NOTES

NEW THEORIES OF GUILT ON APPEAL IN VIRGINIA CRIMINAL CASES

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INTRODUCTION

In the 2003 case of *Commonwealth v. Hudson*,[1] the Supreme Court of Virginia ruled that a criminal defendant must maintain the same interpretation of the facts on appeal as she argued at trial.[2] The supreme court held that although the facts may be subject to more than one interpretation, a criminal defendant must argue on appeal a "theory of innocence" consistent with that argued below.[3] At his trial for the murder of his wife, Louis Scott Hudson argued that his wife committed suicide.[4] The jury rejected his interpretation of the facts and convicted him of second degree murder.[5] In front of the Court of Appeals of Virginia, Hudson argued that the facts could be interpreted to show that he might have accidentally killed his wife, or that she may have accidentally or intentionally killed herself.[6] The court of appeals ruled that the Commonwealth failed to disprove those additional theories of innocence and overturned Hudson's conviction.[7] The Virginia Supreme Court subsequently reinstated Hudson's conviction on the grounds that the court of appeals erroneously considered a theory of innocence not presented at Hudson's trial.[8] In accordance with Virginia Supreme Court Rule 5:25, which prohibits appellate courts from entertaining matters raised for the first time on appeal,[9] the court summarily dismissed Hudson's new theory.[10]

The full implications of the seemingly innocuous rejection of a criminal defendant's new "theory of innocence" have not been

1. 578 S.E.2d 781 (Va. 2003), *cert. denied*, 540 U.S. 972 (2003).

2. *Id.* at 786 ("Of course, upon appellate review, the issue of exclusion of reasonable theories of innocence is limited to those theories advanced by the accused at trial.").

3. *Id.*

4. *Id.* at 783-86.

5. *Id.* at 782.

6. Hudson v. Commonwealth, No. 0917-01-4, 2002 WL 1554484, at *4 (Va. Ct. App. July 16, 2002).

7. *Id.*

8. *Hudson*, 578 S.E.2d at 786.

9. VA. SUP. CT. R. 5:25. There are exceptions "for good cause shown or to enable [the] Court to attain the ends of justice." *Id.*

10. *Hudson*, 578 S.E.2d at 786.

explored by the Virginia appellate system.[11] Quixotically, the *Hudson* decision, which on its face seems to be staunchly antidefendant, could actually have far-reaching benefits for criminal defendants in the Old Dominion. This Note argues that if criminal defendants are prohibited by *Hudson* and the Virginia Supreme Court's rules from presenting new theories of innocence on appeal, the Commonwealth should likewise be prohibited from presenting new theories of guilt or otherwise arguing the facts in a different way than presented at the trial in which the defendant was convicted.

Part I discusses a recent case in which the Virginia Supreme Court permitted the Commonwealth to argue a new theory of guilt on appeal. Part II addresses the treatment the Virginia appellate system gives to theories of innocence proposed for the first time on appeal by criminal defendants. Part III examines Virginia case law and suggests that the Commonwealth should be prohibited from raising new theories of guilt on appeal by analogizing the treatment given to new factual theories presented on appeal both by criminal defendants and in civil cases. Part IV balances the potential risks and benefits of prohibiting new theories of guilt on appeal in criminal cases. This Note concludes that the equity and integrity of Virginia's criminal justice system would be significantly enhanced by the requirement that the theory of guilt articulated by the prosecution at trial must be the solitary interpretation of the facts argued by the Commonwealth when a defendant appeals a conviction. To conclude otherwise is antagonistic to the adversarial system of justice that underlies the entire American legal system.

I. *BOLDEN V. COMMONWEALTH*[12]

On October 19, 2005, the Circuit Court for the City of Hampton convicted Baraka S. Bolden of possession of a firearm while in possession of cocaine with the intent to distribute, possession of a firearm after being declared a felon, and possession of a concealed

11. *See infra* Part II.B. The courts swiftly reject the new theory of innocence without analyzing the consequences.

12. 654 S.E.2d 584 (Va. 2008).

weapon.[13] The trial court sentenced Bolden to a total of ten years in prison.[14] Bolden appealed to the Court of Appeals, which affirmed his conviction.[15] He then appealed to the Supreme Court of Virginia, which granted him a writ of certiorari.[16]

The facts of the case were never in significant dispute. Bolden was sitting in the driver's seat of a vehicle parked in a hotel parking lot early in the morning on February 10, 2005.[17] Another person sat in the passenger's seat.[18] A police officer pulled into the parking lot during a routine check of the premises.[19] The vehicle in which Bolden was sitting was parked "cockeyed" across several parking spots, attracting the police officer's attention.[20] Bolden stepped out of the vehicle as the police officer approached.[21] When Bolden got out of the vehicle, he dropped a one-inch square plastic baggie and some rolling papers.[22] The police officer looked at the bag and "concluded it likely contained cocaine."[23] The officer then arrested Bolden and searched his person, finding nearly six hundred dollars in cash, a cell phone, and several bags of marijuana.[24] A search of the vehicle revealed a backpack containing more marijuana, a digital scale, and more plastic baggies.[25] The officer found a second digital scale on the car's floorboard.[26] Underneath the driver's seat armrest, which was down, the officer found a handgun wrapped

13. Conviction Order dated October 19, 2005 (unpublished court order, on file with author). Bolden was also convicted of possession of cocaine with intent to distribute, and possession of marijuana with intent to distribute. *Id.* His sentences for these crimes were suspended, and these convictions were not appealed. Sentencing Order dated December 22, 2005 (unpublished court order, on file with author).

