# Virginia State Crime Commission

# Admission of Prior Sex Offenses

2013

# Admission of Prior Sex Offenses

## Executive Summary

Delegate Robert Bell and Senator Mark Herring introduced House Bill 1766 and Senate Bill 1114, respectively, during the 2013 Regular Session of the Virginia General Assembly. These nearly identical bills sought to allow previous sex abuse convictions to be entered into evidence in felony sex abuse cases where the victim was a minor. The bills were referred to the Crime Commission for review.

In the common law there has been a long standing disfavor against the admission of collateral or character evidence because it was feared that juries would concentrate on the bad reputation of the defendant and ignore the facts and circumstances of the criminal case. Around 1900, American courts began to allow collateral evidence if it was offered to help establish motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or if it demonstrated a common scheme or plan. All 50 states, including Virginia, follow this exception to the collateral/character evidence rule. This exception can and is being used in every state to admit collateral evidence in child sex abuse cases.

Within the common law, a specific exception, called the "lustful disposition," was created to allow collateral evidence in child molestation and incest prosecutions. This exception allows evidence of the unique nature of the relationship between the defendant and victim, including uncharged criminal conduct/acts against the victim, or a third party, to corroborate the victim's testimony. At least 35 states follow this exception, including Virginia. In 1994, the United States Congress passed Federal Rule of Evidence 414, which codified the "lustful disposition" exception. Since then, at least 12 states have codified a version of the "lustful disposition" exception either in statute or as a rule of evidence.

As a result of the study effort, the Crime Commission endorsed the following recommendation at its December 2, 2013, meeting:

**Recommendation 1**: Codify the "lustful disposition" rule without the qualifier that it only applies when a defendant is accused of a felony offense. A new statute could be created that would state "evidence of the defendant's conviction of another offense or offenses of sexual abuse is admissible and may be considered for its bearing on any matter to which it is relevant."

## Background

House Bill 1766 (HB 1766)[1] was introduced by Delegate Robert Bell, and Senate Bill 1114 (SB 1114)[2] was introduced by Senator Mark Herring during the 2013 Regular Session of the General Assembly. Both bills sought to allow previous convictions to be admitted into evidence in sexual abuse cases committed against minors. The bills were referred, by letter, to the Crime Commission for study from both the Virginia House Courts of Justice and the Senate Courts of Justice Committees. The bills specify that in felony child sexual abuse cases, the admission of the "defendant's conviction of another offense or offenses of sexual abuse is admissible and may be considered for its bearing on any matter to which it is relevant." The bills require a 14 day notice to the defendant if the prosecution plans on introducing the evidence and HB 1766 requires that the evidence must be subject to Virginia Rules of Evidence 2:403.

The subject matter of the bills contemplates the admission into evidence of previous sex convictions in the prosecution of child sex felonies. Previous convictions are referred to as collateral act evidence, also known as propensity or character evidence, which is evidence concerning a person's traits, reputation, or even previous criminal convictions/acts that are not the subject of a current criminal prosecution. There was strong presumption against the admission of character or collateral act evidence in the common law. It is not clear how long the presumption against this type of evidence has existed, but it may go back as far as the Glorious Revolution of 1688.[3] As one American jurist described, the basic reason for the ban on this type of evidence is rooted in the concept of a fair trial for the accused:

> It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili.*[4]

While it was generally held that character or collateral act evidence was inadmissible, early American courts were permitting collateral evidence, as long as it was not admitted to prove propensity.[5]

There was an exception in English common law for the crimes of fraud and forgery.[6] It was reasoned that because these two crimes involve dishonesty or deceptive behavior, evidence of the accused's reputation for honesty was probative on his "reputation for truthfulness." In 1849, British courts began to admit collateral evidence in criminal prosecutions beyond fraud and forgery, as long as the collateral evidence was relevant to an issue of fact in the prosecution.[7] American courts continued to follow the general inadmissibility of collateral evidence throughout the latter half of the 19th century.

