

## PROVING CONSTRUCTIVE POSSESSION IN VIRGINIA: A CHANGE IN THE TRADEWINDS

David L. Thomas

### INTRODUCTION

Dick and Jane are a pair of fun-loving teenage college students. Late one evening several months ago they met a suspicious character at a predesignated spot on campus where the two college party-goers bought some marijuana. Dick paid cash for the stash which he placed on the dash of Jane's brand new car. Then off the two went. On the way to their private getaway where they would smoke the marijuana, Jane's speed caught the attention of a lone policeman who took chase and pulled the young collegians over in his police cruiser. Upon asking Jane for her identification and registration, the officer noticed a greenish leafy substance on the dash in plain view and quickly seized it. Shortly thereafter both Jane and Dick were placed under arrest for possession. Later at trial, as Dick and Jane sat next to their respective attorneys, they each accused the other of being the true possessor. Dick proffered that the marijuana was Jane's because it was found in Jane's car, while Jane insisted that the marijuana was Dick's because he was the one who had actually purchased it and then placed it in the vehicle.

The glaring question for both the court and the prosecutor to consider is typical of all such drug-related cases: Whose marijuana is it, and to prove constructive possession, does it really matter?" The answer to this inquiry has demanded the attention of jurists since the turn of the century. Most recently, in light of the societal push toward a drug-free America, it has emerged as one of the more controversial topics in American politics. Specifically, the tactics and policies of law enforcement agencies, most notably the FBI's policy of Zero-Tolerance, have come under attack. What makes for the strongest echoes of controversy is that many of these same, self-serving individuals who criticize law enforcement for failures in the realm of due process are the ones who also criticize the police department for their perceived lack of initiative toward halting the drug problem in their own communities. As a result of this "Catch 22" situation, a number of perplexing issues and questions have arisen, namely: what is constructive possession? how is it proven? and does this proof pass the constitutional hurdles of due process?

My analysis is intended to discuss the elements of constructive possession and the problems of ambiguity that accompany those elements in the State of Virginia. For a discussion of the more concrete, actual, physical possession, I refer the reader to *Michie's Virginia Jurisprudence* or *Corpus Juris Secundum*. Of general interest here will be a discussion of all major Virginia cases which lay down what the Virginia Supreme Court and the Virginia Court of Appeals have accepted as constructive possession. Because the law of possession is ever evolving, like the rest of common law, it is never assumed that this discussion of possession is complete. It is merely meant to be a guide from which one may predict the outcome of a case involving the constructive possession of a controlled substance in the Virginia court system today.

## WHAT CONSTITUTES CONSTRUCTIVE POSSESSION IN AMERICA: A BACKGROUND GUIDE

To begin an analysis of Virginia law, one may give the reader a general flavor for the diversity of this subject by a quick reference to how alternative jurisdictions prove constructive possession. For example, in Illinois, constructive possession has a narrow spectrum and hence drugs found in the trunk of the defendant's car while s/he is driving is not enough to prove possession.<sup>1</sup> Yet in California, constructive possession has been expanded. There, the state court system has determined that inferences and statutory presumptions can be drawn from varying situations. If drugs are found hidden in a car in California, a presumption is raised that the owner knew of their presence.<sup>2</sup> In most states, the key to proving constructive possession hinges on the accompanying circumstances and not on mere ownership of the premises or the defendant's proximity to the drugs. That's why in New York the owner of an apartment who sublets to another is not responsible for drugs that are found on his premises,<sup>3</sup> and in Oklahoma mere attendance at a party where drugs are used is not enough to prove possession.<sup>4</sup>

The conditions reflecting constructive possession, as determined by a general consensus of the states, can be categorized into three areas: dominion/control, knowledge of presence, and knowledge of nature.<sup>5</sup> A fourth area used to be "exclusivity of control,"<sup>6</sup> but with the advent of "joint possession," that element has lost much of its weight. Nevertheless, there still seems to be some fervor regarding the defense of "equal access", that is to say, the defense of saying, "the drugs are as much his as they are mine, because both of us had access to them."<sup>7</sup> Such a defense would lead to obvious injustice if it were allowed to succeed, as anyone who could prove nonexclusive control could wiggle out of the drug charge. (The perfect preventive measure for any defendant who planned to use a controlled substance would be to have the drugs in open view with many

---

<sup>1</sup> People v. Mosley, 131 Ill. App. 2d 722, 265 N.E.2d 889 (1972).

<sup>2</sup> People v. Waller, 260 Cal. App. 2d 131, 67 Cal. Rptr. 8 (1968).

<sup>3</sup> People v. Schriber, 310 N.Y.S.2d 551, 34 A.D.2d 852, *aff'd* 327 N.Y.S.2d 68, 29 N.Y.2d 780, 277 N.E.2d 187 (1971).

<sup>4</sup> Brown v. State, \_\_\_ Okla. Crim. \_\_\_, 481 P.2d 475 (1971).

<sup>5</sup> See generally, 28 C.J.S. *SUPP. Drugs and Narcotics* §§ 154-61 (1974 & Supp. 1989).

<sup>6</sup> People v. Diaz, 343 N.Y.S.2d 474, 41 A.D.2d 382, *aff'd* 356 N.Y.S.2d 295, 34 N.Y.2d 689, 312 N.E.2d 478 (1973).

<sup>7</sup> Shreve v. State, 172 Ga. App. 190, 322 S.E.2d 362 (1984).

people around. As long as the defendant was not caught actually touching the drugs, s/he would be safe. The ultimate consequence of all of this, if we are to believe the progenitors of the "equal access" defense, is the eventual quasi-legalization of drug parties).

All of this "give and take" leads to a diversity of definitions as to what constructive possession is or isn't -- depending in part upon the law and judicial philosophy that exists in the state where the offense occurred. What is agreed by all jurisdictions is that some quantity of drugs must be actually found and a link establishing some type of corroboration must be made in order for the prosecution to establish a *prima facie* case of constructive possession.<sup>8</sup>

#### ELEMENTS OF CONSTRUCTIVE POSSESSION IN VIRGINIA: A RESTATEMENT OF THE NATIONAL GUIDELINES

Virginia's black letter definition of possession reads that the defendant must be "aware of the presence and character of the particular substance and [must be] . . . intentionally and consciously in possession of it."<sup>9</sup> Generally, "physical possession giving the defendant 'immediate and exclusive control' is sufficient" to establish the above standard.<sup>10</sup> The scenario changes, however, when the drugs are not found on the defendant's physical person. This is where the already-mentioned, three-part rules governing constructive possession begin.

There is, under Virginia's view of constructive possession, a subset identified as "joint possession" where "exclusivity of control" is not a necessary element.<sup>11</sup> Hence, under Virginia's "joint possession" philosophy, control can be exercised simultaneously by plural subjects (defendants).

The overall view of constructive possession in Virginia, like that of the rest of the country, defines its elements in a three-part test, namely, "dominion and control" over the substance,<sup>12</sup> as well as knowledge of both "the presence and the nature/character" of the substance.<sup>13</sup> Another

---

<sup>8</sup> *Wong Sun v. United States*, 371 U.S. 471 (1962).

<sup>9</sup> *Robbs v. Commonwealth*, 211 Va. 153, 176 S.E.2d 429 (1970) (*quoting* *Ritter v. Commonwealth*, 210 Va. 732, 741, 173 S.E.2d 799, 805-06 (1970)).

<sup>10</sup> *Id.*

<sup>11</sup> *Clodfelter v. Commonwealth*, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977).

<sup>12</sup> *Id.*

<sup>13</sup> *Burton v. Commonwealth*, 215 Va. 711, 213 S.E.2d 757 (1975).

essential aspect of this traditional three-part test to prove possession is that the police must actually find drugs (a controlled substance). A defendant's mere confession to possessing drugs is insufficient in and of itself in Virginia to yield a conviction.<sup>14</sup> The police must recover a minuscule quantity or at least a residue of the drug.<sup>15</sup>

After the drug has been found and properly identified via a valid drug analysis and certification, the three aforementioned elements will come into play and must be satisfied to securely link the drugs with the defendant. Although it is suggested that these three elements act as corroborating evidence, the fact that one needs all three without exception seems to suggest a corroboration that is much more intense than in most other criminal proceedings.<sup>16</sup>

#### APPLICATION OF THE POSSESSORY SCHEME IN VIRGINIA

The application of the three components of possession, "dominion/control," "presence," and "character/nature," to any set of facts corresponding to a drug charge is often a vague task, for constructive possession outside of actual physical control has no true, steadfast definition by any means. It changes as the facts change -- what is commonly called constructive possession in one case may not be in another if one seemingly minor fact is different, like the defendant is not present when the drugs are found at his/her residence.<sup>17</sup> As a consequence to this diversity of facts scenario, in order to understand what it takes to prove possession and what the words "control" and "knowledge" truly mean, one must examine not statutory codes, but Virginia case law. What follows is a discussion of the most important factors affecting possession as deemed by the Virginia courts. Many of the topics under each element of possession are interchangeable as pertaining to each of the other elements. As a result, for purposes of simplification, an attempt will be made to discuss key topics with the corresponding possessory element that perhaps best illustrates its use in fulfilling the Commonwealth's burden of proof.

---

<sup>14</sup> *Manley v. Commonwealth*, 211 Va. 146, 176 S.E.2d 309, *cert. denied* 403 U.S. 936 (1970).

<sup>15</sup> *Robbs*, 211 Va. at 153, 176 S.E.2d at 429.

<sup>16</sup> *Adkins v. Commonwealth*, 217 Va. 437, 229 S.E.2d 869 (1976).