14. Sentencing Order dated December 22, 2005 (unpublished court order, on file with author).

15. Bolden v. Commonwealth, 640 S.E.2d 526, 528 (Va. Ct. App. 2007).

16. Brief of Appellant at 2, Bolden v. Commonwealth, No. 070816 (Va. Aug. 31, 2007).

17. *Bolden*, 654 S.E.2d at 585.

18. *Id.* at 585.

19. Transcript of Record at 17, Commonwealth v. Bolden, No. 070816 (Va. Cir. Ct. Oct. 19, 2005).

20. *Id.* at 18.

21. Bolden v. Commonwealth, 640 S.E.2d 526, 528 (Va. Ct. App. 2007).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

inside of a plastic grocery bag.[27] Bolden was either "right beside ... or ... sitting on [the handgun]."[28] The weapon inside the bag was "hidden from common observation."[29]

Because the handgun was not found on Bolden's person, the Commonwealth's Attorney attempted to prove Bolden possessed the weapon through "constructive possession."[30] In order to prove constructive possession, "the Commonwealth must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the [handgun] and that it was subject to his dominion and control."[31] The Commonwealth's theory of the case was that, due to his proximity to the weapon, Bolden possessed the handgun found in the plastic bag stuffed between the

27. Transcript of Record, *supra* note 19, at 21.

28. *Id.* at 24.

29. *Id.* at 30.

30. *Id.* at 43.

31. Powers v. Commonwealth, 316 S.E.2d 739, 740 (Va. 1984) (discussing constructive possession in the drug context). In Virginia, "[t]he principles that govern constructive possession of illegal drugs also apply to constructive possession of a firearm." Grier v. Commonwealth, 546 S.E.2d 743, 747-48 (Va. Ct. App. 2001) (citing Blake v. Commonwealth, 427 S.E.2d 219, 220-21 (Va. Ct. App. 1993)).

driver's seat and the armrest.[32] The trial court summarily convicted Bolden.[33]

Under Virginia's constructive possession case law, however, "[m]ere proximity ... is insufficient to establish possession."[34] Consequently, in his brief to the court of appeals, the Attorney General abandoned the proximity theory of constructive possession, instead arguing that because "firearms are a tool of the drug trade, and ... the facts established [Bolden] was involved in the distribution of drugs, a reasonable inference followed that [Bolden possessed] the firearm ...."[35] The court of appeals affirmed Bolden's conviction based on this alternative theory of guilt,[36] and the

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32. The Commonwealth's theory was evident at several different points in the trial. In response to Bolden's motion to strike the evidence, the Commonwealth's Attorney stated:

> Your Honor, we believe that it was a constructive possession in this particular case, which is proven typically through circumstantial evidence. The officer testified that [the handgun] was in a blue Wal-Mart bag. However, it was on the driver's seat. And the evidence showed that both [Bolden] and the passenger left the vehicle at the same time ... The evidence showed ... that the firearm was something of a nature when [the police officer] picked up the bag he immediately knew the nature of what was in that bag. In addition ... the evidence showed that—the officer testified that he believed that the firearm was positioned in the seat in the nature as such the defendant had to either sit on it or he had to be directly pressed against it.

Transcript of Record, *supra* note 19, at 43.

Earlier in the trial, the Commonwealth's Attorney examined a court-certified drug distribution expert who testified, when describing the materials found in the vehicle, that "[Bolden] has the weapon so he can protect his interests." *Id.* at 34, 37. Bolden's attorney promptly objected, stating "I don't think that's meant as a conclusion that he possessed [the handgun], just the fact that [the police officer] found [the handgun in the vehicle.]" *Id.* The judge immediately accepted this objection, stating, "That's how I took it." *Id.* The Commonwealth's Attorney then moved on with the examination, never again returning to connect the drugs to the firearm. *Id.* at 37-38. In its brief to the Supreme Court of Virginia, the Commonwealth all but conceded that the prosecuting attorney did not put forth the theory of guilt relied upon on appeal. Brief of the Commonwealth at 12, Bolden v. Commonwealth, No. 070816 (Va. Sept. 25, 2007). Rather, the Commonwealth argued "that the trial court, as fact finder, was permitted to consider such a connection as a matter of law once the requisite evidence of drug distribution was adduced at trial." *Id.* See *infra* Part IV.C. for further discussion. For a detailed analysis of the evidence and argument regarding constructive possession presented at trial, see Brief of the Commonwealth at 7-14, Bolden v. Commonwealth, No. 070816 (Va. Aug. 31, 2007).

33. Conviction Order dated October 19, 2005, *supra* note 13.

34. Eckhart v. Commonwealth, 281 S.E.2d 853, 855 (Va. 1981).

35. Brief of the Commonwealth at 14, Bolden v. Commonwealth, No. 070816 (Va. Sept. 18, 2006) (citing Glasco v. Commonwealth, 497 S.E.2d 150, 156 (1998)).