In 1901, the New York Court of Appeals decided People v. Molineux, which permitted exceptions for the admission of collateral evidence. Specifically, the Court held that:

> The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.[8]

This rule has been adopted by every jurisdiction in the United States either as a rule of evidence or by judicial decision,[9] and is reflected in Federal Rule of Evidence (FRE) 404(b).[10] This exception has been widely used to admit prior convictions and uncharged criminal activity in child sex abuse cases.[11]

In the years following the adoption of Molineux or a rule similar to FRE 404(b), courts began to adopt an additional exception within the rule's framework; the "lustful disposition." Under this exception, additional evidence of the defendant's particular relationship with the victim, or information which would show the defendants' "bent of mind" towards the victim or similar victims was considered admissible.[12] The Indiana Supreme Court adopted a typical version of this exception:

> Provided they are not too remote in time or otherwise, such other acts are relevant and admissible to show the "lustful disposition" of defendant as well as to show the existence and continuance of the illicit relation, to characterize and explain the act charged and to corroborate the testimony of the prosecutrix as to that act.[13]

The basic reason for the adoption of the rule was the recognition in the common law that molestation and incest cases are very different from rape and sexual abuse cases involving adults.[14] Consent is often the critical question in adult sexual abuse cases, but in molestation/incest cases the victim frequently "consents" to the abuse and consent is not an element of the crime. What the "lustful disposition" tries to do is help explain why the victim "consented" and how the defendant's actions compelled the victim to consent. There are at least 35 states, including Virginia, that have adopted the "lustful disposition" rule.[15]

In 1994, the United States Congress passed FRE 414, which essentially codified the "lustful disposition" rule.[16] This rule allows the broad admissibility of evidence; "(i)n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation."[17] Additionally, the court may consider the evidence "on any matter to which it is relevant."[18] The federal prosecutor must disclose his intention to offer the evidence at least 15 days prior to trial. In addition, the evidence must go through the probative value versus prejudicial effect analysis required by FRE 403.[19] This rule has been upheld as constitutional by at least two federal appeals courts.[20]

Since the passage of FRE 414, there have been 14 states that have adopted similar statutes or rules broadening the admissibility of prior bad acts in child molestation cases.[21] None of these statutes or rules are as broad as FRE 414.[22] All of these states' statutes or rules require advanced notice from the prosecutor prior to trial, a prejudicial effect versus probative value analysis, and permit relevant prior convictions and uncharged criminal activity to be admitted. There are six of these states that have amended their rules of evidence to add a version of FRE 414/"lustful disposition".[23] For example, the Alaska rule adheres fairly closely to the traditional "lustful disposition" rule:

> (2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses:
>
> > (i) occurred within the 10 years preceding the date of the offense charged;
> > (ii) are similar to the offense charged; and,
> > (iii) were committed upon persons similar to the prosecuting witness.[24]

There are seven of these states that have enacted general statutes, allowing the relaxed admissibility of this type of evidence in cases involving sexual offenses, to apply to cases with either minor or adult victims.[25] California's statute simply states, "(i)n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101 [the general prohibition of prior bad

acts], if the evidence is not inadmissible pursuant to Section 352 [requirement that all evidence undergo the probative value vs. prejudicial effect test]."[26] And finally, both Missouri and Washington's statutes were overturned by their state supreme courts on narrow, state constitutional grounds.[27]

## Virginia Law

Consistent with the trend in other states, while Virginia has long followed the general rule that character evidence is prohibited in criminal prosecutions, it has allowed for Molineux type exceptions.[28] In 2012, this exception was codified in the Virginia Rules of Evidence under Rule 2-404(b) and states:

> Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.[29]

In 1923, the Supreme Court of Virginia adopted a version of the "lustful disposition" rule.[30] The Stump case stated that in prosecutions of statutory rape, where consent is immaterial, such "evidence is admissible as tending to show the disposition of the defendant with respect to the particular act charged."[31] While the rule in Stump is worded slightly differently than other permutations of the "lustful disposition" rule, it still allows evidence that illustrates the defendant's inclination towards committing a particular act, against a particular victim.

Over time the lustful disposition has been both clarified and modified by Virginia courts. The Supreme Court of Virginia made it clear that testimony of previous, uncharged criminal acts between the minor victim and the defendant are permitted in a rape case.[32] The exception was expanded when, in Moore v. Commonwealth, acts the defendant committed against two pre-teen boys, were admitted into evidence in a rape prosecution involving his 12 year old step-daughter.[33] And, in a rape prosecution, evidence of a previous conviction for raping the same victim, in a separate offense, was held to be admissible.[34]

A more recent case illustrates how the "lustful disposition" exception is used along with the character evidence exception in Virginia Rule of Evidence 2-404(b) in a child sexual abuse case.[35] In Ortiz v. Commonwealth, the court allowed testimony from the victim concerning a pattern of sexual abuse that the defendant committed against her over the course of a few years.[36] The court reasoned that this testimony was permitted because it was "relevant for one or more of the following purposes: to show the conduct or attitude of Ortiz toward the child, to prove motive or method of committing the rape, to prove an element of the crime charged, or to negate the possibility of accident or mistake." Essentially, the court used both the "lustful disposition" and Virginia Rule 2-404(b), as grounds for the victim's testimony to be admitted. Furthermore, the court permitted the admission of a drug store receipt for vaginal cream and pornography seized from the defendant's house because it corroborated the victim's testimony and showed how the defendant had used both items to "groom" the victim, making it easier for the victim to consent to the sexual acts.[37] The court also added that this evidence, consistent with Virginia Rule 2-404(b), negated the defendant's explanation that the acts were an accident or mistake.[38]

Overall, the basic framework already exists under Virginia law to admit relevant prior convictions in child sex abuse cases. The convictions can be admitted under Virginia Rule of Evidence 2-404(b) or under the Virginia version of the "lustful disposition" exception.

