOR TREATMENT OF INCOMPETENT DEFENDANT.
Important: The clerk shall also complete district court form DC-343, Tracking Document for Sending or Receiving Evaluation or Treatment Order Upon Entry, attach a copy of district court form DC-345, ORDER FOR TREATMENT OF INCOMPETENT DEFENDANT and fax both orders to the evaluator or to the director of the community services board by close of business on the next business day after the order was entered The evaluator or director shall acknowledge receipt of the order no later than close of business on the next business day after the order is received using district court form DC-343, Tracking Document for Sending or Receiving Evaluation or Treatment Order Upon Entry**.**

If inpatient treatment is ordered and the defendant has not already been hospitalized, the Department of Behavioral Health and Developmental Services to ascertain to which hospital the defendant is to be transported, a district court form DC-354, CUSTODIAL TRANSPORTATION ORDER is prepared, and the sheriff is notified of the need for transporting the defendant. *See* "Coordination with DBDHS" at end of this section. Outpatient treatment may occur in a local correctional facility.

Pursuant to §§ 18.2-308.1:3 and 19.2-169.1 of the Code of Virginia, if a defendant is likely to remain incompetent for the foreseeable future due to an ongoing and irreversible medical condition and prior medical or educational records are available to support the diagnosis, a competency report may recommend that the court find the defendant unrestorably incompetent to stand trial, and the court may proceed with the disposition of the case based on such recommendation. In addition, if the defendant has been determined to be unrestorably incompetent within the past two years, the court may proceed with disposition of the case based on such recommendation in a report without requiring a new competency evaluation be completed.

Upon entry of the order to restore the defendant to competency or a determination that the defendant is incompetent and unrestorable, the clerk of court shall certify and forward forthwith to Virginia State Police form SP237, NOTIFICATION OF INVOLUNTARY ADMISSION, MENTAL INCAPACITY, MENTAL INCOMPETENCE, AND TDO WITH VOLUNTARY ADMISSION and a copy of the DC-345, ORDER FOR TREATMENT OF INCOMPETENT DEFENDANT. Va. Code § 19.2-169.2.

Recommendation for TDO Evaluation

Notwithstanding the provisions of subsection A, in cases in which (i) the defendant has been charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128; (ii) the defendant has been found to be incompetent pursuant to subsection E or F of § 19.2-169.1; and (iii) the competency report described in subsection D of § 19.2-169.1 recommends that the defendant be evaluated to determine whether they meet the criteria for temporary detention pursuant to § 37.2-809, the court may order the community services board or behavioral health authority serving the jurisdiction in which the defendant is located to (a) conduct an evaluation of the defendant and (b) if the community services board or behavioral health authority determines that the defendant meets the criteria for temporary detention, file a petition for issuance of an order for temporary detention pursuant to § 37.2-809. The community services board or behavioral health authority shall notify the court, in writing, within 72 hours of the completion of the evaluation and, if appropriate, file a petition for issuance of an order for temporary detention. Upon receipt of such notice, the court may dismiss the charges without prejudice against the defendant. However, the court shall not enter an order or dismiss charges against a defendant pursuant to this subsection if the attorney for the Commonwealth is involved in the prosecution of the case and the attorney for the Commonwealth does not concur in the motion. If a defendant for whom an evaluation has been ordered fails or refuses to appear for the evaluation, the community services board or behavioral health authority shall notify the court and the court shall issue a mandatory examination order and capias directing the primary law-enforcement agency for the jurisdiction in which the defendant resides to transport the defendant to the location designated by the community services board or behavioral health authority for examination.

Upon receiving a notification from the community services board that the defendant did not appear for the evaluation the clerk's office would initiate the following:

- The Mandatory Examination Order and Capias to Transport (DC-3026) would be issued and sent to law enforcement for service. The DC 3026 is not indexed separately, only issued out of the pending criminal case.
- Law enforcement will detain the defendant and transport them to the named examination location and retain custody of the defendant until

the evaluation is completed and the defendant is released by the evaluator.

- Law enforcement will complete the service of the DC-3026 and return it to the court.

Sanity at the Time of the Offense, Va. Code § 19.2-169.5.

Prior to trial, on motion of the defendant's attorney, the court may hear evidence to determine if there is probable cause to believe that the sanity of the defendant at the time of the offense may be a significant factor in his defense and that the defendant is financially unable to pay for expert assistance. If probable cause is found, then the judge shall appoint one or more qualified mental health experts to evaluate the defendant's sanity at the time of the offense and to assist in developing the defendant's insanity defense. The mental health expert appointed shall be:

- A psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of the Department of Behavioral Health and Developmental Services; and
- Qualified by training and experience to perform forensic evaluations.

The procedures for evaluation of the defendant, i.e. whether the evaluation should be outpatient or inpatient, the orders required to be issued and the information to be provided to the evaluator, are the same as those used in ordering a competency evaluation (see discussion above).

The report is submitted only to the attorney for the defendant and is protected by the attorney-client privilege. However, in all felony cases, once the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence pursuant to Va. Code § 19.2-168, the report, the results of any other evaluation of the defendant's sanity at the time of the offense and copies of psychiatric, psychological, medical or other records obtained during the course of any evaluation must be provided to the Commonwealth. These disclosure provisions also apply when the defendant obtains his own expert to evaluate the defendant's sanity. *See* discussion of the insanity defense below.

Insanity Defense, Va. Code §§ 19.2-168 and 19.2-168.1

The defendant, pursuant to Va. Code § 19.2-168, is required to give notice at least twenty-one days prior to trial of an intent to assert a defense of insanity or mental retardation; otherwise, the judge may allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. Such a continuance period shall not be counted against the speedy trial limits of Va. Code § 19.2-243 (felonies), but shall be counted against the speedy trial limits of Va. Code § 19.2-8 (misdemeanors).

Should the Commonwealth subsequently request its own evaluation of the defendant's sanity, the court shall order such evaluation and advise the defendant in open court that if they fail to cooperate with the Commonwealth's expert, the defendant's expert evidence may be excluded. Va. Code § 19.2-168.1. The procedures for evaluation of the defendant, i.e. whether the evaluation should be outpatient or inpatient, the orders required to be issued and the information to be provided to the evaluator, are the same as those used in ordering a competency evaluation (see discussion above).

If the defendant refuses to cooperate with such evaluators, the court may admit evidence of the refusal or bar the defendant's presentation of certain expert evidence at trial on the issue of sanity at the time of the offense.

The evaluators must provide copies of their evaluation with its findings and opinions plus copies of the psychiatric, psychological, medical and other records obtained during the evaluation to the attorneys for both the Commonwealth and the defendant.

Inpatient psychiatric hospital admission from local correctional facility, Va. Code § 19.2-169.6

Prior to trial, the court with jurisdiction over the inmate's case, if it is still pending, on the petition of the person having custody over an inmate or on its own motion, holds a hearing at which the inmate is represented by counsel and orders hospitalized for psychiatric treatment for up to thirty days pursuant to Va. Code § 19.2-169.6 **if** the defendant has not already been found incompetent to stand trial (if previously found incompetent to stand trial, *see* "Competency to Stand Trial Evaluation", *below*);

The judge will hold a hearing in which the inmate is represented by counsel and find by clear and convincing evidence that:

- the inmate has a mental illness
- there exists a substantial likelihood that, as a result of a mental illness, the inmate will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information
- the inmate requires treatment in a hospital rather than the local correctional facility

Prior to making this determination the court shall consider the examination conducted in accordance with Va. Code § 37.2-815 and the preadmission screening report prepared in accordance with Va. Code § 37.2-816 and conducted in-person or by means of a two-way electronic video and audio communication system as authorized in Va. Code § 37.2-804.1 by an employee or designee of the local community services board or behavioral health authority who is skilled in the assessment and treatment of mental illness, who is not providing treatment to the inmate.

When the hearing is held outside the service area of the CSB or behavioral health authority that prepared the preadmission screening report, and it is not practicable for a representative of the board or authority to attend or participate in the hearing, arrangements shall be made by the board or authority for an employee or designee of the board or authority serving the area in which the hearing is held to attend or participate on behalf of the board or authority that prepared the preadmission screening report.

- The Department of Behavioral Health and Developmental Services will determine to which facility the defendant should be transported. *See* "Coordination with DBHDS" at end of this section.

- the judge will conduct the hearing and complete district court form DC-4003 ORDER FOR TREATMENT OF INMATE, and attach the report of the mental health professional and, if applicable, if the inmate is hospitalized pursuant to this section and their case is still pending the court having jurisdiction over the inmate's case may order that the admitting hospital evaluate the inmate's competency to stand trial and their mental state of mind at the time of offense by completing district court form DC-342, ORDER FOR PSYCHOLOGICAL EVALUATION (which is described below).

- **Important:** The clerk shall also complete district court form DC-343, Tracking Document for Sending or Receiving Evaluation or

Treatment Order Upon Entry, attach a copy of district court form DC-4003, ORDER FOR TREATMENT OF INMATE, and a copy of district court form DC-342, ORDER FOR PSYCHOLOGICAL EVALUATION, if entered, and fax all orders to the evaluator or to the director of the community services board by close of business on the next business day after the order was entered The evaluator or director shall acknowledge receipt of the order no later than close of business on the next business day after the order is received using district court form DC-343, Tracking Document for Sending or Receiving Evaluation or Treatment Order Upon Entry**.**

- the clerk prepares the district court form DC-354, CUSTODIAL TRANSPORTATION ORDER

- arranges for sheriff or other official to pick up the court documents and to transport the defendant. The following documents and information should be provided: (i) the commitment order (ii) the names and addresses of the attorneys and the judge (iii) a copy of the warrant or indictment and (iv) the criminal incident information, the arrest report, or a summary of the facts relating to the crime. Va. Code § 19.2-174.1.

Alternatively, the magistrate may order the temporary commitment of the inmate pursuant to Va. Code § 19.2-169.6(2) if the person having custody over an inmate awaiting trial has reasonable cause to believe that:

- the inmate has a mental illness
- there exists a substantial likelihood that, as a result of a mental illness, the inmate will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information
- the inmate requires treatment in a hospital rather than the local correctional facility

Prior to the filing of the petition, the person having custody shall arrange for an evaluation of the inmate conducted in-person or by means of a two-way electronic video and audio communication system as authorized by Va. Code §37.2-804.1 by an employee or designee of the local CSB or behavioral health authority.

