CHAPTER 2 - ADULT ARREST PROCEDURES

I. INTRODUCTION

One of the magistrate's most important functions is that of a judicial officer in conducting a probable cause hearing for arrest. This chapter is designed to enable the magistrate to conduct a proper probable cause hearing by discussing the basic elements of criminal law and defining "probable cause." Additionally, most of the specific statutes regarding arrest procedures will be discussed. How to issue an arrest warrant or summons will be discussed as well as certain limitations imposed on the Virginia magistrate.

While this chapter provides some information concerning proper arrest procedures, the legality of an arrest generally is not an issue affecting the outcome of a probable cause hearing before a magistrate. The power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of an unlawful arrest. *See* Frisbie v. Collins, 342 U.S. 519 (1952). The issue before the magistrate is whether probable cause exists to issue process of arrest.

II. FACTS ESTABLISHING PROBABLE CAUSE

A. Definition

"Probable cause" is best defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a prudent and cautious man to believe that the accused is guilty of the offense with which he is charged." Sanders v. Palmer, 55 F. 217 (2nd Cir. 1893). The complainant provides the factual foundation for the magistrate's exercise of neutral judgment. The magistrate must answer the question, "What facts are there to indicate that the accused committed a specific offense?" "[The judicial officer] should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." Giordenello v. United States, 357 U.S. 480, 486 (1958). Probable cause does not require proof beyond a reasonable doubt; it requires only a reasonable belief, based on facts, that the accused probably committed the offense. All that is required is that the complainant present enough facts to the magistrate to enable the magistrate to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process. Jaben v. United States, 381 U.S. 214 (1965).

The standard for establishing probable cause to arrest is the same as the standard for establishing probable cause to search. The discussion of probable cause to search in the "Search Warrant" chapter of this manual applies to the issuance of an arrest warrant or summons. The magistrate must make an independent determination that:

- there are facts logically indicating the accused committed or is committing an offense; and

- there is some basis for determining that the facts in the complaint are reliable.

A complaint that does not contain enough information to establish probable cause is legally insufficient and no process of arrest can be issued. For example, a complaint that states, "I swear John Smith committed grand larceny last Tuesday night," provides no facts by which the magistrate can evaluate whether probable cause exists and only states a "mere conclusion." If the complaint is based on personal knowledge and states, "I saw John Smith take my car Tuesday night without my permission," the magistrate can evaluate the complaint by assessing the facts recited.

If constitutional rights are to be preserved, it is essential that the magistrate avoid becoming a "rubber stamp" for police officers. The magistrate exists as a check on the police officers' powers and duties. If the relationship between the officers and the magistrate becomes too informal, this safeguard disappears. In State v. Dudick, 213 S.E.2d 458 (W.Va. 1975), the Supreme Court of Appeals of West Virginia stated:

> "[If] a magistrate is so influenced by the police that he becomes a mere agent of the prosecution, the guarantee of an independent evaluation of probable cause is nullified and the State makes a mockery of one of the constitutional rights of its citizens."

B. General Procedure

"The complaint shall consist of sworn statements of a person or persons of facts relating to the commission of an alleged offense. The statements shall be made upon oath before a magistrate empowered to issue arrest warrants. The magistrate may require the sworn statements to be reduced to writing and signed if the complainant is a law-enforcement officer, but shall require the sworn statements to be reduced to writing if the complainant is not a law enforcement officer." (Rule 3A:3) *See also* Rule 7C:3(a).

1. *Administer Oath*. Prior to receiving testimony from the complainant, the magistrate must administer an oath regardless of whether the complainant is a law enforcement officer or a private citizen. Like an affidavit in the case of a search warrant, the complaint is the foundation that provides a factual basis upon which the magistrate can act.

2. *Form of Complaints*. Unlike an affidavit, Virginia law does not require that the complaint be in writing in all cases. Virginia Code § 19.2-72 requires a written complaint if the complainant is not a law enforcement officer. A written complaint may facilitate a court's ruling on the legality of an arrest warrant, and a written complaint may well be the only practical way a court can review the validity of the issuance of the arrest warrant. Therefore, whenever a magistrate issues a criminal process upon a written complaint, the magistrate should ensure the written complaint contains sufficient facts establishing the probable cause for

the process(es) issued. The DC-311, CRIMINAL COMPLAINT form is available to facilitate this process in a uniform manner.

3. *Return of a Denied Written Complaint.* Pursuant to Va. Code § 19.2-72 if an officer authorized to issue criminal warrants does not issue an arrest warrant in response to the written complaint required of citizen complainants, the written statement shall be returned to the complainant. It is also recommended that when the magistrate does not find probable cause upon a written criminal complaint of a law enforcement officer, the magistrate should return the written criminal complaint to the law enforcement complainant. Thus, the magistrate would return the completed DC-311, CRIMINAL COMPLAINT form to the complainant if the magistrate does not find probable cause to issue any processes in response to the complaint.

4. *Competency to Testify.* Pursuant to Va. Code § 19.2-271, a magistrate is not competent to give testimony respecting any matter that came before the magistrate in the performance of duties except in cases where the defendant is charged pursuant to Va. Code §§ 18.2-460 (obstruction of justice) or 19.2-353.3 (acceptance of personal checks for fees, fines, etc.), or with perjury. A magistrate also may testify in any criminal or civil proceeding arising out of a crime in which the magistrate is a victim.

C. Citizen Complaints of Felony Offenses

1. *Generally.* Virginia Code §§ 19.2-71 and 19.2-72 were amended, effective July 1, 2011, regarding the procedure by which a magistrate may issue an arrest warrant for a felony offense upon the basis of a complaint by a person other than a law-enforcement officer or an animal control officer (a "citizen complainant").

   Virginia Code § 19.2-71 states in relevant part, "[N]o magistrate may issue an arrest warrant for a felony offense upon the basis of a complaint by a person other than a law-enforcement officer or an animal control officer without prior authorization by the attorney for the Commonwealth or by a law-enforcement agency having jurisdiction over the alleged offense."

   Virginia Code § 19.2-72 states in relevant part, "A written complaint shall be required if the complainant is not a law-enforcement officer. … [N]o magistrate may issue an arrest warrant for a felony offense upon the basis of a complaint by a person other than a law-enforcement officer or an animal control officer without prior authorization by the attorney for the Commonwealth or by a law-enforcement agency having jurisdiction over the alleged offense."

2. *Pre-authorization.* The 2011 amendments to Va. Code §§ 19.2-71 and 19.2-72 are interpreted to allow an attorney for the Commonwealth or a law enforcement agency to pre-authorize a magistrate to act on citizen complaints of felony offenses. Such a pre-authorization would relieve the magistrate from having to

contact the attorney for the Commonwealth or a law enforcement officer on every citizen complaint of a felony offense. Pre-authorization, however, should be either in writing from the Commonwealth's Attorney or an appropriate law enforcement agency or otherwise documented by the magistrate. The pre-authorization should clearly define the offenses for which the attorney for the Commonwealth or law-enforcement agency has granted authority to the magistrate to act.

3. *A prerequisite to act.* Prior authorization is a prerequisite for magistrates to exercise their authority. Therefore, when a person other than a law enforcement officer or an animal control officer appears before a magistrate and requests the issuance of an arrest warrant for a felony offense, the magistrate should determine whether issuance of the warrant is authorized by the Commonwealth's Attorney or law enforcement agency with jurisdiction. If issuance of the warrant is not authorized by the attorney for the Commonwealth or a law enforcement agency with jurisdiction over the alleged offense, the magistrate should refer the complainant to the appropriate official. Obviously, if the citizen appears to be in need of emergency medical services or evidence is present that requires preservation, the magistrate should contact the appropriate emergency medical service provider and law enforcement agency to respond to the magistrate's office.

   It is recommended that the magistrate refer the citizen complainant to the local Commonwealth's Attorney and to the local law enforcement agency with general criminal investigative responsibilities for the locality. In most cases, the law enforcement agency will investigate the incident. Where the agency determines that the evidence supports a probable cause finding, the agency may elect to either have a law enforcement officer appear before the magistrate as a complainant or have the citizen appear as the complainant before the magistrate. If the police officer authorizes the magistrate to act, the officer will sign the criminal complaint to indicate his authorization.

   Based on the investigation, however, the agency may determine that no criminal offense occurred. In such cases, the law enforcement agency likely will not give the magistrate authorization to conduct a probable cause hearing on the felony charge. If after having discussed the matter with the local law enforcement agency, the citizen returns to the magistrate requesting further assistance without having obtained authorization, the magistrate may refer the citizen complainant to the attorney for the Commonwealth or the Virginia State Police in appropriate cases.

4. *Normal hearing.* When a citizen appears before a magistrate with a DC-311, CRIMINAL COMPLAINT, authorized by the attorney for the Commonwealth or a law enforcement agency, the magistrate should hold a normal probable cause hearing and examine the complainant under oath. As in any other probable cause hearing, the magistrate must place the complainant under oath. The authorization of the attorney for the Commonwealth or a law enforcement agency does not mean that

the magistrate will necessarily find probable cause based on the complaint. Although the attorney for the Commonwealth or a law enforcement agency must authorize the magistrate to act in this area, the magistrate retains independent authority to decide whether probable cause exists and should refuse to issue process of arrest if probable cause is lacking.

D. Prisoner Complaints of Criminal Offenses

Occasionally, a magistrate office will receive apparent requests for hearings by persons currently incarcerated in a jail or prison. Just like other citizens, prisoners should be afforded an opportunity to seek the services of a magistrate. However, there are logistical and technical considerations that chief magistrates should address.

The initial concern is whether the request for assistance concerns an area in which a magistrate is authorized to act. For instance, a prisoner might be attempting to make an administrative complaint against a law enforcement officer or a member of the jail staff. Magistrates have no authority to act on administrative complaints.

As with any other complaint by a person other than a law enforcement officer, a magistrate may not issue an arrest warrant for a felony offense, pursuant to Va. Code §§ 19.2-71 and 19.2-72, unless the magistrate has received authorization from the attorney for the Commonwealth or a law-enforcement agency.

1. State Prisons

   a. Generally, requests by prisoners confined in state institutions are received by mail. Sometimes it is difficult to determine the exact nature of the request. The chief magistrate should attempt to determine from the correspondence whether a prisoner is making a request for a hearing before a magistrate. If the prisoner's intent cannot be determined or the matter concerns an area in which a magistrate has no authority, the chief magistrate should send an appropriate letter back to the prisoner acknowledging receipt of his correspondence. State institutions often have counselors that can assist prisoners with written correspondence.

   b. It is recommended that magistrate offices conduct hearings for state prisoners based on appropriate requests at least once per month. The chief magistrate may elect to have a magistrate hold such hearings in person at the prison or by videoconference. Magistrates should not ask prison staff to remove prisoners from the institution for a hearing.

   c. Many state institutions have video capabilities that comply with Va. Code § 19.2-3.1. Prior to conducting initial hearings by video, the chief magistrate may contact the Department of Judicial Information and Technology for further assistance. Magistrates may need to arrange in advance with prison staff for facsimile capability where their video equipment is located.

However, the magistrate generally would not need remote printing capability as any process issued would generally be sent to the appropriate law enforcement agency for later service.

2. Local Jails

   a. Local jails do not present the same logistical problems as state prisons. Magistrate offices are often located in jails and the jail staff has the capability to safely bring a prisoner before the magistrate.

   b. However, the close working relationship that magistrates have with local jail staff and law enforcement officers present other issues. Often prisoners confined in jails desire to make criminal complaints against jail staff or law enforcement officials.

   c. Magistrates should treat such criminal complaints no differently than any other criminal complaint. That stated, it would be advisable for a magistrate to disqualify himself or herself, pursuant to Canon 3(D), in a proceeding concerning a law enforcement officer employed by an agency for which the magistrate regularly holds hearings or a staff member with a local jail with which the magistrate regularly conducts business. It would be prudent for magistrates to refer all such complaints by videoconference to a magistrate located in a different judicial district within the magistrate's judicial region.

III. ARREST AUTHORITY IN VIRGINIA

A. Animal Control Officers, Animal Protection Officers, and Humane Investigators

Virginia Code § 3.2-6559 states that "humane investigators" appointed pursuant to Va. Code § 3.2-6558 may, within the locality where appointed, investigate violations of laws and ordinances regarding the care and treatment of animals and the disposal of dead animals.

Pursuant to Va. Code § 3.2-6555, a locality may employ an "animal control officer" and "deputy animal control officers" for the purpose of enforcing Title 3.2, Chapter 65, "Comprehensive Animal Care"; all ordinances enacted pursuant to that chapter; and all laws for the protection of domestic animals. Such animal control officers shall have the power to issue a summons or obtain a felony warrant as necessary. For purposes of a CA consult, such officers are deemed "law enforcement officers" and a consult is not necessary. A law enforcement officer as defined in Va. Code § 9.1-101, not the animal control officer, shall carry out the execution of such warrant. An animal control officer lacks authority to execute an arrest warrant.

Pursuant to Va. Code § 3.2-6555, animal control officers have authority to inspect commercial dog breeding locations. Commercial dog breeders are subject to laws contained in Title 3.2, Chapter 2.1 (Va. Code § 3.2-6507.1 et seq.).

Pursuant to Va. Code §§ 15.2-632 and 15.2-836.1, each division or department of police may include an animal protection police officer and deputy animal protection police officers. Such officers have all the powers of animal control officers. In addition, such officers are law enforcement officer pursuant to § 9.1-101 if they meet minimum qualifications and have been certified pursuant to Va. Code §§ 15.2-1705 and 15.2-1706. This means that they may not only obtain felony warrants without prior authorization but also may execute arrest warrants.

B. Conservation Officers Appointed Pursuant to Va. Code § 10.1-115

Virginia Code § 10.1-117 states that commissioned conservation officers are law enforcement officers and have the power to enforce the laws of the Commonwealth and the regulations of the Department of Conservation and Recreation.

These officers have warrantless arrest powers pursuant to Va. Code § 19.2-81.

C. Conservators of the Peace

Pursuant to Va. Code § 19.2-18, conservators of the peace have authority to arrest without a warrant in such instances as are set out in Va. Code §§ 19.2-19 (recognizance to keep the peace) and 19.2-81. Upon making the arrest, the conservator of the peace must forthwith bring the arrestee before a magistrate or other judicial officer.

1. Statutory Conservators of the Peace

   Virginia Code § 19.2-12 sets forth those persons who are conservators of the peace. Pursuant to Va. Code § 19.2-18 every conservator of the peace shall have authority to arrest without a warrant in such instances as are set out in Va. Code §§ 19.2-19 and 19.2-81.

   - Judges (statewide)
   - Attorneys for the Commonwealth (statewide)
   - Magistrates (only within the geographical area to which the magistrate is appointed)
   - Commissioners in Chancery (while sitting as commissioner)
   - Any special agent or law enforcement officer of the U. S. Departments of:
     - Justice
     - Commerce (National Marine Fisheries Service only)
     - Treasury
     - Agriculture
     - Defense

  - State
  - Transportation (Office of the Inspector General only)
  - Homeland Security
  - Interior

- Any inspector, law-enforcement official, or police personnel of the U. S. Postal Service, or

- U. S. Marshals or deputy marshals who enforce U. S. criminal laws

- Officers of the Virginia Marine Patrol

- Criminal investigators of:

  - Department of Professional and Occupational Regulation (who meet the minimum law-enforcement training requirements established by the Department of Criminal Justice Services for in-service training): According to Va. Code § 54.1-306, "investigators are vested with authority to obtain, serve and execute any warrant, paper or process issued by any… magistrate…"
  - U. S. Department of Labor

- Special agents of the U. S. Naval Criminal Investigative Service

- Special agents of the National Aeronautics and Space Administration

- Any sworn municipal park ranger, who has completed all requirements under Va. Code § 15.2-1706.

- Investigators employed by an attorney for the Commonwealth who, within 10 years immediately prior to being employed by an attorney for the Commonwealth, was an active law-enforcement officer as defined in § 9.1-101 and retired or resigned from his position as a law-enforcement officer in good standing.

2. Special Conservators of the Peace

   Virginia Code § 19.2-13 - A circuit court may appoint a special conservator of the peace upon the showing of a necessity for the security of property or peace upon an application of a sheriff, chief of police, corporation authorized to do business in Virginia, museum owned and managed by the Commonwealth, or the owner, proprietor or authorized custodian of a place within the Commonwealth. Before a person is eligible for appointment as a special conservator of the peace, he or she must possess a valid registration or temporary registration issued by the Department of Criminal Justice Services. The circuit court judge in the order of appointment may "provide that a special conservator of the peace who has completed the minimum training standards established by the Department of

Criminal Justice Services, has the authority to affect arrests, using up to the same amount of force as would be allowed to a law-enforcement officer employed by the Commonwealth or any of its political subdivisions when making a lawful arrest." The court order also may grant to the special conservator of the peace the same authority a law enforcement officer has to execute emergency custody orders and temporary detention orders issued pursuant to Va. Code §§ 37.2-808 and 37.2-809.

However, special conservators of the peace are not "law enforcement officers" as the term is used in different sections of the Code of Virginia. *See* Attorney General Opinion to Evans dated 3/22/2006 (2006, page 172); *No authority for regional jail officers to execute criminal warrants in regional jail; such officers are vested with limited authority and powers of conservators of peace*. Further, as the court stated in Terrell v. Petrie, 763 F. Supp. 1342, 1347 (E.D. Va. 1991), aff'd 952 F.2d 397 (4th Cir. 1991), "[C]onservators of the peace … are not the equivalent of law enforcement officers." As such, a special conservator of the peace may not be identified in the order of appointment "as a law-enforcement officer pursuant to § 9.1-101." Va. Code § 19.2-13.

3. Superintendents of Fairgrounds and Cemeteries

Virginia Code § 19.2-14 states, in part, "The superintendent or other person in charge of any fairgrounds or any public or private cemetery shall, for the purpose of maintaining order and enforcing the criminal and police laws of the Commonwealth, or the county or city in which such fairgrounds or cemetery is situated, have all the powers, functions, duties, responsibilities and authority of a conservator of the peace within the fairgrounds or cemetery over which he may have charge and within one-half mile around the same."

4. Pilots and Airport Managers

Virginia Code § 5.1-20 states, "The pilot of any aircraft carrying passengers for hire, or any person subject to his direction, may take such action as is reasonably necessary to restrain or arrest any person who interferes with, or threatens to interfere with, the operation of the aircraft in flight over the territory of this Commonwealth or to a destination within this Commonwealth."

Virginia Code § 5.1-21 states, "The pilot of any aircraft carrying passengers for hire while actively engaged in the operation of such aircraft shall be a special policeman and have all the powers of a conservator of the peace in the enforcement of order on such aircraft and while in pursuit of persons for disorder upon such aircraft and until such persons as may be arrested by him shall have been placed in confinement or delivered to the custody of some other conservator of the peace or police officer."

Virginia Code § 5.1-21.1 states, "The airport manager of any licensed Virginia airport or in his absence not more than two employees who are designated by him shall be special policemen and have all the powers of conservators of the peace in the enforcement of this title and its regulations as promulgated by the [Virginia Aviation] Board. Persons arrested by them shall be placed in confinement or delivered to the custody of some other conservator of the peace or police officer."

5. Railroad Personnel

Virginia Code § 56-354 states, "Conductors and engineers of railroad passenger trains, and station and depot agents, shall be conservators of the peace. Each shall have the same power to make arrests that other conservators of the peace have except that the conductors and engineers of passenger trains shall only have such power on board their respective trains and on the property of their company while on duty and the agents at their respective places of business. Conductors, engineers, and agents may cause any person so arrested by them to be detained and delivered to the proper authorities for trial as soon as practicable."

6. Voter Registrar

Virginia Code § 24.2-114 states that a registrar shall "[p]reserve order at and in the vicinity of the place of registration. For this purpose, the registrar shall be vested with the powers of a conservator of the peace while engaged in the duties imposed by law. He may exclude from the place of registration persons whose presence disturbs the registration process. He may appoint special officers, not exceeding three in number, for a place of registration and may summon persons in the vicinity to assist whenever, in his judgment, it is necessary to preserve order."