## Conclusion and Recommendations

The admission of collateral act evidence was disfavored in the common law. There has been an exception for evidence that focused on motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or if it was part of a common scheme or plan. This exception may and is being used in child sexual abuse cases.

The "lustful disposition" exception allows evidence of the unique nature of the relationship between the defendant and victim, including uncharged criminal conduct/acts against the victim, or a third party, to corroborate the victim's testimony. The "lustful disposition: exception is followed in Virginia. The federal government and 12 states have codified a version of the "lustful disposition" rule.

The Crime Commission reviewed study findings at its September 3, 2013, meeting and directed staff to draft legislation. As a result of the study effort, the Crime Commission endorsed the following legislative recommendation at its December meeting:

**Recommendation 1:** Codify the "lustful disposition" rule without the qualifier that it only applies when a defendant is accused of a felony offense. A new statute could be created that would state "evidence of the defendant's conviction of another offense or offenses of sexual abuse is admissible and may be considered for its bearing on any matter to which it is relevant."

Recommendation 1 was introduced by Delegate Robert Bell as House Bill 403 during the 2014 General Session of the Virginia General Assembly. The bill was amended and passed by both the Virginia House of Delegates and the Virginia Senate. The Governor recommended an amendment to the bill, which became law when the amendment was adopted by both the Virginia House of Delegates and the Virginia Senate on March 24, 2014.[39]

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[1] H.B. 1766, 2013 Gen. Assem., Reg. Sess. (Va. 2013).
[2] S.B. 1114, 2013 Gen. Assem., Reg. Sess. (Va. 2013).
[3] Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases, 21 Am. J. Crim. L. 127, 156 (1993), *see also* People v. Jenness, 5 Mich. 305, 320 (1858).
[4] State v. Lapage, 57 N.H. 245, 289-90 (1876).
[5] 1A John Henry Wigmore, Evidence In Trials At Common Law § 357, at 336 (Tillers ed., rev. ed. 1983).
[6] See Regina v. Winslow, (1860) 8 Cox C.C. 397; Regina v. Oddy, (1851) 169 Eng. Rep. 499; 5 Cox. C.C. 210.
[7] 18 L.J.M.C. 215 (1849).
[8] People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).
[9] Basyle J. Tchividjian, Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions, 39 Am. J. Crim. L. 327, 379 (2012), *see also* **Hawaii**, HAW. REV. STAT. § 626-1 (West 2013); **Idaho**, I.R.E. 404 Idaho R. Evid. 404; **Indiana**, Ind. R. Evid. 404; **Iowa**, IA R 5.404; **Kentucky**, KRE 404 Ky. R. Evid. 404; **Louisiana**, La. Code Evid. Ann. art. 404; **Maine**, Me. R. Evid. 404; **Maryland**, Md. Rule 5-404; **Massachusetts**, MA R EVID § 404; **Michigan**, Mich. R. Evid. 404; **Minnesota**, Minn. R. Evid. 404; **Mississippi**, Miss. R. Evid. 404; **Montana**, Mont. R. Evid. 404; **Nebraska**, NEB. REV. STAT. § 27-404 (2013); **Nevada**, NEV. REV. STAT. ANN. § 48.045 (West 2013); **New Hampshire**, N.H. R. Evid. 404; **New Jersey**, N.J. R. Evid. 404; **New Mexico**, N.M. R. Evid. 11-404; **New York**, N.Y. CRIM. PROC. LAW § 60.40

(McKinney 2013); **North Carolina**, N.C. R. Evid. § 8C-1,8C-1404; **North Dakota**, N.D. R. Evid. 404; **Ohio**, Ohio Evid. R. 404; **Oregon**, OR. REV. STAT. ANN. § 40.170 (West 2013); **Pennsylvania**, Pa. R. Evid. 404; **Rhode Island**, R.I. R. Evid. 404; **South Carolina**, S.C. R. Evid. 404; **South Dakota**, S.D. CODIFIED LAWS § 19-12-5 (West 2013); **Tennessee**, Tenn. R. Evid. 404; **Texas**, Tex. R. Evid. 404; **Vermont**, Vt. R. Evid. 404; **West Virginia**, W. Va. R. Evid. 404; **Wyoming**, Wyo. R. Evid. 404.