<sup>17</sup> *Drew v. Commonwealth*, 230 Va. 471, 338 S.E.2d 844 (1986).

### *Dominion and Control*

The first factor the court will ponder is ownership, but not ownership of the drugs *per se*, rather ownership or possessory interest in the place where the drugs are found, whether that be a house, apartment, or motor vehicle. Generally, drugs found in private are much more incriminating than if they are found in a public place.<sup>18</sup> The innate inference, which goes toward the weight of the evidence, will be present to suggest that whoever owns the premises probably owns the drugs. Certainly under those circumstances one has them at least within one's dominion.<sup>19</sup> More than this is needed, however, to show possession in Virginia; the Code steadfastly points out that there are no presumptions of possession in Virginia arising out of mere ownership of the premises on which the drugs are found.<sup>20</sup> Nevertheless, there is some relevance to the aforementioned inference surrounding the issue of ownership. As a by-product, the judicial inference arising from ownership coupled with other corroborating evidence will eventually prove constructive possession in the Virginia courts.<sup>21</sup> This same judicial inference arises again if the defendant is found in close proximity to the drugs.<sup>22</sup> A defendant who is charged with possession then takes the first step down the path to conviction if s/he owns the house/vehicle where the drugs are found or if s/he has a legal possessory right to occupy and control the premises, namely, a lease on the apartment, hotel room, or vehicle.

One of the defenses most used to combat the prosecution's assertion of "dominion and control" is referred to as "equal access" -- the showing that others could have controlled the drugs just as easily as the defendant. This is done by demonstrating that the premises was frequented by people other than the defendant and that as a result, the defendant did not have exclusive use of the area.<sup>23</sup> Today "equal access" is not as controlling in Virginia as elsewhere in the nation. This lack of precedential value is rooted in two alternative arguments. First, the development of

---

<sup>18</sup> *Drew v. Commonwealth*, 230 Va. 471, 338 S.E.2d 844 (1986); *Clodfelter v. Commonwealth*, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977).

<sup>19</sup> *Drew*, 230 Va. 471, 338 S.E.2d 844; *Clodfelter*, 218 Va. 619, 238 Va. S.E.2d 820.

<sup>20</sup> VA. CODE ANN. §§ 18.2-250 & 250.1 (1988 & Supp. 1989).

<sup>21</sup> *Adkins v. Commonwealth*, 217 Va. 437, 229 S.E.2d 869 (1976); *Hodge v. Commonwealth*, 7 Va. App. 351, 371 S.E.2d 156 (1988).

<sup>22</sup> *Brown v. Commonwealth*, 5 Va. App. 489, 364 S.E.2d 773 (1988).

<sup>23</sup> *Drew*, 230 Va. 471, 338 S.E.2d 844; *Huvar v. Commonwealth*, 212 Va. 667, 187 S.E.2d 177 (1972); *Crisman v. Commonwealth*, 197 Va. 17, 87 S.E.2d 796 (1955).

"joint possession" allows more than one person or defendant to exercise control over the drugs.<sup>24</sup> Thus, nonexclusive use is acceptable, as long as there are other elements showing control -- a large amount of drugs in open view coupled with ownership of the premises being one such example.<sup>25</sup> Second, the code as amended in 1973 specifies that mere ownership of the premises or proximity to the drugs is not good enough for a conviction, thereby ensuring that the policy behind the "equal access" defense is protected.<sup>26</sup> It is interesting to note that even though "equal access" has seemingly been done away with in Virginia, it still finds its way back into the courts and has been validated by the Virginia Supreme Court as late as 1986 in *Drew v. Commonwealth*.<sup>27</sup> The general approach by the Virginia Supreme Court seems to be that a defendant may use the defense in two differing scenarios: First, when the defendant is not the owner of the premises/vehicle where the drugs are found and there are a lot of other people around in the area; and second, where the defendant is the owner of the premises/vehicle, but, although numerous people are at the premises, the defendant is in fact not present at the scene when the drugs are found.<sup>28</sup>

An important endnote to "equal access" is that the Virginia Court of Appeals has never ruled on the issue. It is this writer's opinion that the use of "equal access" will be even more limited in the future due to the new court's tendency toward conservatism on matters concerning drug possession.

In the event that the defendant doesn't own the premises, the Commonwealth must show that the defendant had access to it and thereby access to the drugs.<sup>29</sup> Without this control link, there is no case for possession, as "equal access" can and will be more readily used. The search for showing access begins by assuming that the owner of record is not the true resident, but is in name only, and proceeds by asking whether the defendant makes the rent, mortgage, utilities, or phone payments. If so, s/he may be the constructive owner.<sup>30</sup> The inference may arise with

---

<sup>24</sup> Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970).

<sup>25</sup> McGee v. Commonwealth, 4 Va. App. 317, 357 S.E.2d 738 (1987).

<sup>26</sup> VA. CODE ANN. §§ 18.2-250 & 250.1.

<sup>27</sup> 230 Va. 471, 338 S.E.2d 844.

<sup>28</sup> See *Drew*, 230 Va. 471, 338 S.E.2d 844; *Lane v. Commonwealth*, 223 Va. 713, 292 S.E.2d 358 (1982); *Adkins*, 217 Va. 437, 229 S.E.2d 869; *Huvar*, 212 Va. 667, 187 S.E.2d 177; *Crisman*, 197 Va. 17, 87 S.E.2d 796.

<sup>29</sup> *Brown v. Commonwealth*, 5 Va. App. 489, 364 S.E.2d 773 (1988); *Albert v. Commonwealth*, 2 Va. App. 734, 347 S.E.2d 534 (1986).

<sup>30</sup> *Patty v. Commonwealth*, 218 Va. 150, 235 S.E.2d 457 (1977).

constructive ownership to prove possession just as it does with actual ownership of the premises; however, this inference will naturally be weaker.

In the event that the defendant doesn't own the premises actually or constructively, the case for possession becomes harder to prove because one corroborating fact, like open view, will not be enough to demonstrate possession. Yet the Commonwealth's case is not sunk. Although the inference is weak,<sup>31</sup> the defendant can still be linked with the premises through accessibility, thus demonstrating "dominion and control" by showing that the defendant either frequents the premises (building) or uses the vehicle.<sup>32</sup> As a result, if a defendant uses the building as a mailing address<sup>33</sup> or rides in the car to work everyday, an inference of "dominion and control" will arise from the excessive use standing alone.

Probably the strongest inference going toward proving possession, which would need only a small amount of corroboration by the Commonwealth to demonstrate control, would be the combination of ownership of the premises with exclusive possession.<sup>34</sup> Although exclusivity is a hard case to prove, it may be inferred by sole occupancy of the house, apartment, or vehicle, together with the fact that the deed or lease is in the defendant's name only, and s/he has the only key.<sup>35</sup> However, just as the plural possession of keys can spell doom for the inference of exclusivity, it can also bring life to an otherwise dead case if the defendant is not a constructive or an actual owner, but does have a key which allows him/her to frequent the premises at will.<sup>36</sup> The defendant caught driving someone else's vehicle is a primary example of how the

---

<sup>31</sup> Clodfelter, 218 Va. 619, 238 S.E.2d 820.

<sup>32</sup> Woodfin v. Commonwealth, 218 Va. 458, 237 S.E.2d 777 (1977); Wynn v. Commonwealth, 5 Va. App. 283, 362 S.E.2d 193 (1987). Keys to demonstrating accessibility include determining: 1) when the defendant last frequented the premises; 2) how often s/he visits; and/or 3) how long s/he stays when visiting. Brown, 5 Va. App. 489, 364 S.E.2d 773.

<sup>33</sup> Fierst v. Commonwealth, 210 Va. 757, 173 S.E.2d 807 (1970); Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970).

<sup>34</sup> Thorne v. Commonwealth, No. 1011-86-2 (Va. App. Sept. 30, 1987).

<sup>35</sup> Iglesias v. Commonwealth, 7 Va. App. 93, 372 S.E.2d 170 (1988); Thorne, No. 1011-86-2 (Va. App. Sept. 30, 1987).

<sup>36</sup> See Thorne, No. 1011-86-2 (Va. App. Sept. 30, 1987); see also Clodfelter, 218 Va. 619, 238 S.E.2d 820 (for discussions about the importance of having access through the use of a key). It should be noted that in these cases the defendant who possessed the key was also the owner of the premises.

Commonwealth can show control, as the defendant has not only a key, but has also demonstrated the ability to use it to control the vehicle.<sup>37</sup>

Another ingredient of "dominion and control" which can act to shore up an otherwise weak case is the finding of the defendant's personal effects at the scene where the drugs are found. These personal effects serve a dual purpose. First, they may be used to show that the defendant frequented and had access to the area.<sup>38</sup> Second, they may be used to draw a tighter link with the defendant's knowledge of the presence of the drugs, the inference being that the defendant must have seen the drugs when s/he put his/her gear in the area.<sup>39</sup> Thus, if the defendant is not the owner of the car where the drugs are found, but has personal mail or other personal papers in that car, a tighter link between the defendant and the drugs is drawn.<sup>40</sup> That link can even be tighter depending upon where the personal items are found in relation to the drugs.<sup>41</sup> As a general rule, personal items that touch the drugs create an unofficial, but nevertheless authoritative, rebuttable presumption of "knowledge" and "control," whereas those that are just close in proximity create a mere inference which needs further corroboration.<sup>42</sup> If the items are in the trunk or glove compartment, an additional burden is created for the Commonwealth to prove a more substantial use of the vehicle by the defendant. In that type of case, one may need more than mere possession of car keys to show use.<sup>43</sup> The more a defendant uses the premises or vehicle, the better the control argument for the Commonwealth.<sup>44</sup>

Another often overlooked area with which to demonstrate control, as it is usually only used to show knowledge of the nature of the substance, is paraphernalia that either is found in open view near the defendant or is found hidden on the defendant's physical person. The former

---

<sup>37</sup> *Patty*, 218 Va. 150, 235 S.E.2d 457; *Adkins*, 217 Va. 437, 229 S.E.2d 869; *Castaneda v. Commonwealth*, 7 Va. App. 574, 376 S.E.2d 82 (1989).