36. Bolden v. Commonwealth, 640 S.E.2d 526, 530-31 (Va. Ct. App. 2007).

Supreme Court of Virginia affirmed.[37] Rather than directly address whether the Commonwealth must maintain a consistent theory of guilt when pressed by Bolden's attorney,[38] the supreme court simply held that an appellate court's review is not limited to the evidence and arguments mentioned by a party or the trial judge.[39]

By failing to restrict the Commonwealth on appeal to the original theory of guilt employed at trial, the Virginia Supreme Court has built uncorrectable error into the justice system in at least two types of cases. The first type are cases like *Bolden*, in which the prosecution's trial argumentation simply fails to meet the required elements for judicially-created doctrines like constructive possession, but where the facts may have supported such a finding if correctly argued. The second type is more theoretical. Consider the situation where a prosecutor presents his theory of the facts at trial and the defendant effectively refutes each element of the prosecutor's theory. Under *Bolden*, the trial court could still convict the defendant because it finds the defendant guilty under a second, and entirely different, theory of the facts. What makes these errors uncorrectable after *Bolden* is the fact that, on appeal, the Commonwealth is allowed to rework a facially insufficient case, yet the defendant never has an opportunity to present facts or arguments in response because Virginia's appellate procedural rules[40] and the Supreme Court's decision in *Hudson*[41] restrict her to what she argued at trial.

In the first type of case, in which the facts may or may not be fairly interpreted to meet the doctrinal requirements, the Commonwealth may completely recast the facts and arguments to meet those elements. In the second type of case, a clever appellate counsel could deduce the alternate theory of guilt utilized by the judge to convict the defendant, and present that theory on appeal as the reason to uphold the defendant's conviction. Even more troubling is that when the Commonwealth retools its theory of guilt, it is given the enormous benefits of having its theory viewed in the light most

37. Bolden v. Commonwealth, 654 S.E.2d 584, 584 (Va. 2008).
38. Brief of Appellant, *supra* note 16, at 15-18.
39. *Bolden*, 654 S.E.2d at 586. See *infra* Part IV.C for further discussion of this concept.
40. *See infra* Part II.A.
41. Commonwealth v. Hudson, 578 S.E.2d 781, 786 (Va. 2003).

favorable to it,[42] and is accorded "all inferences fairly deducible from the evidence" on appeal.[43] The Virginia Supreme Court's holding in *Bolden* allows a criminal defendant to be convicted based on an argument never vocalized at trial, to which she never has an opportunity to reply, and then allows the Commonwealth on appeal to articulate and rely solely on that argument as a reason for upholding the conviction.

II. NEW THEORIES OF INNOCENCE

A. Appellate Procedural Rules

In Virginia criminal cases, appellate procedural rules 5:25 and 5A:18 prohibit defendants from raising arguments not presented at trial.[44] Although framed in terms of responding to objections, Rules 5A:18 and 5:25 are not "applicable only to evidentiary and similar rulings"[45] but to all "legal decisions and findings."[46] The rules mandate that "[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the

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42. Baldwin v. Commonwealth, 645 S.E.2d 433, 433 (Va. 2007).

43. Riner v. Commonwealth, 601 S.E.2d 555, 558 (Va. 2004). See *infra* Part IV for a more detailed analysis of these concerns.

44. Rule 5:25 reads as follows:

> Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.

VA. SUP. CT. R. 5:25.

Rule 5A:18 is 5:25's corollary for the Virginia Court of Appeals. Rule 5A:18 reads:

> No ruling of the trial court ... will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to constitute a question to be ruled upon on appeal.

VA. SUP. CT. R. 5A:18.

Rules 5A:18 and 5:25 should be interpreted to have essentially the same meaning. Lee v. Lee, 404 S.E.2d 736, 738 (Va. Ct. App. 1991) (en banc).

45. *Lee*, 404 S.E.2d at 738.

46. *Id.* (citing a "myriad of cases" that support this holding).

time of the ruling ...."[47] The wording of these rules, therefore, presupposes that factual questions are to be resolved at the trial level. The rules allow for the review of instances in which defense counsel objects, prompting the trial judge to apply a rule of law. It is under this rubric that new theories of innocence are prohibited, despite the fact that the rules only specifically refer to instances when the trial court has made a "ruling."[48]

The logic behind the rules is simple and is reflected in the "contemporaneous objection rule."[49] Requiring trial attorneys to bring error to the attention of the trial judge at the time the error is committed gives the judge an opportunity to correct the error, or mitigate its harms.[50] The contemporaneous objection rule thus promotes judicial economy in several ways. It protects the parties from the needless burden of a costly appeal,[51] promotes "efficient judicial administration"[52] by guarding against reversals and mistrials,[53] and prevents attorneys from building error into the trial record.[54]

More importantly, the contemporaneous objection rule preserves essential fairness by protecting a party from an argument that could be raised against it at trial, but is not.[55] This rule prevents an appealing party from asking for a reversal based on an error not brought to the attention of the trial court at the time it was made. Doing so "is unfair to the opposing party, who may have been able to offer an alternative to the objectionable ruling, but did not do so,

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47. VA. SUP. CT. R. 5:25.

48. *Id.*

49. *See, e.g.*, Henry v. Mississippi, 397 U.S. 443, 450 (1965).

50. "The goal of the contemporaneous objection rule is to avoid unnecessary appeals, reversals and mistrials by allowing the trial judge to intelligently consider an issue and, if necessary, to take corrective action." Campbell v. Commonwealth, 405 S.E.2d 1, 2 (Va. Ct. App. 1991) (en banc) (citing Head v. Commonwealth, 348 S.E.2d 423, 426 (Va. Ct. App. 1986)).