[10] "(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice." Fed. R. Evid. 404(b)(2).

[11] *See generally* State v. Yager, 236 Neb. 481, 483, 461 N.W.2d 741, 743 (1990) (testimony of two prior victims of defendant's fondling to refute accidental touching defense); State v. Lucas, 364 S.E.2d 12, 16-17 (W. Va. 1987) (holding similar prior molestations admissible to show why victim did not resist defendant); Calloway v. State, 520 So. 2d 665, 667 (Fla. Dist. Ct. App. 1988) (holding evidence of conduct of defendant with aunt of victim admissible to corroborate victim's story); State v. Aakre, 2002 MT 101, 309 Mont. 403, 46 P.3d 648 and overruled by Whitlow v. State, 2008 MT 140, 343 Mont. 90, 183 P.3d 861 (common plan or scheme for sexual assault cases).

[12] Tchividjian, *supra*, at note 9.

[13] Barker v. State, 188 Ind. 263, 120 N.E. 593 (1918).

[14] Reed, *supra*, at note 3.

[15] States that have the "lustful disposition" exception: **Alaska**, Burke v. State, 624 P.2d 1240, 1248 (Alaska 1980); **Arizona**, State v. Weatherbee, 158 Ariz. 303, 304, 762 P.2d 590, 591 (Ct. App. 1988); **Arkansas**, Flanery v. State, 362 Ark. 311, 313, 208 S.W.3d 187, 189 (2005); **Connecticut**, State v. DeJesus, 288 Conn. 418, 421, 953 A.2d 45, 49 (2008); **Delaware**, State v. Clough, 33 Del. 140, 132 A. 219 (Gen. Sess. 1925); **Colorado,** Laycock v. People, 66 Colo. 441, 182 P. 880 (1919); **Georgia**, Farmer v. State, 197 Ga. App. 267, 398 S.E.2d 235 (1990); **Idaho**, State v. Lippert, 145 Idaho 586, 594, 181 P.3d 512, 521 (Ct. App. 2007); **Illinois**, People v. Claussen, 367 Ill. 430, 11 N.E.2d 959 (1937); **Iowa**, State v. Spaulding, 313 N.W.2d 878, 879 (Iowa 1981) (incudes third parties, whenever close in time); **Kansas**, State v. Moore, 242 Kan. 1, 7, 748 P.2d 833, 837 (1987) *disapproved of by* Carmichael v. State, 255 Kan. 10, 872 P.2d 240 (1994); **Louisiana,** State v. McCollough, 149 La. 1061, 90 So. 404 (1922); **Maine**, State v. Seaburg, 154 Me. 162, 163, 145 A.2d 550, 551 (1958); **Maryland**, Vogel v. State, 315 Md. 458, 460, 554 A.2d 1231 (1989); **Massachusetts**, Com. v. Dwyer, 448 Mass. 122, 125, 859 N.E.2d 400, 405 (2006); **Mississippi,** Crawford v. State, 754 So. 2d 1211, 1216 (Miss. 2000); **Missouri**, State v. Johnson, 161 S.W.3d 920, 924 (Mo. Ct. App. 2005); **Nebraska**, State v. Baker, 218 Neb. 207, 352 N.W.2d 894 (1984); **New Hampshire**, State v. Desilets, 96 N.H. 245, 73 A.2d 800 (1950); **New Jersey**, State v. Cannon, 72 N.J.L. 46, 60 A. 177 (Sup. Ct. 1905); **New Mexico**, State v. Dodson, 67 N.M. 146, 353 P.2d 364 (1960); **New York**, People v. Lewis, 69 N.Y.2d 321, 506 N.E.2d 915 (1987); **North Carolina**, Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967); **North Dakota**, State v. Schell, 65 N.D. 126, 256 N.W. 416 (1934); **Oklahoma**, Hawkins v. State, 1989 OK CR 72, 782 P.2d 139; **Ohio**, State v. Jackson, 82 Ohio App. 318, 321, 81 N.E.2d 546, 548 (1948); **Oregon**, State v. McKay, 309 Or. 305, 307, 787 P.2d 479, 480 (1990); **Pennsylvania**, Com. v. Hacker, 2008 PA Super 239, 959 A.2d 380, 393 (Pa. Super. Ct. 2008) rev'd, 609 Pa. 108, 15 A.3d 333 (2011) (bolster the credibility); **Rhode Island**, State v. Robinson, 989 A.2d 965, 967 (R.I. 2010); **South Carolina**, State v. Richey, 88 S.C. 239, 70 S.E. 729 (1911); **South Dakota**, State v. Champagne, 422 N.W.2d 840, 843 (S.D. 1988); **Tennessee**, Burlison v. State, 501 S.W.2d 801 (Tenn. 1973); **Virginia**, Ortiz v. Com., 276 Va. 705, 710, 667 S.E.2d 751, 755 (2008); **Washington**, State v. Ray, 116 Wash. 2d 531, 539, 806 P.2d 1220, 1225 (1991); **Wisconsin**, State v. Hunt, 2003 WI 81, 263 Wis. 2d 1, 28, 666 N.W.2d 771, 784 (corroboration); **Wyoming**, Brown v. State, 736 P.2d 1110 (Wyo. 1987) (other than victim corroboration).