<sup>38</sup> *Woodfin*, 218 Va. 458, 237 S.E.2d 777; *Wynn*, 5 Va. App. 283, 362 S.E.2d 193.

<sup>39</sup> *Andrews v. Commonwealth*, 216 Va. 179, 217 S.E.2d 812 (1975); *Albert*, 2 Va. App. 734, 347 S.E.2d 534.

<sup>40</sup> *Patty*, 218 Va. 150, 235 S.E.2d 457.

<sup>41</sup> *Andrews*, 216 Va. 179, 217 S.E.2d 812.

<sup>42</sup> *Compare* *Garland v. Commonwealth*, 225 Va. 182, 300 S.E.2d 783 (1983); *Clodfelter*, 218 Va. 619, 238 S.E.2d 820; *Albert*, 2 Va. App. 734, 347 S.E.2d 534.

<sup>43</sup> *Adkins*, 217 Va. 437, 229 S.E.2d 869.

<sup>44</sup> *See generally*, *Woodfin*, 218 Va. 458, 237 S.E.2d 777; *Wynn*, 5 Va. App. 283, 362 S.E.2d 193 (where the Commonwealth lost on the grounds that it failed to show a more substantial use by the defendant).



circumstance draws as tight of a possessory link as the latter only in a situation where the paraphernalia is found among (touching) the defendant's personal effects.<sup>45</sup> The inference, in that case, is that the paraphernalia was used by the defendant to administer or dispense the drug that was found.

Fingerprints are yet another piece of evidence which can be used to show control and knowledge of presence, if they are found on the drugs<sup>46</sup> or on items, such as guns or paraphernalia, that are either touching or in the same area as the drugs.<sup>47</sup>

#### *Knowledge of Presence*

The factors used to prove knowledge are seemingly subjective by their very nature. What one perceives as happening in the environment around him or her appears to be purely speculative and yet, although it screams of reasonable doubt, is not looked upon in speculative terms by the courts. Courts tend to take a recognized, but unspeakable reasonable man standard, which is the norm in civil tort matters. As a result, the court instinctively asks what a reasonable man would have known. The use of logical inferences is common to satisfy not only the knowledge of "presence" element, but also that of "character/nature".<sup>48</sup>

The strongest circumstance that gives rise to a fulfillment of the knowledge of "presence" requirement is when the defendant is apprehended with the drugs on his/her person. This physical possession carries with it a presumption that the defendant knew s/he was carrying the drugs.<sup>49</sup>

With constructive possession, this presumption is nonexistent. It used to be that a mere inference, not a presumption, toward knowledge of the presence of the drugs arose only in cases where the drugs were in open view and the defendant was present on the premises or in the vehicle where the drugs were found. The presence of the defendant at the scene to show knowledge was an almost essential factor in Virginia. Without it, the case for knowledge was a

---

<sup>45</sup> Brown, 5 Va. App. 489, 364 S.E.2d 773.

<sup>46</sup> Wright v. Commonwealth, 2 Va. App. 743, 348 S.E.2d 9 (1986).

<sup>47</sup> Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975).

<sup>48</sup> Andrews v. Commonwealth, 216 Va. 179, 217 S.E.2d 812 (1975).

<sup>49</sup> Clodfelter v. Commonwealth, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977).

difficult, if not impossible one, to prove.<sup>50</sup> Recently, however, the court of appeals has reversed this philosophy concerning the necessity of the presence of the accused. Now the court holds that although presence is important, it is not essential. A defendant can now be convicted without being present when the drugs are discovered, as long as there is enough corroborating evidence to show that the defendant had knowledge of their presence.<sup>51</sup>

For all of these factors relating to the presence of the accused, the police are cautioned to wait in a stake-out for the defendant to arrive. Arriving at the premises moments before a raid is not a substantial enough presence for most courts to find possession. The defendant must be on the premises or in the vehicle for a reasonable period of time so as to not only know of the drugs' presence, but also to exercise the requisite control over them.<sup>52</sup> Usually, one is safe if the defendant has been there for at least an hour.<sup>53</sup>

The issue over the defendant's presence is yet another important cross-over into the "dominion and control" area. The defendant's presence requirement may have to do more with control than it has to do with knowledge, and yet if the drugs are hidden, then knowledge is harder to prove unless the defendant is in the area for a substantially significant amount of time. This by itself still gives rise only to an inference of knowledge which goes toward the weight of the evidence.<sup>54</sup> Nevertheless, it is an inference that the Commonwealth cannot live without. Another reason for demonstrating knowledge through use of the premises or vehicle may be the fact that one who has frequent access most likely knows the hiding places for the drugs better than one with just a passing interest. As a result, the longer one resides on the premises, the better the link.<sup>55</sup>

---

<sup>50</sup> See *Drew v. Commonwealth*, 230 Va. 471, 338 S.E.2d 844 (1986); *Powers v. Commonwealth*, 227 Va. 474, 316 S.E.2d 739 (1984); *Garland v. Commonwealth*, 225 Va. 182, 300 S.E.2d 783 (1983); *Woodfin v. Commonwealth*, 218 Va. 458, 237 S.E.2d 777 (1977); *Wynn v. Commonwealth*, 5 Va. App. 283, 362 S.E.2d 193 (1987).

<sup>51</sup> See *Hodge v. Commonwealth*, 7 Va. App. 351, 371 S.E.2d 156 (1988); see also *Behrens v. Commonwealth*, 3 Va. App. 131, 348 S.E.2d 430 (1986).

<sup>52</sup> *Gillis v. Commonwealth*, 215 Va. 298, 208 S.E.2d 768 (1974); *Brown v. Commonwealth*, 5 Va. App. 489, 364 S.E.2d 773 (1988).

<sup>53</sup> *Gillis*, 215 Va. 298, 208 S.E.2d 768; *Brown*, 5 Va. App. 489, 364 S.E.2d 773.

<sup>54</sup> *Andrews*, 216 Va. 179, 217 S.E.2d 812.

<sup>55</sup> *Brown*, 5 Va. App. 489, 364 S.E.2d 773.

Perhaps the lack of long term residency is why the Commonwealth lost in *Powers v. Commonwealth*.<sup>56</sup>

Another circumstance that affects knowledge of presence is the drugs in "open view" scenario, which is the natural opposite to the hidden drug scenario just discussed.<sup>57</sup> If the drugs are out in the open and the defendant is present, there is a quasi-presumption that the defendant has knowledge.<sup>58</sup> This presumption, although not admitted by the court, becomes stronger when the defendant has been in the house for over an hour and/or the defendant is found in the same room with a large quantity of drugs in open view.<sup>59</sup>

The issue of personal effects, as mentioned earlier in the discussion of "dominion and control," becomes important to proving knowledge when the defendant is not in the area or is out of eyeshot (i.e., not in the same room) where the drugs are found.<sup>60</sup> The key to demonstrating knowledge lies in how close the defendant's personal items are to the drugs. If they are touching the drugs, then there is a presumption of knowledge, as it is presumed that the defendant had to have seen the drugs when s/he was going through his/her personal items.<sup>61</sup> An interesting case develops if drugs are found in the defendant's gear when the defendant is not present. As mentioned, possession is a hard case to prove when the defendant is not around. In this kind of an example, presence would not go, as it usually would, toward knowledge, but instead to defend the defendant's contention that s/he was not in control of the substance. With a variety of slightly differing fact scenarios, this case type opens up a gambit of possibilities to a resourceful defense attorney.<sup>62</sup>

---

<sup>56</sup> 227 Va. 474, 316 S.E.2d 739. Although the defendant was the sole occupant of the premises, the court held that the drugs could have been left in his attic by someone else. The inference was that someone who possessed the house prior to the defendant's occupancy could have hidden the drugs. Although the opinion does not state the amount of time the defendant had resided in the house prior to his impending move at the time of the raid, the inference was that for the Commonwealth to meet its burden, the defendant would have had to have resided in the house longer.

<sup>57</sup> *McGee v. Commonwealth*, 4 Va. App. 317, 357 S.E.2d 738 (1987).

<sup>58</sup> *Brown*, 5 Va. App. 489, 364 S.E.2d 773.

<sup>59</sup> *Gillis*, 215 Va. 298, 208 S.E.2d 768; *McGee*, 4 Va. App. 317, 357 S.E.2d 738.

<sup>60</sup> *Clodfelter*, 218 Va. 619, 238 S.E.2d 820.

<sup>61</sup> *Iglesias v. Commonwealth*, 7 Va. App. 93, 372 S.E.2d 170 (1988).

<sup>62</sup> See *Hodge*, 7 Va. App. 351, 371 S.E.2d 156 (for an example where the defendant was convicted); see also *Powers*, 227 Va. 474, 316 S.E.2d 739 and *Clodfelter*, 218 Va. 619, 238 S.E.2d 820 (for examples where the defendant was found not guilty).