A magistrate may then determine if probable cause exists for the issuance of district court form DC-894A, TEMPORARY DETENTION ORDER-MAGISTRATE in the

same manner as proceedings for involuntary civil mental commitments. Va. Code §§ 19.2-169.6 (A)(2) and 37.2-809 through 37.2-813. *See also*: "Procedures In Involuntary Admissions Of Mentally Ill/Intellectually Disabled Person".

If probable cause is found, then:

- the Department of Behavioral Health and Developmental Services is contacted to determine to which facility the defendant is to be transported. See "Coordination with DBHDS" at end of this section.
- the magistrate prepares and issues district court form DC-894A, TEMPORARY DETENTION ORDER-MAGISTRATE
- the sheriff or other transporting official is contacted to pick up district court form DC-894A, TEMPORARY DETENTION ORDER-MAGISTRATE and transport the defendant to the hospital.
- A hearing must be held, following notice to the defendant's attorney, before the court having jurisdiction over the defendant's case or before a judge or special justice in the county or city in which the institution is located. The defendant must be represented by counsel, and the judge must make the findings specified in subsection (A)(1) of Va. Code § 19.2-169.6 (detailed above), based upon clear and convincing evidence. The hearing must be held:

    - within 72 hours of execution of district court form DC-894A, TEMPORARY DETENTION ORDER -MAGISTRATE
    - if 72 hours terminates on a Saturday, Sunday or legal holiday, the next day which is not a Saturday, Sunday or legal holiday.
    - The judge or special justice will conduct the hearing and complete the DC4003-ORDER FOR TREATMENT FOR INMATE.

Coordination with DBHDS (Department of Behavioral Health and Developmental Services.

Whenever the court has ordered the admission of an inmate into a DBHDS hospital pursuant to Va. Code §§ 19.2-169.1, 19.2-169.2, 19.2-169.6, or 19.2-168.1, the clerk should contact the forensic coordinator at the state hospital that routinely provides services to individuals within the court's region. The forensic coordinator will triage the case and determine the most appropriate placement for the individual. For defendants charged with significant offenses (i.e. capital murder, murder, malicious wounding,

rape) the clerk should make the referral directly to the maximum-security unit at Central State Hospital. For defendants age 65 or older, the clerk should make the referral to the geriatric state facility that generally provides services to older adults in the court's region. The four geriatric state operated facilities are: Piedmont Geriatric Hospital, Catawba Hospital, Southwestern Virginia Mental Health Institute or Eastern State Hospital – Hancock Geriatric.

NAME OF FACILITY	FORENSIC COORDINATOR	PHONE #
Catawba Hospital	Walton Mitchell, MSW (Acting)	(540) 375-4201
Central State Hospital	Ted Simpson, Psy.D. or Spencer Timberlake, CSWS	(804) 524-7054 (804) 524-7941
Eastern State Hospital	Kristen Hudacek, Psy.D.	(757) 208-7697
Northern Virginia Mental Health Institute	Azure Baron, Psy.D.	(703) 645-4004
Piedmont Geriatric Hospital	Lindsey Slaughter, Psy.D.	(434) 767-4424
Southern Virginia Mental Health Institute	Blanche Williams, Ph.D.	(434) 773-4237
Southwestern Virginia Mental Health Institute	Colin Barrom, Ph.D.	(540) 332-8007
Western State Hospital	Brian Kiernan, Ph.D.	(540) 332-8007

Sexually Transmitted Infections Testing

The attorney for the Commonwealth may request after consultation with a complaining witness, or shall request upon the request of the complaining witness, that any person charged with (i) any crime involving sexual assault pursuant to this article; (ii) any offense against children as prohibited by §§ 18.2-361, 18.2-366, 18.2-370, and 18.2-370.1; or (iii) any assault and battery, and where the complaining witness was exposed to body fluids of the person so charged in a manner that may, according to the then-current guidelines of the Centers for Disease Control and Prevention, transmit a sexually transmitted infection, be requested to submit to diagnostic testing for sexually transmitted infections and any follow-up testing as may be medically appropriate. The person so charged shall be counseled about the meaning of the tests and about the transmission, treatment, and prevention of sexually transmitted infections. If the person so charged refuses to submit to testing or the competency of the person to consent to testing is at issue, the court with jurisdiction of the case shall hold a hearing in a manner as provided by § 19.2-183, as soon as practicable, to determine whether there is probable cause that the individual has committed the crime with which they are charged and that the complaining witness was exposed to body fluids of the person so charged in a manner that may, according to the then-current guidelines of the Centers for Disease Control and Prevention, transmit a sexually transmitted infection. If the court finds probable cause, the court shall order the

person so charged to undergo testing for sexually transmitted infections. The court may enter such an order in the absence of the person so charged if the person so charged is represented at the hearing by counsel or a guardian ad litem. The court's finding shall be without prejudice to either the Commonwealth or the person charged and shall not be evidence in any proceeding, civil or criminal. At any hearing before the court, the person so charged or his counsel may appear. Form DC 3010, Request for Sexually Transmitted Infection Testing Pursuant to §18.2-61.1, and Form CC 1390, Order for DNA or Sexually Transmitted Infections Testing are used to complete this process. The motion is not indexed by the clerk's office separately from the underlying case. Costs are assessed against the defendant if the court finds evidence sufficient and continues the case for disposition or if the court finds the defendant guilty. Account code 133 is used to collect the costs of the testing. Test results are sealed in the court's file pending the court hearing.

Interpreters for Deaf and Non-English Speaking Persons

Interpreters for the Deaf

If a defendant is deaf, they entitled to a court-appointed interpreter at state expense, regardless of financial status. If the victim or a witness is deaf, an interpreter shall be appointed by the trial judge unless the court finds that the victim or witness does not require the services of a court-appointed interpreter, and that the deaf person has waived their right to an interpreter. Va. Code § 19.2-164.1. If a deaf person wishes to retain his own interpreter at his own expense, court approval of the interpreter is not required. A deaf person may waive the appointment of an interpreter. Interpreters for the deaf shall be procured through the Virginia Department for the Deaf and Hard of Hearing.

Interpreters for Non-English Speaking Persons

If a defendant does not speak English, they are entitled to a court-appointed interpreter at state expense, regardless of financial status. If the victim or a witness does not speak English, an interpreter shall be appointed by the trial judge unless the court finds that the victim or witness does not require the services of a court appointed interpreter. Va. Code § 19.2-164. If the non-English speaking defendant, victim or witness wishes to retain an interpreter at state expense, the court must determine that such interpreter is competent.

The compensation of an interpreter shall be fixed by the court in accordance with the guidelines established by the Judicial Council of Virginia. Va. Code § 19.2-164. The guidelines can be found on the court system's website at: www.courts.state.va.us.

All foreign language interpreters must be located by the court directly. The Office of the Executive Secretary of the Supreme Court of Virginia offers a voluntary program to certify Spanish language interpreters. A list of certified Spanish language interpreters is provided to all courts on an annual basis and is also available on the Virginia judiciary's homepage at: www.courts.state.va.us. The Office of the Executive Secretary does not maintain the names of any foreign language interpreters other than those certified for Spanish language interpretation. Suggested resources for locating interpreters include foreign language departments of colleges and universities, federal courts or private sector interpreter firms. However, when utilizing interpreters from such sources, the judge should determine the competency of the person to interpret court proceedings.

While all courts are encouraged to utilize certified Spanish language interpreters who have proven competencies and skill levels, there is no requirement that only certified interpreters be used in courts. However, judges are encouraged to inquire about the qualifications of an interpreter to perform such services in a court environment. This is particularly important given the experience of courts in recent years that mere fluency in a foreign language does not equate to competence in court interpretation. Inquiry may take the form of the suggested "*voir dire*" of foreign language interpreters which can be found in the "Guide to Foreign Language Interpreter Usage and Spanish Language Interpreter Certification in Virginia's Courts" (this guide accompanies the Certified Spanish Language Interpreter List for Virginia's Courts distributed by OES and can also be found the court system's website at www.vacourts.gov when qualifying on-certified interpreters of any language.

Admissibility of Affidavits

Sex Offender

In a prosecution for failing to register or re-register as a sex offender, the Virginia State Police may issue an affidavit signed by the custodian of records that such person failed to comply with the duty to register or re-register. In a preliminary hearing, that affidavit shall be admitted into evidence. In a trial or hearing other than a preliminary hearing, that affidavit may be admitted into evidence if the procedures of Va. Code § 18.2-472.1 (G) have been followed and the accused has not objected pursuant to the procedures of Va. Code § 18.2-472.1 (H). The Commonwealth's Attorney will first send a copy of the affidavit as well as a notice of the right to object to the admission of the affidavit in lieu of testimony at least 28 days prior to trial. The Commonwealth's Attorney will

also file a copy of the affidavit and notice with the court. The clerk should time/date stamp and file the affidavit and notice upon receipt. The accused or his counsel then has the right to object to the admission of the affidavit in lieu of testimony. The accused or his counsel will file district court form DC-306, OBJECTION TO ADMISSION OF AFFIDAVIT. The clerk should time/date stamp and file the DC-306 upon receipt. Va. Code § 18.2-472.1.

By Government Official Regarding Search of Government Records

On occasion the lack of a record is what is necessary to be proved. Virginia Code § 19.2-188.3 now allows an affidavit signed by a government official, who is competent to testify, deemed to have custody of an official record, or signed by his designee, stating that after a diligent search, no record or entry of such record is found to exist among the records in his custody to be admitted into evidence. This "no records found" affidavit may be admitted in any hearing or trial provided the procedures of Va. Code § 18.2-472.1 (G) have been followed and the accused has not objected pursuant to the procedures of Va. Code §18.2-472.1 (H). The Commonwealth's Attorney will first send a copy of the affidavit as well as a notice of the right to object to the admission of the affidavit in lieu of testimony at least 28 days prior to trial. The Commonwealth's Attorney will also file a copy of the affidavit and notice with the court. The clerk should time/date stamp and file the affidavit and notice upon receipt. The accused or his counsel then has the right to object to the admission of the affidavit in lieu of testimony. The accused or his counsel will file district court form DC-306, OBJECTION TO ADMISSION OF AFFIDAVIT. The clerk should time/date stamp and file the DC-306 upon receipt. Va. Code § 19.2-188.3.