7. Hospital Personnel

Virginia Code § 37.2-426 states, "Pursuant to § 19.2-13, the director, resident officers, policemen and fire fighters of any hospital or training center may be appointed conservators of the peace on the hospital or training center property and shall have, in addition to the powers of conservators of the peace, authority to patrol and regulate traffic on all roadways and roads through hospital or training center property and to issue summons for violations thereof."

D. Correctional Officers

Virginia Code § 53.1-1 defines a "correctional officer" as "a duly sworn employee of the Department of Corrections whose normal duties relate to maintaining immediate control, supervision and custody of prisoners confined in any state correctional facility."

Pursuant to Va. Code § 19.2-81.1, correctional officers have the warrantless arrest powers listed in Va. Code § 19.2-81 for crimes involving:

- escape of an inmate
- assisting an inmate to escape
- delivery of contraband to an inmate
- any other criminal offense that may contribute to the disruption of the safety, welfare, or security of the population of a correctional institution.

Virginia Code § 19.2-81.2 sets forth when a correctional officer or a non-custodial employee of the Department of Corrections may detain a person suspected of having committed certain violations.

E. Bailiffs and Deputy Bailiffs of the State Corporation Commission

Virginia Code § 12.1-23 states that bailiffs and deputy bailiffs of the State Corporation Commission have the powers of a sheriff including arrest authority in all matters within the jurisdiction of the Commission.

F. Department of Motor Vehicles Commissioner, Assistants, Sworn Members of the Enforcement Division

Virginia Code § 46.2-217 gives to the commissioner, police officers appointed by the commissioner, agents, and members of the enforcement division of the Department of Motor Vehicles the powers of sheriffs for the purpose of enforcing the laws which the commissioner is required to enforce. Full-time members of the enforcement division of the Department of Motor Vehicles appointed pursuant to Va. Code § 46.2-217 are law enforcement officers for the purposes of Va. Code §§ 9.1-101 and 18.2-57.

G. Chief and Assistant Arson Investigators of the Department of State Police

Virginia Code § 27-56 states that the chief and assistant arson investigators have the same police powers as a sheriff in the investigation and prosecution of all offenses involving fires, fire bombings, bombings, attempts, threats to commit such offenses, false alarms relating to such offenses, and possession and manufacture of explosive devices, substances, and firebombs.

H. Local Fire Marshals and Their Assistants

Virginia Code § 27-34.2 states that local fire marshals and their assistants have the power to arrest, to procure and serve warrants of arrest, and to issue summonses for violations of fire prevention and fire safety laws and related ordinances if authorized by the appointing governing body. Specific training is required.

Additionally, Va. Code § 27-34.2:1 provides that appointing governing bodies may empower local fire marshals and their assistants with the same police powers as a

sheriff, police officer, or law enforcement officer. The appointing governing body may also make fire marshals or their designees responsible for the investigation and prosecution of all offenses involving hazardous materials, fires, fire bombings, bombings, attempts or threats to commit such offenses, false alarms relating to such offenses, and possession and manufacture of explosive devices, substances, and firebombs. Specific training is required before such persons may exercise the police powers described in § 27-34.2:1.

I. Law Enforcement Officers of Other States

Virginia Code § 19.2-79 authorizes law enforcement officers from other states and the District of Columbia to arrest and hold in custody any person suspected of having committed a felony in the other state if such law enforcement officers enter the Commonwealth in close pursuit and continue in close pursuit. If another state's law enforcement officer perfects an arrest within Virginia, he "shall without unnecessary delay take the person arrested before a judge of a general district court, or of the circuit court, of the county or city in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest…" (Emphasis added.)

J. State Fire Marshals and Assistants

Virginia Code § 9.1-206 grants to the State Fire Marshal and others duly authorized to enforce the Statewide Fire Prevention Code the authority to arrest, to procure and serve warrants, and to issue summonses for violations of the Statewide Fire Prevention Code. State Fire Marshals are not authorized by this statute to wear or carry firearms.

K. Virginia Marine Patrol Officers of the Marine Resources Commission

Virginia Code § 28.2-900 authorizes officers of the Virginia Marine Patrol to arrest with or without a warrant any person found violating any provision of Subtitle II (Tidal Fisheries) of Title 28.2.

Virginia Code § 28.2-900 also authorizes officers of the Virginia Marine Patrol to arrest with or without a warrant any person who commits in his or her presence:

- any larceny committed upon or adjacent to the waters of Virginia;
- any violation of Chapter 7 of Title 29.1 (Boating Laws) or regulations promulgated thereunder; or
- any violation of Chapter 18 (Protection of Aids to Navigation) or Chapter 20 (Miscellaneous Offenses Relating to State Waters, Ports, and Harbors) of Title 62.1.

Virginia Code § 19.2-81 also grants to Virginia Marine Patrol Officers the power to make warrantless arrests in certain circumstances.

Virginia Code § 9.1-101 also classifies officers of the Virginia Marine Patrol as law enforcement officers for purposes of Chapter 1 of Title 9.1 (Department of Criminal Justice Services) and Chapter 23 of Title 19.2 (Central Criminal Records Exchange).

L. Conservation Police Officers

Virginia Code § 29.1-205 grants all conservation police officers, upon displaying a badge or other credential of office, the authority to issue a summons or to arrest any person found violating any of the hunting, trapping, inland fish, and boating laws.

Virginia Code § 29.1-200 mandates that a special conservation police officer initially appointed after October 1, 2009, must have a valid registration as a Special Conservator of the Peace from the Department of Criminal Justice Services.

Pursuant to Va. Code § 29.1-205, regular conservation police officers are vested with the same authority as sheriffs and other law enforcement officers to enforce all of the criminal laws.

The same statute states that special conservation police officers have general police power while performing duties on properties owned or controlled by the Board of Game and Inland Fisheries.

Virginia Code § 19.2-81 also grants to conservation police officers the power to make warrantless arrests in certain circumstances.

Virginia Code § 10.1-1417 states that all law enforcement officers and those employees of the Department of Game and Inland Fisheries have the power to enforce the provisions of Article 3 of Title 10.1 (Litter Control and Recycling) and any regulations adopted under that Article.

Virginia Code § 9.1-101 also classifies conservation officers of the Department of Conservation and Recreation commissioned pursuant to § 10.1-115 as law enforcement officers for purposes of Chapter 1 of Title 9.1 (Department of Criminal Justice Services) and Chapter 23 of Title 19.2 (Central Criminal Records Exchange).

M. Commissioned, Warrant, and Petty Officers of the United States Coast Guard or of the United States Coast Guard Reserves

Virginia Code § 29.1-205 grants to commissioned, warrant, and petty officers of the U.S. Coast Guard and the U.S. Coast Guard Reserves, while engaged on active duty and in the conduct of their official duties in uniform, the power to make arrest under Chapter 7 of Title 29.1 (boating laws). Virginia Code § 19.2-81 also grants to such officers the power to make warrantless arrests in certain circumstances.

N. Officers of Customs as Defined by 19 U.S.C § 1709 (b)

Virginia Code § 29.1-205 grants to officers of customs as defined by 19 U.S.C. § 1709 (b), while in the conduct of their official duties and while in uniform, the power to make arrest under Chapter 7 of Title 29.1 (boating laws).

O. Private Security Officers

1. Virginia Code § 9.1-146 states that a registered armed security officer of a private security services business has the power to arrest for an offense occurring:

   a. While at a location where the security office is employed to protect when the accused commits the offense in the security officer's presence; or

   b. In the presence of a merchant, agent, or employee of the merchant whom the private security business has contracted to protect, if the merchant, agent, or employee had probable cause to believe that the person arrested had shoplifted or committed willful concealment of goods.

2. Virginia Code § 9.1-146 also states that a registered armed security officer of a private security services business is considered an arresting officer for purposes of Va. Code § 19.2-74.

   This language allows a registered armed security officer to issue a summons to the accused at the time the guard detains the accused. The guard may issue the summons either for a violation of a local ordinance or of a Code of Virginia section.

3. Virginia Code § 9.1-138 defines "armed security officer" as "natural person employed to (i) safeguard and protect persons and property or (ii) deter theft, loss, or concealment of any tangible or intangible personal property on the premises he is contracted to protect, and who carries or has access to a firearm in the performance of his duties."

   Virginia Code § 9.1-138 defines "armed" as a private security registrant who carries or has immediate access to a firearm in the performance of his duties.

   Virginia Code § 9.1-138 defines "registration" as "a method of regulation whereby certain personnel employed by a private security services business are required to register with the Department [of Criminal Justice Services]..."

   Virginia Code § 9.1-138 defines "private security services business" as "any person engaged in the business of providing, or who undertakes to provide, armored car personnel, security officers, personal protection specialists, private investigators, couriers, security canine handlers, security canine teams, detector

canine handlers, alarm respondents, locksmiths, central station dispatchers, electronic security employees, electronic security sales representatives or electronic security technicians and their assistants to another person under contract, express or implied."

P. Probation and Parole Officers

Virginia Code § 53.1-145 states that probation and parole officers have the power to arrest and recommit to confinement parolees and probationers who violate the terms or probation or parole, pending a hearing by a court or the Parole Board.

Virginia Code § 53.1-149 authorizes probation officers and Va. Code § 53.1-162 authorizes parole officers to arrest without a warrant. The probation or parole officer may deputize any other officer having the power of arrest by a written statement setting forth that the accused has violated one or more of the terms or conditions of his probation or parole. Once deputized, the other officer has the authority to arrest the probation or parole violator without a warrant. This written statement is sufficient warrant for the detention of the probationer or parolee.

Magistrates do not conduct bail hearings in such cases, and consequently do not prepare a DC-352, COMMITMENT ORDER.

Q. Railroad Police Agents

Pursuant to Va. Code § 56-353, any railroad company incorporated by Virginia may appoint police agents with the approval of the circuit court of any county through which the railroad passes or has its chief office.

Virginia Code § 56-353 further states that railroad police agents have "authority in all cases in which the rights of such railroad company are involved to exercise within the State all powers which can be lawfully exercised by any police officer for the preservation of the peace, the arrest of offenders and disorderly persons, and for the enforcement of laws against crimes…"

R. Investigators and Special Police Officers Appointed by the Governor

Virginia Code § 52-23 allows the Governor to appoint investigators and special police officers that are directly responsible to the Governor. Such investigators and officers have the same power and authority as vested in sheriffs and police officers, and they may exercise their authority anywhere in Virginia.

S. State Lottery Department Director, Director of Security, and Investigators

Virginia Code § 58.1-4006 vests the Director, the director of security, and investigators of the Virginia Lottery with the powers of sheriffs in enforcing the statutes and regulations relating to the lottery.

Virginia Code § 9.1-101 also classifies full-time members of the security division of the Virginia Lottery as law enforcement officers for purposes of Chapter 1 of Title 9.1 (Department of Criminal Justice Services) and Chapter 23 of Title 19.2 (Central Criminal Records Exchange).

T. Virginia State Police Officers

Virginia Code § 52-8 grants to the Superintendent of State Police, assistants, and police officers appointed by the Superintendent the same powers as a sheriff for the purpose of enforcing all criminal laws and for investigating any aircraft accident that occurs in Virginia.

A trooper's exercise of his or her powers is not confined to any one jurisdiction. *See* Crowder v. Commonwealth, 213 Va. 151 (1972).

U. Police Officers

Virginia Code § 15.2-1704 grants to police officers constituting the police force of counties, cities, and towns all the power and authority which formerly belonged to the office of constable at common law in enforcing the criminal laws of Virginia and the ordinances and regulations of the city, county, or town for which they are appointed.

Such police officers have no authority in civil matters with the exception of executing and serving temporary detention and emergency custody orders and other powers granted to law enforcement officers pursuant to Va. Code §§ 16.1-340, 16.1-340.1, 37.2-808, and 37.2- 809; serving orders of protection pursuant to Va. Code §§ 16.1-253.1, 16.1-253.4, and 16.1-279.1; executing all warrants or summonses placed in their hands by magistrates serving their locality; and delivering, serving, executing, and enforcing orders of isolation and quarantine issued pursuant to Va. Code §§ 32.1-48.09, 32.1-48.012, and 32.1-48.014 and emergency custody orders issued pursuant to § 32.1-48.02.

Part-time police officers who are responsible for the prevention and detection of crime and the enforcement of the penal, traffic, or highway laws are law enforcement officers pursuant to Va. Code § 9.1-101.

Virginia Code § 8.01-293 allows law enforcement officers as defined in Va. Code § 9.1-101 to execute capiases and show cause orders.

Virginia Code § 15.2-1726 allows counties, cities, and towns to enter into reciprocal agreements that allow officers of police departments and deputies of sheriff's departments of the localities entering into the agreements to have the authority to make arrests and to have the same powers, rights, benefits, privileges and immunities in every jurisdiction subscribing to the agreement.

Virginia Code § 19.2-250 provides that the jurisdiction of certain towns and cities shall extend within the Commonwealth one mile beyond the corporate limits of such town or city. Moreover, the jurisdiction of the authorities of Chesterfield County and Henrico County, in criminal cases involving offenses against the Commonwealth, shall extend one mile beyond the limits of such county into the City of Richmond.

V. Auxiliary Police Officers

Virginia Code § 15.2-1731 allows the governing bodies of any city, county, or town to establish auxiliary police forces. Such forces have all the powers, authority, and immunities of full-time law enforcement officers if they meet the training standards established by the Department of Criminal Justice Services under § 9.1-102.

W. Private Police Officers

In 2015, the General Assembly authorized several existing, appropriately trained private police departments that had been previously recognized by the Department of Criminal Justice Services as valid private police departments to act as police forces. Prior to the enactment, private police officers already had arrest authority through their appointment orders as special conservators of the peace. *See supra* subsection

C. 2. "Special Conservators of the Peace." Additionally, the General Assembly provided that the establishment of any future private police departments would be accomplished only by way of an authorizing act of assembly. Virginia Code § 9.1-101 provides that, "[n]o entity is authorized to operate a private police department or represent that it is a private police department unless such entity has been authorized by statute or an act of assembly."

The specifically recognized previously existing private police departments were: the Aquia Harbour Police Department, the Babcock and Wilcox Police Department, the Bridgewater Airpark Police Department, the Carilion Police and Security Services Department, the Kings Dominion Park Police Department, the Kingsmill Police Department, the Lake Monticello Police Department, the Massanutten Police Department, and the Wintergreen Police Department. Also in 2015, the General Assembly authorized by act of assembly certain other localities to adopt ordinances to effectuate the establishment of other private police departments.

Virginia Code § 9.1-101 defines a private police department as "any police department, other than a department that employs police agents under the provisions of § 56-353, that employs private police officers operated by an entity authorized by statute or an act of assembly to establish a private police department or such entity's successor in interest..." That section also defines the term "law-enforcement officer" to include any full-time or part-time employee of a private police department.

The authority of a private police officer to act as law enforcement is limited to the real property owned, leased, or controlled by the entity employing the private police

department. Such authority may be extended to any contiguous property if the private police department is approved to do so by the local chief of police or sheriff. The authority granted to private police departments does not supersede the authority, duties, or jurisdiction vested by law with the local police department or sheriff's office. The chief local law enforcement officer of the locality (whether chief of police or sheriff) must enter into a memorandum of understanding with the private police department to address the respective duties and responsibilities of the private police department and the chief law enforcement officer in the conduct of criminal investigations. *See* Va. Code § 9.1-101.

In general, a private police officer is a law enforcement officer when acting within the scope of their authority. However, a magistrate should be cognizant of the fact that private police officers are not law-enforcement officers in all cases.

Certain provisions of the code contain more narrowly defined definitions of the term "law-enforcement officer" that may be applicable. For example, Va. Code § 18.2-57 subsection F more narrowly defines the term "law-enforcement officer" in a way which would not include employees (private police officers) of the various private police departments.

X. Toll Bridge Special Police

Pursuant to Va. Code § 33.2-605, upon application of the proprietor of a toll bridge, the circuit court may appoint anyone employed in the control or operation of such toll bridge as a special police officer. Such officer has all the powers and duties conferred upon sheriffs in criminal matters upon the toll bridge and its approaches. If the special police officer is in pursuit of a person accused of a crime or when acting under authority of a warrant issued for the arrest of a person, such power extends throughout Virginia.

Y. Campus Police Officers

Virginia Code § 23.1-815 states that campus police officers appointed pursuant to Va. Code § 23.1-812 may exercise the powers and duties conferred by law upon city, county, or town police officers:

1. upon the property owned or controlled by the public or private institution of higher education, or, upon request, any property owned or controlled by another public or private institution of higher education, and upon the streets, sidewalks, and highways immediately adjacent to any such property;

2. pursuant to a mutual aid agreement:

   a. under § 15.2-1727,

b. between the governing boards of two public or private institutions of higher education, or

c. between the governing board of a public or private institution of higher education and an adjacent political subdivision;

3. in close pursuit of a person as provided in § 19.2-77; or

4. in designated areas of concurrent jurisdiction with the police officers of the locality in which the institution, its satellite campuses, or other properties are located (if approved by an appropriate circuit court upon an appropriate petition).

Z. Auxiliary Campus Police Officers

Virginia Code § 23.1-811 states that auxiliary campus police officers have the same authority and powers as campus police officers.

AA. Capitol Police Officers

Virginia Code § 30-34.2:1 states that the Capitol Police have all the powers, duties, and functions that are exercised by police officers and sheriffs.

The jurisdiction of the Capitol Police is generally limited to Capitol Square and to other property owned, leased, or controlled by the Commonwealth (when the officer is assigned to that property). The jurisdictional boundaries extend 300 feet beyond the property to which they are assigned to protect.

The Capitol Police have concurrent jurisdiction with law enforcement officers of the City of Richmond. In any case involving the theft or misappropriation of the personal property of a member or employee of the General Assembly, the Capitol Police have concurrent jurisdiction with law enforcement officers of any county contiguous to the City of Richmond.

When assigned to accompany the Governor or Governor-elect, members of the Governor's family, the Lieutenant Governor or Lieutenant Governor-elect, the Attorney General or Attorney General-elect, members of the General Assembly, members of the Supreme Court or Court of Appeals of Virginia, or when directed to serve certain processes, members of the Capitol Police have all the powers and authorities as a law enforcement officer in the county or city in which the member of the Capitol Police is required to be.

Additionally, a Capital Police officer who is a detector canine handler has concurrent jurisdiction with law enforcement officers of any city or county that has requested assistance from the Capitol Police in the detection of firearms, ammunition, explosives, propellants, or incendiaries.

BB. Deputy Sheriffs

Pursuant to Va. Code § 15.2-1603, a deputy sheriff is empowered to discharge any of the official duties of the sheriff unless it is some duty the performance of which by a deputy is expressly forbidden by law.

Part-time employees of a sheriff's office who are responsible for the prevention and detection of crime and the enforcement of the penal, traffic, or highway laws are law enforcement officers pursuant to Va. Code § 9.1-101.

Virginia Code § 19.2-72 states that a sheriff or his deputy may execute an arrest warrant throughout the county in which the sheriff or deputy serves and in any city or town surrounded thereby. If the accused commits an offense during the execution of the warrant in such a town or city, the sheriff or deputy has the authority to arrest the accused for the new offense.

Virginia Code § 15.2-1726 allows counties, cities, and towns to enter into reciprocal agreements that give their law enforcement officers the authority to make arrests and to have the same powers, rights, benefits, privileges and immunities in every jurisdiction subscribing to the agreement.

CC. Town Sergeants

Virginia Code § 15.2-1701 states that the chief law enforcement officer of a town may be called the town sergeant. Va. Code § 15.2-1704 sets forth the authority of a police force of a locality.

DD. Alcoholic Beverage Control Board Members, Officers, Employees

Virginia Code § 4.1-105 states, "Members of the Board [of Directors of the Virginia Alcoholic Beverage Control Authority] are vested, and such agents and employees of the Board designated by it shall be vested, with like power to enforce the provisions of (i) this title and the criminal laws of the Commonwealth as is vested in the chief law-enforcement officer of a county, city, or town; (ii) § 3.2-4207; (iii) § 18.2-371.2; and (iv) § 58.1-1037." Furthermore, a 2011 amendment to Va. Code § 19.2-81 added special agents of the Virginia Alcoholic Beverage Control Authority to those authorized to make arrests without warrants in certain cases.