A more substantial link that would solve the problem of "knowledge" and "control" and would precipitate a conviction, even in the absence of the defendant, is the uncontroverted fingerprint. If the print is on the drug package, then, just as with actual physical possession, knowledge of "presence" and "control" are presumed.<sup>63</sup> Most cases are not so clear cut, however, and only items around the drugs end up having readable fingerprints. In the more common case where the prints are taken from the defendant's personal effects, only an inference toward knowledge arises.<sup>64</sup>

The amount or quantity of drugs also plays a role, although a small one, in deciphering whether the defendant had the prerequisite knowledge of presence. This only comes to bear when the defendant is present on the premises and, although s/he is there for under an hour and not apprehended in the same room with the drugs, the drugs are found strung out all over the premises or vehicle. The mere quantity of drugs alone invokes a strong inference of knowledge.<sup>65</sup> Under this condition, presence is still important; however, it may not be essential to the Commonwealth's case if the defendant frequented the premises recently, owned it and had semi-exclusive use over it. In that case, a strong inference going toward the weight of the evidence, even in the absence of the defendant's presence, will be allowed.<sup>66</sup>

#### *Knowledge of Character/Nature*

Intent or *mens rea* is an essential element of all criminal offenses that demand punishment by incarceration.<sup>67</sup> Even in light of Virginia's First Time Offender Statute,<sup>68</sup> the crime of possession is no different than any other crime. The *mens rea* in possession cases equates to knowingly controlling an illegal substance. The process for demonstrating this knowledge is a two-part equation, the second part naturally flowing from the fulfillment of the first. This means that

---

<sup>63</sup> Wright v. Commonwealth, 2 Va. App. 743, 348 S.E.2d 9 (1986).

<sup>64</sup> Andrews, 216 Va. 179, 217 S.E.2d 812.

<sup>65</sup> McGee, 4 Va. App. 317, 357 S.E.2d 738; *contra* Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972).

<sup>66</sup> Hodge, 7 Va. App. 351, 371 S.E.2d 156.

<sup>67</sup> See J. G. COOK and P. MARCUS, *CRIMINAL LAW*, at 157-61 (2d ed. 1988) (*quoting* HOOK, *DETERMINISM AND FREEDOM*, at 143-45 (1958)); *see also* People v. Hood, 1 Cal. 3d 444, 82 Cal. Rptr. 618, 462 P.2d 370 (1969).

<sup>68</sup> VA. CODE ANN. § 18.2-251 (1988 & Supp. 1989). This statute suspends all jail time/incarceration and thus would seemingly contradict the mandatory requirement of "intent" in narcotics cases in terms of the philosophical reasoning behind criminal law and punishment.

first, the defendant must have knowledge of the nature of the substance (be able to identify the substance on sight by name) and second, from that knowledge a natural presumption will arise that the defendant knew that the drug was illegal.<sup>69</sup> Although the defendant's attorney may challenge this presumption through the constitutional argument of due process or notice, it is a rare occurrence for him/her to succeed. Even relatively unknown drugs carry with them a strong presumption of illegality if they can only be received by virtue of a valid doctor's prescription. This is not to say that notice is never a valid defense. The defendant can assert due process to rebut a presumption of knowledge if s/he had no knowledge of the need for a prescription, as in a case where the defendant finds the drugs or buys them from another under innocent conditions. It should be noted that over-the-counter drugs are never part of the Schedule II or misdemeanor class of illegal drugs.<sup>70</sup> The fulfillment of the traditionally required intent or *mens rea* for possession will therefore depend heavily upon the satisfaction of the knowledge of the nature of the drug element as defined by modern case law.<sup>71</sup>

Probably the easiest way to infer knowledge is to find the defendant with drug paraphernalia on his person that is applicable to the drug found. The paraphernalia will trigger a stronger inference that the defendant knew the nature/purpose of the drug.<sup>72</sup> The harder case is when the paraphernalia is not on the defendant's person, but is instead just in the area. The connection between the drugs and the defendant and the paraphernalia will then depend upon any other circumstantial evidence that relates to control and presence.<sup>73</sup> Fingerprints on the paraphernalia would be one such example of this additional evidence.

Another key to proving knowledge is the defendant's past history of drug use or his/her prior drug conviction record.<sup>74</sup> The prior uses must be with the same drug that the defendant is now accused of possessing; otherwise, the defendant need only distinguish his/her past record by pointing to the differences in the prior and present instances of drug use.

---

<sup>69</sup> McGee v. Commonwealth, 4 Va. App. 317, 325, 357 S.E.2d 738, 740-41 (1987).

<sup>70</sup> See VA. CODE ANN. §§ 54.1-3443 - 56. *et seq.* (1988 & Supp. 1989).

<sup>71</sup> McGee, 4 Va. App. at 325, 357 S.E.2d at 740-41.

<sup>72</sup> Servis v. Commonwealth, 6 Va. App. 507, 371 S.E.2d 156 (1988).

<sup>73</sup> Clodfelter v. Commonwealth, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977); Brown v. Commonwealth, 5 Va. App. 489, 364 S.E.2d 773 (1988); McGee, 4 Va. App. 317, 357 S.E.2d 738.

<sup>74</sup> Stoval v. Commonwealth, 213 Va. 67, 189 S.E.2d 353 (1972); Brown, 5 Va. App. 489, 364 S.E.2d 773.

An important method of overcoming the debacle surrounding the demonstration of knowledge of nature element is to elicit statements from the defendant about the drugs. Any pre-Miranda or valid post-Miranda statements which show that the defendant had a knowledge of what the substance was will satisfy the requirements. Thus, when the police do not mention what the substance that was found is and the defendant says something to the effect that, "I've never seen that dope before in my life," the nature element will be satisfied.<sup>75</sup>

Additionally, knowledge can be inferred through the defendant's educational status or the kinds of books that the defendant owns,<sup>76</sup> the inferences being either that the well-educated man or woman would know that a drug (e.g., cocaine) is illegal, or that one who has a book on cocaine knows what it looks like and its character as an illegal drug.

A few other noticeable signs of knowledge that merely go toward the weight of the evidence are: 1) absence of surprise on the defendant's face when the drugs are found;<sup>77</sup> 2) nervousness of the defendant when the police want to search for the drugs in an area near the defendant;<sup>78</sup> 3) the defendant's associations with known drug dealers;<sup>79</sup> 4) needle marks in the defendant's arm;<sup>80</sup> 5) the defendant being noticeably stoned or high at the time of the arrest;<sup>81</sup> and/or 6) the defendant giving the police a false identification.<sup>82</sup>

---

<sup>75</sup> McGee, 4 Va. App. 317, 357 S.E.2d 738.

<sup>76</sup> Eckhart v. Commonwealth, 222 Va. 447, 281 S.E.2d 853 (1981).

<sup>77</sup> Behrens v. Commonwealth, 3 Va. App. 131, 348 S.E.2d 430 (1986) (lack of surprise was not enough, by itself, to show knowledge).

<sup>78</sup> Lane v. Commonwealth, 223 Va. 713, 292 S.E.2d 358 (1982) (nervousness was enough to show knowledge when taken together with elements that also demonstrate dominion and control).

<sup>79</sup> Behrens, 3 Va. App. 131, 348 S.E.2d 430 (although guilt by association is forbidden under the law, demonstrations by the prosecutor that the defendant associates with known drug dealers can be used as one of many corroborating pieces of evidence that together prove knowledge. In this case, however, a demonstration of the defendant's association with drug dealers, along with the defendant's lack of surprise, was not enough to meet the Commonwealth's burden).

<sup>80</sup> Robbs v. Commonwealth, 211 Va. 153, 176 S.E.2d 429 (1970).

<sup>81</sup> *Id.*

<sup>82</sup> Clodfelter, 218 Va. 619, 238 S.E.2d 820 (the giving of a false identification was suspicious, but did not rise to the level of a presumption of knowledge by itself).

## THE 1973 AMENDMENT

The 1973 amendment<sup>83</sup> didn't change Virginia law all that much, as the court had always inherently believed that mere presence and ownership were never enough to convict.<sup>84</sup> However, the supreme court in the 1970's and the court of appeals today have also consistently viewed any extra evidence at all to be enough to corroborate the ownership/presence/proximity inference, which is accepted as a factor going to the weight of the evidence, in order to raise the presumption of possession and thus make out a *prima facie* case of possession against the defendant.

This was demonstrated by the Virginia Supreme Court in *Adkins v. Commonwealth*,<sup>85</sup> when the defendant was stopped by the police in his own vehicle while he was driving and drugs were found in open view on the floor, as well as hidden in the glove compartment and the trunk. Although there were other people in the car, the court did not accept the defendant's use of the "equal access" defense, distinguishing *Crisman* and finding the defendant guilty of possession.<sup>86</sup> The defendant suggested that all the prosecution could prove was ownership and proximity, which in accordance with the 1973 amendment to the statute would be insufficient to show possession. The court held that the defendant's ownership and close proximity, together with the corroboration of exclusive use of the front seat and the trunk, as well as the defendant's act of driving would be sufficient to convict on the issue of possession.<sup>87</sup>

Two points of this decision are worth emphasizing. First, the court's unstated, but inferred, view that the "equal access" defense only applies to cases where the defendant doesn't own the premises. Second, the court's use of minor corroborating evidence to get around the statute's

---

<sup>83</sup> 1973 Va. Acts 64, § 54.524.101:2.

<sup>84</sup> *Gillis v. Commonwealth*, 215 Va. 298, 208 S.E.2d 768 (1974); *Huvar v. Commonwealth*, 212 Va. 667, 187 S.E.2d 177 (1972). "While no presumption arises from ownership or occupancy of premises, . . . such circumstances may be considered along with other circumstances . . ." *Gillis*, 215 Va. at 301, 208 S.E.2d at 770-71.