[16] Fed. R. Evid. 414. See also Tchividjian 327, 342, *supra* at note 9.

[17] Id.

[18] Id.

[19] Fed. R. Evid. 403.

[20] United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001); United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Sandoval, 410 F. Supp. 2d 1071 (D.N.M. 2005).

[21] States with statutes similar to FRE 414: **Alaska**, Alaska R. Evid. 404; **Arizona**, ARIZ. REV. STAT. ANN. § 13-1420 (2013) and Ariz. R. Evid. 404; **California**, CAL. EVID. CODE § 1108 (West 2013); **Colorado**, COLO. REV. STAT. ANN. § 16-10-301 (West 2013); **Connecticut**, CT R REV § 4-5; **Florida**, FLA. STAT. ANN. § 90.404 (West 2013); **Illinois**, 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2013); **Kansas**, KAN. STAT. ANN. § 60-455 (West 2013); **Louisiana**, LA. CODE EVID. ANN. art. 412.2 (2013); **Missouri**, MO. ANN. STAT. § 566.025 (West 2013),

repealed; **Oklahoma**, OKLA. STAT. ANN. tit. 12, § 2414 (West 2013); **Texas**, TEX. CRIM. PROC. CODE ANN. art. 38.37 (West 2013), amended effective September; **Utah**, Utah R. Evid. 404(c); **Washington**, WASH. REV. CODE ANN. § 10.58.090 (West 2013).

[22] Tchividjian, *supra*, at note 9.

[23] Alaska R. Evid. 404(b)(2); Ariz. R. Evid. 404(c); CT R REV § 4-5(b); FLA. STAT. ANN. § 90.404(2)(b) (West 2013); KAN. STAT. ANN. § 60-455(c) (West 2013); LA. CODE EVID. ANN. art. 412.2 (2013); Utah R. Evid. 404(c).

[24] Alaska R. Evid. 404(b)(2).

[25] Ariz. R. Evid. 404; CAL. EVID. CODE § 1108 (West 2013); CT R REV § 4-5; FLA. STAT. ANN. § 90.404 (West 2013); 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2013); KAN. STAT. ANN. § 60-455 (West 2013); OKLA. STAT. ANN. tit. 12, § 2414 (West 2013).

[26] CAL. EVID. CODE § 1108(a) (West 2013).

[27] Missouri's statute was overturned by its Supreme Court on a state constitution, due process issue. State v. Burns, 978 S.W.2d 759 (Mo. 1998). In Washington, its Supreme Court invalidated the law on the basis of separation of powers. State v. Gresham, 173 Wash. 2d 405, 269 P.3d 207 (2012).

[28] Roy v. Commonwealth, 191 Va. 722, 727, 62 S.E.2d 902, 904 (1951).

[29] Va. Sup. Ct. R. 2:404(b).

[30] Stump v. Commonwealth, 137 Va. 804, 119 S.E. 72, 73 (1923).

[31] Id.

[32] Waitt v. Commonwealth, 207 Va. 230, 234, 148 S.E.2d 805, 808 (1966).

[33] Moore v. Commonwealth, 222 Va. 72, 75, 278 S.E.2d 822, 824 (1981).

[34] Marshall v. Commonwealth, 5 Va. App. 248, 250, 361 S.E.2d 634, 636 (1987).

[35] Ortiz v. Commonwealth, 276 Va. 705, 667 S.E.2d 751 (2008).

[36] Id. at 276 Va. 705, 711, 667 S.E.2d 751, 755.

[37] Id. at 276 Va. 705, 716, 667 S.E.2d 751, 758.

[38] Id.

[39] 2014 Va., Acts ch. 782.