Notice, Motion and Order for Chemical Analysis of Alleged Plant Material

Pursuant to Va. Code §19.2-188.1, a law enforcement officer shall be permitted to testify as to the results of any field test approved by the Department of Forensic Science regarding whether or not any plant material, the identity of which is at issue, is marijuana. The bill also provides an opportunity for defense counsel to require full laboratory analysis. It is suggested that the district court form DC-304, NOTICE, MOTION AND ORDER FOR CHEMICAL ANALYSIS OF ALLEGED PLANT MATERIAL be given to the defendant a time of arraignment, and if the defendant or their counsel wish to file the district court form DC-304, NOTICE, MOTION AND ORDER FOR CHEMICAL ANALYSIS OF ALLEGED PLANT MATERIAL it should be filed prior to trial before the court in which the charge is pending.

Custody of Evidence

While the parties to the case or the appropriate law-enforcement entity usually have custody of evidence, clerk's offices sometimes become a repository for evidence in a

criminal case either through the voluntary deposit of evidence by a party or a law-enforcement entity or upon production of evidence in the clerk's office for examination as required by a subpoena *duces tecum*. Va. Code §§ 16.1-89 and 16.1-131; and Rule 3A:12(b) of the Rules of Supreme Court. The judge may order the appropriate law enforcement entity to take into custody or maintain custody of substantial quantities of any controlled substances, imitation controlled substances, chemicals, marijuana or paraphernalia used or to be used in a criminal case. Va. Code § 19.2-386.25. The order may make provisions for ensuring the integrity of these items until further order of the judge.

Recall of Process

On occasion, it becomes necessary for the judge to order the immediate return of process to the court even though the law enforcement entity possessing the document has not served it. Examples include:

- the defendant was arrested on a facsimile or "teletype" copy of the warrant.
- the defendant voluntarily appeared in court after a capias for contempt or for failure to appear had been issued.

In every such instance, the law enforcement entity possessing the document must be telephoned promptly to return the process without further attempt to serve it. This call should be documented with a subsequent written notification to protect the court from claims that notification was not given. To this end, the DC-323, Recall of Process should be used whenever process is recalled prior to its being served.

Photographing and Broadcasting Judicial Proceedings

A court, solely in its discretion, may permit many, but not all, types of judicial proceedings to be photographed or broadcast. Such coverage is governed and limited by the provisions of Va. Code § 19.2-266.

Transfer of Jurisdiction

A JDR Judge may determine that jurisdiction over a case written for the JDR District Court lies with the General District Court, or *vice versa*.

Once such a determination is made, the following steps should be taken:

- The judge will order that the case be transferred pursuant to Va. Code § 16.1-245 to the appropriate court using a district court form DC-322, ORDER - TRANSFER OF JURISDICTION.
- The defendant, if released on bail, and the witnesses should be recognized to appear in the court to which the case is being transferred using a district court form DC-330, RECOGNIZANCE after coordinating the next hearing date with the receiving court.
- If the defendant is returned to custody, the clerk prepares a district court form DC-355, ORDER FOR CONTINUED CUSTODY with the bold notation "**TRANSFER CASE**" next to the name of the defendant and showing the name of the transferee court as the court for which the case is continued.
- The clerk attaches all case papers to the district court form DC-322, ORDER - TRANSFER OF JURISDICTION and issues a check for any cash bond to the transfer court.
- The clerk transmits the case to the transferee court, retaining a copy of the district court form DC-322, ORDER - TRANSFER OF JURISDICTION to document the transfer and a photocopy of the case papers. The case should be finalized in JCMS with **TR** disposition code.

Confidentiality of Certain Pretrial Reports

Pretrial investigation reports and any report of a local community-based probation agency are not subject to disclosure under the Virginia Freedom of Information Act. These reports are filed as part of the case records. Such reports must be sealed upon entry of the court's final order. Upon request, such a report may be available for inspection only to counsel for the person who is the subject of the report, to an agency to which the person has been referred for assessment of treatment and to a "criminal justice agency" (as defined in Va. Code § 9.1-101). Va. Code §§ 9.1-177.1, 19.2-152.4:2.

Case Trial Procedures

The Trial Procedures portion of the Criminal Case Process section describes the functions or activities performed at trial and the procedures for processing and completing these activities.

Adjudicatory Hearing

For cases heard in court, the clerk's office must perform several functions to assure that cases are processed efficiently. The clerk's office is responsible for assuring that:

- All case-related paperwork is complete and accounted for in the case files, which may include:

  - original summons or warrant

- either the defendant's copy of the VIRGINIA UNIFORM SUMMONS or a district court form DC-324, NOTICE - APPEARANCE, WAIVER AND PLEA if prepayment has been made
- original complaint
- District court form DC-339, SEARCH WARRANT and district court form DC-338, AFFIDAVIT FOR SEARCH WARRANT
- District court form DC-325, REQUEST FOR WITNESS SUBPOENA and subsequent district court form DC-326, SUBPOENA FOR WITNESSES
- District court form DC-330, RECOGNIZANCE (Witness)
- other pleadings and documentary evidence filed with the court
- prepayments are recorded on the docket.
- The docket and all of the case papers for the cases on the docket are transferred to the judge on the morning of trial.
- If there is a continuance or pretrial resolution of a case, witnesses should be notified. If a case is continued, several different mechanisms exist for notifying and/or reminding witnesses and the parties of the continuance date.
- If all parties have consented to the continuance, the moving party should be reminded that they are responsible for assuring that the witnesses are notified of the continuance in the manner provided in Rule 7A:14 of the Rules of Supreme Court.
- If a party is represented by an attorney, then the attorney (including the Commonwealth's Attorney) should be required to notify their client and witnesses.
- Parties not represented by a lawyer and their witnesses should be notified in court, if they are in court; otherwise, the clerk or judge may require the party to notify their witness(es) of the continuance date or the clerk may complete and mail a district court form DC-346, NOTICE OF NEW TRIAL DATE to such party and their witnesses. If the witnesses are in court, the judge may use an oral recognizance of the witnesses or a written district court form DC-329, RECOGNIZANCE (WITNESS).

- The disposition is recorded correctly in the JCMS system and on the back of the warrant, except on the VIRGINIA UNIFORM SUMMONS, where it is recorded on the front. All documents are scanned into JDIS.
- All other court actions are recorded in the JCMS system and on the warrant or summons and scanned into JDIS such as:

  - Dismissal on "accord and satisfaction" conditioned on payment of costs. Va. Code § 19.2-151.
  - Deferred disposition in drug cases, domestic violence cases and certain property offenses. Va. Code §§ 18.2-251, 18.2-57.3 and 19.2-303.2.
  - Deferred disposition under Va. Code § 19.2-303.6.
  - Guilty plea to reduced charges.
  - Continuance.
  - Waiver of court appearance, guilty plea, and prepayment of fine/costs.

- The CCRE is transmitted to the Virginia State Police electronically after the ten-day appeal period expires. *See* also "CCRE Procedures" in this chapter.

Failure to Appear and Bond Forfeiture

When a defendant fails to appear in court on a traffic misdemeanor or criminal case, the court may conduct a trial in the defendant's absence or continue the case and issue a district court form DC-360, SHOW CAUSE SUMMONS or district court form DC-361, CAPIAS if the defendant is to be charged with contempt; or a district court form DC-312, WARRANT OF ARREST - FELONY, or district court form DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE) if the defendant is to be charged with failure to appear. A magistrate who is to set the terms of bail of a person arrested and brought before them pursuant to Va. Code § 19.2-234 shall do so in accordance with the order of the court that issued the capias if such an order is affixed to or made a part of the capias by the court, unless circumstances exist that require them to set more restrictive terms. Va. Code § 19.2-130.1. The court should mark the capias as such if the judge sets the bond.

A trial in the defendant's absence may be conducted for misdemeanors when no jail sentence is possible or when the court notes beforehand that no jail sentence will be imposed upon conviction. Following the entry of a judgment in a trial in absentia, the clerk's office will:

- Record the disposition in JCMS
- Ensure that the judge has recorded the disposition on the summons or warrant
- Issue a district court form DC-482, ORDER AND NOTICE OF BOND FORFEITURE for the surety or sureties.
- Apply cash posted by the defendant to secure bail as payment of fine and costs.
- Prepare a district court form DC-225, NOTICE TO PAY as per the instructions in the DISTRICT COURT FORMS MANUAL and send it to the defendant, if the defendant was tried in their absence and convicted.

A case will be continued when the defendant fails to appear, if a jail sentence is possible, and the judge does not wish to restrict the maximum sentence to a fine, should the defendant be found guilty. The judge may order issuance of a district court form DC-360, SHOW CAUSE SUMMONS, or district court form DC-361, CAPIAS if the defendant is to be charged with contempt; or a district court form DC-312, WARRANT OF ARREST - FELONY, or district court form DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE) if the defendant is to be charged with failure to appear.

If the *defendant* is returned to custody prior to commencement of bond forfeiture proceedings, the surety is discharged from liability on the bond and is entitled to a return of their security if the bail bond was secured.

However, if the defendant posted a cash bond and failed to appear and

- was tried in their absence and is convicted, the cash bond is applied first to any fine or cost imposed, with the balance forfeited without further notice. If a rehearing is granted, the court, for good cause shown, may remit part or all of such bond not applied ultimately to fine and costs and order a refund by the State Treasurer or local treasurer/Director of Finance.
- was not tried in their absence, the cash bond shall be forfeited promptly without further notice. If the defendant appears in court within sixty days of forfeiture, the judge may remit all or part of the bond and order a refund by the State Treasurer or local treasurer/Director of Finance. This provision does not apply to a cash bond posted by a third-party surety.

Note: Bond forfeitures are civil in nature – *See* "Miscellaneous" chapter for detailed procedures on bond forfeitures.

Trial Provisions

Both the prosecuting attorney and the defendant's attorney (or, if unrepresented, the defendant) may make opening statements. A *nolle prosequi* is a request by the

prosecution not to try the case; it is entered, in the judge's discretion, only for good cause shown. Va. Code § 19.2-265.3.

"Exclusion of witnesses" pursuant to Va. Code § 19.2-265.1 is the process by which all witnesses in a case, including but not limited to police officers and other investigators, must leave the courtroom and may return only while testifying. The judge may exclude witnesses on their own motion and must do so if requested by the prosecuting attorney or the defendant's attorney (or, if unrepresented, by the defendant).

This provision does not apply to:

- a defendant.
- one officer or agent of any defendant that is a corporation or association. Va. Code § 19.2-265.1.
- the complaining witness, if there is no prosecuting attorney and if necessary for the orderly presentation of prosecution witness.
- the victim, unless the court determines that the presence of the victim would substantially impair the conduct of a fair trial.
- any minor victim and an adult chosen by the minor in addition to or in lieu of the minor's parent or guardian. Va. Code § 19.2-265.1.