<sup>85</sup> 217 Va. 437, 229 S.E.2d 869 (1976).

<sup>86</sup> *Id.* at 438-39, 229 S.E.2d at 870.

<sup>87</sup> *Id.*

nullification of the proximity/ownership presumption.<sup>88</sup> This jurisprudential thought adhered to by the court was confirmed in both *Womack v. Commonwealth*<sup>89</sup> and *Dutton v. Commonwealth*.<sup>90</sup>

The court of appeals strongly reiterated this same jurisprudential philosophy concerning the 1973 amendment to the Virginia Code in both *Brown v. Commonwealth*<sup>91</sup> and *Castaneda v. Commonwealth*<sup>92</sup>. In *Brown* the defendant was found in another's home, sitting on a bed within an arm's length of the drugs which were in open view. The court, acknowledging the statute, stated that the defendant's proximity went toward the weight of the evidence, and that the corroboration needed to draw the presumption and hence meet the Commonwealth's burden came from the fact that the defendant was present for over an hour on the premises and the drugs were in open view.<sup>93</sup> *Castaneda* went on to reaffirm *Brown* by stating that although standing alone the defendant's leasing and presence in the rental vehicle didn't make out a *prima facie* case of possession, the combined fact that the defendant was also driving and acted nervously when the police approached the vehicle did.<sup>94</sup>

#### *Judicial Trends of the Virginia Court of Appeals*

There are a number of judicial trends that can be observed from recent case law. These trends are especially relevant in light of the relatively new Virginia Court of Appeals, as the older opinions of the Virginia Supreme Court will not be regarded as absolutely binding on the new intermediate court's judicial philosophy.<sup>95</sup> What follows is a compilation of new trends presently being adhered to by this relatively new court.

---

<sup>88</sup> *Id.*

<sup>89</sup> 220 Va. 5, 255 S.E.2d 351 (1979) (where lots of drugs were found in open view near the defendant. Open view corroborated the inference of possession raised by the proximity of the drugs to the defendant).

<sup>90</sup> 220 Va. 762, 263 S.E.2d 52 (1980) (where the defendant was driving a car that he had in his exclusive possession and drugs were found under his seat).

<sup>91</sup> 5 Va. App. 489, 364 S.E.2d 773 (1988).

<sup>92</sup> 7 Va. App. 574, 376 S.E.2d 82 (1989).

<sup>93</sup> *Brown*, 5 Va. App. 489, 364 S.E.2d 773.

<sup>94</sup> *Castaneda*, 7 Va. App. 574, 376 S.E.2d 82.

<sup>95</sup> The two courts' statistical trends in regard to constructive possession are surprising in light of the general notions that the Virginia Supreme Court tends to be more conservative and the Virginia Court of Appeals lends itself toward a more liberal view of criminal justice. Since 1970, the Virginia Supreme Court has overturned about 50% of all drug related petitions heard, while the Virginia Court of Appeals has overturned a mere 33%.



First, the supreme court's usual insistence that the defendant be present when the police find the drugs was broken recently in *Hodge v. Commonwealth*,<sup>96</sup> where the court of appeals held for the first time that the defendant need not be present when there is enough corroboration to link him/her to the drugs. The notion of this had been first mentioned two years earlier by this same court in *Behrens v. Commonwealth*.<sup>97</sup> Although *Wynn v. Commonwealth*<sup>98</sup> seems to contradict this nonpresence school of thought, that case was decided in 1987, prior to the ruling in *Hodge*.

Second, the old mailbox rule is no longer the norm.

Third, although showing the defendant as the owner of the premises is important to inferring ownership of the drugs found therein, it is no longer critical to the case, as *Albert v. Commonwealth*,<sup>99</sup> *Hamburg v. Commonwealth*,<sup>100</sup> and *Wright v. Commonwealth*<sup>101</sup> demonstrate.

Fourth, a key ingredient to most successful defenses to possession has been the use of "equal access" when the defendant is found with multiple parties present on the premises. This defense was successfully used in *Drew v. Commonwealth*,<sup>102</sup> *Bentley v. Cox*,<sup>103</sup> *Huvar v. Commonwealth*,<sup>104</sup> and *Crisman v. Commonwealth*.<sup>105</sup>

Fifth, *Powers v. Commonwealth*<sup>106</sup> suggested that exclusivity and ownership were not enough to convict one for possession if the defendant was not present and there was no other corroborating evidence. This hard line stance on the interpretation of the 1973 amendment by the Virginia Supreme Court has been slowly whittled away by the Virginia Court of Appeals over the last three years. *Behrens v. Commonwealth*<sup>107</sup> broke the ice. In that case, although the court reversed the circuit court's decision, it did state unequivocally that the presence of the defendant

---

<sup>96</sup> 7 Va. App. 351, 371 S.E.2d 156 (1988).

<sup>97</sup> 3 Va. App. 131, 348 S.E.2d 430 (1986).

<sup>98</sup> 5 Va. App. 283, 362 S.E.2d 193 (1987).

<sup>99</sup> 2 Va. App. 734, 347 S.E.2d 534 (1986).

<sup>100</sup> 3 Va. App. 435, 350 S.E.2d 524 (1986).

<sup>101</sup> 2 Va. App. 743, 348 S.E.2d 9 (1986).

<sup>102</sup> 230 Va. 471, 338 S.E.2d 844 (1986).

<sup>103</sup> 508 F. Supp. 870 (E.D. Va. 1981).

<sup>104</sup> 212 Va. 667, 187 S.E.2d 177 (1972).

<sup>105</sup> 197 Va. 17, 87 S.E.2d 796 (1955).

<sup>106</sup> 227 Va. 474, 316 S.E.2d 739 (1984).

<sup>107</sup> 3 Va. App. 131, 348 S.E.2d 430 (1986).

was not necessary in order to prove possession. The next year in *Thorne v. Commonwealth*,<sup>108</sup> the court applied its newfound philosophy and affirmed a conviction based upon exclusivity and ownership alone without the presence of the defendant or any other corroborating evidence. This newfound importance of exclusivity as corroboration when ownership is involved was reiterated as late as 1988, in *Hodge v. Commonwealth*,<sup>109</sup> where in the absence of the defendant and only minor corroborating evidence, the defendant's conviction was affirmed. The trend allows for a more flexible position in dealing with the issue of ownership, exclusivity, and presence.

Sixth, the trend of both courts in cases involving automobiles is to hold the driver of the vehicle out as the inferred, not presumed, owner of the drugs. This was seen in *Adkins v. Commonwealth*<sup>110</sup> and most recently in *Castaneda v. Commonwealth*,<sup>111</sup> where the driver of a rental car was convicted of possession.

Seventh, the Virginia Supreme Court has the tendency to give some leeway to a defendant when the drugs and paraphernalia are found in open view on the defendant's property -- as in *Garland v. Commonwealth*, where open view was not able to defeat the quasi-inference of possession established by the defendant's ownership of the premises.<sup>112</sup> The new trend instituted by the court of appeals, however, has been to make it easier to link the defendant to the drugs by allowing open view as corroboration of the defendant's proximity to the drugs/paraphernalia, even if the defendant is not an owner of the premises.<sup>113</sup>

This use of open view evidence to shore up the inferences of "knowledge of presence" and "control" established by proximity runs parallel to the defendant's use of the statute to nullify all presumptions. The natural extension of the court of appeals' ruling would be to counter *Garland* and enable open view to be used with ownership to convict one of possession. Yet, the court will still require more than mere open view as corroboration in regard to the knowledge of the nature element. Additionally, this does not preclude the defendant, as in *Garland*, from using "equal access" as a defense under the correct conditions although as mentioned earlier, the court of

---

<sup>108</sup> No. 1011-86-2 (Va. App. Sept. 30, 1987).

<sup>109</sup> 7 Va. App. 351, 371 S.E.2d 156.

<sup>110</sup> 217 Va. 437, 229 S.E.2d 869 (1976).

<sup>111</sup> 7 Va. App. 574, 376 S.E.2d 82 (1989).

<sup>112</sup> 225 Va. 182, 300 S.E.2d 783 (1983).

<sup>113</sup> See *Brown v. Commonwealth*, 5 Va. App. 489, 364 S.E.2d 773 (1988); see also *McGee v. Commonwealth*, 4 Va. App. 317, 357 S.E.2d 738 (1987).

appeals has not ruled on the acceptability of this defense. In fact, it may be that *Garland* would have been resolved by the supreme court the same way that the court of appeals decided *Brown*, had it not been for Garland's successful use of "equal access." Yet the supreme court probably would still have reached the same conclusion as it did originally in *Garland* even without "equal access," because of the court's seeming insistence on the defendant being present when the drugs are found.<sup>114</sup>

Eighth, the continuing trend of both courts concerning personal effects is to draw a strong inference of "knowledge" and "control" from the dispersing of the defendant's personal items near to or touching the drugs.<sup>115</sup>

#### ELEMENTAL INTERPLAY TODAY

As a result of the interplay between these three elements previously discussed, possession in the Commonwealth has become a contest of distinguishing facts rather than of real truth saying. Only the right combination will justify the vague repose called "constructive possession."

For this reason, it is necessary to evaluate each fact scenario of every new drug case in terms of 1) a fact's checklist; and 2) a precedent table which reflects Virginia's case law development over the past twenty-five years. Through the use of the matching principle with these two tables, one should be able to have a tenable predictor of the outcome of possession cases in the Commonwealth.

---

<sup>114</sup> The court of appeals did away with this absolute to possession in *Behrens* and *Hodge*.