EE. Sheriffs

Pursuant to Va. Code § 15.2-1609, city sheriffs are not distinguished from county sheriffs. *See* Attorney General Opinion to Waters, dated 7/1/86 (1986-87, page 101); *City sheriffs and deputies have authority and duty to enforce criminal and motor vehicle laws; existence of police department does not affect sheriff's authority but does affect his duty*.

Virginia Code § 19.2-72 requires the magistrate to direct any warrant issued to "an appropriate officer or officers…"

Virginia Code § 19.2-76 states, in part, that a "law-enforcement officer may execute within his jurisdiction a warrant, capias or summons issued anywhere in the Commonwealth. A warrant or capias shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally."

Virginia Code § 19.2-72 states, however, that a sheriff or his deputy may execute an arrest warrant throughout the county in which the sheriff or deputy serves and in any city surrounded thereby.

Furthermore, Va. Code § 19.2-236 states, "When process of arrest in a criminal prosecution is issued from a court, either against a party accused or a witness, the officer to whom it is directed or delivered may execute it in any part of the Commonwealth."

Virginia Code § 19.2-249 provides that any sheriff, deputy sheriff, or police officer shall have jurisdiction to make arrests and preserve the peace within 300 yards of the boundary of two counties, two cities, or a county and a city. An offense committed therein may be prosecuted in either jurisdiction.

Virginia Code § 8.01-295 states the sheriff may execute civil processes throughout the political subdivision in which he serves and in any contiguous county or city.

Virginia Code § 19.2-81 states that the sheriffs of the various counties, provided that they are in uniform or displaying a badge of office, may arrest people without a warrant in certain circumstances.

Virginia Code § 15.2-1726 allows counties, cities, and towns to enter into reciprocal agreements that give their law enforcement officers the authority to make arrests and to have the same powers, rights, benefits, privileges and immunities in every jurisdiction subscribing to the agreement.

FF. Litter Control Officers

Pursuant to Va. Code § 10.1-1417, the Department of Waste Management has the authority to contract with state and local governmental agencies that have law enforcement powers for "services and personnel reasonably necessary to carry out the provisions of this article [Article 3 of Ch. 14 of Title 10.1 (Litter Control and Recycling)]."

Virginia Code § 10.1-1417 also states that all law enforcement officers and those employees of the Department of Game and Inland Fisheries have the power to enforce the provisions of Article 3 of Ch. 14 of Title 10.1 (Litter Control and Recycling) and any regulations adopted under that Article.

GG. Members of the Enforcement Division of the Department of Motor Vehicles

Virginia Code § 9.1-101 states that full-time sworn members of the enforcement division of the Department of Motor Vehicles appointed pursuant to Va. Code § 46.2-217 are "law-enforcement officers."

HH. Certain Agents and Employees of the Department of Charitable Gaming

Virginia Code § 18.2-340.18 provides that Department of Charitable Gaming agents and employees who are sworn to enforce charitable gaming laws and regulations are deemed to be law-enforcement officers as defined in Va. Code § 9.1-101.

II. Virginia Ports Authority Special Police

Pursuant to Va. Code § 62.1-132.12, the Virginia Ports Authority may appoint and employ special police officers to enforce the laws of the Commonwealth and rules and regulations adopted pursuant to Va. Code § 62.1-132.11 on property owned, leased, or operated by the Ports Authority. Such authority may be extended beyond such geographical limits by agreement with the locality in which the property is located and with approval of the circuit court. These special police have the powers vested in police officers under Va. Code §§ 15.2-1704 and 52-8. They may issue summonses to appear, or arrest on view or on information without a warrant.

JJ. Jail Officers

Virginia Code § 19.2-76 states, "A jail officer as defined in § 53.1-1 employed at a regional jail or jail farm may execute upon a person being held in his jail a warrant, capias or summons issued anywhere in the Commonwealth."

IV. LAW ENFORCEMENT ARREST PROCEDURES

A. Summons Requirements and Exceptions for Violations of Title 46.2

Virginia Code § 46.2-936 generally requires that a law enforcement officer issue a summons instead of arresting and taking the accused before a judicial officer for a violation of any provision of Title 46.2 that is punishable as a misdemeanor. Virginia Code § 46.2-937 states that, for purposes of arrest, traffic infractions shall be treated as misdemeanors.

1. Pursuant to Va. Code § 46.2-940, a law enforcement officer may arrest and bring the accused before a judicial officer under the following circumstances:

   a. the arresting officer believes that the accused has committed a felony; or

   b. the arresting officer believes that the accused will disregard a summons

2. Virginia Code § 46.2-936 further authorizes a law enforcement officer to arrest and bring the accused before a judicial officer under the following circumstances:

   a. if the general district court has issued an order which allows the arresting officer to arrest the accused and bring him or her before the magistrate and request that the magistrate issue a warrant for a violation of either Va. Code §§ 46.2-301 or 46.2-302; or

   b. the officer arrested the accused for driving a commercial motor vehicle while having a blood alcohol concentration of 0.08% or more by weight by volume, etc., in violation of Va. Code § 46.2-341.24 (A), or for driving a commercial motor vehicle while having a blood alcohol concentration of 0.04% or more by weight by volume, etc, in violation of Va. Code § 46.2-341.24 (B); or the officer arrested the accused for driving a commercial motor vehicle while having any amount of alcohol in his or her blood in violation of Va. Code § 46.2- 341.31.

3. If the arresting officer brings the accused before a magistrate, the magistrate must then decide whether probable cause exists that the accused committed the misdemeanor or traffic infraction.

   a. If the magistrate does not find probable cause and a warrant or summons is not issued, the person arrested shall be released. Law enforcement may not then issue a summons for the charge for which the magistrate did not find probable cause.

   b. If the magistrate does find probable cause that the accused committed a traffic infraction or misdemeanor, the magistrate will:

      1) issue an arrest warrant or summons in a Class 1 or Class 2 misdemeanor case.

         - If the magistrate issues a warrant, the magistrate then must conduct a bail hearing.
         - If the magistrate issues a summons, the defendant is released upon service of the summons.

      2) issue a DC-319, SUMMONS in Class 3 and Class 4 misdemeanor cases and in traffic infraction cases. The defendant will be released upon service of the summons.

Again, law enforcement officers must issue summonses in all misdemeanor and traffic infraction cases arising out of Title 46.2 unless one of the above exceptions exists. Pursuant to Va. Code § 46.2-936, any officer who brings the accused before a magistrate without the existence of one of the above exceptions "shall be guilty of

misconduct in office and subject to removal therefrom upon complaint filed by any person in a court of competent jurisdiction." However, the United States Supreme Court held that if a law enforcement officer makes a physical arrest instead of issuing a summons, as required by such a statute, evidence found during a search incident to such an arrest would not be suppressed as long as there was probable cause for the initial arrest. *See* Virginia v. Moore, 533 U.S. 164, 128 S.Ct. 1598, 170 L.Ed. 2d 559 (2008). Virginia Code § 52-21 requires state police officers to follow the procedures set forth in Va. Code § 46.2-936.

B. Summons Requirements and Exceptions for Violations of Any Other Title of the Code of Virginia

1. Class 1 or 2 Misdemeanor Summons Requirement and Exceptions.

   When a law enforcement officer detains a person for committing a Class 1 or 2 misdemeanor in the officer's presence, Va. Code § 19.2-74 requires the officer to release the accused on a summons unless:

   a. the accused fails to sign the summons, or
   b. the accused fails to discontinue the unlawful act, or
   c. the officer believes the accused is likely to disregard the summons, or
   d. the officer believes the accused is likely to cause harm to himself or herself or any other person, or
   e. the accused is detained for an offense listed in subsection D of Va. Code § 19.2-81.

   Virginia Code § 19.2-81 (D) states: "Such officers may, within three hours of the alleged offense, arrest without a warrant at any location any person whom the officer has probable cause to suspect of driving or operating a motor vehicle, watercraft or motorboat while intoxicated in violation of § 18.2-266, 18.2-266.1, 46.2-341.24, or subsection B of § 29.1-738; or a substantially similar ordinance of any county, city, or town in the Commonwealth, whether or not the offense was committed in such officer's presence. Such officers may, within three hours of the alleged offense, arrest without a warrant at any location any person whom the officer has probable cause to suspect of operating a watercraft or motorboat in violation of an order issued pursuant to § 29.1-738.4, whether or not the offense was committed in such officer's presence."

If any one of the above five conditions is present, the officer may then arrest the accused and proceed according to the provisions of Va. Code § 19.2-82.

In an Attorney General Opinion to Harvell, dated 12/27/83 (1983-84, page 122), the Attorney General stated that a law enforcement officer has the legal authority to issue a VIRGINIA UNIFORM SUMMONS for a violation of Va. Code § 18.2-266 pursuant to Va. Code § 19.2-74. The Attorney General, however, warned against the practice unless the officer could safely release the defendant to the custody of a third

party. This situation, however, may arise when the defendant is involved in an automobile accident, and because of the injuries to the defendant, the officer declares the breath test unavailable and requires the defendant to submit to a blood test at the hospital to which the defendant was transported. In such a case Va. Code § 19.2-73 (B) authorizes an officer to issue a summons: " If any person under suspicion for driving while intoxicated has been taken to a medical facility for treatment or evaluation of his medical condition, the officer at the medical facility may issue, on the premises of the medical facility, a summons for a violation of § 18.2-266, 18.2-266.1, 18.2-272 or 46.2-341.24 and for refusal of tests in violation of subsection A of § 18.2-268.3 or subsection A of § 46.2-341.26:3, in lieu of securing a warrant and without having to detain that person, provided that the officer has probable cause to place him under arrest. The issuance of such summons shall be deemed an arrest for purposes of Article 2 (§ 18.2-266 et seq.) of Chapter 7 of Title 18.2."

Virginia Code § 28.2-901 sets forth language similar to Va. Code § 19.2-74 in regards to when a law enforcement officer must issue a summons for violations of Subtitle II of Title 28.2 (Tidal Fisheries), Chapter 7 of Title 29.1 (Boating Laws), and Chapters 18 (Protection of Aids to Navigation) and 20 (Miscellaneous Offenses) of Title 62.1. These deal with the waters, ports, and harbors of the Commonwealth.

2. Class 3 or 4 Misdemeanor Summons Requirement and Exceptions.

   When a law enforcement officer detains a person for committing in the officer's presence a Class 3 or 4 misdemeanor or any other misdemeanor for which the accused cannot receive a jail sentence, Va. Code § 19.2-74 requires the officer to release the accused on a summons unless:

   a. the accused fails to sign the summons, or
   b. the accused fails to discontinue the unlawful act, or
   c. the accused is detained for being intoxicated in public in violation of Va. Code § 18.2-388 or similar local ordinance, or
   d. the accused is detained for remaining at a place of riot or unlawful assembly after having received a warning to disperse in violation of Va. Code § 18.2-407 or a similar local ordinance.

If any one of the above four conditions is present, the officer may arrest the accused and proceeds according to the provisions of Va. Code § 19.2-82.

If the arresting officer establishes probable cause, the magistrate should issue a DC-319, SUMMONS instead of an arrest warrant to avoid the consequences of Pulliam v. Allen, 466 U.S. 522 (1984).
However, if law enforcement arrests the defendant for being intoxicated in public in violation of Va. Code § 18.2-388, or a similar local ordinance, the magistrate, upon finding probable cause, may not release the defendant until the defendant is no longer intoxicated or a responsible custodian can take custody of the defendant. If such an intoxicated defendant has not been charged with a jailable offense, the magistrate

should utilize a warrant of arrest, not a DC-319, SUMMONS, to issue the intoxicated in public charge. If the defendant has been charged with a jailable offense in addition to the intoxicated in public offense, the magistrate may charge the defendant with being intoxicated in public utilizing a DC-319, SUMMONS, so long as the magistrate imposes bail conditions related to the jailable offense that ensure that the defendant will only be released when no longer intoxicated or into the custody of a responsible custodian.

C. Warrantless Arrests Pursuant to Va. Code § 19.2-81

Pursuant to Va. Code § 19.2-81 a law enforcement officer may arrest without a warrant:

1. any person who commits a crime in the presence of the officer;

   "In the presence of the officer" means that the officer has direct personal knowledge, through his sight, hearing, or other senses that the offense is then and there being committed. Penn v. Commonwealth, 13 Va. App. 399 (1991).

2. any person whom the officer has reasonable grounds or probable cause to suspect of having committed a felony;

3. within three hours of the alleged offense, at any location, any person whom the officer has probable cause to suspect of driving or operating a motor vehicle, watercraft or motorboat while intoxicated in violation of Va. Code §§ 18.2-266, 18.2-266.1, 46.2-341.24, or subsection B of 29.1-738; or a substantially similar ordinance of any county, city, or town in the Commonwealth, whether or not the offense was committed in such officer's presence;

4. within three hours of the alleged offense, at any location, any person whom the officer has probable cause to suspect of operating a watercraft or motorboat in violation of an order issued pursuant to Va. Code § 29.1-738.4, whether or not the offense was committed in such officer's presence;

   a. In 2010, the General Assembly authorized the warrantless arrest for certain boating offenses whether or not the offense was committed in the arresting officer's presence. This language still exists. In addition to such authority, in 2011 the General Assembly reinstated language also allowing the transfer of custody of suspects arrested for certain boating violations:

      "Such officers may arrest without a warrant any person whom the officer has probable cause to suspect of operating any watercraft or motorboat while (i) intoxicated in violation of subsection B of § 29.1-738 or a substantially similar ordinance of any county, city, or town in the Commonwealth or (ii) in violation of an order issued pursuant to § 29.1-738.4 and may thereafter

transfer custody of the person arrested to another officer, who may obtain a warrant based upon statements made to him by the arresting officer."

b. The officer presenting testimony to the magistrate for one of these boating offenses may be either the arresting officer (whether or not the act occurred in the officer's presence) or an officer to whom custody was transferred by an arresting officer.

5. at the scene of a motor vehicle, watercraft, or motorboat accident on the highways or waters of the Commonwealth, any person then and there present and reasonably believed, based on the officer's personal investigation, to have committed a crime;

6. at any hospital or medical facility, any person transported to such a facility after being involved in a motor vehicle, watercraft, or motorboat accident on the highways or waters of the Commonwealth and who is then and there present and reasonably believed, based on the officer's personal investigation, to have committed a crime;

7. during the apprehension of any person charged with the theft of any motor vehicle, on any of the highways or waters of the Commonwealth, any person who is then and there present and reasonably believed, based on the officer's personal investigation, to have committed a crime;

8. any person duly charged with a crime in another jurisdiction upon the officer's receipt of a photocopy of a warrant or capias, telegram, computer printout, facsimile printout, radio message, telephone message, or teletype message when such communications medium contains the name or a reasonably accurate description of such person wanted and the crime alleged;

   a. Upon arrest on a photocopy of the warrant or capias, telegram, computer printout, facsimile printout, or teletype message, the arresting officer should serve a copy of the document on the accused. The officer should then deliver a copy of the warrant or capias to the accused as soon as practicable. *See* Rule 7C:3(e).

   b. If the arrest is made based on a radio or telephone message, the officer should document the name of the person who sent the message, the department or agency that sent the message, the date and time the officer received the message, and the contents of the message. The officer then should serve a copy of this information on the accused to satisfy the requirements of Rule 7C:3(e). As soon as practicable, the officer should deliver a copy of the warrant or capias to the accused.

   c. Once law enforcement has executed the message, the magistrate must conduct a bail hearing. The magistrate should proceed just as if the officer had

executed the original arrest warrant. The magistrate also should treat the executed message as if it were the original arrest warrant.

d. Law enforcement agencies have no authority to state in a teletype or other type of message that such communication be treated as a "detainer," or that the arresting locality should "hold" the accused until the requesting law enforcement agency arrives to take custody of the accused. The magistrate should ignore such demands and conduct a bail hearing just as if the accused had been arrested on the original arrest warrant.

e. Because the teletype or other message must contain the crime alleged, the magistrate will always know the charge. Consequently, there should be no danger in the magistrate conducting a bail hearing when not authorized by statute.

f. However, magistrates have no authority to conduct bail hearings when law enforcement arrests a person on a parole board warrant or detainer issued pursuant to Title 53.1 of the Code of Virginia. Magistrates do not become involved in such cases.

g. Likewise, magistrates have no authority to conduct bail hearings or otherwise act when law enforcement arrests a person on a "detainer" issued by U.S. Immigration and Customs Enforcement, unless the arresting officer is requesting an arrest warrant pursuant to subsection B of Va. Code § 19.2-82 and all elements of that statute are satisfied. An "I.C.E. detainer" is not an arrest warrant. "I.C.E. detainers" are issued by certain federal officers, such as immigration enforcement agents. 8 C.F.R. § 287.7. Furthermore, an "I.C.E. detainer" is not a command to arrest:

   1) "A detainer serves to advise another law enforcement agency that the Department [I.C.E.] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing that alien. The detainer is *a request* that such agency advise the Department, prior to the release of the alien, in order for the Department to arrange to assume custody, in situations where gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7 (emphasis added).

   2) Whether a state or local law enforcement agency or jail chooses to detain a person subject to an "I.C.E. detainer" is a determination for those entities to make. *See* Attorney General Opinion to Stolle, 14-067 dated 01/05/2015.

9. any person for an alleged misdemeanor when the officer receives a radio message from the officer's department or any other law enforcement agency within the Commonwealth that a warrant for such offense is on file; or

10. any person for the following misdemeanors (or a similar local ordinance) not committed in the presence of the officer when based on probable cause upon reasonable complaint of the person who observed the alleged offense

    a. shoplifting in violation of Va. Code §§ 18.2-96 or 18.2-103,
    b. carrying a weapon on school property in violation of Va. Code § 18.2-308.1,
    c. assault and battery,
    d. brandishing a firearm, air or gas operated weapon, or object similar in appearance in violation of Va. Code § 18.2-282, or
    e. destruction of property in violation of Va. Code § 18.2-137, when such property is located on premises used for businesses or commercial purposes.

D. Warrantless Arrests Pursuant to Other Provisions of the Code of Virginia

1. *State Police*. Virginia Code § 52-20 sets forth the warrantless arrest powers of the state police force. This statute is very similar, but not identical, to Va. Code § 19.2-81.

2. *Failure to Surrender to Serve Sentence*. Virginia Code § 19.2-298 authorizes law enforcement officers to arrest with or without a warrant if a person released on bail after sentencing fails to surrender or submit to the custody of the sheriff on time to begin serving the sentence, as ordered by the court. The law enforcement officer may arrest the person, with or without a warrant or capias, anywhere in the Commonwealth. *See* "Failure to Surrender to Serve Sentence," below.

3. *Marine Resources Commission Officers*. Pursuant to Va. Code § 28.2-900, Marine Resources Commission officers have warrantless arrest authority for the following:

    a. a violation of Subtitle II of Title 28.2 (Va. Code § 28.2-200 et seq.);
    b. any larceny committed upon or adjacent to the waters of the Commonwealth if the accused commits the offense in the presence of the officer;
    c. a violation of the provisions of Chapter 7 of Title 29.1, or any regulations promulgated thereunder, if the accused commits the offense in the presence of the officer;
    d. a violation of the provisions of Chapter 18 (Va. Code § 62.1-187 et seq.) or 20 (Va. Code § 62.1-194 et seq.) of Title 62.1 if the accused commits the offense in the presence of the officer.

4. *Correctional Officers and Designated Noncustodial Correctional Employees*. Pursuant to Va. Code § 19.2-81.2, correctional officers who have completed minimum training standards and noncustodial weapon-carrying employees of the

Department of Corrections who have completed the basic training course in detention may detain a person suspected of having committed the following crimes if such officer or employee is on duty in or on the grounds of a correctional institution or if the employee has custody of prisoners:

a. violations of Va. Code §§ 18.2-473 through 18.2-475; or
b. aiding and abetting a prisoner in violation of Va. Code § 53.1-203.

The purpose of detention is to allow the correctional officer or employee to summon a law enforcement officer.