The judge, pursuant to Va. Code § 19.2-269.2, on motion of the defendant or the Commonwealth's Attorney, may prohibit testimony as to the current residential or business address of a victim or witness, if it is not material in the case. *See* also Va. Code § 19.2-11.2.

If the charge is dismissed because the court finds that the person arrested or charged is not the person named in the warrant or summons, the court shall, upon motion of the person improperly arrested or charged, enter a district court form DC-365, EXPUNGEMENT ORDER requiring expungement of the police and court record relating to the charge and stating that dismissal and expungement are conducted pursuant to Va. Code § 19.2-392.2. The motion is treated as a subsequent action of the underlying case, and the motion and EXPUNGEMENT ORDER should be attached to the original case. *See* "Records Retention, Destruction and Expungements - Expungement of Police and Court Records –Adults".

Pre-Conviction Probation for "First-Time Offenders"

In cases involving certain offenses, a person who is deemed by statute to be a "first-time" offender may be eligible for probation and, if probation is successfully completed, dismissal of the case. The situations involve a person who pleads guilty or not guilty to:

- possession of a controlled substance (Va. Code § 18.2-250) or possession of marijuana (Va. Code § 18.2-250.1) *and* who has never been convicted of drug offenses and who has not had a proceeding dismissed against him under the first offender statute, Va. Code § 18.2-251, *or*
- a misdemeanor crime against property under articles 5, 6, 7 and 8 of chapter 5 of Title 18.2 (Va. Code § 18.2-119 *et seq.*) *and* who has not previously been convicted of a felony (*See* Va. Code § 19.2-303.2) *or*
- assault and battery against a family or household member under Va. Code § 18.2-57.2 *and* who (i) has not been previously convicted of any offense of assault or bodily wounding under Article 4 of Chapter 4 of Title 18.2 (Va. Code §§ 18.2-51 through 18.2-57.3) or under any statute of the United States or of any state or any ordinance relating to assault and battery against a family or household member or (ii) has not had a proceeding against him for such offense dismissed under the first offender statute, Va. Code § 18.2-57.3, (No charges dismissed pursuant to this section shall be eligible for expungement under Va. Code § 19.2-152.8) *or*
- underage possession or purchase of alcohol. Va. Code § 4.1-305 (F). This provision is directly applicable to adults under 21. For a juvenile who has violated Va. Code § 4.1-305, see Va. Code § 16.1-278.9.

In each of these situations, the judge must first find facts sufficient to justify a finding of guilt (to avoid retrial of the case if the defendant fails to successfully complete probation). If the judge chooses this option, then the consenting defendant is placed on probation without the entry of a judgment of guilt. Costs are assessed when the defendant is placed on probation.

Some specific statutory provisions apply to each type of probation.

- In a domestic violence case, as a condition of probation, the court may order that the defendant be evaluated and enter an appropriate treatment and/or education program, if available. Va. Code § 18.2-57.3.
- For probation under Va. Code § 18.2-251, the driver's license of the defendant is suspended for six months, as required by Va. Code § 18.2-259.1. Where there are compelling circumstances warranting an exception, the court may authorize the issuance of a restricted license containing the statutory options. Va. Code § 18.2-259.1. Form district court form DC-359, FORFEITURE OF DRIVER'S LICENSE AND RESTRICTED DRIVER'S LICENSE ORDER - DRUG VIOLATION is used for reporting to the Department of Motor Vehicles the license suspension and, if so ordered, the issuance of a restricted license. Va. Code § 18.2-259.1. The court must order the accused to undergo a substance abuse assessment and enter a treatment and/or education program. The Department of Motor Vehicles requires that the program to which

the defendant was referred endorse the back of the order before the Department will issue a restricted license to the defendant.

- In cases involving possession or purchase of alcohol by an adult under twenty-one, the court must require the defendant to enter a treatment or education program, or both, which the court determines best suits the needs of the defendant. The defendant may be granted a restricted license.

Accord and Satisfaction

When a defendant is charged with assault and battery, or another misdemeanor not specifically excluded by statute, for which there is a civil remedy, the judge has the discretion to dismiss the case conditioned upon the defendant's payment of costs when the injured party appears in court and acknowledges in writing that the injured party has received satisfaction for the injury. *See* Va. Code § 19.2-151. The charges cannot be dismissed upon a satisfaction and discharge if the offenses were committed by or upon a law enforcement officer, riotously in violation of Va. Code §§ 18.2-404, 18.2-405, 18.2-406,and 18.2-407, against a family or household member in violation of Va. Code § 18.2-57.2 or with the intent to commit a felony.

Sentencing

The maximum punishment in district court for misdemeanors is confinement in jail for twelve months and/or a $2,500 fine. In addition, the sentencing judge has certain statutory sentencing alternatives including:

Suspension of imposition of sentence or fine or suspension of all or part of sentence or fine, including requirement of probation after serving a portion of the sentence, paying at least partial restitution, or performance of community service to discharge the fine and/or sentence. (Va. Code §§ 18.2-163, 18.2-187.1; 19.2-303 and 19.2-354) The court assessing the fine or costs against a person shall inform such person of the availability of earning credit toward discharge of the fine or costs through the performance of community service work under this program and provide such person with written notice of terms and conditions of this program including before or after imprisonment or in accordance with the provisions of §§ 9.2-316.4, 53.1-59, 53.1-60, 53.1-128, 53.1-129, or 53.1-131 during imprisonment, if applicable.

A defendant convicted of an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3 shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, "victim" means a person who is depicted in a still or video graphic image involved in an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.

See also restitution for investigative costs under Va. Code §§ 18.2-163 and 18.2-187.1.

- Probation. Va. Code §§ 19.2-303, 19.2-305.
- Placement in a local community-based probation program. Va. Code § 19.2-303.3.
- Placement on probation or suspension of imposition or execution of "sentence" (incarceration) conditioned upon payment of fines and/or costs either on a date certain or on an installment plan. Va. Code § 19.2-356.
- Commitment to the Department of Corrections (only for certain offenses or contagious diseases). Va. Code §§ 53.1-21, 53.1-22.
- Jails or jail farms. Va. Code § 53.1-105.
- Local government work force. Va. Code §§ 53.1-128 and 53.1-129. If the defendant was permitted to participate in the jail work force prior to trial, the defendant gets credit towards completing their sentence for such work. A specific order authorizing participation in a local government work force must be entered for each individual defendant. An entry for this order has been placed on the reverse of the warrants.
- Work/Education/Rehabilitation treatment release. Va. Code § 53.1-131. This option is available for any person who has been convicted of a misdemeanor, traffic offense or a felony that is not an act of violence and (i) the active jail sentence is 45 days or less or (ii) is being held pending completion of a pre-sentence report pursuant to Va. Code § 19.2-299. If placed on work release under Va. Code § 53.1-131 and the defendant is to serve time on weekends or on nonconsecutive days to permit the defendant to retain gainful employment, the judge shall require the defendant to pay the clerk an amount to defray their jail costs which shall not exceed the amount specified by the Compensation Board. Va. Code § 53.1-131.1. If the defendant fails to report at the times specified by the judge, the sentence imposed pursuant to Va. Code § 53.1-131.1 shall be revoked and a "straight" jail sentence imposed.
- Home electronic incarceration program. Va. Code § 53.1-131.2. The court may assign the defendant to such a program as a condition of probation.
- Monitoring by a GPS (Global Positioning System) tracking device, or other similar device. The defendant may be ordered by the court to pay the cost of the GPS tracking device or other similar device.
- Referral to community-based probation program. *See* Va. Code § 9.1-174 *et seq.*
- Commitment for treatment of drug or alcohol abuse. Va. Code § 18.2-254.
- Posting of a DC-364, RECOGNIZANCE AND BOND TO KEEP THE PEACE if the judge finds good cause for the complaint that the defendant breached the peace.
- Order to defendant not to operate a motorboat or watercraft after conviction for boating while intoxicated, Va. Code § 29.1-738.4, and to participate in VASAP, Va. Code § 29.1-738.5.

- Order the defendant's license to drive a motor vehicle suspended for the unlawful purchase or possession of alcohol beverages. Va. Code § 4.1-305.
- Active duty military-If any active duty member of the United States Armed Forces is found guilty of a violation of Va. Codes §§ 18.2-57.2 or 18.2-57.3, the court shall report the conviction to family advocacy representatives of the United States Armed Forces. Va. Code § 18.2-57.4. (*See* Quick Reference Materials for *Military Contact List*)
- Any person who is convicted of a misdemeanor and who is sentenced to incarceration in a local correctional facility, or who is granted suspension of sentence and probation or who is participating in a community corrections program or who is participating in a home/electronic incarceration programs is required to pay a fee of $50.00 towards the cost of confinement, supervision or participation. This fee is included in the misdemeanor fixed fees.

DNA Analysis

Every person convicted of §§ 16.1-253.2 (violation of a protective order), 18.2-57 (assault and battery), 18.2-60.3 (stalking), 18.2-60.4 (violation of a stalking protective order), 18.2-67.4 (sexual battery), 18.2-67.4:1 (infected sexual battery), 18.2-67.4:2 (sexual assault of child 13-14 years of age), 18.2-67.5 (attempted sexual battery), 18.2-102 (unauthorized use of animal, aircraft, vehicle, or boat valued at less than $ 500), 18.2-119 (trespass), 18.2-121 (entering property of another for purpose of damaging it), 18.2-130 (peep into dwelling), 18.2-370.6 (penetration of mouth of child with lascivious intent under 13 years of age), 18.2-387 (indecent exposure), 18.2-387.1 (obscene sexual display), and 18.2-460(E)(resisting arrest) or of similar ordinance of any locality shall have a sample of their blood, saliva or tissue taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. If a sample has been previously taken from the person no additional sample shall be taken. A fee of $53 shall be charged for the withdrawal of this sample. The fee shall be taxed as part of the costs of the criminal case resulting in the conviction and the breakdown of the fee is $15 shall be paid into the general fund of the locality where the sample was taken and $38 of the fee shall be paid into the general fund of the state treasury. This fee shall only be taxed one time regardless of the number of samples taken. The assessment provided for herein shall be in addition to any other fees prescribed by law. The analysis shall be performed by the Department of Forensic Science or other entity designated by the Department. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the Department in a DNA data bank and shall be made available only as provided in § 19.2-310.5. Va. Code § 19.2-310.2.

Notes:

- DNA collection does not apply to those being convicted of § 18.2-57.2 (assault and battery on a family member).
- The court should still collect DNA in the event the defendant notes the appeal of conviction.