<sup>115</sup> *Eckhart v. Commonwealth*, 222 Va. 447, 281 S.E.2d 853 (1981); *Andrews v. Commonwealth*, 216 Va. 179, 217 S.E.2d 812 (1975); *Iglesias v. Commonwealth*, 7 Va. App. 93, 372 S.E.2d 170 (1988); *Albert v. Commonwealth*, 2 Va. App. 734, 347 S.E.2d 534 (1986).

## VIRGINIA PRECEDENT PREDICTOR TABLES

### *The Narcotics Scenario Checklist of Facts*

1. The defendant either owns or has the right of legal possession, by virtue of a lease, to the place where the drugs were found. Examples of drug sites include vehicles, houses, boats, apartments or hotel rooms. Ownership goes toward "dominion and control" of the premises.
2. The defendant pays the rent, mortgage, phone, or utility bills of the place where the drugs were found. The finding of bill receipts addressed to the defendant will satisfy this to establish the ability of the defendant to control the area and will demonstrate constructive ownership.
3. The defendant uses the place where the drugs were found as a mailing address or as a place of residence, although his/her name does not appear on the deed or lease. This applies to houses, including the home of a parent, and to apartments.
4. The defendant is the sole occupant/exclusive user of the place where the drugs were found. If a house or vehicle, then proving exclusivity may demand that the Commonwealth prove the following: 1) others do not have access to keys; 2) the defendant has the only set of keys; and 3) the defendant is the sole lessor/owner on the lease/deed.
5. The defendant's personal effects are not only in the same area where the drugs were found, but are actually touching the drugs. These personal items can include the following: suitcase, clothing, gun, baby stuff, mattress, birth certificate, personal papers, invoice to defendant, briefcase, medicine, wallet, tote bag, glasses, and credit cards.
6. There is something in the place/premises where the drugs were found to show that the defendant was in the area; the defendant's personal effects are not touching the drugs, but are in the same room as the drugs. Examples of this scenario are: clothes in the closet, personal effects in the defendant's vehicle where the drugs are found, or personal items in the defendant's chest of drawers or on the defendant's bed in the room where the drugs are found.
7. The drugs were in plain/open view to the defendant.
8. There was drug paraphernalia in plain/open view to the defendant.
9. The defendant owns books on drugs.
10. The defendant has gone to high school or college. The higher the education (e.g., two years of college), the more likely the defendant knows about the character of the drugs.

11. The defendant has prior convictions on drug related charges and/or the defendant admitted to prior use. The drugs used in the past must be the same kind as those charged in the instant offense.
12. The defendant made statements like "I've never seen that dope before." It may be inferred from such statements that the defendant knew not only the name of the drug, but also its illegal character.
13. The defendant's fingerprints are found on the drugs or on personal items found with the drugs (e.g., on the gun or on the plastic baggie that held the drugs).
14. The defendant was using a middleman who will testify against him/her to show that the defendant had "dominion/control" over and "knowledge" of the drugs.
15. The defendant was in close proximity to the drugs, e.g., within an arm's length, at the defendant's feet, or in the same room. If the drugs are in the same vehicle, they must be in either the front seat or the back seat. It cannot be that the defendant was in the front seat and the drugs were in the back seat or trunk.
16. The defendant has or has not been on the premises in the last two weeks prior to the incident. The nearer the defendant's last visit to the premises the better the link and vice versa.
17. The defendant was present on the premises (house or vehicle) when the drugs were found.
18. The defendant is not the owner of the premises, but does frequent the premises. This is different than scenario 2, and is not constructive ownership. It can be shown by virtue of the items found on the premises -- check stubs, defendant's clothes, defendant's wallet -- or by other evidence such as proof that it is the defendant's girlfriend/boyfriend's place, that the defendant uses the car to run errands/go to work, or that the premises is a place of employment of the defendant.
19. A large amount/quantity of drugs was found on the premises.
20. The defendant confessed that the drugs were his/hers.
21. The drugs were found in the defendant's clothing when the defendant was not wearing them. The clothes must have been in the defendant's bedroom, house, or vehicle.
22. The drugs were mailed to the defendant and the address label reflects the defendant's present address. The drugs must have been sent by U.S. Mail or another service that delivers directly to the defendant's house. These are the "mailbox cases."

23. The drugs were delivered in a box with the defendant's name on them to the bus station where the defendant had to pick them up, but the defendant never arrived to claim the drugs. This distinguishes the mailbox cases.
24. The drugs were in the vehicle that the defendant was driving. This goes toward control.
25. The drugs were hidden in a place where the defendant has exclusive use. All of the following elements are necessary: 1) the defendant has the only keys to the place; 2) the defendant is the sole owner or the sole lessor; and 3) the drugs found were in the defendant's briefcase/suitcase, in a hiding place in the defendant's house (not in open view), in the defendant's car trunk, or in a hotel room where the defendant had been staying and a maid testifies that the drugs were not there before the defendant took possession of the room.
26. The defendant was visibly nervous when the police were searching the area around him/her. The defendant was visibly sweating, staring in what turns out to be the exact location where the drugs are later found, trying to direct the police away from the drugs (e.g., the defendant opens the trunk and tells the police to search it, thus directing attention away from the back seat of the vehicle where the drugs are actually hidden), or the defendant's actions suggest that s/he knows drugs are present (e.g., s/he is trying to get away from the area where the drugs are found or dispose of the drugs when the police arrive).
27. The defendant did not show surprise when the police found the drugs.
28. The defendant associates with known drug dealers.
29. The defendant has needle marks and/or was noticeably stoned/high when s/he was arrested.
30. The drugs suddenly appeared in a place previously checked by the police where no one but the defendant had been (e.g., a police cruiser).
31. There were other people present when the drugs were found. "Equal access" is an acceptable defense if in addition to the above fact: 1) the defendant is the owner of the house or the vehicle, is not present when the drugs are found, and the drugs are not hidden but are in open view; or 2) the defendant is not the owner of the house or vehicle where the drugs are found.
32. The defendant gave the police a false identification.
33. The defendant threw away a bag or other container which contained drugs, but the police/witness did not see him/her actually throw it (e.g., the police saw the defendant with a bag beforehand and then saw it on the ground later; drugs are found inside of the bag).

34. Another person confessed to owning the drugs (e.g., the defendant's wife).
35. The defendant was an unsuspecting middleman who only delivered the drugs, but did not know what s/he was delivering (e.g., laundry bag to an inmate).
36. Drugs were found on something that the defendant was touching; however, the drugs were hidden and others had touched the item where the drugs were hidden within the last two hours (e.g., drugs in an infant child's clothing).
37. The defendant has owned the premises for a long period of time or is the original and only owner that the premises has had. The longer the ownership, the stronger the inference of knowledge of the presence of any drugs that are hidden on the premises.
38. Drugs were hidden in the defendant's car trunk or in his/her personal gear in his/her car.
39. Other witnesses/defendants are pointing the finger at the defendant.
40. The defendant was not present during the search/raid/finding of the contraband.
41. The drugs were hidden on the premises or vehicle, but the defendant did not have exclusive use (i.e., others were present in the house or vehicle).
42. The defendant did not own the vehicle or the premises.
43. The defendant rented a vehicle and was stopped and searched when it was not returned after thirty days.
44. The defendant had been on the premises for at least an hour before the police arrived.
45. The defendant used language typical of one familiar with the sale and use of narcotics.
46. "Joint possession" is sustained as acceptable by the court (multiple parties charged).
47. The defendant was lying on his own bed in a room occupied by only the defendant, and drugs were found in the room.
48. Multiple people were present in the area; however, "equal access" was ruled a nonacceptable defense and "joint possession" was not used by the Commonwealth as a theory of possession (only one individual was arrested and charged).

*What May Demonstrate Possession:*

**Virginia Supreme Court**

*Fierst v. Commonwealth*, 210 Va. 757, 173 S.E.2d 807 (1970) (drugs mailed to defendant, addressed to him, put in his mail box, defendant opened the package in front of police).<sup>116</sup> This case addresses item 22 on the preceding checklist.

- *Ritter v. Commonwealth*, 210 Va. 732, 173 S.E.2d 799 (1970) (drugs mailed to defendant, defendant had receipt for money order which equaled the value of the drugs found, defendant held claim check for drug package).<sup>117</sup> This case addresses item 22 on the preceding checklist.

*Manley v. Commonwealth*, 211 Va. 146, 176 S.E.2d 309, cert. denied, 403 U.S. 936 (1970) (defendant admits drugs are his, drugs found in another's residence).<sup>118</sup> This case addresses item 20 on the preceding checklist.

*Robbs v. Commonwealth*, 211 Va. 153, 176 S.E.2d 429 (1970) (drugs in defendant's housecoat in defendant's room, where three other people were also present who point the finger at the defendant, paraphernalia found, needle marks in the defendant's arm, confession that defendant is a user). This case addresses items 1, 3, 21, 8, 11, 29, 39 and 48 on the preceding checklist.

*Fox v. Commonwealth*, 213 Va. 97, 189 S.E.2d 367 (1972) (defendant is in the driver's seat of the car, defendant's wallet is on the ground outside of the car, the drugs are on the floor of the car, there are numerous other people present in the car). This case addresses items 5, 15, 18, 24, 41 on the preceding checklist.

---

<sup>116</sup> There has been some debate as to whether these two cases, *Fierst* and *Ritter*, are merely aberrations from the norm or binding Virginia law. Since 1970, there have been no mailbox cases before the court. The problem with the mailbox cases is that the defendant was not present when the mail was delivered, and in the *Fierst* case, there really was no other corroborating evidence outside of the package itself. It seems that the court inferred control, presence, and nature from the mere mailing label on the mail parcel. This seems to be a stretching of the normal guidelines. It is a dangerously scary dilemma indeed when anyone can incriminate another merely by sending them drugs through the mail. Perhaps that is why the Virginia Court of Appeals today has not affirmed the 1970 Virginia Supreme Court's mailbox philosophy.