51. And in civil cases, the rule protects against the possibility of an expensive retrial. *Lee*, 394 S.E.2d at 491.

52. *Id.*

53. *See* Woodson v. Commonwealth, 176 S.E.2d 818, 820-21 (Va. 1970) (citing Reil v. Commonwealth, 171 S.E.2d 162, 164 (Va. 1969)).

54. Keecher's Adm'r v. Richmond, Fredricksburg & Potomac R.R. Co., 142 S.E. 393, 395 (Va. 1928).

55. *Lee*, 394 S.E.2d at 491.

believing there was no problem."[56] Defendants cannot advocate a new theory of innocence because Virginia Supreme Court and Court of Appeals rules, and the case law interpreting those rules, require the appellant to object to some ruling of the lower court in order for there to be something to review.[57] That Virginia appellate rules 5A:18 and 5:25 act in this fashion makes sense as a practical matter. The prevailing party below rarely appeals,[58] and the losing party often would like to raise new issues to bolster their trial argumentation.[59]

B. Virginia Case Law

Virginia case law is replete with examples in which a criminal defendant attempted to raise a new theory of innocence on appeal. In *Kelly v. Commonwealth*,[60] the court of appeals upheld convictions for possession of marijuana with intent to distribute and for importing narcotics into Virginia.[61] The issues in *Kelly* were whether

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56. *Id.* Rules 5A:18 and 5:25 contain two exemptions to allow appellate courts to entertain new arguments "for good cause shown or to enable this Court to attain the ends of justice ...." VA. SUP. CT. R. 5A:18, 5:25. For various reasons outside the scope of this Note, these exceptions do not justify a new theory of guilt or innocence. Essentially, the Commonwealth is constitutionally prohibited from appealing a finding of innocence, *see infra* note 59, while with criminal defendants, the failure to raise a theory of innocence is not considered a miscarriage of justice. Ryan v. Commonwealth, 247 S.E.2d 698, 703 (Va. 1978) (citing VA. SUP. CT. R. 5:21, the predecessor to today's Rule 5:25).

57. *See*, *e.g.*, VA. SUP. CT. R. 5A:18, 5:25; Taylor v. Commonwealth, 157 S.E.2d 185, 191 (Va. 1967).

58. The Commonwealth never appeals in criminal trials due to the Fifth Amendment's Double Jeopardy provisions. *See* Sanabria v. United States, 437 U.S. 54, 64 (1978) ("Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous."); *see also* Tibbs v. Florida, 457 U.S. 31, 40-42 (1982); Ball v. United States, 163 U.S. 662, 666-71 (1896). For a review of instances when the Commonwealth of Virginia may appeal in criminal proceedings, see Deborah Lee Titus, Note, *Commonwealth Right of Appeal in Criminal Proceedings*, 43 WASH. & LEE L. REV. 295 (1986).

59. This new argumentation in criminal cases could come either in the form of a new theory of innocence or a new rationale supporting an objection raised at trial. For an example of a new theory of innocence rejected on appeal, see Commonwealth v. Hudson, 578 S.E.2d 781, 786 (Va. 2003); *see also* Goins v. Commonwealth, 470 S.E.2d 114, 128 (Va. 1996) (denying a defendant the ability to raise a new rationale on appeal to support an objection made at trial).

60. 584 S.E.2d 444 (Va. Ct. App. 2003) (en banc).

61. *Id.* at 445-46.

the defendant knew the drugs were in the vehicle, and whether the drugs were acquired at the restaurant at which he was arrested or instead had been purchased in Maryland.[62] The trial court specifically held that Kelly did know that the packages contained marijuana when he was arrested,[63] and that "the evidence is clear that [Kelly] was coming from Maryland."[64] Because the trial court made these specific findings, the Court of Appeals, sitting en banc, easily rejected Kelly's "alternative hypothesis of innocence" that the drugs were picked up in Virginia at the restaurant where Kelly was arrested.[65] Specifically, the *Kelly* court held that "whether an 'alternative hypothesis of innocence is reasonable is a question of fact and, therefore, is binding on appeal unless plainly wrong.'"[66] Although Kelly presented his "alternative hypothesis" of innocence at trial, the case falls within the scope of this Note because it lays the logical foundation for rejecting new defendant theories of innocence on appeal.

The Supreme Court of Virginia rejected a new theory of innocence in *Lyons v. City of Petersburg*.[67] Lyons was convicted of driving under the influence of alcohol.[68] At trial, the arresting officer testified that "Mr. Lyons had run into a parked car ...."[69] Lyons was found sitting in his car near the parked car, which had been thrown forward about twenty-five feet from its previously parked position.[70] On appeal, Lyons claimed that the police officer did not testify as to how he determined Lyons was driving the vehicle when the accident occurred,[71] as opposed to simply sitting in the car after the

62. *Id.* at 447-48 & n.2.

63. *Id.* at 447.

64. *Id.* (brackets in original).

65. *Id.* at 448 (quotation omitted).

66. *Id.* (quoting Stevens v. Commonwealth, 567 S.E.2d 537, 540 (Va. Ct. App. 2002)). Within this holding is the inherent assumption that for a question of fact to be binding on an appellate court, it must have been considered by the trial court. See *infra* Part IV.A for a further elaboration of this point.

67. 266 S.E.2d 880, 881-82 (Va. 1980) (per curiam).

68. *Id.* at 880.

69. *Id.*

70. *Id.* at 880-81.