Upon dismissal of any violent felony, the clerk is required to submit information to the Department of Forensic Science. According to 6VAC40-40-110, "timely submission of the final disposition of a qualifying offense to CCRE by the clerk shall satisfy the requirement that the clerk notifies the department of final disposition of the criminal proceedings under § 19.2-310.2:1 of the Code of Virginia". 6VAC40-40-110.

The circuit court form CC-1390, ORDER FOR DNA OR SEXUALLY TRANSMITTED INFECTION TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE CC-1390, ORDER FOR DNA OR SEXUALLY TRANSMITTED INFECTION TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE must be entered for ordering a buccal swab to collect the DNA. Enter a **Y** in the **DNA** field on the H/D Tab. (Mandatory). When the DNA Sample Ordered field is equal to 'Y', the text "**(DNA)**" will display beneath the Case Number in the Name Search and the Hearing/Case Number Search. DNA is only collected once.

If the CC-1390, ORDER FOR DNA OR SEXUALLY TRANSMITTED INFECTION TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE CC-1390, ORDER FOR DNA OR SEXUALLY TRANSMITTED INFECTION TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE is returned to the court indicating the DNA sample has already been taken, refund the fee if the defendant has paid or remove the fee from the individual account if the fee has not been paid.

Restitution

When a defendant is convicted of committing certain crimes that result in property damage or loss, they must enter into a restitution plan if their sentence is suspended or if placed on probation. The plan shall include the defendant's home address, place of employment and address, social security number and bank information. Va. Code § 19.2-305.1. Restitution also may be used in other instances as a part of the sentence. *See* Va. Code §§ 18.2-163, 18.2-187.1, 19.2-303.2, 19.2-305.1 and 19.2-305.2. Where property damage, loss or destruction occurred, the court may require the return of the property; if return is impractical or impossible, then payment equal to the greater of the value of the property at the time of the offense or of sentencing may be ordered.

Pursuant to § 19.2-305.1, at the time of sentencing, the court shall enter the amount of restitution to be repaid by the defendant, the date by which all restitution is to be paid, and the terms and conditions of such repayment on a form prescribed by the Office of the Executive Secretary of the Supreme Court of Virginia, namely the Order for Restitution,

DC-317. If the attorney for the Commonwealth participated in the prosecution of the defendant, the attorney for the Commonwealth or designee shall complete, to the extent possible, all portions of the form excluding the amount of restitution to be repaid by the defendant and the terms and conditions of such repayment. If the attorney for the Commonwealth did not participate in the prosecution of the defendant, the court or the clerk shall complete the form. A copy of the form, excluding contact information for the victim, shall be provided to the defendant at sentencing. A copy of the form shall be provided to the attorney for the Commonwealth and to the victim, their agent, or their estate upon request and free of charge.

In any case in which the court orders the defendant to pay restitution and places the defendant on probation that includes a period of active supervision, the probation agency supervising the defendant shall notify the court and the attorney for the Commonwealth of the amount of any restitution that remains unsatisfied and the last known address for the defendant (i) 60 days prior to the defendant's release from supervision pursuant to the terms of the sentencing order or (ii) if the agency requests that the defendant be released from supervision, at the time the agency submits its request to the court. Such notice shall be in writing and the attorney for the Commonwealth shall, if practicable, provide a copy of the notice to the victim. If any amount of restitution remains unsatisfied, the court shall conduct a hearing prior to the defendant's release from supervision after providing notice of the hearing to the defendant and the attorney for the Commonwealth. If the court finds that the defendant is not in compliance with the restitution order, the court may (a) release the defendant from supervision, (b) modify the period or terms of supervision pursuant to § 19.2-304, (c) revoke some or all of the suspended sentence or probation pursuant to § 19.2-306, or (d) proceed in accordance with subsection E of § 19.2-358. The court shall also docket the restitution order as a civil judgment pursuant to subsection B of § 19.2-305.2 unless such order has previously been docketed. The restitution shall be docketed in the name of the Commonwealth, or a locality if applicable, on behalf of the victim, unless the victim requests in writing that the order be docketed in the name of the victim. If restitution is docketed in the name of the victim, the court does not collect payments on restitution and the restitution amount is removed from the individual account in the Financial Accounting System (FAS).

In any case in which the court orders the defendant to pay restitution and places the defendant on probation that does not include a period of active supervision, the court shall include in the order a date, not to exceed two years from the date of the entry of the order or, if the court has sentenced the defendant to an active term of incarceration, from the date of the defendant's release from incarceration, on which the defendant's compliance with the restitution order shall be reviewed and the court shall schedule a hearing for such date. The court may, on its own motion, cancel the hearing if the amount of restitution has been satisfied. If at the hearing the court finds that the defendant is not in compliance with the restitution order, the court may (i) modify the period or terms of probation pursuant to § 19.2-304, (ii) revoke some or all of the suspended sentence or

probation pursuant to § 19.2-306, or (iii) proceed in accordance with the provisions of subsection E of § 19.2-358. The court shall also docket the restitution order as a civil judgment pursuant to subsection B of § 19.2-305.2 unless such order has previously been docketed.

If any amount of restitution remains unsatisfied at the time of a hearing conducted, the court shall continue to schedule hearings to review the defendant's compliance with the restitution order until the amount of restitution has been satisfied and provide notice of such hearings to the defendant. The court may, on its own motion, cancel any such hearing if the amount of restitution has been satisfied or if the defendant is in compliance with the restitution order. If at any hearing conducted pursuant to this subdivision the court finds that the defendant is not in compliance with the restitution order, the court may (i) modify the period or terms of probation pursuant to § 19.2-304, (ii) revoke some or all of the suspended sentence or probation pursuant to § 19.2-306, or (iii) proceed in accordance with the provisions of subsection E of § 19.2-358. The court shall follow the procedures set forth in this subdivision for the purpose of reviewing compliance with a restitution order by a defendant (a) until the amount of restitution has been satisfied or (b) if any amount of restitution remains unsatisfied, for the longer of 10 years from the date of the hearing held or the period of probation ordered by the court.

If the court determines at any hearing conducted pursuant to this subsection that the defendant is unable to pay restitution and will remain unable to pay restitution for the duration of the review period, the court may discontinue any further hearings to review a defendant's compliance with the restitution order.

If the court determines that a defendant would be incarcerated on the date of any hearing scheduled pursuant to this subsection, the court may remove the case from the docket, reschedule such hearing to a date after the defendant's release from incarceration, and provide notice of the hearing to the defendant and the attorney for the Commonwealth. If the defendant who is on probation that includes a period of active supervision is incarcerated, the probation agency supervising the defendant shall notify the court when the defendant has been released from incarceration.

A defendant convicted of an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3 shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, “victim” means a person who is depicted in a still or video graphic image involved in an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.

A show cause for failing to pay restitution may be issued within 3years after the expiration period of probation or suspension of sentence.

The victim may enforce the restitution order in the same manner as a civil judgment. The court, when ordering restitution pursuant to Va. Code §§ 19.2-305 or 19.2-305.1, may provide that interest on the amount so ordered shall accrue at the rate specified in Va. Code § 6.1-330.54. Va. Code § 19.2-305.4. If the order requires interest, it shall accrue from the date of loss or damage unless otherwise specified in the order. The DISTRICT COURT FINANCIAL ACCOUNTING SYSTEM (FAS) USER'S GUIDE describes the clerical procedures for handling funds collected through restitution. If the defendant is ordered to pay restitution to a crime victim and that victim cannot be located or identified, the clerk shall deposit the restitution collected in the Criminal Injuries Compensation Fund.

Assault and Battery – First Offender Status and Motion to Withdraw Consent to Deferral of Proceedings Pursuant to VA. Code § 18.2-57.3(B)

A person may file a motion to withdraw his consent to the deferral and waiver of his right to appeal within ten days of the entry of the order deferring proceedings utilizing DC-634, MOTION TO WITHDRAW CONSENT TO DEFERRAL OF PROCEEDINGS PURSUANT TO VA. CODE § 18.2-57.3(B). The court shall schedule a hearing within 30days of receipt of the motion and shall provide reasonable notice to the attorney for the Commonwealth and to the person and his attorney, if any. If the person appears at the hearing and requests to withdraw his consent, the court shall grant such request, enter a final order adjudicating guilt and sentence the person accordingly. If the person does not appear at the hearing, the court shall deny his request to withdraw his consent.

Any person placed on probation pursuant to this section who is subsequently adjudicated guilty upon a violation of a term of condition of his probation shall have no right to appeal on such adjudication.

The Motion to Withdraw Consent to Deferral of Proceedings, DC-634, is not indexed in JCMS. Enter a new hearing line on the underlying charge with the hearing type of 'MO for Motion'.

Costs

Costs are automatically imposed by statute upon conviction in any case and also on dismissal of a case under Va. Code § 16.1-69.48:1 (traffic school), Va. Code § 19.2-151 (accord and satisfaction), Va. Code § 18.2-57.3 (first time assault and battery against a family or household member), Va. Code § 18.2-251 (first time drug offense) and Va. Code § 19.2-303.2 (first time property offense) and pursuant to Va. Code § 19.2-303.4 deferred dispositions under Va. Code §§ 18.2-57.3, 18.2-61, 18.2-67.1, 18.2-67.2, 18.2-251 ,19.2-303.2 and 19.2-303.6).
When the defendant is represented by an attorney appointed by the court to represent the defendant or by the Public Defender's office, the same procedures apply other than

the Public Defender's office is not entitled to fees, only to payment of expenses. The court must:

- determine the appropriate fee, including submission of time sheets, and expenses incurred in defending the defendant;
- collect the fee and expenses from the appropriate locality for local offenses;
- tax the fee and expenses as costs in the case; and
- collect the fee and expenses from the defendant and, for local offenses, reimburse the locality for fees and expenses recovered on local cases.

A person who is sentenced to incarceration in a local correctional facility, or who is granted suspension of sentence and probation, or who is participating in a community-based corrections program or who is participating in a home/electronic incarceration program must pay a supervision fee. This fee is included in the misdemeanor fixed fee.

If an appeal is withdrawn after ten days from the date of conviction in district court, the judgment is affirmed in circuit court as a judgment of the circuit court and the circuit court clerk collects all fines and costs imposed in the case. If an appeal is withdrawn within ten days from the date of conviction in district court, the sentence is reinstated in district court and the district court clerk collects all fines and costs imposed on the case.

See the DISTRICT COURT FINANCIAL ACCOUNTING SYSTEM (FAS) USER'S GUIDE for type and assessment of costs. The imposition of costs may not be suspended or the amount reduced, since costs are to reimburse the public treasury for the expenses of prosecution and are not a part of the penalty.