5. Law Enforcement Procedures in Cases of Assault and Battery against a Family or Household Member and for Violations of Protective Orders. Pursuant to Va. Code § 19.2-81.3:

   a. Virginia Code § 19.2-81.3 (A) (Warrantless Arrest Permitted)

      1) Law enforcement may arrest a defendant without a warrant for violations of Va. Code §§ 18.2-57.2 (assault and battery on a family or household member), 18.2-60.4 (violation of protective orders), or 16.1-253.2 (violation of family abuse protective orders) based upon:

         - probable cause, or
         - the officer's person observation, or
         - the reasonable complaint of a person who observed the offense, or
         - the officer's personal investigation

      2) the crime does not have to occur in the officer's presence.

   b. Virginia Code § 19.2-81.3 (B) (Mandatory Arrest)

      If the officer has probable cause to believe that the defendant violated Va. Code §§ 18.2-57.2 or 16.1-253.2, the officer must arrest the defendant and take him into custody when the officer has probable cause to believe that the defendant was the predominant physical aggressor based on the following statutory factors:

      1) who was the first aggressor;
      2) the protection of the health and safety of family and household members;
      3) prior complaints of family abuse by the allegedly abusing person involving the family or household members;
      4) the relative severity of the injuries inflicted on persons involved in the incident;
      5) whether any injuries were inflicted in self-defense;

6) witness statements; and
7) other observations.

Physical injury, however, is not an element of assault and battery. "A battery is an unlawful touching of another. It is not necessary that the touching result in injury to the person. Whether a touching is a battery depends on the intent of the actor, not on the force applied.…. The slightest touching of another … if done in a rude insolent, or angry manner, constitutes battery for which the law affords redress." Adams v. Commonwealth, 33 Va. App. 463 (2000).

If special circumstances dictate another course of action, the officer does not have to arrest pursuant to this subsection.

Whenever an officer makes an arrest pursuant to this subsection, the officer will bring the accused before the magistrate and seek a process. On complaint of a criminal offense, if the magistrate finds probable cause that an offense has been committed, she shall issue an arrest process. Va. Code § 19.2-72.

c. Virginia Code § 18.2-81.3 (C) (Mandatory Arrest)

If the officer has probable cause to believe that the defendant violated Va. Code § 18.2-60.4 in a manner involving physical aggression, the officer must arrest the defendant and take him into custody when the officer has probable cause to believe that the defendant was the predominant physical aggressor based on the following statutory factors:

1) who was the first aggressor;
2) the protection of the health and safety of the person to whom the protective order was issued and the person's family and household members;
3) prior acts of violence, force, or threat by the person against whom the order was issued against the person protected by order or the protected person's family or household members;
4) the relative severity of the injuries inflicted on persons involved in the incident;
5) whether any injuries were inflicted in self-defense;
6) witness statements; and
7) other observations.

If special circumstances dictate another course of action, the officer does not have to arrest pursuant to this subsection.

Whenever an officer makes an arrest pursuant to this subsection, the officer will bring the accused before the magistrate and seek a process. On complaint of a criminal offense, if the magistrate finds probable cause that an offense has been committed, she shall issue an arrest process. Va. Code § 19.2-72.

d. Virginia Code § 19.2-81.3 (D) (Written Report Required)

1) Regardless of whether the officer makes an arrest, he or she must file a written report containing the following information:

- whether any arrests were made;
- the number of arrests made;
- specific information about any incident in which the officer has probable cause to believe family abuse occurred; and
- if applicable, a complete statement as to whether special circumstances dictated a course of action other than arrest.

2) The department must make a summary of this report available to the abused and/or protected person upon request.

3) The officer must provide the allegedly abused person or the person protected by an order issued pursuant to Va. Code §§ 19.2-152.8, 19.2-152.9, or 19.2-152.10, both orally and in writing, information regarding available legal and community resources.

e. Virginia Code § 19.2-81.3 (E) (EPO Requirement)

1) In every case where the officer arrests the defendant pursuant to Va. Code § 18.2-57.2, the officer must petition for an emergency protective order as authorized in Va. Code § 16.1-253.4 when he or she brings the defendant before the magistrate.

If the officer arrests a minor for committing an assault and battery on a family or household member, the officer is not required to petition for a family abuse emergency protective order. However, the statute does not prohibit the officer from petitioning for a family abuse emergency protective order when the abuser is a minor.

2) If the officer does not make an arrest, the officer still must petition for an emergency protective order if he or she has probable cause to believe that a danger of acts of family abuse exists.

The officer is not required to petition for a family abuse emergency protective order in this case if the suspected abuser is a minor. However, the statute does not prohibit the officer from petitioning for a family abuse emergency protective order when the abuser is a minor.

f. Virginia Code § 19.2-81.3 (F) (Transportation Requirement)

g. An officer investigating any complaint of family abuse must transport or arrange for the transportation of an abused person to a hospital, safe shelter, or magistrate upon request of such person.

h. Virginia Code § 19.2-81.3 (G) (Definition of "Family or Household Member")

The definition of "family or household member" in Va. Code § 16.1-228 applies to this code section.

i. Virginia Code § 19.2-81.3 (H) (Definition of "Law-enforcement Officer")

For purposes of Va. Code § 19.2-81.3, "law-enforcement officer" means "(i) any full-time or part-time employee of a police department or sheriff's office which is part of or administered by the Commonwealth or any political subdivision thereof, and any campus police officer appointed under Article 3 (§ 23.1-809 et seq.) of Chapter 8 of Title 23.1, and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this Commonwealth; (ii) any member of an auxiliary police force established pursuant to subsection B of § 15.2-1731; and (iii) any special conservator of the peace who meets the certification requirements for a law-enforcement officer as set forth in § 15.2-1706. Part-time employees are compensated officers who are not full-time employees as defined by the employing police department or sheriff's office."

Uncompensated part-time officers do not qualify as law enforcement officers for purposes of Va. Code § 19.2-81.3.

E. Execution of Process by a Law Enforcement Officer

1. Virginia Code § 19.2-76 states that a "law-enforcement officer… may execute … within his jurisdiction a warrant, capias or summons issued anywhere in the Commonwealth…. A warrant or capias shall be executed by the arrest of the accused, and a summons shall be executed by delivering a copy to the accused personally." The statute further states, "A jail officer as defined in § 53.1-1 employed at a regional jail or jail farm may execute upon a person being held in his jail a warrant, capias or summons issued anywhere in the Commonwealth."

2. Virginia Code § 15.2-1726 allows counties, cities, and towns to enter into reciprocal agreements that allow officers of police departments and deputies of sheriff's departments of the localities entering into the agreements to have the authority to make arrests and to have the same powers, rights, benefits, privileges and immunities in every jurisdiction subscribing to the agreement.

Virginia Code § 19.2-236 states, "When process of arrest in a criminal prosecution is issued from a court, either against a party accused or a witness, the

officer to whom it is directed or delivered may execute it in any part of the Commonwealth."

3. The Virginia Supreme Court in Crowder v. Commonwealth, 213 Va. 151, 191 S.E.2d 239 (1972), held that by virtue of his or her appointment as a State Police Officer, a trooper is vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of the Commonwealth. The exercise of these powers is not confined to any one jurisdiction.

4. Virginia Code § 52-22 allows state police officers to execute warrants for violations of local ordinances when requested to do so by local authorities. This authority is discretionary; the state police officer may not execute such warrants if the execution will interfere with, delay, or hinder the officer in the discharge of official duties.

   Virginia Code § 46.2-102 states "notwithstanding § 52-22, state police officers may enforce local ordinances, adopted under subsection G of § 46.2-752, requiring the obtaining and displaying of local motor vehicle licenses."

5. Virginia Code § 19.2-73.1 states that in any misdemeanor or Class 5 or 6 felony case, the chief of police, his designee, the sheriff, or a deputy sheriff may notify the accused of the issuance of a warrant or summons and direct the accused to appear at the time and place directed for the purpose of executing the summons or warrant.

   The magistrate may direct that law enforcement not contact the accused prior to execution. If the magistrate does not want law enforcement to contact the defendant prior to execution, the magistrate should note that fact on the face of the warrant.

6. Virginia Code § 16.1-264 (A1) states that any person who is subject to an emergency protective order issued pursuant to Va. Code §§ 16.1-253.4 or 19.2-152.8 shall have been personally served with the protective order when a law-enforcement officer, as defined in Va. Code § 9.1-101, personally provides to such person a notification of the issuance of the order, which shall be on a form approved by the Executive Secretary of the Supreme Court of Virginia.

F. Witness Subpoenas

1. Virginia Code § 19.2-73.2 states, "Law enforcement officers as defined in § 9.1-101 and state police officers, in the course of their duties, in the investigation of any Class 3 or 4 misdemeanor or any traffic infraction, may, within seventy-two hours of the time of the offense, issue a subpoena to any witness to appear in court. … The return of service thereof shall be made within seventy-two hours

after service to the appropriate court clerk. A subpoena so issued shall have the same force and effect as if issued by the court."

2. Virginia Code § 46.2-939 authorizes local law enforcement officers and state police to issue witness subpoenas at the scene of a motor vehicle accident. The statute further authorizes state police officers to issue witness subpoenas in cases involving motor vehicle accidents at locations other than the accident scene. Such officers must issue the subpoena within seventy-two hours of the accident and make return of service to the clerk's office within forty-eight hours after service.

3. Virginia Code § 19.2-267 authorizes attorneys for the Commonwealth, attorneys responsible for the prosecution of violations of any ordinance, and attorneys for defendants to issue summonses for witnesses in criminal cases.

G. Unexecuted Warrants

Virginia Code § 19.2-76.1 requires the chief law enforcement officer to submit quarterly reports to the Commonwealth's Attorney concerning unexecuted felony and misdemeanor warrants.

The reports list felony arrest warrants which remain unexecuted for seven years from issuance and misdemeanor arrest warrants, summonses, capiases, and other criminal process that remain unexecuted for three years from issuance.

A 2010 amendment to the statute authorizes a Commonwealth's Attorney to move at any time for a dismissal of an unexecuted warrant or summons issued by a magistrate. A 2011 amendment to the statute further authorizes the destruction of the dismissed, unexecuted warrant.

H. Violation of Parking or Town Trash Ordinance Procedures (Va. Code §§ 46.2-1220, 19.2-76.2 and 19.2-76.3)

1. Virginia Code § 46.2-1220 allows localities to adopt local ordinances governing parking, stopping, and standing of vehicles. This statute also allows localities having a population of 40,000 or more to adopt an ordinance authorizing law-enforcement officers, other uniformed employees of the locality, or uniformed personnel serving under contract with the locality to issue "a summons or parking ticket" for a violation of a parking ordinance.

   The last paragraph of Va. Code § 46.2-1220 provides: "In any prosecution charging a violation of the ordinance or regulation, proof that the vehicle described in the complaint, summons, parking ticket citation, or warrant was parked in violation of the ordinance or regulation, together with proof that the defendant was at the time the registered owner of the vehicle, as required by Chapter 6 (§ 46.2-600 et seq.), shall constitute in evidence a prima facie

presumption that the registered owner of the vehicle was the person who committed the violation."

2. Virginia Code § 19.2-76.2 authorizes:

   a. the execution of a summons for a violation of a local parking ordinance by mailing a copy of the summons by first-class mail to the owner of the vehicle as shown on the records of the Department of Motor Vehicles; and

   b. the execution of a summons for a violation of a local county, city, or town trash ordinance punishable as a misdemeanor under Va. Code § 15.2-901 by mailing a copy by first-class mail to the person who occupies the premises in question.

The statute does not specify whether the "summons" mentioned is a local summons form, a VIRGINIA UNIFORM SUMMONS issued by an officer, or a DC-319, SUMMONS issued by a magistrate. All three summonses appear to be proper under the language of the statute. The local ordinances may provide additional insight on the issue of the type of summons.

If the accused fails to appear in court as directed in a summons mailed pursuant to Va. Code § 19.2-76.2, the court may not issue a capias for the arrest of the accused or issue a show cause summons for failing to appear.

Pursuant to Va. Code § 19.2-76.3, if the accused does not appear pursuant to the mailed summons, the sheriff must serve the summons as described in Va. Code § 8.01-296. If the accused still fails to appear, a summons shall be executed as set out in Va. Code § 19.2-76.

Proceedings for contempt or arrest may only be instituted after a person summoned pursuant to Va. Code § 19.2-76.3 has been personally served with the summons and fails to appear on the return date contained therein.

I. Photo-Monitoring of Traffic Light Signal Violations

1. Virginia Code § 15.2-968.1 allows localities to adopt local ordinances to enforce traffic signal violations. The use of photo-monitoring systems to enforce such ordinances is described.

2. Once law enforcement produces a sworn or affirmed certificate setting forth the facts of the traffic signal violation based upon evidence produced by a photo-monitoring system, the evidence contained in the certificate becomes prima facie.

3. Subsection D of Va. Code § 15.2-968.1 creates a rebuttable presumption that the owner, lessee, or renter of the vehicle described in the certificate was the operator

of the vehicle at the time of the traffic light signal violation. The owner, lessee, or renter may rebut the presumption by:

a. filing, by regular mail, an affidavit in which he states that he was not the operator of the vehicle at the time of the offense to the clerk of the general district court having trial authority of the offense;

b. testifying under oath in open court that he was not the operator of the vehicle at the time of the offense; or

c. presenting to the court adjudicating the violation, prior to the return date on the summons, a certified copy of a police report showing that the vehicle had been reported to the police as stolen prior to the offense.

4. Subsection G of this statute allows the execution of the summons to be done by the procedures set forth in Va. Code § 19.2-76.2. These procedures are set forth above under the Violation of Parking or Town Trash Ordinance section. The summons may be executed by mailing a copy of the summons to the owner, lessee, or renter of the vehicle by first class mail.

   The statute does not specify whether the "summons" is a local summons form issued by a local law enforcement officer or a DC-319, SUMMONS issued by a magistrate. The local ordinances may provide additional insight on the issue of the type of summons. If the magistrate issues the summons, subsection G requires that the trial date be no earlier than 30 days from the date that the summons will be mailed to the defendant.

   The mailing shall also include a notice of (i) the defendant's ability to rebut the presumption that he was the operator of the vehicle at the time of the alleged violation through the filing of an affidavit as provided in subsection D of Va. Code § 15.2-968.1 and (ii) instructions for filing such affidavit, including the address to which the affidavit is to be sent.

   If the person fails to appear, the summons shall be executed as described in Va. Code § 19.2-76.3. No proceedings for contempt or arrest of a person summoned by mailing shall be instituted for failure to appear.

J. Photo Speed Monitoring Devices in Highway Work Zones and School Crossing Zones

1. Virginia Code § 46.2-882.1 allows state and local law enforcement agencies to place and operate photo speed monitoring devices in highway work and school crossing zones for the purpose of recording violations of Va. Code §§ 46.2-873 (school crossing zone speed violations) and 46.2-878.1 (highway work zone speed violations).

Once law enforcement produces a sworn or affirmed certificate setting forth the facts of the speed violation based upon evidence produced by a photo speed monitoring device, the evidence contained in the certificate becomes prima facie.

2. Subsection B(3) of Va. Code § 46.2-882.1 creates a rebuttable presumption that, when a summons was issued by mail for a violation of Va. Code §§ 46.2-873 or 46.2-878.1 and there is prima facie evidence that the vehicle was operated in violation of Va. Code §§ 46.2-873 or 46.2-878.1, the owner, lessee, or renter of the vehicle described in the summons was the operator of the vehicle at the time of the violation. The owner, lessee, or renter may rebut the presumption by:

   a. filing, by regular mail, an affidavit to the clerk of the general district court stating that he was not the operator of the vehicle at the time of the violation and providing the name and address of the person that was operating the vehicle at the time;

   b. testifying under oath in open court that he was not the operator of the vehicle at the time of the violation and providing the name and address of the person that was operating the vehicle at the time; or

   c. presenting to the court adjudicating the violation, prior to the return date on the summons, a certified copy of a police report showing that the vehicle had been reported to the police as stolen prior to the violation.

3. Subsection B(5) of this statute allows the execution of the summons to be done by the procedures set forth in Va. Code § 19.2-76.2. These procedures are set forth above under the Violation of Parking or Town Trash Ordinance section. The summons may be executed by mailing a copy of the summons to the owner, lessee, or renter of the vehicle by first class mail.

   If the magistrate issues the summons, subsection B(5) requires that the trial date be no earlier than 30 days from the date that the summons will be mailed to the defendant.

   The mailing shall also include a notice of (i) the defendant's ability to rebut the presumption that he was the operator of the vehicle at the time of the alleged violation through the filing of an affidavit as provided in subsection B(3) of Va. Code § 46.2-882.1 and (ii) instructions for filing such affidavit, including the address to which the affidavit is to be sent.

   If the person fails to appear, the summons shall be executed as described in Va. Code § 19.2-76.3. No proceedings for contempt or arrest of a person summoned by mailing shall be instituted for failure to appear.

K. Close Pursuit within Virginia

Virginia Code § 19.2-77 provides that an officer may pursue or arrest a person who escapes or when actually in close pursuit, anywhere in the Commonwealth.

It is not necessary for the accused to be eluding or speeding away from the officer. "Close pursuit 'is a relative term which depends upon time and distance and which must be determined by examining the particular facts of each case.'" Neiss v. Commonwealth, 16 Va. App. 807, 810, 433 S.E.2d 262, 264 (1993) (quoting Callands v. Commonwealth, 208 Va. 340, 342-43, 157 S.E.2d 198, 201 (1967)); *see* Robert Bruce Hamm v. City of Norton, Record No. 1607-98-3, September 28, 1999. "Proof that the officer was attempting to arrest the suspect and was closely pursuing the suspect satisfies the statutory requirement." Neiss, 16 Va. App. at 811.

1. If the officer makes the arrest in a county or city that adjoins that from which the accused fled, the officer may forthwith return the accused before the judicial officer in the locality from which the accused fled.

2. If the officer makes the arrest in an area of the Commonwealth within one mile of the boundary of the locality from which the accused fled, the officer may forthwith return the accused before the judicial officer in the locality from which the accused fled. Va. Code § 19.2-77.

3. If the locality of arrest is not contiguous to, or within one mile of, the locality from which the accused fled, the officer must:

   a. when making an arrest pursuant to an existing warrant or capias: proceed in accordance with Va. Code § 19.2-76

   b. when making a warrantless arrest: take the accused before the magistrate in the locality of arrest and obtain a warrant charging the accused with the offense committed in the locality from which the accused fled and any offense committed during the close pursuit. In such circumstances, the magistrate would issue the warrant returnable to the locality in which the crime occurred, even if the defendant committed the underlying crime outside the magistrate's judicial region.

L. Uniform Requirement

Virginia Code § 19.2-78 requires that an officer making an arrest or conducting a search or seizure be in uniform. The fact that the officer is not in uniform at the time of the arrest, search, or seizure does not affect the lawfulness of the arrest, search, or seizure.

M. Close Pursuit across State Lines

Virginia Code § 19.2-79 provides that officers from another state or the District of Columbia may arrest an accused in Virginia if the officer travels across the state line in close pursuit.

Once the out-of-state officer makes the arrest after the pursuit, he or she must take the accused before a judge of the general district or circuit court in the locality of arrest. The magistrate has no authority to conduct a probable cause hearing under these circumstances.

N. Driver Arrested, Car Not Impounded

If an officer arrests the operator of a motor vehicle and there is no cause to retain the vehicle, Va. Code § 19.2-80.1 requires an officer to allow the operator to choose another person present at the scene of the arrest to drive the vehicle to where the operator designates. If the operator does not make a designation, the officer may cause the vehicle to be taken to the nearest appropriate place for safekeeping.

O. Law Enforcement's Authority to Obtain Address of a Defendant From the Records of a Public Agency

Virginia Code § 19.2-81.5 allows a public agency to disclose the address of a person who is the subject of an arrest warrant or an indictment for a crime punishable by incarceration upon receipt of a request and documentation from a law enforcement agency.

P. Failure to Surrender to Serve Sentence

Virginia Code § 19.2-298 states in relevant part, "Whenever any person willfully and knowingly fails to surrender or submit to the custody of a sheriff as ordered by a court, any law-enforcement officer, with or without a warrant, may arrest such person anywhere in the Commonwealth. If the arrest is made in the county or city in which the person was ordered to surrender, or in an adjoining county or city, the officer may forthwith return the accused before the proper court. If the arrest is made beyond the foregoing limits, the officer shall proceed according to the provisions of § 19.2-76, and if such arrest is made without a warrant, the officer shall procure a warrant from the magistrate serving the county or city wherein the arrest was made, charging the accused with contempt of court."