71. There was also a second person found in Lyons's car when the police officer arrived, and, presumably, Lyons's argument at trial and on appeal was that this person was just as likely to be the driver as he was. *Id.* at 881.

accident.[72] Although the Virginia Supreme Court had no problem inferring from the officer's testimony and other facts that Lyons was the driver,[73] the court also found it incumbent upon Lyons's trial counsel to point out that the officer failed to provide specific reasons for how he concluded that Lyons was the driver.[74] Because Lyons failed to flesh out these specific reasons and present his alternate theory at trial, the court prohibited him from raising these points for the first time on appeal.[75] Although the Virginia Supreme Court did not cite Rule 5:25 in this particular opinion, it is clear that the Virginia Supreme Court exercised its power to reject a new theory of innocence proffered for the first time on appeal.

In *Wise v. Commonwealth*,[76] Wise was convicted of capital murder in the commission of armed robbery.[77] On appeal, Wise attempted to argue a new theory of innocence, proclaiming that the evidence did not show he was in "exclusive possession" of the pickup truck he was convicted of stealing.[78] Citing Rule 5:25, the Virginia Supreme Court refused to hear his argument, saying, "The defendant did not raise that ground for the trial court's consideration, and he cannot assert it for the first time in this Court."[79]

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72. *Id.*

73. *Id.* at 881 ("It strains one's credulity to believe that the accident involved here happened other than in the manner claimed by the City. There is no other reasonable explanation for the scene which the officer found ....").

74. *Id.* at 882. Unlike trial counsel in *Lyons*, the trial attorney in *Bolden* specifically objected to an unwarranted assertion by a police detective that Bolden possessed the gun found in the vehicle in which he was sitting. Transcript of Record, *supra* note 19, at 37. The trial judge agreed with the objection, holding that the testimony would only be considered for the fact that a gun was found in the car. *See supra* note 32. The difference in the two cases is that in *Lyons* it was the defense attempting to supplement an ineffective trial court argument, whereas in *Bolden*, the Commonwealth successfully supplemented their trial court argument with an additional theory of guilt on appeal. Whether this distinction makes a difference or is susceptible to a "right for the wrong reason" exception will be discussed *infra* Part III.C.

75. *Lyons*, 266 S.E.2d at 882.

76. 337 S.E.2d 715 (Va. 1985).

77. *Id.* at 717.

78. *Id.* at 722.

79. *Id.*

In an unreported 2004 case,[80] the defendant was convicted of driving after having been adjudicated an habitual offender.[81] At trial, the Commonwealth evidenced and argued that the defendant "knew his license had been revoked as an habitual offender."[82] At trial, the defendant argued "only that [he] did not have actual notice of his habitual offender status."[83] On appeal, the defense asserted a new theory of innocence—namely that the defendant lied to the DMV and to the police officer because he was "motivated by his prior suspended license convictions, rather than any actual knowledge of his habitual offender status."[84] The appellate court swiftly rejected this theory saying, "At trial, [the defendant] never mentioned the suspended-license hypothesis as an alternative explanation for the false statements ...."[85] Citing *Hudson*, the Court of Appeals affirmed the conviction.[86]

The defendant in *Hogan v. Commonwealth*[87] attempted to question the verity of a photographic lineup for the first time on appeal.[88] Hogan had failed to object to the problematic identification at trial.[89] During his appeal, Hogan argued that the victim's identification of him was faulty because the lineups were improperly performed.[90] Because Hogan failed to raise this theory at trial or obtain a ruling from the trial court as to the admissibility of the lineup evidence, the appellate court quickly disposed of this argument, relying on Rule 5A:18.[91]

Like new theories of innocence, new procedural arguments by criminal defendants receive the same unfriendly treatment by the

80. Bolden v. Commonwealth, No. 0500-03-4, 2004 WL 2706338 (Va. Ct. App. Nov. 30, 2004). It should be noted that this defendant "Bolden" is not the same "Bolden" discussed in the 2008 Virginia Supreme Court case.

81. *Id.* at *1.

82. *Id.*

83. *Id.* at *2.

84. *Id.* at *3.

85. *Id.*

86. *Id.* at **3-4 (citing Commonwealth v. Hudson, 578 S.E.2d 781, 786 (Va. 2003)).

87. 360 S.E.2d 371 (Va. Ct. App. 1987).

88. *Id.* at 376.

89. *Id.* at 373-74.

90. *Id.* at 376.

91. *Id.*

Virginia appellate system.[92] In *Commonwealth v. Jenkins*,[93] the Supreme Court of Virginia reinstated two convictions previously reversed by the court of appeals.[94] The court had reversed the convictions because it disregarded handwriting on a document that incriminated Jenkins.[95] Notably, the defense had not objected to the introduction of this evidence at trial.[96] The handwriting was from a doctor who had examined the victim and stated that the victim died from aspiration, which resulted from the gunshot wound inflicted by Jenkins.[97] The supreme court found the court of appeals erred in disregarding this evidence, noting that "[w]hen Jenkins' counsel offered the document into evidence, he did not request that the handwritten notation be excluded .... Thus ... Jenkins has waived any later objection to its consideration by the trier of fact."[98] Jenkins's appellate counsel argued a new procedural argument,[99] and a new theory of innocence,[100] both of which the Virginia Supreme Court denied because of their newness.[101]

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92. *See supra* Part II.A. For a criticism of the overuse of procedural default in denying capital appeals in Virginia, see Matthew K. Mahoney, Note, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000).