Localities may adopt an ordinance authorizing a processing fee not to exceed $25 to be charged as part of court costs for any individual admitted to jail following conviction. The fee is collected only once for an admission to jail, even if admission is for multiple convictions. Va. Code § 15.2-1613.1. This fee is sent to the locality.

Virginia Code § 16.1-69.48:1.02, Additional fee assessed for conviction requiring computer analysis. In addition to the fees provided for by §§ 16.1-69.48:1, upon a finding of guilty of any charge or charges in which any computer forensic analysis revealed evidence used at trial of a defendant, the defendant may be assessed costs in an amount equal to the actual cost of the computer forensic analysis not to exceed $100 for each computer analyzed by any state or local law-enforcement agency. Upon motion and submission to the court of an affidavit by the law-enforcement agency setting forth the number of computers analyzed, and the total amount of costs requested, the court shall determine the appropriate amount to be assessed and order such amount paid to the law-enforcement agency. District court form DC-362, MOTION AND AFFIDAVIT REQUESTING COSTS OR COMPUTER FORENSIC ANALYSIS may be used for this purpose. The court may receipt these funds as

restitution (revenue account code 520) and subsequently disburse funds so collected to the requesting law-enforcement agency. At the court's discretion or as otherwise ordered by the court, the defendant may make payment directly to the law-enforcement agency.

Cash Bond Used to Pay Fines and Costs

Except when the defendant is tried in their absence and convicted, cash bonds cannot be applied to fines and costs, without the consent of the person who posted the cash bond. Va. Code §§ 19.2-143 and 19.2-121. The district court form DC-330, RECOGNIZANCE contains a preprinted consent if the defendant posts a cash bond. If a third-party surety consents to the cash bond being applied to fines and costs, such consent should be written and should be signed by such surety. *See* "Miscellaneous – Bond Forfeiture" in this manual for step-by-step procedures.

Not Guilty by Reason of Insanity

A defendant who is found not guilty of a misdemeanor by reason of insanity on or after July 1, 2002, shall remain in the custody of the Department of Behavioral Health and Developmental Services for a period not to exceed one year from the date of acquittal. During that year, if it is determined that the person meets the criteria for conditional release or release without conditions (Va. Code § 19.2-182.7), emergency custody (Va. Code § 37.2-808), temporary detention (Va. Code § 37.2-809), or involuntary commitment (Va. Code §§ 37.2-814 , 37.2-815, 37.2-816, 37.2-817, 37.2-818, 37.2-819 and 37.2-820), the Department of Behavioral Health and Developmental Services shall petition the court which committed the person. The Department's duty to file a petition during that year shall not preclude the ability of any other person meeting the requirements of Va. Code § 37.2-808 to file such a petition. Va. Code § 19.2-182.5.

Insanity after Conviction (Adjudication)

Any inmate of a local correctional facility who is not subject to provisions of Va. Code § 19.2-169.2 may be hospitalized for psychiatric treatment at a hospital designated by the Commissioner of Behavioral Health and Developmental Services as appropriate for treatment of person under criminal charge.

The court with jurisdiction over the inmate's case, if it is still pending, on the petition of the person having custody over an inmate or on its own motion, holds a hearing at which at the inmate is represented by counsel and find by clear and convincing evidence that (i) the inmate has a mental illness, (ii) there exists a substantial likelihood that, as a result of a mental illness the inmate will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information if any and (iii) the inmate requires treatment in a hospital rather than the local correctional facility. The court would order such treatment on the DC-4003, ORDER FOR TREATMENT OF INMATE. The clerk shall complete DC-343, TRACKING

DOCUMENT FOR SENDING OR RECEIVING EVALUATION OR TREATMENT ORDER UPON ENTRY and provide a copy of the order to the evaluator or to the director of the community services board by close of business on the next business day after the order was entered The evaluator or director shall acknowledge receipt of the order no later than close of business on the next business day after the order is received using the DC-343, TRACKING DOCUMENT FOR SENDING OR RECEIVING EVALUATION OR TREATMENT ORDER UPON ENTRY.

Prior to making this determination, the court shall consider the examination conducted in accordance with Va. Code § 37.2-815 and the preadmission screening report prepared in accordance with Va. Code § 37.2-816 by an employee or designee of the local community services board or behavioral health authority who is not providing treatment to the inmate.

If an inmate is hospitalized pursuant to §19.2-169.6 and the criminal case is still pending, the court having jurisdiction over the inmate's case may order that the admitting hospital evaluate the inmate's competency to stand trial and mental state at the time of the offense pursuant to §§ 19.2-169.1 and 19.2-169.5.

It may also be appropriate that upon petition by the person having custody over an inmate, a magistrate finds probable cause to believe that (i) the inmate has a mental illness, (ii) there exists a substantial likelihood that, as a result of a mental illness the inmate will, in the near future, cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information if any and (iii) the inmate requires treatment in a hospital rather than the local correctional facility, and the magistrate issues a temporary detention order for the inmate.

Prior to the filing of the petition, the person having custody shall arrange for an evaluation of the inmate conducted in-person or by means of two-way electronic video and audio communication as authorized by § 37.2-804.1 by and employee or designee of the local community services board or behavioral health authority. The person having custody over the inmate shall notify the court having jurisdiction over the inmate's case, if it is still pending, and the inmate's attorney prior to the detention pursuant to the temporary detention orders or as soon thereafter as is possible.

Upon detention, a hearing shall be held; either (a) before the court having jurisdiction over the inmate's case or (b) before the district court judge or a special justice in accordance with the provisions of §§ 37.2-815 through 37.2-821, in which the inmate shall be represented by counsel as specified in § 37.1-814. The hearing shall be held within 72-hours of the execution of the temporary detention order. If the 72-hour period terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the inmate may be detained until the close of business the next day that is not a Saturday, Sunday, legal holiday or day on which the court is lawfully closed.

In no event shall an inmate have the right to make application for involuntary admission or be subject to an order for mandatory outpatient treatment.

An inmate may not be hospitalized for more than 90 days under §19.2-169.2 subsection A unless the court which has criminal jurisdiction over them or a district court judge or a special justice, holds a hearing and orders the inmate's continued hospitalization in accordance with § 19.2-169.2 (A)2. If the inmate's hospitalization is continued under this subsection by a court other than the court which has jurisdiction over the inmate's criminal case, the facility at which the inmate is hospitalized shall notify the court with jurisdiction over the criminal case and the inmate's attorney in the criminal case, if the case is still pending.

Hospitalization may be extended in accordance with § 19.2-169.2(D) for periods of 60 days for inmates awaiting trial, but in no event may such hospitalization be continued beyond trial, nor shall such hospitalization act to delay trial, as long as the inmate remains competent to stand trial.

Hospitalization may be extended for periods of 180 days for an inmate who has been convicted and not yet sentenced, or for an inmate who has been convicted of a crime and is in the custody of a local correctional facility after sentencing, but in no event may such hospitalization be continued beyond the date upon which their sentence would have expired had they received the maximum sentence for the crime charged. Any inmate who has not completed service of their sentence upon discharge from the hospital shall serve the remainder of their sentence.

For any inmate who has been convicted and not yet sentenced, or who has been convicted of a crime and is in custody of a local correctional facility after sentencing, the time the inmate is confined in the hospital for psychiatric treatment shall be deducted from any term for which they may be sentenced to any penal institution, reformatory or elsewhere.

When the clerk's office receives paperwork in conjunction with an inmate's committal, the clerk shall enter the temporary detention order and or the order for treatment in the involuntary civil commitment division of case management. The clerk's office will utilize the case type and hearing results as established for the entry of mental commitment hearings.

Note: A different procedure applies to prisoners in state correctional facilities (such as a prison or camp operated by the Virginia Department of Corrections) under Va. Code §§ 53.1-40.2, 53.1-40.3, 53.1-40.4, 53.1-40.5, 53.1-40.6, 53.1-40.7 and 53.1-40.8. A temporary detention order is not specifically required by statute; however, a petition is filed with the court for a commitment proceeding. The case shall be scheduled as soon as possible in any available courtroom in the prisoner's locality or in a facility provided by the

Virginia Department of Corrections and approved by the judge. These statutes provide in detail the pre-hearing notice requirements, the procedure required for examination of the prisoner, the findings required for commitment, and other similar details.

Emergency Custody Order Issued by Judge

The judge may issue a DC-492 EMERGENCY CUSTODY ORDER pursuant to § **19.2-271.6** in any criminal case when evidence of the defendant's mental condition at the time of the alleged offense is introduced.

If a defendant intends to introduce evidence pursuant to this section, they, or their counsel, shall give notice in writing to the attorney for the Commonwealth at least 21 days prior to trial in the juvenile and domestic relations district court, or at least 14 days if the trial date is set within 21 days of last court appearance, of their intention to present such evidence. In the event that such notice is not given, and the person proffers such evidence at trial as a defense, then the court may in its discretion either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § **19.2-243**.

Nothing in this section shall be construed as limiting the authority of the court from entering an emergency custody order pursuant to subsection A of § **37.2-808**.

The clerk's office indexes the Emergency Custody Order in the adult division as a subsequent action to the criminal case using the EC case type and code section § **19.2-271.6**. These cases are confidential and will not display on public access terminals or the Juvenile Secured Viewing System (JSVS).

Central Criminal Records Exchange (CCRE) Procedures

All duly constituted police authorities having the power of arrest shall take fingerprints and photographs of any adult who is taken into custody and charged with an act for which is required to be reported to the Central Criminal Records Exchange (CCRE), pursuant to subsection A of Va. Code § 19.2-390. The preparation of fingerprint forms is done on all felonies, treason, Title 54.1 violations punishable as a Class 1 or Class 2 misdemeanor, and any misdemeanors punishable by confinement in jail under Title 18.2, Title 19.2, or similar local ordinances. Exceptions are family desertion or nonsupport (Va. Code § 20-61).

This preparation is the responsibility of the chief law enforcement officer or designee, who may be the arresting officer. It is the court's responsibility to inform the appropriate law enforcement officer, upon conviction of applicable charges, that fingerprinting and photographs are required.

Fingerprint Form received without charging documents.

The following procedures are recommended when a fingerprint form is received without charging documents.

The clerk shall destroy the fingerprint form, all copies of the fingerprints, and all photographs sixty (60) days after fingerprints were taken if a warrant is not filed against the adult. Va. Code § 19.2-390. To prevent destruction of any fingerprint forms and/or photographs that may have been sent in error to the court, the clerk may choose to return the form and/or photographs to the issuing agency for corrected distribution.