1. If the law enforcement officer makes the arrest with a warrant or capias issued pursuant to Va. Code § 19.2-298 in the city or county where the person was to surrender, or in a city or county that is adjacent to such city or county (as the case may be), the law enforcement officer can either take the arrested individual to the detention facility for appearance in court or execute the process and bring the individual before a judicial officer pursuant to Va. Code §§ 19.2-76 and 19.2-

80 and the magistrate would proceed to conduct a bail hearing as required by those sections.

2. If the law enforcement officer makes the arrest with a warrant or capias issued pursuant to Va. Code § 19.2-298 in a city or county other than those described above, the law enforcement officer must bring the individual before a judicial officer pursuant to Va. Code § 19.2-76 and 19.2-80 and the magistrate would proceed to conduct a bail hearing as required by those sections.

3. If the law enforcement officer makes the arrest under Va. Code § 19.2-298 without a warrant or capias in the city or county where the person was to surrender, or in a city or county that is adjacent to such city or county (as the case may be), the law enforcement officer takes the person directly to the detention facility to commence service of the sentence. The magistrate does not see the arrested person.

4. However, if the law enforcement officer makes the arrest without a warrant or capias in a city or county other than those described above, the law enforcement officer takes the person to the magistrate where the arrest was made and requests a warrant.

   If the magistrate determines that there is probable cause to issue, it is recommended that the magistrate issue a capias, not a warrant. The nature of the allegation is that the person is in contempt of court. Issuance of a show cause capias preserves for the court the option to proceed and punish utilizing either summary or plenary contempt procedures. The maximum authorized punishments are different depending on how the court chooses to proceed. In issuing the capias, the magistrate would cite Va. Code § 19.2-298 in the capias and allege that the accused willfully and knowingly failed to surrender or submit to the custody of the sheriff as ordered by the court.

   If the magistrate issues a capias pursuant to Va. Code § 19.2-298 following a warrantless arrest, the magistrate would then proceed to conduct a bail hearing as required under Va. Code § 19.2-76.

V. ARREST PROCEDURES APPLICABLE TO MAGISTRATES

A. Certain Hearings Conducted by Means of Two-Way Electronic Video and Audio Communication

Virginia Code § 19.2-3.1 allows magistrates, intake officers, and judges to conduct certain hearings by means of two-way electronic video and audio communication.

1. Where an appearance is required or permitted before a magistrate, intake officer or, prior to trial, before a judge, the appearance may be by:

a. personal appearance before the magistrate, intake officer, or judge, or

b. use of two-way electronic video and audio communication.

2. If two-way electronic video and audio communication is used, a magistrate, intake officer, or judge may exercise all powers conferred by law.

3. The magistrate, intake officer, or judge conducts all communications and proceedings in the same manner as if the appearance were in person. For purposes of filing a copy of an affidavit for a search warrant pursuant to Va. Code § 19.2-54, the term "wherein the search warrant was issued" is interpreted to mean the location where the magistrate is physically located at the time of issuance. For example, if a sheriff's deputy physically located in Lee County appears before the magistrate on video while the magistrate is physically located in Floyd County, the search warrant should be considered issued in Floyd County for purposes of filing a copy of the affidavit with the circuit court. *See* the "Search Warrant Procedures" chapter of this manual for further information.

4. When using an audio-visual system, the magistrate may transmit documents by electronically transmitted facsimile process. Law enforcement may serve and execute the facsimile in the same manner and with the same force, effect, authority, and liability as the original document. All signatures on facsimile documents are treated as original signatures.

5. Any two-way electronic video and audio communication system used for appearance must meet the following standards:

a. the persons communicating must simultaneously see and speak to one another;

b. the signal transmission must be live, real time;

c. the signal transmission must be secure from interception through lawful means by anyone other than the persons communicating; and

d. any other specifications promulgated by the Chief Justice of the Supreme Court.

B. Statute of Limitations

The statute of limitations is not at issue in a probable cause hearing before the magistrate. Pleading the statute of limitations is an affirmative defense that must be raised at trial. *See* Locklear v. Commonwealth, 46 Va. App. 488, 498 (2005). If the defendant does not raise the issue at trial, he is deemed to have waived the defense.

1. Virginia Code § 19.2-8 sets forth the statute of limitations for misdemeanors. This statute requires that prosecutions for misdemeanors commence within a specific

period of time after the violation of law. Most, but not all, misdemeanors have a one-year limitation.

2. With limited exceptions, there are no statutes of limitations for felony cases.

C. Venue

A magistrate must determine the locality where the trial for a criminal offense will be held. There are specific statutory rules that govern the determination of venue.

1. Virginia Code § 19.2-244 sets forth the general venue statute for criminal prosecutions. This statute states:

   A. Except as otherwise provided by law, the prosecution of a criminal case shall be had in the county or city in which the offense was committed. Except as to motions for a change of venue, all other questions of venue must be raised before verdict in cases tried by a jury and before the finding of guilty in cases tried by the court without a jury.

   B. 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.

   C. The courts of a locality shall have concurrent jurisdiction with the courts of any other locality adjoining such locality over criminal offenses committed in or upon the premises, buildings, rooms, or offices owned or occupied by such locality or any officer, agency, or department thereof that are located in the adjoining locality.

2. Crimes such as murder, larceny, embezzlement, forgery, tax offenses, and computer crimes have unique venue statutes found in Title 19.2. Other crimes have special venue provisions contained in statutes outside of Title 19.2 as well. These special provisions often will give a choice of localities where venue is proper.

3. Virginia Code § 19.2-249 states that if a crime occurs on the boundary of two counties, two cities, or of a county and a city, venue is proper in either jurisdiction. Similarly, if a crime occurs within 300 yards of the boundary of such localities, venue is proper in either locality.

   Example: A husband and wife live in Floyd County in a house located 100 yards from the border of Patrick County. The husband commits an assault and battery against his wife while in the house. Venue is proper either in Floyd County or Patrick County.

4. Virginia Code § 19.2-250 likewise extends territorial jurisdiction of (generally) a town or a city one mile into an adjoining locality. The effect of this statute is to allow a town or city police officer to go one mile outside the town or city limits to enforce the laws of the Commonwealth and venue is proper within such town or city.

   a. Virginia Code § 19.2-250 does not authorize a town or city officer to enforce local ordinances within a mile of the town or city limits. The one-mile jurisdiction only applies to criminal violations of the Code of Virginia. *See* Attorney General Opinion to Nettles, dated 12/2/03 (2003, page 84); *Jurisdiction of Waverly police department in criminal cases involving offenses against Commonwealth extends 1 mile beyond town corporate limits. Because corporate authorities have no jurisdiction to enforce town ordinances outside corporate limits of town, town of Waverly is not entitled to fines collected for violations of state law occurring outside its corporate limits.*

   b. The one-mile rule does not apply to towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more. A 300-yard rule applies instead.

   c. The statute extends the jurisdiction of the Counties of Henrico and Chesterfield one mile into the City of Richmond. Virginia Code § 19.2-250 is otherwise inapplicable to counties.

D. Procedures for the Arrest of a Person on an Existing Warrant or Capias

Virginia Code §§ 19.2-76 and 19.2-80 set forth the procedures that law enforcement officers and magistrates must follow when a law enforcement officer arrests a person on an existing warrant or capias.

1. Virginia Code § 19.2-76 allows a law enforcement officer to execute within his or her jurisdiction a warrant, capias, or summons issued anywhere in the Commonwealth.

2. Virginia Code § 19.2-236 states, "When process of arrest in a criminal prosecution is issued from a court, either against a party accused or a witness, the officer to whom it is directed or delivered may execute it in any part of the Commonwealth."

3. Virginia Code § 19.2-80 requires law enforcement to bring the accused forthwith before a magistrate or other judicial officer upon making an arrest under an existing warrant or capias. If the officer brings the accused before the magistrate, the magistrate must immediately conduct a bail hearing. If the defendant is brought before a judge of the court having jurisdiction to try the case and both the

accused and the Commonwealth consents, the judge may proceed to trial instead of conducting a bail hearing.

4. If law enforcement arrests the accused in a county or city other than that in which the charge is to be tried, Va. Code § 19.2-76 requires the officer making the arrest to either:

   a. bring the accused forthwith before a judicial officer in the locality where the arrest was made or where the charge is to be tried; or

   b. commit the accused to the custody of an officer from the county or city where the charge is to be tried who shall bring the accused forthwith before a judicial officer in the county or city in which the charge is to be tried.

   If the arresting officer brings the arrestee before the magistrate in the place of arrest, the magistrate conducts a bail hearing. If the arresting officer commits the accused to the custody of an officer from the county or city where the charge is to be tried, the magistrate plays no role in this transfer. Once the transferring officer brings the accused to the county or city where the charge will be tried, the magistrate there immediately will conduct a bail hearing.

5. If the accused can meet the conditions of bail, the magistrate must prepare a DC-330, RECOGNIZANCE form and release the defendant. If the accused cannot meet the conditions of bail, the magistrate must prepare a DC-352, COMMITMENT ORDER form and commit the defendant to jail.

E. Procedures for Warrantless Arrests

Virginia Code § 19.2-82 sets forth the procedures for cases in which the officer has made a warrantless arrest. The section states, "A person arrested without a warrant shall be brought forthwith before a magistrate or other issuing authority having jurisdiction…"

1. Appearance:

   The second paragraph of Va. Code § 19.2-82 states, "As used in this section the term 'brought before a magistrate or other issuing authority having jurisdiction' shall include a personal appearance before such authority or any two-way electronic video and audio communication meeting the requirements of § 19.2-3.1, in order that the accused and the arresting officer may simultaneously see and speak to such magistrate or authority…"

   a. In a warrantless arrest situation, the magistrate may not conduct a probable cause hearing without the defendant being present at the hearing unless the defendant is so disruptive that the magistrate is unable to conduct the hearing.

The magistrate first must give a warning to the defendant before concluding the hearing outside the defendant's presence.

b. It is recommended that the magistrate conduct all hearings in the magistrate's office, unless unusual circumstances prevent this, e.g. where the defendant is uncontrollable.

2. Examination:

Virginia Code § 19.2-82 further requires that the magistrate "examine the officer making the arrest under oath."

a. This section requires that the officer who makes the arrest be the complainant who appears before the magistrate.

b. Title 19.2 does not define "examine." Black's Law Dictionary, however, states the following as part of the definition of "examination": "The examination of a witness consists of the series of questions put to him by a party to the action, or his counsel, for the purpose of bringing before the court and jury in legal form the knowledge which the witness has of the facts and matters in dispute, or of probing and sifting his evidence previously given.

1) Given the legal meaning of "examination," Va. Code § 19.2-82 seems to require that the magistrate receive oral testimony during a probable cause hearing. This interpretation is supported by Rule 3A:3, which states that, "The complaint shall consist of sworn statements of a person or persons of facts relating to the commission of an alleged offense. The statements shall be made upon oath before a magistrate empowered to issue arrest warrants. The magistrate may require the sworn statements to be reduced to writing and signed…." (Emphasis added.)

2) Rule 7C:3(a) tracks the language of Rule 3A:3 verbatim with the exception of substituting the term "judicial officer" for "magistrate," and by deleting the words "and signed" at the end of the last sentence.

3) The magistrate must administer the oath prior to receiving testimony in any hearing.

3. Virginia Code § 19.2-82 further states that if the magistrate does not issue a warrant or a summons, the person arrested is released.

4. Virginia Code § 52-21 sets forth the warrantless arrest procedures for state police officers. This statute is very similar, but not identical to Va. Code § 19.2-82.

F. Officer to Provide Arrested Person's Criminal History (Va. Code § 19.2-80.2)

"In any case in which an officer proceeds under §§ 19.2-76, 19.2-80, and 19.2-82, such officer shall, to the extent possible, obtain and provide the magistrate or court with the arrested person's criminal history prior to any proceeding under Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title. A pre-trial services program established pursuant to § 19.2-152.4 may, in lieu of the arresting officer, provide the criminal history to the magistrate or court."

This language requires the arresting officer to provide the magistrate with a copy of the arrestee's criminal history at the time the officer brings the accused before the magistrate for a bail hearing. Virginia Code § 19.2-120 requires the magistrate to obtain the criminal history prior to conducting a bail hearing.

G. Complaint of a Criminal Offense to a Magistrate

Virginia Code § 19.2-72 states, in part, that on a complaint of a criminal offense to a magistrate, the magistrate "shall examine on oath the complainant and any other witnesses… If upon such examination such officer finds that there is probable cause to believe the accused has committed an offense, such officer [the magistrate] shall issue a warrant…"

1. Requirement to issue upon finding of probable cause.

   Virginia Code § 19.2-72 requires the magistrate to issue criminal process of arrest if the complainant establishes probable cause.

2. Virginia Code § 18.2-251.03 Overdose Provision.

   Formerly, Va. Code § 18.2-251.03 stated that those experiencing drug or alcohol overdoses could raise an "affirmative defense" in some circumstances. However, a 2020 amendment struck the phrase "affirmative defense" and instead stated that those experiencing overdoses cannot "be subject to arrest or prosecution" under certain circumstances. Virginia Code § 18.2-251.03 defines an overdose as "a life-threatening condition resulting from the consumption or use of a controlled substance, alcohol, or any combination of such substances." Below is a list of the circumstances that may trigger the overdose provision.

   Virginia Code § 18.2-251.03 (B) states that no individual shall:

   a. "be subject to arrest or prosecution for:"

      1) the unlawful purchase, possession, or consumption of alcohol pursuant to § 4.1-305;
      2) the unlawful purchase, possession, or consumption of marijuana pursuant to § 4.1-1105.1;

3) possession of a controlled substance pursuant to § 18.2-250;
4) intoxication in public pursuant to § 18.2-388; or
5) possession of controlled paraphernalia pursuant to § 54.1-3466;

b. if such individual:

1) in good faith, seeks or obtains emergency medical attention for an overdose involving himself or another person; or

2) is experiencing an overdose and another person, in good faith, seeks or obtains emergency medical attention for such individual by contemporaneously reporting the overdose to:

- a firefighter as defined in Va. Code § 65.2-102;
- emergency medical services personnel as defined in Va. Code § 32.1-111.1;
- a law-enforcement officer as defined in Va. Code § 9.1-101; or
- an emergency 911 system; or

3) in good faith, renders emergency care or assistance, including CPR or the administration of an opioid antagonist for overdose reversal, to an individual experiencing an overdose while another individual seeks or obtains such emergency medical attention;

c. and such individual remains at the scene of the overdose or an alternative location to which he or the person requiring emergency medical attention has been transported until a law enforcement officer responds to the report of an overdose; and

d. such individual identifies himself to the law enforcement officer who responds to the report of an overdose; and

e. the evidence for the prosecution of one of the enumerated offenses was obtained as a result of the individual seeking or obtaining emergency medical attention or rendering emergency care or assistance.

f. However, this provision does not apply during the execution of a search warrant or during the conduct of a lawful search or arrest.

If the overdose provision applies, Va. Code § 18.2-251.03 not only bars an "arrest" in such circumstances but also "prosecution" of the individual. A "prosecution" is "the process in which an accused is brought to justice from the time a formal accusation is made through trial and final judgment[.]" Phillips v. Commonwealth, 257 Va. 548, 553, 514 S.E.2d 340, 343 (1999). In the statute of limitations context, the Court of Appeals has stated that "[t]he issuance of a warrant commences a prosecution…" Hall v. Commonwealth, 2

Va. App. 159, 162, 342 S.E.2d 640, 641 (1986). Therefore, it appears that a magistrate should not issue process of arrest for an individual when the information presented to the magistrate establishes that the overdose provision listed in § 18.2-251.03 applies.

In many circumstances, there will be insufficient information at the probable cause stage to establish that the overdose provision applies. The General Assembly seems to have recognized this by protecting law enforcement officers from claims of false arrest if they were acting in good faith. Va. Code § 18.2-251.03 (E). If the magistrate does not receive sufficient information to establish that the overdose provision applies, the magistrate should issue process of arrest upon a finding of probable cause.

3. Charge selection.

The language in Va. Code § 19.2-72 requiring a magistrate to issue upon a finding of probable cause is subject to differing interpretations regarding a magistrate's discretion as to charge selection.

For example, a police officer presents an arrestee to a magistrate based on a warrantless arrest. The officer seeks a warrant for DUI (Va. Code § 18.2-266). After reviewing the facts, the magistrate believes that probable cause exists to charge the accused with DUI (Va. Code § 18.2-266), Person Under Age 21 Driving After Illegally Consuming Alcohol (Va. Code § 18.2-266.1), and Underage Possession of Alcohol (Va. Code § 4.1-305).

The arresting officer states, however, that she desires only one arrest warrant: DUI (Va. Code § 18.2-266). Two issues develop: (1) What arrest warrant(s) may the magistrate issue? (2) What arrest warrant(s) must the magistrate issue?

a. What arrest warrant(s) may the magistrate issue?

Regarding the first issue, the statute suggests that even without a "formal complaint" of a specific offense, the magistrate has the authority to act. It states, in part:

> "[W]hen such [judicial] officer shall suspect that an offense punishable otherwise than by a fine has been committed he may, *without formal complaint*, issue a summons for witnesses and shall examine such witnesses.… If upon such examination such officer finds that there is probable cause to believe the accused has committed an offense, such officer shall issue a warrant for his arrest…"

While it appears that a magistrate has the authority to issue arrest warrants for specific charges not requested by a law enforcement officer, the magistrate should exercise restraint and do so only when she believes that the interests of

justice require such action. Such charging decisions generally should be left to the discretion of the attorney for the Commonwealth or a law enforcement agency.

b. What arrest warrant(s) must the magistrate issue?

Regarding the second issue, the statute suggests that if a law enforcement officer requests a specific charge as part of his complaint of a criminal offense, the magistrate must issue an arrest warrant for that particular charge if probable cause exists. Likewise, if the law enforcement officer specifically requests multiple charges for which probable cause exists, the magistrate must issue process of arrest for each charge supported by probable cause. However, the statute does not require a magistrate to issue every conceivable charge supported by the facts without a formal request for the specific charges.

Based on the foregoing, assuming that probable cause exists for all three charges in the above example, the magistrate would be required to issue at least an arrest warrant for DUI (Va. Code § 18.2-266). Although the magistrate could issue the other two charges, it does not appear that the interests of justice require such action. Therefore, it is recommended that the magistrate not issue the two arrest warrants not requested by the arresting officer.

4. "Cross Warrants"

A "cross warrant" situation arises when parties involved in a situation wish to obtain criminal processes against each other. In most cases, the parties will arrive at the magistrate's office at very separate and distinct times. Occasionally, the parties will come before the same magistrate.

Example: John Doe and Jay Hill have a fistfight. John goes to the magistrate for a charge against Jay. Jay goes to the magistrate for a charge against John.

a. In relatively routine instances where cross complaints are filed, the magistrate should evaluate each complaint individually following the procedures described in Section II above and elsewhere in this chapter to determine whether probable cause exists to issue process against each accused party. To do otherwise is improper and reduces the criminal justice process to a race to the magistrate's office.

b. For a magistrate to deny criminal process solely on the basis of a general practice or self-imposed policy of "not issuing cross warrants" is improper.

c. However, issuing warrants on cross complaints can often be problematic for magistrates and for many other entities in the criminal justice system. Consideration of cross complaints often raises issues of complainant credibility. Issuing a "cross warrant" in some cases may frustrate the efforts of an ongoing or a completed investigation or complicate a commenced prosecution. As such, they may require the consideration of a number of unique factors that may not always be present in the routine criminal complaint hearing.

1) In many of these instances, it is often helpful for the magistrate to inquire if law enforcement responded to the matter. If so, requesting a copy of any police report that might have been generated could provide the magistrate with useful information the magistrate could use for further questions during the hearing or consideration of the matter.

2) See the information regarding cross warrants in domestic violence cases in the Juvenile and Domestic Relations Procedures chapter of this manual.

5. Motive for warrant

The reason that a complainant wishes to pursue a criminal warrant is relevant only to the issue of the complainant's credibility. It is improper for a magistrate to base the denial of a criminal process solely on the complainant's motive.