It has been suggested that perhaps the supreme court had a change of heart in 1973, and although not wanting to overrule its prior mailbox rule, in fact distanced itself from the ruling by holding in *Buono v. Commonwealth*, 213 Va. 475, 193 S.E.2d 798 (1973), that a package delivered to a bus station with an address label to the defendant was not enough to convict. This seems to be the reverse of what was inferred in 1970, when the court stated in *Ritter* that knowledge of nature or presence vis a vis the defendant picking up his mail was not necessary, and that all that was needed in order to convict was evidence that the package had been mailed, such as a valid post mark. Yet the court, in distinguishing these two cases, infers that the key to the distinguishment lies in the fact that the package at the bus station had not been delivered to the defendant's home -- the defendant had to pick it up and never did. The suggestion by some jurists that in *Ritter* the corroborating evidence (besides the label) was the physical delivery to the defendant's residence is shallow at best. The court's use of the mailbox rules, as referenced in the University of Richmond Law Review's "Comment on *Ritter*," 5 U. Rich. L. Rev. 454, 55 (1971), to the legislative intent, *Id.* at 457 n. 12 (quoting Ch. 451 Secs. 1 (14), (19), [1952] Virginia Acts of Assembly 737 (repealed 1970); ch. 86, sec. 2 [1934] Va. Acts of Assembly 82 (repealed 1970); and Virginia Code Ann. Sec. 54-524.101 (c) (Cum. Supp. 1970)), which reads possession broadly, may be outdated in light of the constitutional concerns emphasized in the last decade.

<sup>117</sup> See n. 116.

<sup>118</sup> As emphasized in *Manley*, more than a confession is needed to establish possession. *Wong Sun* emphasized the need for corroborating evidence. That evidence may be the fact that drugs were found. *Manley* held this to be acceptable corroborating evidence.



*Gillis v. Commonwealth*, 215 Va. 298, 208 S.E.2d 768 (1974) (defendant rented apartment, drugs in open view in living room, defendant in different room, defendant in apartment for over an hour, prior to arrest had not been in apartment for two weeks). This case addresses items 1, 7, 16, 17, 44 and 46 on the preceding checklist.

*Cook v. Commonwealth*, 216 Va. 71, 216 S.E.2d 48 (1975) (defendant is driving his own car, drugs are hidden in a bag next to defendant, defendant is the sole occupant of the car). This case addresses items 1, 24, 25 and 15 on the preceding checklist.

*Andrews v. Commonwealth*, 216 Va. 179, 217 S.E.2d 812 (1975) (defendant picked up package at airport, drugs found in defendant's suitcase, which contained clothes that were the defendant's size and a gun with defendant's fingerprints on it). This case addresses items 5, 13, 15 and 25 on the preceding checklist.

*Adkins v. Commonwealth*, 217 Va. 437, 229 S.E.2d 869 (1976) (defendant was driving car that he owned, defendant was the only person in the front, three other people were in the back, drugs found at defendant's feet, in glove box, and in trunk). This case addresses items 1, 7, 15, 24, 38 and 48 on the preceding checklist.

*Patty v. Commonwealth*, 218 Va. 150, 235 S.E.2d 457 (1977) (defendant was driving car, defendant's birth certificate and an invoice found in car, paper with drug computations on it in car, drugs were in the trunk). This case addresses items 1, 7, 15, 24, 38 and 48 on the preceding checklist.

*Womack v. Commonwealth*, 220 Va. 5, 255 S.E.2d 351 (1979) (defendant ran from an apartment in which a large amount of drugs were found out in open view). This case addresses items 7, 8, 15, 17, 19 and 42 on the preceding checklist.

*Dutton v. Commonwealth*, 220 Va. 762, 263 S.E.2d 52 (1980) (defendant was driving his own car, drugs were found underneath the defendant's seat, three others were present in the car). This case addresses items 1, 15, 17, 24 and 41 on the preceding checklist.

*Eckhart v. Commonwealth*, 222 Va. 447, 281 S.E.2d 853 (1981) (defendant was holding baby outside of room that contained a crib and drugs in open view, defendant could see into the room, defendant was co-owner of the house, phone bills and check stubs found in the house, defendant had two years of college education). This case addresses items 1, 2, 5, 7, 10, 18 and 48 on the preceding checklist.

*Lane v. Commonwealth*, 223 Va. 713, 292 S.E.2d 358 (1982) (defendant owned house, defendant had not been in house for two weeks prior to arrest, defendant was noticeably nervous while the police were searching, drugs found behind chair where defendant was sitting). This case addresses items 1, 15, 16, 17, 26 and 48 on the preceding checklist.

*Archer v. Commonwealth*, 225 Va. 416, 303 S.E.2d 863 (1983) (another person acted as a middleman for the defendant). This case addresses item 14 on the preceding checklist.

*Dukes v. Commonwealth*, 227 Va. 119, 313 S.E.2d 382 (1984) (defendant's desk at work was searched under a warrant, drugs were found in a thirty-five millimeter film canister and a wallet in the defendant's desk). This case addresses items 5, 17, 18 and 42 on the preceding checklist.

#### **Virginia Court of Appeals**

*Wright v. Commonwealth*, 2 Va. App. 743, 348 S.E.2d 9 (1986) (defendant in his own bed at parents' house, drugs under bed with defendant's fingerprints on them). This case addresses items 1, 3, 6, 13, 15 and 47 on the preceding checklist.

*Albert v. Commonwealth*, 2 Va. App. 734, 347 S.E.2d 534 (1986) (defendant sleeping on bed in another's apartment, drugs in semi-open briefcase next to bed, defendant's wallet, personal papers and labeled medicine were also in briefcase). This case addresses items 5, 6, 15, 17, 25, 26 and 47 on the preceding checklist.

*Glover v. Commonwealth*, 3 Va. App. 152, 348 S.E.2d 434 (1986) (defendant searched incident to arrest, put in police cruiser, drugs appear on the seat next to defendant). This case addresses items 26 and 30 on the preceding checklist.

*Hambury v. Commonwealth*, 3 Va. App. 435, 350 S.E.2d 524 (1986) (drugs in defendant's jacket, but defendant was not wearing it at the time, confession). This case addresses items 20 and 21 on the preceding checklist.

*McGee v. Commonwealth*, 4 Va. App. 317, 357 S.E.2d 738 (1987) (drugs, paraphernalia, and manufacturing equipment found ten feet from defendant, defendant rented cabin, defendant noticeably stoned, defendant stated, "I didn't know it was PCP"). This case addresses items 1, 7, 8, 12, 15, 19 and 46 on the preceding checklist.

*Thorne v. Commonwealth*, No. 1011-86-2 (Va. App. Sept. 30, 1987)<sup>119</sup> (drugs in hotel room, defendant rented room and had the only key, defendant was not present when drugs found). This case addresses items 1, 4 and 40 on the preceding checklist.

*Servis v. Commonwealth*, 6 Va. App. 507 (1988) (drugs in the defendant's car, paraphernalia in hotel room, defendant rented hotel room, defendant confessed). This case addresses items 1, 8 and 20 on the preceding checklist.

*Iglesias v. Commonwealth*, 7 Va. App. 93, 372 S.E.2d 170 (1988) (defendant rented car, defendant sole user, drugs in tote bag, defendant admitted bag was his, bag on back seat of car). This case addresses items 1, 4, 5, 17, 24 and 38 on the preceding checklist.

*Hodge v. Commonwealth*, 7 Va. App. 351, 371 S.E.2d 156 (1988) (defendant rented apartment, drugs under rug, defendant's glasses and credit cards in room where drugs were found, defendant had the only keys, defendant not present when the drugs were found). This case addresses items 1, 4, 6, 25, 40, 45 and 46 on the preceding checklist.

*Brown v. Commonwealth*, 5 Va. App. 489, 364 S.E.2d 773 (1988) (drugs found within arm's length of defendant, drug paraphernalia was all over the room, defendant had been there over an hour, drugs in open view, defendant admitted to prior use, other people present but not charged, defendant did not own house but was just visiting). This case addresses items 7, 8, 11, 15, 17, 19, 42, 44 and 48 on the preceding checklist.

*Castaneda v. Commonwealth*, 7 Va. App. 574, 376 S.E.2d 82 (1989) (drugs found hidden in back seat of rental car, defendant rented the car, defendant had failed to return the car). This case addresses items 1, 17, 24, 26 and 43 on the preceding checklist.

#### *What Will Not Demonstrate Possession:*

#### **Virginia Supreme Court**

*Henderson v. Commonwealth*, 130 Va. 761, 107 S.E. 700 (1921) (drugs in defendant's house, wife confesses). This case addresses items 1 and 34 in the preceding checklist.

*Crisman v. Commonwealth*, 197 Va. 17, 87 S.E.2d 796 (1955) (drugs in the back seat of car, multiple people present, drugs were hidden, defendant was not the owner of the car). This case addresses items 31, 41 and 42 on the preceding checklist.

*Gordon v. Commonwealth*, 212 Va. 298, 183 S.E.2d 735 (1971) (police saw defendant with envelope, chase ensued, defendant did not have the envelope after caught by the police, envelope recovered on chase route, drugs in envelope). This case addresses item 33 on the preceding checklist.