Fingerprint Form is filed with the charging documents.

The following procedures are recommended when the fingerprint form is received at the time of the charging documents.

STEP	DESCRIPTION
1	Enter fingerprint form number in JCMS in **DOC#** field upon data entry of charge. For manual fingerprint forms, court should receive entire State Police form SP180.
2	**Upon adjudication**, of an adult whose case is being transferred to another court for disposition, the clerk forwards the fingerprint form with the case papers. Clerk enters **TR** for transfers to another court or **GJ** for cases where the defendant's case is to be tried in Circuit Court.
3	**Upon a finding of guilt and disposition**, clerk completes disposition. No further action is required. Transmission of information to the State Police will be electronic. Cases with Final Disposition **OT**, **TR**, **FF** or **GJ** will not transmit to State Police. If the defendant is released by summons and a disposition other than a finding of guilt is entered no fingerprints are required. The court should update the defendant status as "S". **Exception**: If the defendant is released by summons, charged with domestic assault and battery under § 18.2-57.2, and the case is deferred under first offender status and subsequently dismissed, fingerprints are required. For finalized cases transferred as part of disposition to another court, clerk shall forward fingerprint form with transferred case papers.

4	For an adult case that has a "fugitive" status, the clerk enters a **FF** disposition code, and retains the fingerprint form with the case papers. If defendant does not appear on charge, no further action is required.

Fingerprint Form is **not** filed with the charging documents.

The following procedures are recommended when the **fingerprint form is not received with the charging documents**. The clerk will check the "unknown" checkbox until fingerprint form is received.

STEP	DESCRIPTION
1	Upon final disposition or deferral of the charge, it is recommended the clerk issue the circuit court form CC-1390, ORDER FOR DNA OR SEXUALLY TRANSMITTED INFECTION TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE CC-1390, ORDER FOR DNA OR SEXUALLY TRANSMITTED INFECTION TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE to facilitate fingerprinting and photographing of the defendant.
2	Upon receipt of the circuit court form CC-1390, ORDER FOR DNA OR SEXUALLY TRANSMITTED INFECTION TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE CC-1390, ORDER FOR DNA OR SEXUALLY TRANSMITTED INFECTION TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE showing compliance with court order, the CCRE is returned to the court. The clerk should update the **DOC#** in JCMS and file with the case papers. Upon notice of noncompliance with court order, the clerk shall notify the judge for further action required. If upon the order of the Judge, the clerk shall issue a district court form DC-360, SHOW CAUSE SUMMONS against the defendant for non-compliance with a court order under the summary contempt section, Va. Code § 18.2-456.
3	Upon adjudication, for an adult whose case is being transferred to another court for disposition, the clerk enters the appropriate disposition and forwards the fingerprint form with the case papers. Clerk enters **TR** for transfers to another court or **GJ** for cases where the defendant's case is to be tried in Circuit Court.
4	Upon final disposition transmission of information to the State Police will be electronic. Cases with final disposition **OT**, **TR**, **FF** and **GJ** will not transmit to CCRE.

5	For an adult case that has a "fugitive" status, the clerk enters a **FF** disposition code, and retains the fingerprint form with the case papers. If defendant does not appear on charge no further action is required.
6	If fingerprint form is received more than twenty days after disposition, then the clerk shall enter the **DOC#** in JCMS and forward the fingerprint form manually to CCRE by mail or to appropriate court.

Forms

CC-1390	ORDER FOR DNA OR HIV TESTING AND/OR FOR PREPARATION OF REPORTS TO CENTRAL CRIMINAL RECORDS EXCHANGE
SP 180	MANUAL FINGERPRINT FORM
SP 222	AUTOMATED FINGERPRINT FORM
Optional	DC-360, SHOW CAUSE SUMMONS

References

Va. Code § 19.2-390	Reports to be made by local law-enforcement officers when authorized to take prints
Va. Code § 19.2-392.01	Judges may require taking of fingerprints and photographs in certain misdemeanor cases.

Constitutionality of Statutes

Va. Code § 16.1-131.1

In any criminal or traffic case in a court not of record, if the court rules that a statute or local ordinance is unconstitutional, it shall upon motion of the Commonwealth, stay the proceedings and issue a written statement of its findings of law and relevant facts, if any, in support of its ruling, and shall transmit the case, together with all papers, documents and evidence connected therewith, to the circuit court for a determination of constitutionality. If the Circuit court rules that the statute or local ordinance is constitutional; it shall remand the case to the court not of record for trial.

JCMS Update

The Clerk should update the case using F as hearing result and TR as final disposition. In remarks it is suggested to put "appealed pursuant to Va. Code § 16.1-131.1". DO NOT PUT DATE IN THE APPEAL DATE FIELD. Keep copy of the original summons or warrant. Immediately transfer original to Circuit court along with DC-322, ORDER - TRANSFER OF JURISDICTION.

Case Payment Procedures

When a defendant is convicted of a criminal offense, the fines and court costs imposed become due. A defendant may also be required to pay costs when the defendant is placed on probation with further proceedings deferred. Va. Code § 19.2-303.4. When a defendant has been charged with multiple offenses arising out to the same incident, the defendant pays the fixed fee only once. However, if a defendant has been assessed a fixed fee after conviction for one offense and is then convicted of a second offense that has a higher fixed fee, the defendant will be required to pay the difference between the two fees upon conviction for the second offense. Va. Code § 16.1-69.48:1.

The range of fines permitted by statute is summarized by criminal offense in the Appendix on sentence and penalty. This table may also be used to determine the appropriate fine. If the defendant is unable to make payment within ninety days of sentencing, the court shall order the defendant to make deferred, modified deferred or installment payments. Interest must be imposed on unpaid fines beginning on the 181st day after final judgment, except while the defendant is making full and timely payments on a deferred, modified deferred or installment payment plan pursuant to an order of the court or is incarcerated as a result of that case. Interest on any unpaid fines or costs shall accrue at the judgment rate. Va. Code § 19.2-353.5.

The DISTRICT COURT FINANCIAL ACCOUNTING SYSTEM (FAS) USER'S GUIDE and the Appendix on criminal traffic fines and fees describes detailed procedures for assessing and collecting the fines and costs ordered by the court and should be referred to for answers to questions concerning specific procedures.

Payment within 90 Days of Sentencing

Where the defendant is able to pay their fine and costs, the clerk's office will:

- Determine the amount of fine and costs from the order.
- Determine if there are restrictions on personal checks or credit cards established by the court, such as:
  - Personal checks not taken for certain offenses (e.g., passing worthless checks).
  - Only certain credit/debit cards may be accepted.
  - If restriction applies, require cash, a money order, or a cashier's check.
- Collect fines and court costs.
- Prepare and issue a receipt.
- Deposit and account for money collected (*See* District Court Financial Accounting System (FAS) User's Guide for details).

Petition for Payment Agreement for Fines and Costs or Request to Modify Existing Agreement

The court shall offer any defendant who is unable to pay in full the fines and costs within 90 days of sentencing the opportunity to enter into a deferred, modified deferred or installment payment agreement.

The court shall not deny a defendant the opportunity to enter into a payment agreement solely (i) because of the category of offense for which the defendant was convicted or found not innocent, (ii) because of the total amount of all fines and costs, (iii) because the defendant previously defaulted under the terms of a payment agreement, (iv) because the fines and costs have been referred for collections pursuant to § 19.2-349, (v) because the defendant has not established a payment history or (vi) because the defendant is eligible for a restricted driver's license under subsection E of § 46.2-395.

In determining the length of time to pay under a deferred, modified deferred, or installment payment agreement and the amount of the payments, a court shall take into account the defendant's financial resources and obligations, including any fines and costs owed by the defendant in other courts. If the defendant requests to enter into an installment agreement, the court may offer installment payments of $25.00 per month, or a higher amount depending on a defendant's ability to pay, or less than $25.00 per month if the defendant is determined to be indigent by the court pursuant to § 19.2-159. In assessing the defendant's ability to pay, the court shall use a written financial statement, DC-211, PETITION FOR PAYMENT AGREEMENT FOR FINES AND COSTS OR REQUEST TO MODIFY EXISTING AGREEMENT, setting forth the defendant's financial resources and obligations or conduct an oral examination of the defendant to determine their financial resources and obligations. The length of a payment agreement and the amount of the payments shall be reasonable in light of the defendant's financial resources and obligations and shall not be based solely on the amount of fines and costs. The court may offer a payment agreement combining an initial period during which no payment of fines and costs is required followed by a period of installment payments.

A court may not require a down payment as a condition of a defendant entering a deferred, modified deferred, or installment payment agreement.

All fines and costs that a defendant owes for all cases in any single court may be incorporated into one payment agreement, unless otherwise ordered by the court in specific cases. A payment agreement shall include only those outstanding fines and costs for which the limitations period set forth in § 19.2-341 has not run.

At any time during the duration of a payment agreement, the defendant may request a modification of the agreement in writing on a form provided by the Executive Secretary of

the Supreme Court, and the court may grant such modification based on a good faith showing of need.

A court shall consider a request by a defendant who has defaulted on a payment agreement to enter into a subsequent payment agreement. In determining whether to approve the request for a subsequent payment agreement, the court shall consider any change in the defendant's circumstances. A court may require a down payment to enter into a subsequent payment agreement, see § 19.2-354.1 (I) for additional information.

The filing of a DC-211, PETITION FOR PAYMENT AGREEMENT FOR FINES AND COSTS OR REQUEST TO MODIFY EXISTING AGREEMENT does not require a hearing by statute. Do not index the motion. If local policy requires a hearing for initial or additional time-to-pay the following apply:

- If the case is still pending, enter a hearing with the hearing type of 'MO- Motion'.
- If the case is finalized, use an 'AH' hearing type.

If the defendant's sole financial resource is a Social Security benefit or Supplemental Security Income, then they are not required to pay until they have another resource or income. The defendant is required to notify the court in writing if their sole source of income is a Social Security benefit or Supplemental Security Income. Most often, this written notification will be completed by the defendant on the DC-210, ACKNOWLEDGEMENT OF SUSPENSION OR REVOCATION OF DRIVER'S LICENSE or DC-211, PETITION FOR PAYMENT AGREEMENT FOR FINES AND COSTS OR REQUEST TO MODIFY EXISTING AGREEMENT. Upon receiving written notification, the court updates the defendant's individual account in the Financial Accounting System (FAS) with the social security status indicator.