For example, the statements of the complainant establish probable cause that a crime has occurred. The complainant, however, states that the only reason he is seeking a warrant is because his attorney told him his chances in court are better if he obtains a warrant against the other party. The magistrate finds the complainant credible. Under these facts, the magistrate must issue a warrant or summons. The complainant's motive does not bar issuance of the criminal process.

6. Time lapse

A time lapse between the offense date and the probable cause hearing is relevant only to the issue of credibility. When there is a time lapse and the magistrate determines that the complainant is credible, it is improper for the magistrate to deny the issuance of a warrant or summons if the facts support a probable cause finding.

7. The effect of a civil action

A pending or completed civil action does not affect the magistrate's authority to issue a warrant or summons.

For example, Alan Jones buys a ring from Teresa Tucker and pays for the ring with a check in the amount of $500.00. The bank dishonors the check for lack of sufficient funds. Teresa sues Alan in court and obtains a judgment for the amount of the check, for bank fees, and a processing charge plus $250.00 as is allowed by Va. Code § 8.01-27.2. Although Ms. Tucker has obtained a judgment against Mr. Jones because of the bad check, she also may pursue criminal bad check charges against him. *See* Cook v. Commonwealth, 178 Va. 251 (1941).

H. Form of the Warrant

Virginia Code § 19.2-72 sets forth the form of a warrant. The warrant must:

1. be directed to an appropriate officer or officers;

2. name the accused or, if the name is unknown, set forth a description by which the accused can be identified with reasonable certainty;

3. describe the offense charged with reasonable certainty;

4. command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city, or town in which the offense was allegedly committed; and

5. be signed by the issuing officer.

   An unsigned warrant is void. If law enforcement arrests a person pursuant to an unsigned warrant and brings the accused before the magistrate for a bail hearing, the magistrate must release the arrestee immediately.

In addition, if a warrant is issued for a violation of a local ordinance that is similar to a provision found in the Code of Virginia, the warrant must reference the offense by using both the citation corresponding to the local ordinance and the specific state provision found in the Code of Virginia.

I. Copies of Certain Warrants to be Delivered to the Attorney for the Commonwealth

A copy of all felony warrants issued at the request of a citizen shall be promptly delivered to the attorney for the Commonwealth for the county or city in which the warrant is returnable. Upon the request of the attorney for the Commonwealth, a copy of any misdemeanor warrant issued at the request of a citizen shall be delivered to the attorney for the Commonwealth for such county or city. Virginia Code § 19.2-45.

J. Magistrates Never Take Possession of Evidence

The complainant should keep all evidentiary items such as bad checks, threatening letters, notices not to trespass, etc. The magistrate should instruct the complainant to bring those documents or items to the trial.

Magistrates act outside the scope of their authority by taking possession of evidence, and consequently, may be liable for damages if evidence is lost.

K. When to Issue Summons or Warrant of Arrest

In the case of any felony, a magistrate would issue a DC-312, WARRANT OF ARREST – FELONY which may not be executed as a summons by the arresting officer.

In misdemeanor cases, the circumstances would dictate the type of summons or warrant to be issued. Below is a discussion of each type.

1. DC-319, SUMMONS

Subsection A of Va. Code § 19.2-73 states, "In any misdemeanor case or in any class of misdemeanor cases, or in any case involving complaints made by any state or local governmental official or employee having responsibility for the enforcement of any statute, ordinance, or administrative regulation, the magistrate... may issue a summons instead of a warrant when there is reason to believe that the person charged will appear…"

a. In Class 3 and 4 misdemeanor and traffic infraction cases, the magistrate almost always issues a DC-319, SUMMONS.

1) In 1984, the U.S. Supreme Court decided in the case of Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed. 2d 565 (1984), that "the practice. . . which persons are confined prior to trial on offenses for which no jail time is authorized solely because they cannot meet bond is unconstitutional."

2) There are extremely limited instances in which a magistrate may issue a warrant for a violation of a Class 3 or 4 misdemeanor. The most prominent is the crime of intoxicated in public in violation of Va. Code § 18.2-388.

If law enforcement arrests the defendant for being intoxicated in public in violation of Va. Code § 18.2-388, or a similar local ordinance, the magistrate, upon finding probable cause, may not release the defendant until the defendant is no longer intoxicated or a responsible custodian can take custody of the defendant. If such an intoxicated defendant has not been charged with a jailable offense, the magistrate should utilize a

misdemeanor warrant of arrest, not a DC-319, SUMMONS, to issue the intoxicated in public charge. If the defendant has been charged with a jailable offense in addition to the intoxicated in public offense, the magistrate may charge the defendant with being intoxicated in public utilizing a DC-319, SUMMONS, so long as the magistrate imposes bail conditions related to the jailable offense that ensure that the defendant will only be released when no longer intoxicated or into the custody of a responsible custodian.

3) Issuance of summonses in Class 3 and 4 misdemeanor and traffic infraction cases avoids the problem of defendants who are arrested on a warrant and who refuse to sign the recognizance on the DC-330, RECOGNIZANCE at the conclusion of a bail hearing.

The defendant does not sign a magistrate-issued summons. The officer executes the summons merely by handing the document to the defendant.

b. In Class 1 and 2 misdemeanor cases, the magistrate should issue a DC-319, SUMMONS when she believes that the accused will appear in court and will not be a danger to himself or others.

c. The magistrate should consider issuing a DC-319, SUMMONS in cases where an inmate who is serving a sentence in a jail or correctional facility has committed a misdemeanor.

1) The jail administration will ensure that the inmate appears in court.

2) The jail administration usually will take steps to isolate the accused inmate if he or she is a danger to himself or herself or others.

3) This approach avoids having to conduct a bail hearing for an inmate who is serving time and who is charged only with misdemeanor violations.

4) Before deciding to issue a DC-319, SUMMONS the magistrate should ensure that the accused inmate is not scheduled for release prior to his or her court date.

d. A magistrate may never issue a DC-319, SUMMONS for a felony charge.

2. DC-314, Warrant of Arrest – Misdemeanor (State) and DC-315, Warrant Of Arrest – Misdemeanor (Local)

a. The DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE) may be utilized for misdemeanor violations of state law. The DC-315, WARRANT OF ARREST

– MISDEMEANOR (LOCAL) may be utilized for misdemeanor violations of local ordinances.

b. Virginia Code § 19.2-74 authorizes the magistrate to issue a misdemeanor warrant that may be executed as a summons at the discretion of the serving officer. This applies to both the DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE) and the DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL).

The officer then must execute the warrant as a summons unless:

1) the accused fails to sign the summons;

2) the accused fails or refuses to discontinue the unlawful act;

3) the officer believes the accused is likely to disregard the summons; or

4) the officer believes the accused is likely to cause harm to himself or herself or any other person.

c. The magistrate should issue a DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE) or DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL) that DOES NOT permit the arresting officer to execute it as a summons if the magistrate has reason to believe that:

1) the accused will not appear in court; or
2) the accused constitutes a danger to himself or herself or others.

The officer would then be required to arrest the defendant and bring him or her before a judicial officer for a bail hearing.

d. Except in very rare instances, a magistrate would never issue a DC-314, WARRANT OF ARREST – MISDEMEANOR or a DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL) for an offense that is not punishable by jail time. Regarding the exception for intoxication in public in violation of Va. Code § 18.2-388, see the discussion regarding the DC-319, SUMMONS above.

e. When the magistrate finds probable cause to charge the defendant with a Class 1 or 2 misdemeanor following a warrantless arrest, the magistrate either will issue a DC-319, SUMMONS or a misdemeanor arrest warrant that is NOT authorized to be executed as a summons. Because the law enforcement officer already has arrested the accused and brought him before a magistrate, the officer lacks authority to execute the arrest warrant as a summons. *See* Va. Code § 19.2-74.

L. Process Issued Must Be in Duplicate/Copy to Person Charged

Virginia Code § 19.2-75 provides that, except as provided in Va. Code § 46.2-936, any processes issued against a person charged with a criminal offense must be in duplicate and the officer serving such process must leave a copy with the person charged.

M. Summons of Corporation or Legal Entity (Misdemeanor or Felony)

There may be occasions when a complaint of a criminal offense is made against a legal entity rather than a natural person. To cover such situations, Va. Code § 19.2-76 states, in relevant part:

> "If the accused is a corporation, partnership, unincorporated association or legal entity other than an individual, a summons may be executed by service on the entity in the same manner as provided in Title 8.01 for service of process on that entity in a civil proceeding. However, if the summons is served on the entity by delivery to a registered agent or to any other agent who is not an officer, director, managing agent or employee of the entity, such agent shall not be personally subject to penalty for failure to appear as provided in § 19.2-128, nor shall the agent be subject to punishment for contempt for failure to appear under his summons as provided in § 19.2-129."

1. DC-321, SUMMONS OF CORPORATION OR LEGAL ENTITY – MISDEMEANOR OR FELONY

   If the magistrate finds probable cause to issue process against such an entity, the magistrate shall issue a DC-321, SUMMONS OF CORPORATION OR LEGAL ENTITY - MISDEMEANOR OR FELONY. This form is appropriate for both misdemeanor and felony offenses.

   The magistrate shall list the name of the legal entity in the "ACCUSED" block on the summons. However, it is the complainant's responsibility to obtain the correct name and address of the legal entity.

2. Misdemeanor Offense by Corporation or Other Legal Entity

   a. For example, an investigator with the Virginia State Police has been investigating a theft ring. Based on his investigation, he establishes probable cause that *XYZ Corporation*, through its employees, has been changing the serial numbers on household appliances and selling them at its store. The investigator seeks criminal charges against *XYZ Corporation* for violating Va. Code § 18.2-215, a Class 1 misdemeanor. The magistrate would issue a DC-321, SUMMONS OF CORPORATION OR LEGAL ENTITY - MISDEMEANOR OR FELONY listing *XYZ Corporation* in the "ACCUSED" block on the summons.

The investigator would execute the summons in accordance with the provisions of Va. Code § 19.2-76.

b. Although service may be made on the registered agent of the legal entity, the magistrate does NOT list the registered agent on the DC-321, SUMMONS OF CORPORATION OR LEGAL ENTITY - MISDEMEANOR OR FELONY in the "ACCUSED" block on the summons. However, as a matter of convenience, the magistrate may insert the registered agent's information after the offense verbiage if the complainant provides the information. The person making service on a registered agent or other agent will insert the representative's name and title on the service portion of the summons at the time of service if service is made upon the agent. Title 8.01 provides alternative means of service.

3. Felony Offense by Corporation or Other Legal Entity

The same procedure applies for a felony charge sought against a legal entity. For example, the investigator with the Virginia State Police also establishes probable cause that *XYZ Corporation*, through its employees, has engaged in racketeering, which is an unclassified felony in violation of Va. Code § 18.2-514. The investigator seeks criminal charges against *XYZ Corporation*. The magistrate would issue a DC-321, SUMMONS OF CORPORATION OR LEGAL ENTITY - MISDEMEANOR OR FELONY listing *XYZ Corporation* in the "ACCUSED" block on the summons. This summons is the appropriate process even though the offense is a felony. The investigator would execute the summons in accordance with Va. Code § 19.2-76.

4. Violations of Statutes not Specifically Addressing Violations by Corporations or Other Legal Entities

a. In the examples above, the criminal statutes at issue specifically address violations by a corporation or other legal entity. Virginia Code § 18.2-215, used in the first example, states, in part, "No person, firm, association or corporation …." However, a criminal statute need not state that its prohibitions apply to legal entities as well as to natural persons. *See*, e.g., Wall Dist. v. Newport News, 228 Va. 358, 323 S.E.2d 75 (1984) (a legal entity was convicted of a violating a city ordinance paralleling Va. Code § 18.2-374, (possession with intent to deliver obscene items) even though the law is directed at conduct by "any person").

Virginia Code § 1-230 states:

> "'Person' includes any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof."

Therefore, based on Va. Code § 1-230, when a statute prohibits conduct by a "person," a legal entity is also prohibited from engaging in such conduct. Legal entities are deemed and taken as persons when the circumstances in which they are placed are the same as natural persons identified in such statutes. *See* Portsmouth Gas Co. v. Sanford, 97 Va. 124, 125, 33 S.E. 516, 516 (1899) (civil case decided under prior law).

b. For example, if an employee of a limited liability company makes a criminal complaint against the company because the manager delivered a company check to him with insufficient funds for labor that he performed, the magistrate would issue a DC-321, SUMMONS OF CORPORATION OR LEGAL ENTITY - MISDEMEANOR OR FELONY if she found probable cause for a violation of Va. Code § 18.2-182. Virginia Code § 18.2-182 states, in relevant part, "Any person who shall make, draw, or utter…." Based on Va. Code § 1-230, however, the limited liability company is considered a "person" for whom the prohibitions of the statute apply.

c. The employee of the limited liability company could also make a criminal complaint against the manager of the company as an individual for delivering a company check to him with insufficient funds for labor that he performed. When issuing against an individual, the magistrate would issue a DC-319, SUMMONS or a DC-314, WARRANT OF ARREST - MISDEMEANOR (STATE) if she found probable cause for a violation of Va. Code § 18.2-182.

5. Magistrate Should Not Suggest Charges against Legal Entities

Many charges may be brought against a natural person or a legal entity. The magistrate should not suggest to the complainant that criminal charges be filed against a legal entity rather than a natural person. However, if the complainant requests that charges be made against the legal entity, the magistrate shall issue the process upon finding probable cause. Va. Code § 19.2-72.

VI. WARRANTS OR ARRESTS FOR EXTRADITION

A. Introduction

Extradition is the legal process by which the Commonwealth of Virginia surrenders a person to another state that has jurisdiction over that person.

1. When used in Va. Code §§ 19.2-84 through 19.2-118, the word "state" means "a state other than this Commonwealth, includ[ing] any other state or territory, organized or unorganized, of the United States of America, and the District of Columbia…." Va. Code § 19.2-85. "State" does not include the federal government for purposes of extradition.

2. There are three potential instances in which a person may be subject to extradition:

   a. The person is a fugitive from justice

      1) To be a fugitive from justice for extradition purposes, a person may merely be the subject of an unexecuted criminal process from another state. The person does not have to know about the existence of the outstanding criminal process in order to be a fugitive from justice.

      2) To be a fugitive from justice, under some rare instances, the accused may have only incurred culpability for a crime committed in another state but has not yet been charged in the other state. (*See* below).

   b. The person has been convicted of a crime and has escaped confinement.

   c. The person has broken the terms of his or her bail, probation, or parole.

3. The Uniform Criminal Extradition Act (Va. Code § 19.2-85, et seq.) governs the extradition process in Virginia. Virginia Code §§ 19.2-99 and 19.2-100 set forth the procedures for issuance of extradition warrants upon requests of process or arrests for extradition.

4. Magistrates have jurisdiction to issue extradition warrants regardless of where in Virginia the accused supposedly is located. It is not necessary that the defendant be physically within the magistrate's judicial region.

5. Virginia Code § 16.1-323 deals with Virginia's procedures for returning juveniles who have been accused of an offense in another state or have run away, escaped, or absconded from institutional custody or control in another state. Generally, the courts (rather than magistrates) will be responsible for dealing with juveniles wanted by other states.

B. Procedures for Issuance of Warrants Prior to Arrest

1. Virginia Code § 19.2-99 recites two separate procedures for how a magistrate may be called upon to issue a warrant of extradition for an accused not in custody.

   a. The sworn complaint of a credible person who appears before the magistrate alleging that a person in Virginia has committed a crime in another state, and:

      1) is a fugitive from justice; or
      2) has been convicted of a crime in the requesting state and has escaped confinement; or
      3) has broken the terms of his or her bail, probation, or parole.

b. The complaint of a person upon an affidavit of any credible person in another state that a crime has been committed in such other state, and

1) the accused has been charged with the commission of the crime, and
2) the accused

- is a fugitive from justice; or
- has been convicted of a crime in the requesting state and has escaped confinement; or
- has broken the terms of his or her bail, probation, or parole.

2. The underlying criminal offense in the other state that forms the basis of the extradition warrant may either be a felony or a misdemeanor.

3. Instances when a credible person appears before the magistrate to swear out a complaint that the accused committed a crime in another state in order to obtain an extradition warrant when the accused has not been formally charged in the other state are exceedingly rare. Where the person is not yet charged with an offense in the requesting state, and a credible person appears before the magistrate to seek process of arrest for extradition, the magistrate must observe the following procedures:

a. The magistrate must first place the complainant under oath.

b. The magistrate must examine the complainant and determine if probable cause exists that the accused committed an offense in the other state.

1) In this instance, the magistrate will be examining the underlying facts of the alleged offense to determine if probable cause exists to charge the accused with the offense in the requesting state.

2) The magistrate must be careful to examine the factual testimony and the complainant's basis of knowledge for those alleged facts.

c. The complainant should attempt to contact law enforcement in the state where the accused is charged to verify that the other state will seek the extradition of the accused.

1) The inability to confirm this information does not affect the magistrate's ability to issue the extradition warrant.

2) If the state from which the alleged criminal offense originates is no longer interested in seeking the extradition of the accused, the magistrate must not prepare the warrant of extradition.

d. The complainant should seek verification of the maximum penalty for the crime with which the accused is charged.

1) Upon the arrest of the individual on the warrant, the magistrate determining bail will need this data for the bail hearing.

2) The inability of the complainant to ascertain this information does not affect the magistrate's ability to issue the extradition warrant.

e. The magistrate must require that the complainant reduce all of the above information to writing.

1) The complainant may use a DC-311, CRIMINAL COMPLAINT form or a DC-699, AFFIDAVIT form to document the facts establishing the probable cause finding.
2) The complainant should also attach any supporting documents and NCIC teletype messages received from the officials in the state seeking extradition to the complaint or affidavit form.

f. Upon finding that the information presented by the complainant is credible, and probable cause has been established that the accused committed the crime in the requesting state, the magistrate will issue a DC-374, WARRANT OF ARREST FOR EXTRADITION.

1) Any district or circuit court within the Commonwealth has jurisdiction to conduct an extradition hearing. The Attorney General has opined that, "*a district court judge, as well as a circuit court judge, may act in accordance with the procedures authorized by* §§ 19.2-99, 19.2-100, 19.2-101." *See* Attorney General Opinion to Zepkin, dated 3/30/87 (1986-87, page 183, 184). The Attorney General further stated that district courts have the authority to have a fugitive brought before them to answer the charge under Va. Code §§ 19.2-99 and 19.2-100; commit the fugitive to jail under Va. Code § 19.2-101; and either extend the period of incarceration or release the fugitive under Va. Code § 19.2-103, but may not perform the formal extradition procedures under Va. Code §§ 19.2-95, 19.2-104, or 19.2-114.

2) To avoid confusion, venue of the case should be the locality of the law enforcement agency that is seeking the warrant of extradition.

4. When a complainant appears before a magistrate to make a complaint upon an affidavit from a credible person in another state that the accused has committed a crime in such other state and has been charged with such crime, the magistrate must observe the following procedures:

a. The magistrate must examine the document(s) to ensure that an attestation appears on them.

b. The affidavit must state that the accused has been charged with a crime in another state, and that the accused:

- is a fugitive from justice; or
- has been convicted of a crime and has escaped confinement; or
- has broken the terms of his or her bail, probation, or parole.

c. The magistrate should ask a law enforcement officer to verify that the other state still seeks the extradition of the accused.

1) The inability to confirm this information does not affect the magistrate's ability to issue the extradition warrant.

2) If the state from which the criminal charge originates no longer seeks the extradition of the accused, the magistrate should not prepare the warrant of extradition.

d. The complainant should seek verification of the maximum penalty for the crime with which the accused is charged.

1) Upon the arrest of the individual on the warrant, the magistrate determining bail will need this data for the bail hearing.

2) The inability of the complainant to ascertain this information does not affect the magistrate's ability to issue the extradition warrant.

e. The magistrate should require that the complainant produce any affidavit, charging documents, supporting documentation, and/or NCIC teletype messages received from the officials in the state seeking extradition to attach to the extradition warrant if issued.

f. Upon finding that the information presented by the complainant is credible, the magistrate issues a DC-374, WARRANT OF ARREST FOR EXTRADITION.