---

<sup>119</sup> This case cannot be cited as precedent, but does tend to show the court's state of mind on the issues contained therein.

*Huvar v. Commonwealth*, 212 Va. 667, 187 S.E.2d 177 (1972) (defendant at a drug party in room filled with drugs, defendant was not the owner of the house but was just visiting). This case addresses items 7, 15, 17, 31 and 42 on the preceding checklist.

*Stovall v. Commonwealth*, 213 Va. 67, 189 S.E.2d 353 (1972) (defendant had a prior drug-related conviction). This case addresses item 11 on the preceding checklist.

*Buono v. Commonwealth*, 213 Va. 475, 193 S.E.2d 798 (1973) (package delivered to bus station addressed to the defendant, drugs in package, defendant did not pick up the package but did go to the bus station). This case addresses item 23 on the preceding checklist.

*Craig v. Commonwealth*, 215 Va. 260, 208 S.E.2d 744 (1974) (police checkpoint, defendant tossed out the bag of drugs but was unseen by the police, ten cars passed the site before the police spotted the bag). This case addresses item 33 on the preceding checklist.

*Burton v. Commonwealth*, 215 Va. 711, 213 S.E.2d 757 (1975) (defendant was holding another's laundry bag, bag had drugs in it). This case addresses item 35 on the preceding checklist.

*Fogg v. Commonwealth*, 216 Va. 394, 219 S.E.2d 672 (1975) (defendant on bed ten feet from drugs, drugs hidden in paper bag on chair, defendant was not the renter of the room). This case addresses items 15, 17, 41 and 42 on the preceding checklist.

*Wright v. Commonwealth*, 217 Va. 669, 232 S.E.2d 733 (1977) (defendant was visiting a friend's apartment, drugs found three feet from the defendant in open view, defendant witnessed the apartment owners shooting up drugs when the police arrived). This case addresses items 7, 8, 11, 15 and 42 on the preceding checklist.

*Woodfin v. Commonwealth*, 218 Va. 458, 237 S.E.2d 777 (1977) (defendant sometimes stayed at girlfriend's apartment, personal items of defendant at apartment, drugs underneath mattress in bedroom). This case addresses items 5, 18 and 40 on the preceding checklist.

*Clodfelter v. Commonwealth*, 218 Va. 619, 238 S.E.2d 820, *rev'g and remanding* 218 Va. 98, 235 S.E.2d 340 (1977) (defendant rented room and had the only key, maid testified that there were no drugs in room before the defendant rented it, drugs found behind mirror, paraphernalia on bed in open view, defendant's personal gear spread throughout room, defendant not present when drugs found, defendant later gave police false identification). This case addresses items 1, 4, 6, 8, 25, 32 and 40 on the preceding checklist.

*Garland v. Commonwealth*, 225 Va. 182, 300 S.E.2d 783 (1983) (defendant co-rented apartment, drugs and paraphernalia found in defendant's bedroom, defendant's personal effects in room, defendant not in apartment when drugs were found). This case addresses items 1, 6, 7, 8, 31 and 40 on the preceding checklist.

*Powers v. Commonwealth*, 227 Va. 474, 316 S.E.2d 739 (1984) (defendant owned house, defendant was in the process of moving, drugs found under floor board in attic with defendant's ceramics and workbench on top of floor board, defendant was not in house when the drugs were found). This case addresses items 1, 4, 6, 25 and 40 on the preceding checklist.

*Drew v. Commonwealth*, 230 Va. 471, 338 S.E.2d 844 (1986) (defendant owned the house, personal items throughout the house, twenty-two people were at the house (party), drugs were semi-hidden, defendant was not present when the drugs were found). This case addresses items 1, 6, 31 and 40 on the preceding checklist.

#### **Virginia Court of Appeals**

*Behrens v. Commonwealth*, 3 Va. App. 131, 348 S.E.2d 430 (1986) (defendant rented hotel room, maid testified that no drugs had been in the room before the defendant rented it, maid found the drugs behind the dresser, defendant not surprised by the finding of the drugs, defendant associated with drug dealers). This case addresses items 1, 4, 25, 27, 28 and 40 on the preceding checklist.

*Hairston v. Commonwealth*, 5 Va. App. 183, 360 S.E.2d 893 (1987)<sup>120</sup> (drugs hidden in an infant's clothing, defendant was caught holding the infant, three other people had held the infant within the last two hour). This case addresses item 36 on the preceding checklist.

*Wynn v. Commonwealth*, 5 Va. App. 283, 362 S.E.2d 193 (1987) (defendant's clothing found at his girlfriend's apartment, bills and a letter made out to the defendant also found at the apartment, defendant admitted to staying overnight on occasions, large amount of drugs found hidden all over the apartment). This case addresses items 6, 18 and 40 on the preceding checklist.

#### **Federal District Court**

*Bentley v. Cox*, 508 F. Supp. 870 (E.D. Va. 1981) (defendant co-owned house, drugs found behind the garbage in the kitchen, party was going on at the house, defendant in a different room than the kitchen when the drugs were found). This case addresses items 1, 6, 17, 31 and 41 on the preceding checklist.

#### *How to Use the Checklist and Precedent Tables*

The use of the checklist and the precedent tables in a logical fashion will facilitate a best guess predictor of the outcome of criminal cases involving drug possession. To use the tables correctly in order to gain the appropriate case precedent, first list all of the known facts and evidence about the case at bar. Second, compare the facts list to the checklist and match the facts to the corresponding numbers on that list. Third, take the new list of matching numbers and compare them to the precedent tables to find all cases that are similar. Last, look up the most similar cases and compare their fact scenarios to the case at bar. Remember that the more numbers one has in common with a case in the precedent tables, the more on point it will be. Thus, every distinguishing fact will be essential to the finding of the appropriate precedent. Additionally, note which of the checklist facts are most critical to the case. List these in their order of importance. This is the best procedure to use in order to prioritize the numerical listings in such a way that the best precedent can be found.

What follows are three examples of using the checklist and tables:

##### *Scenario #1*

The defendant is driving a car that s/he borrowed from a friend. Drugs are located in the trunk and there are no personal items of the defendant found in the car.

The matching up of the case facts to the checklist will show that the following checklist numbers correspond: 17, 24, 41, and 42.

---

<sup>120</sup> The key in this case was the "equal access" rule as applied to the other individuals who could have put the drugs in the infant's clothing. The two hour time factor played the critical role in the eyes of the court.

In comparing these numbers to the tables, one will find that *Fogg* is the best case. A closer look at that case will show that when drugs are hidden in a car and the defendant is not the owner of the vehicle or in exclusive possession of it (e.g., the defendant has the only key), the courts will not find him/her guilty of possession.

#### *Scenario #2*

The police raided the defendant's home and found drugs in open view, but the defendant was not at home. The defendant lives alone and has the only keys to the residence.

The corresponding numbers on the checklist to these facts are: 1, 4, 7, and 40.

Although *Powers* is nearly on target, *Hodge* is the court's new trend and identifies well with the checklist numbers. If two or more cases are on point or nearly on point, take the latest case as controlling precedent. *Hodge* will render this defendant guilty of possession.

#### *Scenario #3*

The police raid X's home and the defendant is present. The drugs are found in open view, but the defendant had just arrived and says that s/he was just visiting X.

The corresponding numbers on the checklist to these facts are: 7, 15, and 42.

Although *Brown* is a close case, the time of the defendant's arrival at the house is critical, and *Wright* should control. Thus the defendant would be found not guilty of possession.

### THE DICK AND JANE DILEMMA RESOLVED

To answer the Commonwealth Attorney's question as to whether ownership of the marijuana matters, either of two approaches may be taken. The first is the ideal judicial approach, which has as its objective the punishment of the true wrongdoer. The second is the less than ideal approach. Under the guise of this second approach, fairness is no real concern -- only conformity to predesignated standards is of true worth. For purposes of true life pragmatism, the Dick and Jane Dilemma will be answered using the latter, nonidealistic approach.

In compliance with that approach, the end result for the fun-loving couple is that Jane will, in all probability, be convicted. This is because applying the tables to this scenario would yield *Adkins* as precedent. Although it is a Virginia Supreme Court case that is over a decade old, it is the only case that addresses all of the issues present in Jane's predicament. An argument could be made for "equal access," but the fact that Jane owns the car and is present when the drugs are found makes it an unlikely winner. *Crisman* can be easily distinguished.

On the other hand, Dick will more than likely be found not guilty. The key for Dick is that "equal access" works for him because he is not the owner of the vehicle and his case more closely parallels *Huvar*. The only hang-up for Dick is that the Virginia Court of Appeals has never officially ruled on the "equal access" defense and with its present, more conservative, trend in

finding possession, may not accept the doctrine in favor of a more liberal "joint theory." Dick's chances are nevertheless very good compared to Jane's. Although one may ask whether this is really very fair considering our knowledge of what truly happened, the reality is that fairness is of no real concern to the court that practices academia over equity.

## CONCLUSION

It's an easy case to prove constructive possession in instances where there is a lot of evidence or the defendant confesses; however, it is quite another story where the facts and evidence are skimpy at best or at worst still in dispute. Those are the situations where knowing case precedents and judicial trends will make the difference. Unfortunately for the Commonwealth, these troublesome close calls are in fact the majority, not the minority, of the drug-related cases pending before the Virginia courts today. Prosecutorial discretion becomes a key part of this process, as the Commonwealth Attorney determines whether to proceed with or to withdraw the charge (*nolle prosequi*). It is only through an insightful and studious analysis of the precedential trends that a competent prosecutor can come to any meaningful conclusions as to what is or is not the crime of constructive possession in Virginia.