Nondisclosure

The court clerk or agency shall not disclose the SSN or other ID numbers appearing on driver's licenses or information appearing on credit cards, debit cards, bank accounts or other electronic billing and payment systems that was supplied to a court clerk for the purposes of paying fees, fines, taxes, or other charges collected by a court clerk, unless required to complete transaction or by other law as court order.

Case Post-Trial Procedures

The Post-trial Procedures portion of the Criminal Case Process section describes the functions performed after trial and the procedures for processing and completing these activities.

Failure to Comply with Conditional Release

When a defendant willfully fails to comply with a conditional release, usually a suspended sentence entered by the court, the court may order issuance of a district court form DC-

360, SHOW CAUSE SUMMONS or district court form DC-361, CAPIAS to the defendant to show cause why they should not be ordered to serve the original sentence imposed by the court. In such cases, the clerk's office must issue the DC-360, SHOW CAUSE SUMMONS or DC-361, CAPIAS to notify the accused or to compel their appearance before the court within 90 days of receiving notice of the alleged violation or within one year after the expiration of the period of probation or the period of suspension, whichever is sooner. The clerk's office prepares the district court form DC-360, SHOW CAUSE SUMMONS or district court form DC-361, CAPIAS and the sheriff serves the respective process on the defendant for return on the date specified on the summons or capias. Subsequent procedures are the same as for failure to pay fine and costs, except that the objective is not to collect fines but rather to obtain compliance with the court order or to punish the defendant for failing to comply with the order. The court does not assess the fixed fee cost on a hearing or proceeding to revoke probation or a suspended sentence. The defendant is eligible for a deferred, modified deferred or installment payment plan upon imposition of a suspended sentence. If the defendant is unable to make payment within 180 days of sentencing, the court may assess the $10 time-to-pay fee. The defendant shall not be charged interest during any term of incarceration. An indigent defendant facing incarceration in a revocation proceeding is eligible for counsel, and the court appointed counsel is eligible for separate compensation for the revocation proceeding. Va. Code § 19.2-163 "Such amount shall be allowed in any case wherein counsel conducts the defense of a single charge against the indigent through to its conclusion or a charge of violation of probation at any hearing conducted under Va. Code § 19.2-306." Since it is a separate proceeding eligible for separate representation and separate compensation, the fee should be assessed. If the defendant is admitted to jail and a local ordinance is in place, the jail fee should be assessed. Va. Code § 15.2-1613.1

Notices to Jail

There are several situations where the jail must be notified when a defendant is to be incarcerated or is being held in jail pending further action:

- The defendant has been sentenced to jail as a result of a conviction.
- The defendant is incarcerated pending trial or an appeal because they cannot meet bond.
- The defendant is incarcerated because they cannot obtain bail after being taken into custody on a district court form DC-331, Surety's Capias and Bailpiece Release that may be issued by a clerk or magistrate.
- The defendant is not eligible for bail (pending trial or appeal).
- When an adult is taken into custody pursuant to a warrant or detention order alleging a delinquent act committed when they were a juvenile.

- A juvenile is being held pursuant to a district court form DC-529, Detention Order attached to a district court form DC-352, COMMITMENT ORDER where the confinement is authorized under Va. Code § 16.1-249.

The district court form DC-352, COMMITMENT ORDER may be prepared by a clerk, magistrate, or judge when a defendant is to be incarcerated prior to the defendant's first appearance in court. If the defendant is returned to jail prior to trial in this case, use a district court form DC-355, ORDER FOR CONTINUED CUSTODY. If the defendant is incarcerated after conviction in district court, use a district court form DC-356, Disposition Notice. Instructions for preparing these are given in the DISTRICT COURT FORMS MANUAL.

The district court form DC-353, RELEASE ORDER is prepared by a clerk, magistrate, or judge when a defendant is to be released. Situations where this may occur include:

- A defendant, who was initially committed to jail because they were unable to make bail, later secures bail.
- The sentence shown on the district court form DC-356, Disposition Notice is reduced by the judge, and the defendant has served the reduced sentence.
- Defendant, held in jail for willful failure to pay a fine, pays the fine.
- A defendant, held in jail pending trial, is released when found not guilty.

Details of how and when to prepare the district court form district court form DC-353, RELEASE ORDER are given in the DISTRICT COURT FORMS MANUAL.

The district court form DC-354, CUSTODIAL TRANSPORTATION ORDER is used to instruct the sheriff or jailor to transport a defendant in custody to court. A clerk or judge may complete the form. The form instructions in the DISTRICT COURT FORMS MANUAL describe procedures for preparing the district court form DC-354, Custodial Transportation Order. The sheriff or jail superintendent or his designee, upon the discovery of an improper release or discharge of a prisoner from custody, shall report the release to the sentencing court, which shall issue a capias for the arrest of the prisoner, upon good cause shown. Va. Code § 53.1-116.3.

Appeals

A person convicted of a misdemeanor in district court may appeal the conviction to the circuit court within ten days of the conviction date. Va. Code § 16.1-132. The ten-day period begins to run on the day following the conviction. If the tenth day falls on a Saturday, Sunday or legal holiday or any day on which the clerk's office is closed as authorized by statute, the appeal may be noted on the next day that the clerk's office is authorized to be open. *See* Va. Code § 1-210. The defendant or their attorney may note the appeal.

Note: For details and step-by-step instructions for handling appeals, refer to the appendix on "Appeals".

There is an exception to this ten-day limitation. It does not apply to pre-trial appeals of bail decisions pursuant to Va. Code § 19.2-124. If the Commonwealth appeals bail granted by the court over the presumption against bail the hearing before the circuit court must be held in no event more than 5 days, unless the defendant requests a hearing date outside the 5 day limit.

Motion to Rehear

A defendant convicted of a criminal offense may file a district court form DC-368, MOTION TO REOPEN (CRIMINAL/TRAFFIC)/MOTION TO REHEAR (CIVIL)/MOTION FOR NEW TRIAL (CIVIL) in district court, within sixty days of the conviction date. There is no refund of fines or court costs as there is for an appeal. If the motion is granted by the judge, the clerk's office reopens the case removing all final disposition codes in JCMS, inserts the court date, prepares the Notice of Hearing portion of the district court form DC-368, MOTION TO REOPEN (CRIMINAL/TRAFFIC)/MOTION TO REHEAR (CIVIL)/MOTION FOR NEW TRIAL (CIVIL), and attaches the motion to the original case. At the conclusion of the motion to rehear, all notices to agencies (DMV, VSP, etc.) must be processed manually.

Testing for Sexually Transmitted Infections

Pursuant to § **18.2-346.1**. Any person convicted of a violation of § **18.2-346** or **18.2-361**, any violation of Article 1 (§ **18.2-247** et seq.) or 1.1 (§ **18.2-265.1** et seq.) of Chapter 7 shall, as soon as practicable shall be provided the option to be tested for a sexually transmitted infection. The court enters the order for testing using the CC-1390 ORDER FOR DNA OR HIV AND HEPATITIS B, C VIRUSES TESTING AND/OR FOR PREPARATION OF REPORTS TO THE CENTRAL CRIMINAL RECORDS EXCHANGE. The results of such test for a sexually transmitted infection shall be confidential as provided in § **32.1-36.1**.

Records Management

The records of a case must be properly handled after close of court and all orders issued as a result of jurisdiction in the case must be maintained with the case initiation document. To properly prepare the case records, the clerk's office will:

- Prepare orders committing a defendant to jail, where applicable, and forward them to the jail.
- Determine witness expenses and send information on DC-40, LIST OF ALLOWANCES to the Office of the Executive Secretary of the Supreme Court.
- Provide certified copies of sentencing documents without charge to the Department of Corrections within thirty days after request. Va. Code § 19.2-310.01. A clerk or deputy clerk may do so by making an authenticated copy pursuant to Va. Code § 8.01-391 (C) and may use district court form DC-372, AUTHENTICATION OF RECORD (IN-STATE USAGE) for this purpose, as discussed above.

On occasion, a request will be received to provide an authenticated copy of a case record. The following procedure should be implemented:

- Make a copy of the entire document or documents requested. Include copies of backs of documents if the back is not blank.
- Prepare and execute a district court form DC-372, AUTHENTICATION OF RECORD (IN-STATE USAGE) if being used in Virginia or stamp the back of each copy with authentication language. Otherwise, prepare and execute a district court form DC-619, EXEMPLIFICATION OF RECORD. Carefully follow the instructions in this portion of the manual because the failure to follow all of the technical requirements may result in the rejection of the copies by other courts as true copies.

Disposition of Property

The district court form DC-367, ORDER AND CERTIFICATE OF DESTRUCTION OF CONTROLLED/ CONFISCATED ITEMS should be used when the court, after trial, wishes to dispose of drugs or drug paraphernalia or other tangible property introduced as evidence. Pursuant to Va. Code § 19.2-270.4, unless objection with sufficient cause is made, the trial court in any criminal case may order the donation or destruction of any or all exhibits received in evidence during the course of the trial (i) at any time after the expiration of the time for filing an appeal from the final judgment of the court if no appeal is taken or (ii) if an appeal is taken, at any time after exhaustion of all appellate remedies.

The order of donation or destruction may require that photographs be made of all exhibits ordered to be donated or destroyed and that such photographs be appropriately labeled for future identification. In addition, the order shall state the nature of the exhibit subject to donation or destruction, identify the case in which such exhibit was received and from whom such exhibit was received, if known, and the manner by which the exhibit is to be destroyed or to whom donated.

Any photographs taken pursuant to an order of donation or destruction or an order returning exhibits to the owners shall be retained with the record in the case and, if

necessary, shall be admissible in any subsequent trial of the same cause, subject to all other rules of evidence.

Upon petition of any organization that is exempt from taxation under § 501 (c) (3) of the Internal Revenue Code, the court in its sound discretion may order the donation of an exhibit to such charitable organization. Exceptions to the provision for donation or destruction of exhibits are provided in Va. Code § 19.2-270.4

- The court may permit the seizing law enforcement agency to use confiscated weapons for a period of time as specified in a court order, after which their disposition shall be as otherwise provided in Va. Code § 19.2-270.4.
- Upon petition and notice to the court and to the Commonwealth's Attorney, the court, for good cause shown, shall return the weapon to the lawful owner at the conclusion of the case if the court finds that the owner did not know and had no reason to know of the conduct giving rise to the forfeiture, and is not otherwise prohibited by law from possessing the weapon. The owner shall acknowledge in a sworn affidavit to be filed in the case papers that they have retaken possession of the weapon.