93. 499 S.E.2d 263 (Va. 1998).

94. *Id.* at 266. Jenkins v. Commonwealth, No. 1093-96-1, 1997 WL 290199 (Va. Ct. App. June 3, 1997).

95. *Jenkins*, 499 S.E.2d at 265. The court of appeals stated in a footnote:

> We acknowledge that one of the exhibits, Jackson's typewritten discharge summary which is signed by Dr. Carney, contains an almost indecipherable handwritten note in the top left corner: "many Factors contributed to his death but all were result of Gunshot wound." There is no indication in the record of the source or author of this handwritten note and neither party acknowledged the note in its brief. Consequently, we can only speculate as to its origin, authenticity, and authorship, and we are constrained by the record before us to disregard it.

Jenkins, 1997 WL 290199, at *2 n.1.

96. *Jenkins*, 499 S.E.2d at 264.

97. *Id.*

98. *Id.* at 266 (citing VA. SUP. CT. R. 5:25).

99. The new procedural argument was objecting to the handwritten evidence. *Id.* at 264.

100. Specifically, the new theory of innocence was that the aspiration was caused by a seizure not the gunshot wound. *Id.* at 264-65. In response, the Commonwealth successfully argued in this case that "even if [the victim] had a seizure prior to his death, such an intervening event would not exonerate Jenkins because any such seizure would have been 'put into operation' by Jenkins' acts." *Id.* at 265.

101. *Id.* at 266.

Virginia appellate courts also use Rules 5A:18 and 5:25 to reject statutory defenses brought by criminal defendants for the first time on appeal. In *Jacques v. Commonwealth*,[102] Jacques's trial counsel contested the search of his vehicle on constitutional grounds.[103] On appeal, however, Jacques supplemented his appeal by arguing that a Virginia Code section "proscribed the search of his car."[104] In rejecting Jacques's new argument, the court said that "[t]he appellant's motion to suppress was based on constitutional grounds. We will not consider this issue for the first time on appeal."[105]

The prohibition on new argumentation extends through factual, procedural, and statutory arguments to new constitutional claims. In *Connelly v. Commonwealth*,[106] the defendant was charged with possession of a controlled substance, but a finding of guilt was withheld for a period of one year in accordance with Virginia's First Offender statute.[107] During the one-year period, Connelly tested positive for marijuana.[108] Notwithstanding the probation officer's recommendation to the contrary, the court convicted Connelly of her original offense.[109] On appeal, Connelly "contend[ed] that the dispositional proceedings violated her 'due process rights.'"[110] The court of appeals, citing Rule 5A:18, rejected this new argument stating that even with constitutional questions, the "trial judge [must] be given the first opportunity to rule ...."[111]

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102. 405 S.E.2d 630 (Va. Ct. App. 1991).

103. *Id.* at 631.

104. *Id.* (citing VA. CODE ANN. § 19.2-83 (repealed 1994)).

105. *Id.* (citing VA. SUP. CT. R. 5A:18).

106. 420 S.E.2d 244 (Va. Ct. App. 1992).

107. *Id.* at 245. Virginia's First Offender statute may be found at VA. CODE ANN. § 18.2-251 (West 2008).

108. *Connelly*, 420 S.E.2d at 245.

109. *Id.*

110. *Id.*

111. *Id.* at 245-46 (citing Gardner v. Commonwealth, 350 S.E.2d 229, 232 (Va. Ct. App. 1986)) (internal quotation omitted). Additionally, the United States Supreme Court ruled that arguments to which a procedural default would apply in state courts apply in federal courts for the purposes of habeas corpus proceedings, meaning Rules 5A:18 and 5:25 will prevent a criminal defendant from being able to raise new arguments in habeas proceedings based on Virginia state convictions. Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); *see also* Mahoney, *supra* note 92, at 306-07.

C. Commonwealth v. Hudson

The most significant case with respect to the ability of defendants to raise a new theory of innocence on appeal is the 2003 case of *Commonwealth v. Hudson*.[112] The Virginia Court of Appeals overturned Hudson's murder conviction on the grounds that "the Commonwealth's evidence fail[ed] to exclude all reasonable hypotheses of innocence."[113] The court reasoned that when "the proof relied upon by the Commonwealth is wholly circumstantial, as it here [was], then to establish guilt beyond a reasonable doubt all necessary circumstances proved must be consistent with guilt and inconsistent with innocence."[114] The court allowed Hudson to argue that "Mrs. Hudson did not die through the criminal agency of another"[115] and that "the evidence failed to exclude the reasonable conclusion that Mrs. Hudson was fatally shot by accident or intentionally by her own act."[116] The court then reviewed the evidence[117] and found that "[t]here [was] simply no evidence establishing Hudson ever touched the weapon that fired the fatal bullet. Yet there [was] some evidence that Mrs. Hudson may have fatally fired the gun."[118] The court thus concluded that "[t]he evidence in the instant case fail[ed] to prove [Hudson's] guilt beyond a reasonable doubt."[119]

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112. 578 S.E.2d 781 (Va. 2003).

113. Hudson v. Commonwealth, No. 0917-01-4, 2002 WL 1554484, at *4 (Va. Ct. App. July 16, 2002).

114. *Id.* at *3 (quoting Clodfelter v. Commonwealth, 238 S.E.2d 820, 822 (1977)).