1) Any district or circuit court within the Commonwealth has jurisdiction to conduct an extradition hearing. The Attorney General has opined that, "*a district court judge, as well as a circuit court judge, may act in accordance with the procedures authorized by §§ 19.2-99, 19.2-100, 19.2-101*." *See* Attorney General Opinion to Zepkin, dated 3/30/87 (1986-87, page 183, 184).

The Attorney General further stated that district courts have the authority to have a fugitive brought before them to answer the charge

under Va. Code §§ 19.2-99 and 19.2-100; commit the fugitive to jail under Va. Code § 19.2-101; and either extend the period of incarceration or release the fugitive under Va. Code § 19.2-103, but may not perform the formal extradition procedures under Va. Code §§ 19.2-95, 19.2-104, or 19.2-114.

2) To avoid confusion, venue of the case should be the locality in which the magistrate serves.

C. Procedures for Issuance of Warrants Following Arrest

1. Virginia Code § 19.2-100 recites procedures for the issuance of a warrant where law enforcement has arrested the accused without a warrant.

2. The underlying criminal charge of the other state that forms the basis of a lawful warrantless arrest must be one punishable by imprisonment for a term exceeding one year (a felony).

   a. The legality of an arrest, however, is not a concern for the magistrate. *See* Frisbie v. Collins, 342 U.S. 519 (1952) (the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by unlawful means).

   b. Virginia courts have held that "mere procedural violations" of statutes not mandated by either the Fourth or the Fourteenth Amendments to the Constitution of the United States are not grounds for dismissal of criminal charges. *See*, e.g., Thompson v. Commonwealth, 10 Va. App. 117, 121-23, 390 S.E.2d 198, 201-02 (1990) (arrest without warrant for misdemeanor not committed in officer's presence is procedural violation of Va. Code § 19.2-81 not amounting to constitutional error). The Court of Appeals noted, however, that "violations of state procedural statutes are viewed with disfavor." Id.

   c. The Attorney General has opined that an arrest or detention is not rendered invalid by certain procedural statutory violations. (*See* Attorney General Opinion to Jenkins, dated 5/17/91 (1991, page 128)).

   d. Therefore, if the accused is arrested without a warrant for a charge not punishable by imprisonment for a term exceeding one year, the magistrate should still issue an extradition warrant if all other requirements are met. The magistrate, however, would select Va. Code § 19.2-100 for use on the DC-374, WARRANT OF ARREST FOR EXTRADITION to document that the process was issued subsequent to a warrantless arrest.

3. Any peace officer or private person may affect the arrest of the accused.

4. When the arresting authority appears before the magistrate to obtain the warrant of extradition, the magistrate must observe the following requirements:

   a. The magistrate first must place the complainant under oath.

   b. The complainant must give evidence that the accused has been charged with a crime in another state, and that the accused:

      – is a fugitive from justice; or
      – has been convicted of a crime and has escaped confinement; or
      – has broken the terms of his or her bail, probation, or parole

   c. The magistrate should ask a law enforcement officer to verify that the other state still seeks the extradition of the accused.

      1) The inability to confirm this information does not affect the magistrate's ability to issue the extradition warrant.

      2) If the state from which the criminal charge originates no longer seeks the extradition of the accused, the magistrate should not prepare the warrant of extradition.

   d. The complainant should seek verification of the maximum penalty for the crime with which the accused is charged.

      1) Upon the warrant's execution, the magistrate determining bail will need this data for the bail hearing.

      2) The inability of the complainant to ascertain this information does not affect the magistrate's ability to issue the extradition warrant.

   e. The magistrate must require that the complainant reduce the above information to writing. The complainant may use a DC-311, CRIMINAL COMPLAINT form or a DC-699, AFFIDAVIT form. The complainant should attach any teletype message received from the state seeking extradition to the complaint form.

   f. Upon finding that the information presented by the complainant is credible, the magistrate issues a DC-374, WARRANT OF ARREST FOR EXTRADITION.

      1) Any district or circuit court within the Commonwealth has jurisdiction to conduct an extradition hearing.

         The Attorney General has opined, "*a district court judge, as well as a circuit court judge, may act in accordance with the procedures authorized by* §§ 19.2-99, 19.2-100, 19.2-101." *See* Attorney General

Opinion to Zepkin, dated 3/30/87 (1986-87, page 183, 184) The Attorney General further stated that district courts have the authority to have a fugitive brought before them to answer the charge under Va. Code §§ 19.2-99 and 19.2-100; commit the fugitive to jail under Va. Code § 19.2-101; and either extend the period of incarceration or release the fugitive under Va. Code § 19.2-103, but may not perform the formal extradition procedures under Va. Code §§ 19.2-95, 19.2-104, or 19.2-114.

2) To avoid confusion, venue of the case should be the locality in which the accused was arrested.

D. Bail in Extradition Cases

For guidance on bail considerations in cases of extradition, *see* "Bail Procedures in Extradition Cases" in the Bail Procedures chapter of this manual.

VII. VIRGINIA ARREST WARRANTS ISSUED UNDER VIRGINIA MILITARY LAW

Any officer of the unit to which an active soldier or airman of the Virginia National Guard is assigned may request process of arrest from a Virginia judicial officer for a violation of Va. Code § 44-41.1, which states:

> "If any person, being an active member of the Virginia National Guard, in violation of valid orders, fails to initially report to his appointed place of duty at the appointed time of duty under Title 32 of the United States Code or for state active duty, or having initially reported absents himself without leave, he shall be guilty of a Class 4 misdemeanor."

The statute describes the process of arrest to be issued as a "warrant" even though the offense is a non-jailable, Class 4 misdemeanor. Therefore, a magistrate should issue a DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE), and check the box indicating, "Execution by summons [ ] permitted at officer's discretion."

Virginia Code § 44-41.1 further provides that "[a]ny such warrant shall be withdrawn upon the written request of the soldier or airman's commanding officer." It is recommended that magistrates play no role in the withdrawal of such process of arrest. Magistrates receiving such requests should refer the commanding officer to the attorney for the Commonwealth.

VIII. WARRANTS OF ARREST FOR ILLEGAL ALIENS

Procedures for most probable cause hearings involving arrests of illegal aliens are the same as for United States citizens or aliens legally present in this country. Below is a discussion of the exception to this general rule. Note that in all cases involving arrestees who are non-

English speakers or individuals with limited English proficiency, magistrates should utilize the services of a foreign language interpreter in accordance with procedures established by the Department of Magistrate Services.

A. Introduction

Virginia Code §§ 19.2-81.6 and 19.2-82 (B) set forth procedural requirements for cases involving an illegal alien arrested under special circumstances. The provisions of Va. Code § 19.2-81.6 apply only to illegal aliens who:

1. have previously been convicted of a felony in the United States; and

2. have either been deported or have left the United States after conviction.

If the illegal alien does not fit this special category, normal probable cause and bail hearing procedures apply.

B. Law Enforcement Arrest Procedures

1. Before a law enforcement officer has the authority to arrest a person pursuant to Va. Code §§ 19.2-81.6 and 19.2-82 (B), Immigration and Customs Enforcement of the United States Department of Homeland Security must confirm that the person is an alien illegally present in the United States, and that the alien had previously been convicted of a felony in this country and either was deported or left the U.S. after conviction. Immigration and Customs Enforcement also needs to provide the applicable violation of federal law, since the magistrate must recite this information in the warrant.

2. In most cases, the arrest pursuant to Va. Code § 19.2-81.6 will be in addition to an arrest made for Virginia criminal offenses. Often, a law enforcement agency will not realize that the defendant is subject to Va. Code § 19.2-81.6 until after the defendant already is in custody.

3. Once Immigration and Customs Enforcement confirms that the illegal alien meets the criteria set forth in Va. Code § 19.2-81.6, the law enforcement officer must take the arrestee forthwith before a magistrate.

C. Magistrate Procedures

1. Once the person is brought before the magistrate, Va. Code § 19.2-82 requires the magistrate to place the officer under oath and conduct a probable cause hearing. If the magistrate makes a probable cause finding that the arrestee meets the requirements set forth above, Va. Code § 19.2-82 directs the magistrate to issue a warrant.

2. The proper form is the DC-320, Warrant Of Arrest – Illegal Alien Pursuant To §19.2-81.6.

3. Virginia Code §§ 19.2-81.6 and 19.2-82 (B) have several unique aspects.

   a. The warrant automatically expires by operation of law:

      1) seventy-two hours after issuance, or
      2) when the defendant is taken into federal custody if that event occurs first.

   b. The warrant does not trigger a hearing before a Virginia court and the statutes do not specify any court to which to make the warrant returnable. They also do not mention venue. To provide uniform guidance, the following procedures are recommended.

      1) The magistrate should make the warrant returnable to the general district court.
      2) Venue should be the locality in which the officer made the arrest.

      In many cases involving an illegal alien subject to Va. Code § 19.2-81.6, an officer will have arrested the defendant on Virginia criminal charges. In such situations, the normal bail procedures will apply.

   c. *See* the "Bail Procedures" chapter of this manual for coverage of procedures for bail determination hearings for illegal aliens.

D. Recurrent Applications

Recurrent applications for a warrant under Va. Code § 19.2-82 (B) are not permitted within a six-month period except where confirmation has been received from Immigration and Customs Enforcement that the arrested person will be taken into federal custody.

IX. DANGEROUS, VICIOUS, AND DEPREDATION BY DOG PROCEDURES

A. Introduction

Magistrates should be cognizant that there are three distinct sections of the Code of Virginia dealing with attacks committed by dogs.

1. Virginia Code § 3.2-6540 (dangerous dogs) governs situations where a dog has killed a companion animal that is a dog or a cat or has inflicted injury on a person or companion animal that is a dog or cat.

2. Virginia Code § 3.2-6540.1 (vicious dogs) governs situations where a dog has (i) killed a person, (ii) inflicted serious injury to a person, or (iii) continued to exhibit the behavior that resulted in a previous finding by a court or, on or before July 1, 2006, by an animal control officer as authorized by ordinance that it is a dangerous dog, provided that its owner has been given notice of that finding.

3. Virginia Code § 3.2-6552 (depredation by dogs) governs cases where a dog attacks livestock or poultry.

B. Dangerous Dog Procedures (Va. Code § 3.2-6540

1. Only a law enforcement officer or an animal control officer located in the jurisdiction where the dangerous dog resides or where the act was committed is authorized to seek a summons from a magistrate pursuant to Va. Code § 3.2-6540 or a parallel local ordinance.

2. The animal control officer or law enforcement officer should reduce the relevant facts to writing utilizing a DC-395 AFFIDAVID FOR SUMMONS FOR DANGEROUS DOG. This form has the same function as an affidavit for a search warrant. The officer should supply facts on this affidavit from which the magistrate may determine if probable cause exists to issue the summon.

3. The magistrate must swear the officer to the facts presented on the affidavit

4. In addition to receiving the relevant facts from the complainant in writing, the magistrate should also conduct an oral probable cause hearing.

5. To issue the summons, the magistrate must find probable cause that:

   a. the law enforcement or animal control officer has reason to believe that the animal is either located within the officer's jurisdiction or the act was committed in the officer's jurisdiction; and

   b. the jurisdiction where the animal is located or the jurisdiction where the act was committed is within the magistrate's region; and the animal has either:

      1) killed or inflicted serious injury on a companion animal that is a dog or cat. A serious injury to a companion animal includes a serious impairment of health or bodily function that requires significant medical attention, a serious disfigurement, any injury that has a reasonable potential to cause death, or any injury other than a sprain or strain;

OR

2) directly caused serious injury to a person. Serious injury to a person includes a laceration, broken bone, or substantial puncture of skin by teeth.

6. Virginia Code § 3.2-6540 lists numerous exceptions that may ultimately prevent a particular animal from being found to be a dangerous dog. However, as discussed below, most of these exceptions will not be considered by the magistrate at the probable cause phase.

   a. According to Va. Code § 3.2-6540 (C), no law enforcement or animal control officer shall apply for a summons if, upon investigation, the officer finds that:

      1) no serious injury has occurred to the victim dog or cat as a result of the attack or bite; or

      2) both the attacking or biting animal and the victim dog or cat are owned by the same person; or

      3) the incident that resulted in an injury to a dog or cat originated on the property of the attacking or biting animal's owner; or

      4) the injury inflicted upon a person consists solely of a single nip or bite resulting only in a scratch, abrasion, or other minor injury.

      This subsection appears to give the law enforcement or animal control officer sole authority to make these findings. The magistrate has no role in determining whether an officer applies to the magistrate for a summons.

   b. Virginia Code § 3.2-6540 (K) states that no animal shall be found by the court to be a dangerous dog:

      1) Solely because it is a particular breed; or

      2) If the threat, injury or damage was sustained by a person who was

         - Committing at the time a crime upon the premises occupied by the animal's owner; or
         - Committing at the time a willful trespass upon the premises occupied by the animal's owner; or
         - Provoking, tormenting, physically abusing the animal or can be shown to have repeatedly provoked, tormented, a used or assaulted the animal at other times; or

      3) If the animal is a police dog that was engaged in the performance of its duties at the time of the act complained of; or

4) If at the time of the acts complained of the animal was responding to pain or injury or was protecting itself, its kennel, its offspring, a person or its owner's property; or

5) as a result of killing or inflicting serious injury on a dog or cat while engaged with its owner as part of lawful hunting or participating in an organized, lawful dog handling event; or

6) if the court determines, based on the totality of the evidence before it, or for other good cause, that the dog is not dangerous or a threat to the community.

A 2021 amendment appeared to grant the authority to make these findings solely to the court. It is recommended that magistrates treat these exceptions as trial court matters and not consider them at the probable cause stage. However, a magistrate should not issue a dangerous dog summons solely because the animal is a particular breed.

7. If there is probable cause, the magistrate must issue a DC-396, SUMMONS – DANGEROUS DOG.

   a. The complainant may request that the summons be issued pursuant to Va. Code § 3.2-6540 or a parallel local ordinance.

   b. Venue is proper the jurisdiction in which the animal is located or in the jurisdiction where the act was committed.

   c. The summons is returnable to the general district court. Va. Code § 3.2-6540 states that, unless good cause is determined by the court, the evidentiary hearing shall be held no more than 30 days after the issuance of the summons. The magistrate should set a return date on the summons that ensures that the court can conduct an evidentiary hearing within the statutory time period.

   d. The magistrate should name the owner(s) of the animal in the summons.

      1) If the owner is a minor, the minor's custodial parent(s) or legal guardian(s) should also be named in the summons.

      2) If the owner is unknown, the magistrate should note this on the summons.

8. Any law enforcement officer who obtains a DC-396, SUMMONS – DANGEROUS DOG for a dangerous dog from a magistrate is required by Va. Code § 3.2-6540 (E) to contact the local animal control officer and inform him or her of the

location of the animal and the relevant facts pertaining to his or her belief that the dog is dangerous. The animal control officer is then responsible for ensuring that the animal is confined.

9. The court will determine if the animal is a dangerous dog. If the court ultimately enters an adjudication that the animal is a dangerous dog, Va. Code § 3.2-6540 3.2-6540.01, 3.2-6542, and 3.2-6542.1 place numerous restrictions on the animal and requirements on the owner. Compliance with these restrictions and requirements is the responsibility of the owner (or if the owner is a minor, the minor's custodial parent, parents, or legal guardian).

10. An owner of an animal adjudicated to be a dangerous dog who "willfully" fails to comply with the requirements of Va. Code §§ 3.2-6540, 3.2-6540.01, 3.2-6540.02, or 3.2-6540.04 is guilty of a Class 1 misdemeanor pursuant to Va. Code § 3.2-6540.03(C).

    a. In the unlikely event that a non-willful violation of these requirements is sought, contact the magistrate advisors.

    b. Upon conviction of the owner pursuant to Va. Code § 3.2-6540.03, the court may:

        1) order the dangerous dog to be disposed of pursuant to Va. Code § 3.2-6562; or

        2) grant the owner up to 30 days to comply with the requirements of Va. Code § 3.2-6540.01. The dangerous dog would remain in the custody of the animal control officer until compliance has been verified. If the owner fails to comply within the time specified by the court, the court shall order the dangerous dog to be disposed of pursuant to Va. Code § 3.2-6562.

11. The owner of an animal previously found to be a dangerous dog may also be charged with either a Class 1 or 2 misdemeanor pursuant to Va. Code § 3.2-6540.04(A) if the animal commits a subsequent attack.

    However, § 3.2-6504.04(A) "shall not apply to any animal that at the time of the act complained of was responding to pain or injury, was protecting itself, its kennel, its offspring, a person, or its owner's property, or was a police dog engaged in the performance of its duties at the time of the attack." These exceptions are identical to those currently found in Va. Code § 3.2-6540(K) that the General Assembly has given the court sole authority to evaluate in the dangerous dog context. When analyzing a previous version of the dangerous dog statute, the Attorney General described most of these exceptions as "defenses" that "may be applied only by the court…" *Attorney General Opinion to Ebert*, dated 9/1/2016 (analyzing the provisions while they were part of Va. Code § 3.2-

6540(C)). Therefore, it is likely that these exceptions are also affirmative defenses to the criminal offense. Affirmative defenses should not be considered by the magistrate at the probable cause stage.

C. Vicious Dog Procedures (Va. Code § 3.2-6540.1)

1. Virginia Code § 3.2-6540.1 defines a "vicious dog" as "a canine or canine crossbreed that has (i) killed a person, (ii) inflicted serious injury to a person, or (iii) continued to exhibit the behavior that resulted in a previous finding by a court or, on or before July 1, 2006, by an animal control officer as authorized by ordinance that it is a dangerous dog, provided that its owner has been given notice of that finding."

2. Only a law enforcement officer or an animal control officer located in the jurisdiction where the vicious dog resides or where the act was committed is authorized to seek a summons from a magistrate pursuant to Va. Code § 3.2-6540.1 or a parallel local ordinance.

3. The animal control officer or law enforcement officer should use space provided on the DC-3020, SUMMONS FOR VICIOUS DOG to recite the relevant facts. This form is similar to a motion and order form; it includes space both for the complainant to recite relevant facts and for the magistrate to issue the process. It is available in the "Preprint Forms" section of the eMagistrate system. The officer should include sufficient facts from which the magistrate may determine if probable cause exists to issue the summons. If the space provided on the DC-3020 is insufficient to recite the relevant facts, the officer may incorporate an attachment by reference. The magistrate must swear the officer to the facts presented.

4. In addition to receiving the relevant facts from the complainant in writing, the magistrate should also conduct an oral probable cause hearing.

5. To issue the summons, the magistrate must find probable cause that:

   a. the law enforcement or animal control officer is located in a jurisdiction (within the magistrate's region) where the canine or canine crossbreed resides or where the canine or canine crossbreed committed an act set forth in the definition of "vicious dog"; and

   b. the canine or canine crossbreed has done one of the following:

      1) inflicted "serious injury" to a person;

"Serious injury" is defined as "an injury having a reasonable potential to cause death or any injury other than a sprain or strain, including serious disfigurement, serious impairment of health, or serious impairment of bodily function and requiring significant medical attention." Va. Code § 3.2-6540.1.

2) killed a person; or

3) continued to exhibit the behavior that resulted in a previous finding by the court or, on or before July 1, 2006, by an animal control officer as authorized by ordinance that it is a dangerous dog, provided that its owner has been given notice of that finding.

6. Virginia Code § 3.2-6540.1 (C) states that no animal shall be found to a vicious dog if the animal was a police dog that was engaged in the performance of its duties at the time.

   In a 2016 opinion analyzing the definition of "dangerous dog" for purposes of a former version of Va. Code § 3.2-6540(C), the Attorney General stated, "With an exception for a police dog engaged in the performance of its duties… the statute defines the term 'dangerous dog' as…" *Attorney General Opinion to Ebert*, dated 9/1/2016.

   The opinion of the Attorney General treated police dogs engaged in their duties as being definitionally exempt from the dangerous dog provisions. Although the General Assembly subsequently amended the dangerous dog statute to provide the court with sole authority to consider the police dog exception, no such amendment was made to the vicious dog statute. The current language of Va. Code § 3.2-6540.1(C) is more similar to the previous version of the dangerous dog statute than the present version of the dangerous dog statute. Therefore, it appears that magistrates should not issue a summons for a vicious dog based on the actions of a police dog engaged in the performance of its duties.