115. *Id.* at *4.

116. *Id.*

117. The Court of Appeals specifically considered:

> The .22 revolver that fired the fatal shot was found in Mrs. Hudson's hand. The expert evidence demonstrated that the gunshot residue found on Mrs. Hudson's right hand was consistent with the .22 shells at the scene. The gunshot residue evidence further showed the residue found on Hudson's hands was not consistent with that ammunition. In addition, there were no identifiable fingerprints found on the .22 revolver or any of the cartridges attributable to Hudson.

Id. at *4.

118. *Id.*

119. *Id.* at *4-5.

Citing Rules 5A:18 and 5:25, the Supreme Court of Virginia reversed the court of appeals and reinstated Hudson's convictions.[120] The supreme court admonished the court of appeals for considering the additional "reasonable hypotheses of innocence"[121] not offered at trial, saying:

> Of course, upon appellate review, the issue of exclusion of reasonable theories of innocence is limited to those theories advanced by the accused at trial. Subject to the ends of justice exception, appellate courts will not entertain matters raised for the first time on appeal .... In the case before us, Hudson did not testify at trial; however, many of his pretrial statements were introduced through other witnesses. Hudson's theory of innocence was advanced in counsel's argument to the jury.
>
> Hudson argued only that [his wife] committed suicide. He did not advance a theory of accidental shooting by [his wife] or by himself. He did not advance a theory that the fatal shot was fired by someone other than [his wife]. In closing argument, counsel stated to the jury, "Tragically, tragically, suicide is the only reasonable explanation of what happened on September 20th, 1999." Emphasizing the circumstantial nature of the evidence and the presumption of innocence, Hudson maintained that [his wife] shot herself.[122]

With this statement, the supreme court unquestionably confirmed that Virginia Supreme Court Rules 5A:18 and 5:25 prohibit a criminal defendant from pursuing a theory of innocence on appeal that was not raised in the trial court, even if the facts introduced at trial are susceptible to such an interpretation.[123] In the 2008 *Bolden* decision, the Supreme Court rejected an opportunity to apply this same principle to new theories of guilt on appeal presented by the Commonwealth.[124]

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120. Commonwealth v. Hudson, 578 S.E.2d 781, 786-88 (Va. 2003).

121. *Id.* at 785 (quotation omitted).

122. *Id.* at 786 (citation omitted).

123. That the facts in *Hudson* were susceptible to such an alternate explanation can be inferred from the ease with which the Court of Appeals accepted them, apparently without even considering whether it was necessary that they be raised before the trial court.

124. *See supra* Part I.

D. Comparison Between New Theories of Innocence and Guilt

This Note does not take issue with Virginia appellate courts applying procedural default rules strictly to prevent criminal defendants from raising new theories of innocence, procedural arguments, statutory claims, or constitutional defenses. This Part contrasts the application of the procedural default rules to new theories of innocence raised by criminal defendants with the treatment given to new theories of guilt proffered by the Commonwealth on appeal. In the cases discussed above, the defendants' new contentions were hardly given a passing mention before being summarily dismissed.[125] When the Commonwealth attempts to present new theories of guilt on appeal to preserve a criminal conviction, in contravention of the maxim that "appellate courts will not entertain matters raised for the first time on appeal,"[126] Virginia appellate courts often go to great lengths to consider the new theories.[127] One appellate court went so far in one instance to say that "the Commonwealth is not subject to the provisions of Rule[s 5A:18 and 5:25]."[128] Indeed, all Virginia appellate courts so hold, in spite of the claim that they "consistently have applied [Rules 5A:18 and 5:25] in both civil and criminal cases ...."[129]

Perhaps, however, these two comments are not actually inconsistent. Perhaps "consistently" means that the Virginia Supreme Court has "consistently" applied procedural default rules to criminal defendants, while "consistently" not subjecting the Commonwealth to the same strictures. This Note argues that this uneven application of rules 5A:18 and 5:25 should be changed. A truly just appellate system would prohibit criminal defendants from presenting new theories of innocence on appeal, while also limiting the Commonwealth to the theory of guilt it presented at trial. An appellate system that limits criminal defendants to the theory of innocence presented at trial while allowing the Commonwealth to present theories of guilt above and beyond those presented at trial

125. *See supra* Part II.B-C.
126. *Hudson*, 578 S.E.2d at 786.
127. *See infra* Part III.B.
128. Mason v. Commonwealth, 373 S.E.2d 603, 607 (Va. Ct. App. 1988).
129. Jimenez v. Commonwealth, 402 S.E.2d 678, 680 (Va. 1991).

is literally unbalanced—the scales of justice are tipped against criminal defendants from the beginning.

The legitimate procedural advantages that the Commonwealth has on appeal—particularly the ability to have the facts viewed in the light most favorable to it[130]—and the appropriate procedural disadvantages to which criminal defendants are subject—specifically Rules 5A:18 and 5:25—allowing the Commonwealth to present a new theory of guilt on appeal effectively allow the Commonwealth to construct an incredibly damaging version of the facts to which the defendant cannot respond.[131] When the Commonwealth can advocate a new theory of guilt with the added benefits of being granted all reasonable inferences from the facts[132] and having the facts viewed in the light most favorable to it,[133] what may have been an arguable interpretation of the facts at trial can become an unbeatable theory of guilt on appeal. Because Rules 5A:18 and 5:25 prevent a defendant from raising new factual interpretations on appeal to combat a new theory of guilt, her only possible reply is to argue that the Commonwealth's new theories should likewise be procedurally barred. By failing to use Rule 5:25 to bar the Commonwealth from presenting new theories of guilt on appeal with its decision in *Bolden*,[134] the Virginia Supreme Court has only further entrenched the Commonwealth's ability to manipulate this imbalance.