7. Virginia Code § 3.2-6540.1 (C) lists several other exceptions that may ultimately prevent a particular canine or canine crossbreed from being found to be a vicious dog. No animal shall be found to be a vicious dog if:

   a. the animal, at the time of the acts complained of, was responding to pain or injury, or was protecting itself, its kennel, its offspring, a person, or its owner's or custodian's property; or

   b. the threat, injury, or damage was sustained by a person who was:

1) committing, at the time, a crime upon the premises occupied by the animal's owner or custodian; or

2) committing, at the time, a willful trespass upon the premises occupied by the animal's owner or custodian; or

3) provoking, tormenting, or physically abusing the animal, or can be shown to have repeatedly provoked, tormented, abused, or assaulted the animal at other times

These exceptions are identical to those in Va. Code § 3.2-6540(K) that the General Assembly has given the court sole authority to evaluate in the dangerous dog context. When analyzing a previous version of the dangerous dog statute, the Attorney General described these exceptions as "defenses" that "may be applied only by the court…" *Attorney General Opinion to Ebert*, dated 9/1/2016 (analyzing the provisions while they were part of Va. Code § 3.2-6540(C)). Therefore, it is likely that these exceptions are also affirmative defenses in the vicious dog statute. Affirmative defenses should not be considered by the magistrate at the probable cause stage.

8. If there is probable cause, the magistrate must issue a DC-3020, SUMMONS FOR VICIOUS DOG. This form is similar to a motion and order form; it includes space both for the complainant to recite relevant facts and for the magistrate to issue the process. It is available in the "Preprint Forms" section of the eMagistrate system.

   a. The complainant may request that the summons be issued pursuant to Va. Code § 3.2-6540.1 or a parallel local ordinance.

   b. Venue is proper in the locality where the canine or canine crossbreed resides or in the locality where the canine or canine crossbreed committed an act set forth in the definition of "vicious dog".

   c. The summons is returnable to the general district court. Va. Code § 3.2-6540.1 states that, unless good cause is determined by the court, the evidentiary hearing shall be held no more than 30 days after the issuance of the summons. The magistrate should set a return date on the summons that ensures that the court can conduct an evidentiary hearing within the statutory time period.

   d. The magistrate should name the owner(s) or custodian(s) of the animal in the summons.

      1) If the owner is a minor, the minor's custodial parent(s) or legal guardian(s) should also be named in the summons.

2) If the owner or custodian is unknown, the magistrate should note this on the summons.

9. Any law enforcement officer who obtains a DC-396, SUMMONS FOR VICIOUS DOG from a magistrate is required by Va. Code § 3.2-6540.1 (B) to contact the local animal control officer and inform him or her of the location of the dog and the relevant facts pertaining to his or her belief that the dog is vicious. The animal control officer is then responsible for confining the animal.

10. The court will determine if the canine or canine crossbreed is a vicious dog. If the court ultimately finds that the animal is vicious, it must order the animal euthanized in accordance with the provisions of Va. Code § 3.2-6562.

11. Pursuant to Va. Code § 3.2-6540.1 (D), any owner or custodian whose willful act or omission in the care, control, or containment of their canine, canine crossbreed, or other animal is so gross, wanton, and culpable as to show a reckless disregard for human life and is the proximate cause of the animal attacking and causing serious injury to any person is guilty of a felony.

    However, the provisions of Va. Code § 3.2-6540.1 (D) also do not apply "to any animal that, at the time of the acts complained of, was responding to pain or injury, or was protecting itself, its kennel, its offspring, a person, or its owner's or custodian's property, or when the animal is a police dog that is engaged in the performance of its duties at the time of the attack…"

    a. These exceptions are very similar to those currently found in Va. Code § 3.2-6540(K) that the General Assembly has given the court sole authority to evaluate in the dangerous dog context. When analyzing a previous version of the dangerous dog statute, the Attorney General described most of these exceptions as "defenses" that "may be applied only by the court…" *Attorney General Opinion to Ebert*, dated 9/1/2016 (analyzing the provisions while they were part of Va. Code § 3.2-6540(C)). Therefore, it is likely that these exceptions are also affirmative defenses to this criminal offense. Affirmative defenses should not be considered by the magistrate at the probable cause stage.

    b. Virginia Code § 18.2-52.2 has provisions and exceptions similar to those found in § 3.2-6540.1(D).

D. Depredation by Dog Procedures (Va. Code § 3.2-6552)

1. Pursuant to Va. Code § 3.2-6552, an animal control officer or other person who has reason to believe that a dog is killing livestock, or committing any of the

depredations mentioned in § 3.2-6552 or a similar local ordinance, may seek a warrant from a magistrate.

2. The animal control officer or other person must reduce the relevant facts to writing. The officer has two primary options to accomplish this.

   a. Generally, the officer will complete a DC-397, AFFIDAVIT FOR WARRANT FOR DEPREDATION BY DOG. This form has the same function as an affidavit for a search warrant. The affiant must supply facts on this affidavit from which the magistrate may determine if probable cause exists to issuance the summons.

   b. Instead of using the affidavit, the officer could use space provided on the DC-398, WARRANT FOR DEPREDATION BY DOG to recite the relevant facts. This option is not always the best; it may be very difficult for the officer to list enough facts in the limited amount of space provided on the form to establish probable cause.

   c. The magistrate must swear the officer to the facts presented on either the affidavit or the warrant.

3. In addition to receiving the relevant facts from the complainant in writing, the magistrate must also conduct an oral probable cause hearing.

4. To issue the warrant, the magistrate must find probable cause that:

   a. the dog is within the magistrate's region; and

   b. the dog has killed or injured livestock or poultry.

      1) Virginia Code § 3.2-5900 defines "livestock" as "all domestic or domesticated bovine animals; equine animals; ovine animals; porcine animals; cervidae animals; capradae animals; animals of the genus Lama or Vicugna; ratites; fish or shellfish in aquaculture facilities, as defined in § 3.2-2600; enclosed rabbits or hares raised for human food or fiber; or any other individual animal specially raised for food or fiber, except companion animals."

      2) Virginia Code § 3.2-5900 defines "poultry" as "includ[ing] all domestic fowl and game birds raised in captivity."

5. If there is probable cause, the magistrate must issue a DC-398, WARRANT FOR DEPREDATION BY DOG.

a. The complainant may request that the warrant be issued pursuant to Va. Code § 3.2-6552 or a parallel local ordinance. Pursuant to Va. Code § 3.2-6543, such local ordinance may be more stringent than § 3.2-6552.

b. Venue is proper only in the locality in which the dog is located. In most situations, the dog will be located in the same city or county where the incident that triggered the complaint occurred. In rare cases, the incident will occur in one locality, but at the time the complainant seeks the warrant, the dog is located in a different county or city. In such cases, venue is proper where the dog is located rather than where the incident occurred.

c. The summons is returnable to the general district court.

d. The magistrate should name the owner(s) or custodian(s) of the animal in the summons.

1) If the owner is a minor, the minor's custodial parent(s) or legal guardian(s) should also be named in the summons.

2) If the owner or custodian is unknown, the magistrate should note this on the summons.

6. Although the magistrate issues a "warrant," this is a civil process that does not trigger a bail hearing before a judicial officer.

7. The court will determine if the dog is a livestock killer or has committed any of the depredations mentioned in Va. Code § 3.2-6552. If so, the court must order that the dog be:

a. removed to another state that does not border Virginia and prohibited from returning to Virginia;

If such a dog is later found in Virginia, the court shall order that the dog be killed or euthanized.

b. killed or euthanized; or

c. if the dog has killed or injured only poultry,

1) transferred to another owner whom the court deems appropriate and permanently fitted with an identifying microchip registered to that owner; or

2) fitted with an identifying microchip registered to the owner and confined indoors or in a securely enclosed and locked structure of sufficient height and design to prevent the dog's escape; direct contact

with the dog by minors, adults, or other animals; or entry by minors, adults, or other animals.

X. DESERTION AND NONSUPPORT

Most people who seek spousal or child support file a petition with either the Juvenile and Domestic Relations District Court or the Circuit Court. Almost all such cases are civil in nature. Virginia Code § 20-70 does not allow magistrates to issue an arrest warrant for desertion and nonsupport pursuant to Chapter 5 of Title 20 of the Code of Virginia, "[e]xcept as otherwise…provided." Virginia Code § 20-61 sets forth the exception to the general rule by establishing criminal penalties for desertion and nonsupport.

A. Procedural Requirements

1. Virginia Code § 20-70 appears to require that a magistrate may only issue a warrant for a violation of Va. Code § 20-61 if the spouse or other complainant provides an affidavit establishing reasonable cause to believe that the spouse or parent is about to leave the jurisdiction of the juvenile and domestic relations court with intent to desert the person's spouse, child, or children. The affiant must use a DC-614, AFFIDAVIT – DESERTION AND NON-SUPPORT form for this purpose

2. Any warrant issued by a magistrate pursuant to Va. Code § 20-61 would be returned to the Juvenile and Domestic Relations District Court in the locality in which the alleged victim resided at the time of the alleged desertion or nonsupport.

B. Elements

For a violation of Va. Code § 20-61:

1. the accused must be either a spouse or a parent; and

2. the accused must without cause willfully neglect, refuse, or fail to provide for the support and maintenance of the accused's;

   a. spouse; or

   b. child under the age of 18 years of age; or

   c. a child of any age who is "crippled or otherwise incapacitated from earning a living."

3. and the spouse, child, or children being then and there in "necessitous circumstances."

   a. "There is no fixed standard by which the law undertakes to define what shall constitute… 'necessitous circumstances.' It may vary with the conditions to which the parties have been accustomed. The necessaries of one person may be the luxuries of another, reared in and habituated to different surroundings." Burton v. Commonwealth, 109 Va. 800, 805, 63 S.E. 464, 466 (1909) (interpreting a predecessor statute).

   b. However, the legislature's "use of 'necessitous circumstances' suggests that the neglected [individual or individuals] must have financial or other needs, such as housing, medical care, or sustenance, that are unmet." Williams v. Commonwealth, 57 Va. App. 750, 765, 706 S.E.2d 530, 537 (2011).

4. However, Va. Code § 20-61 does not apply to:

   a. a parent whose child of whatever age qualifies for and is receiving aid under a federal or state program for aid to the permanently and totally disabled; or

   b. a parent of an adult who meets the visual requirements for aid to the blind

   For this purpose, any state agency shall use only the financial resources of the child of whatever age in determining eligibility.
   Such a parent is still subject to prosecution for the desertion or nonsupport of a spouse or of another child who is not receiving such aid.

C. Penalty

Virginia Code § 20-61 punishes the crime of desertion and nonsupport as a misdemeanor with:

1. a fine not exceeding $500.00; or

2. confinement in jail not exceeding twelve months; or

3. a fine not exceeding $500 and confinement in jail not exceeding 12 months; or

4. work release employment for a period not less than 90 days no more than twelve months; or

5. in lieu of fine or confinement, and as required by the court, a forfeiture of up to $1,000.00.

The fine or forfeiture may be directed by the court to be paid to the spouse; guardian, curator, custodian, or trustee of the minor child or children; or to another person or organization designated by the court.

XI. CONFIDENTIALITY OF CRIME VICTIM INFORMATION

A. Introduction

The General Assembly enacted Va. Code § 19.2-11.2 in 1994. This statute allows a crime victim, upon request, to prevent courts, law enforcement agencies, attorneys for the Commonwealth, the Department of Corrections, and their employees from disclosing the victim's residential address, telephone number, email address, or place of employment. A victim may also request the non-disclosure of this information as it pertains to members of the victim's family. A witness in a criminal prosecution under Va. Code §§ 18.2-46.2, 18.2-46.3, 18.2-248, or of any violent felony as defined in Va. Code § 17.1-805 (C) also may request the same confidentiality. The victim may file a request for confidentiality at any stage of the criminal proceeding. If requested, following these procedures will be different from the usual way magistrates process case papers.

The Committee on District Courts approved the creation of the DC-301, REQUEST FOR CONFIDENTIALITY form in response to Va. Code § 19.2-11.2. The Committee also altered the DC-311, CRIMINAL COMPLAINT form by deleting the space for the complainant's residential address and telephone number.

B. Procedures for Magistrates

When applicable, the following steps outline the recommended procedure:

1. Determine if the person is an eligible witness or victim.

   a. As noted above, Va. Code § 19.2-11.2 states that the only witnesses that qualify are those in criminal prosecutions under Va. Code §§ 18.2-46.2, 18.2-46.3, 18.2-248, or of any violent felonies as defined in Va. Code § 17.1-805 (C).

   b. Virginia Code § 19.2-11.01 (B) defines the term "victim" as:

      1) a person who has suffered physical, psychological or economic harm as a direct result of the commission of:

         - a felony; or
         - assault and battery in violation of Va. Code §§ 18.2-57 or § 18.2-57.2; or
         - stalking in violation of Va. Code § 18.2-60.3; or

- a violation of a protective order in violation of Va. Code §§ 16.1-253.2 or 18.2-60.4; or
- sexual battery in violation of Va. Code § 18.2-67.4; or
- attempted sexual battery in violation of Va. Code § 18.2-67.5; or
- maiming or driving while intoxicated in violation of Va. Code §§ 18.2-51.4 or § 18.2-266, or
- a delinquent act that would have been a violation of one of the above if committed by an adult;

2) or a spouse of such a person, a child of such a person, or a parent or legal guardian of such a person who is a minor; or

3) a spouse, parent, sibling, or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide.

c. However, a "victim" does not include a parent, child, spouse, sibling, or legal guardian who commits a felony or other enumerated criminal offense against a victim as defined in Va. Code § 19.2-11.01(B)(i).

2. When a magistrate is required to have the complainant/victim reduce his or her testimony to writing, the complainant would not list his or her or a family member's residential address, telephone number, or place of employment on the DC-311, CRIMINAL COMPLAINT. Instead, the magistrate will require this information on a DC-325, REQUEST FOR WITNESS SUBPOENA. If the complainant/victim needs to subpoena non-family member witnesses, he or she should complete a separate DC-325, REQUEST FOR WITNESS SUBPOENA.

3. The magistrate also must not list the complainant/victim's address and telephone number information on the face of a DC-312, WARRANT OF ARREST – FELONY, DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE), DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL), or DC-319, SUMMONS.

4. Should the complainant/victim request to keep the information in question confidential, the magistrate will require him or her to complete a DC-301, REQUEST FOR CONFIDENTIALITY form.

5. After completion, the magistrate dates and signs the bottom of the form. He or she then should staple all documents to the DC-312, WARRANT OF ARREST – FELONY, DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE), DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL) or DC-319, SUMMONS.

6. The magistrate, however, should staple the DC-301, Request For CONFIDENTIALITY form on top of the DC-312, WARRANT OF ARREST– FELONY,

DC-314, WARRANT OF ARREST – MISDEMEANOR (STATE), DC-315, WARRANT OF ARREST – MISDEMEANOR (LOCAL) or DC-319, SUMMONS.

7. If the magistrate prepares the DC-326, SUBPOENA FOR WITNESSES forms, she should issue one subpoena for the victim or eligible witness and any family-member witnesses, and a separate subpoena for any other witnesses. Note that magistrates generally submit DC-325, REQUEST FOR WITNESS SUBPOENA forms to the court instead of issuing actual subpoenas.

C. Other Statutory Non-Disclosure Provisions

1. Virginia Code § 19.2-269.2 allows a judge, upon the motion of the defendant or the attorney for the Commonwealth, to prohibit trial testimony as to the current residential or business address, telephone number, or email address of a victim or witness if such information is immaterial to the case.

2. Virginia Code §§ 16.1-253 (I), 16.1-253.1 (E), 16.1-253.4 (I), and 16.1-279.1 (H) prohibit law-enforcement agencies, attorneys for the Commonwealth, courts, clerk's offices, and employees of these entities from disclosing the residential address, telephone number, or place of employment of a person, or a family member of such person, protected by an emergency protective order, preliminary protective order, or order of protection.

   Magistrates, as part of the court system, also may not disclose this information. These statutes allow disclosure only when (i) required by law or the Rules of the Supreme Court, (ii) necessary for law-enforcement purposes, or (iii) permitted by the court for good cause. This disclosure prohibition is automatic and does not require a person to file a DC-301, REQUEST FOR CONFIDENTIALITY.

XII. PROCEDURES FOR CASES INVOLVING NON-ENGLISH SPEAKING, LIMITED ENGLISH PROFICIENT, DEAF, OR HARD OF HEARING INDIVIDUALS

A. Foreign Language Interpreter Services

In accordance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) and applicable Federal funding statutes such as the Omnibus Crime Control and Safe Streets Act of 1968 (34 U.S.C. § 10101 et seq.), courts receiving federal financial assistance must take reasonable steps to ensure meaningful access to their programs and services by individuals with limited English proficiency (LEP).

Non-English speaking individuals or individuals with limited English proficiency should be provided with language assistance by qualified foreign language interpreters in all magistrate hearings involving these individuals.

The Supreme Court of Virginia has entered into a state contract for a telephone interpreter services provider. Each magistrate's office has access to this service. The

Office of the Executive Secretary has sent instructions for the operation of the service to each magistrate's office. Refer to these instructions for further guidance.

It is recommended that every interpreter used in a legal proceeding be required to swear an "oath of true interpretation" and to properly discharge the role of interpreter.

To maximize communication during interpreted hearings, magistrates should speak, and assure that others speak, at a volume and rate that can be accommodated by the interpreter.

For further information concerning non-English speakers in the Virginia Court System, *see*:

http://www.courts.state.va.us/courtadmin/aoc/djs/programs/interpreters/manuals/lep/guidelines.pdf.

B. Interpreters for the Deaf and Hard of Hearing

Virginia's judicial system will make all reasonable modifications to policies and programs to ensure that people with disabilities have an equal opportunity to enjoy all of its programs, services, and activities. People who are hard of hearing qualify as persons with a disability under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.). Therefore, the magistrate's office must make reasonable accommodations to ensure that people hard of hearing have the same access to services as all other individuals. Magistrates must utilize the video remote interpreting service (the "VRI"). Most magistrate's offices have been provided with specialized equipment to use the VRI. Any other magistrate office in the state is also able to access this equipment via a bridged video call with a web cam-equipped office. Chief magistrates should ensure that every magistrate in their district is familiar with the methods and procedures for accessing the VRI. The magistrate should access the VRI with a Firefox or Chrome web browser. The VRI's website is supremecourtva.cli-video.com. The magistrate should click to "allow" use of the microphone and camera. Enter access code 85709scva on the Login Screen and click sign in. On the next screen, under "Person needing interpreter," enter the person's name. The magistrate should enter his or her name as the magistrate. For the billing code, enter 510-513. For "Case# or Case Name," enter the OTN or the defendant's name. Select type of case, click on "Submit data," then select the American Sign Language box. Wait for the interpreter to appear on screen.

Renee Fleming Mills, Ph.D., is the ADA coordinator for the Office of the Executive Secretary. Further questions about accommodations for any disability may be directed to adacoordinater@vacourts.gov.

It is recommended that every interpreter used in a legal proceeding be required by the magistrate to swear to an "oath of true interpretation" and to properly discharge the role of interpreter.

XIII. DIPLOMATIC IMMUNITY

The Diplomatic Relations Act (22 U.S.C. 254a et seq.) sets forth the law regarding diplomatic immunity. Diplomatic agents and members of administrative and technical staff or diplomatic missions have complete personal inviolability, i.e., they may not be arrested or detained. Family members of either diplomatic agents or members of administrative and technical staff also have the same degree of diplomatic immunity. Consequently, these family members are not subject to arrest or detention. Normally, other classes of personnel at diplomatic missions do not receive protection from arrest or detention. The United States, however, has entered into agreements with some countries to extend complete personal inviolability to other diplomatic staff personnel.

The United States Department of State issues diplomatic identification cards to diplomatic officers, embassy administrative and technical staff employees, and to their family members. These identification cards set forth the immunity afforded to the bearer. In cases involving serious crimes or where the magistrate doubts the authenticity of the card, the magistrate should verify the diplomatic status by calling the Diplomatic Security Command Center at (571) 345-3146 or (866) 217-2089. The command center is staffed 24 hours per day.

The United States Department of State Bureau of Diplomatic Security provides a handbook entitled *Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities*, which provides further contact information and useful information on these matters.