The Virginia Supreme Court likely did not intend the procedural scenario just described. More plausibly, the imbalance is a procedural irregularity that has resulted from the fact that the cases interpreting Rules 5A:18 or 5:25 never look at the rules as applying to both the Commonwealth and the criminal defendant at the same time.[135] Regardless, the Virginia Supreme Court should seize the next opportunity to restore equity in Virginia's appellate system by holding that Rule 5:25[136] bars new theories of guilt proffered by the

130. Higginbotham v. Commonwealth, 218 S.E.2d 534, 537 (Va. 1975).

131. *See supra* notes 40-43 and accompanying text.

132. *Higginbotham*, 218 S.E.2d at 537.

133. *Id.*; *see also* Commonwealth v. Hudson, 578 S.E.2d 781, 786 (Va. 2003).

134. Bolden v. Commonwealth, 654 S.E.2d 584, 584-87 (Va. 2008).

135. Unlike civil cases, in criminal cases only one party can appeal, not both. Driscoll v. Commonwealth, 417 S.E.2d 312, 313 (Va. Ct. App. 1992) (prohibiting the Commonwealth from arguing a cross-appeal in criminal cases).

136. And by extension, Rule 5A:18.

Commonwealth, just as it bars new theories of innocence argued for the first time on appeal by criminal defendants.

III. NEW THEORIES OF GUILT

A. New Arguments on Appeal in Civil Cases

Although the Virginia Supreme Court failed specifically to extend *Hudson*[137] and the prohibitions contained in Rules 5A:18 and 5:25 to new Commonwealth theories of guilt in *Bolden*,[138] the Virginia case law supports such an extension. The argument that Rules 5A:18 and 5:25 should apply only to criminal defendants during appeals stems from the fact that the language of the rules restricts only "appellants."[139] The Commonwealth is constitutionally barred from appealing a finding of innocence,[140] making the rules facially applicable only to criminal defendants. The application of rules 5A:18 and 5:25 in the context of civil appeals, however, makes clear that the rules' prohibitions should apply to both parties in criminal litigation.

In *West Alexandria Properties, Inc. v. First Virginia Mortgage & Real Estate Investment Trust*[141] the Virginia Supreme Court applied its customary strict interpretation of Rule 5:25, stating, "On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court."[142] Therefore, Rule 5:25 applies in the same fashion to civil appellants as it does to criminal appellants. However, because of the nature of civil litigation, often both parties will have issues they would like to appeal. In civil appeals, Rule 5:25 applies equally to prohibit appellants from raising new arguments on appeal, just as it does to appellees who attempt to argue new theories, arguments, or rationales on appeal.[143]

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137. *Hudson*, 578 S.E.2d at 786.

138. *Bolden*, 654 S.E.2d at 586.

139. VA. SUP. CT. R. 5A:18; 5:25.

140. *See supra* note 58.

141. 267 S.E.2d 149 (Va. 1980).

142. *Id.* at 151 (citing Rule 5:21, now Rule 5:25).

143. *See* Langley v. Meredith, 376 S.E.2d 519, 522-23 (Va. 1989) (relying on Rule 5:25 to reject an appellee's attempt to assign cross-errors on appeal that were not raised at trial);

Prior to being elevated to Chief Justice, then-Justice Hassell wrote in an impassioned dissent, "This Court has an obligation to apply its procedural rules impartially and uniformly to all litigants. Uniform application of procedural rules, regardless of the status of the litigant who appears before the bar of this Court, is an indispensable component of justice."[144] Although this comment was made in the context of an appellant's failure to assign properly an error upon which the supreme court eventually ruled,[145] the implication cannot be missed. The soon-to-be Chief Justice of the Virginia Supreme Court felt that the rules of the court should apply to *all litigants* regardless of their economic or social position, whether their case is civil or criminal, and regardless of their status as appellant or appellee. Again dissenting, this time in a criminal case, Chief Justice Hassell wrote:

> The Commonwealth asserts its procedural bar argument for the first time in this Court, after Buck's appeal had been awarded. The Commonwealth should not be permitted to do so. In essence, the Commonwealth is permitted to play "fast and loose" with the Court of Appeals and this Court .... I am not aware of any other appeal from the Court of Appeals in which this court has permitted an appellant to raise a procedural bar that is not jurisdictional when the bar was not raised in the Court of Appeals.[146]

It is precisely to prevent the Commonwealth from playing "fast and loose"[147] with the Virginia appellate system that the Commonwealth

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Harbour Gate Owners' Ass'n v. Berg, 348 S.E.2d 252, 259 (Va. 1986) (citing Rule 5:25 to disallow an appellee's arguments raised for the first time on appeal); *see also* Reid v. Baumgardner, 232 S.E.2d 778, 780-81 (Va. 1977).

144. Taylor v. Worrell Enters., 409 S.E.2d 136, 140 (Va. 1991) (Hassell, J., dissenting).

145. *Id.*

146. Buck v. Commonwealth, 443 S.E.2d 414, 418 (Va. 1994) (Hassell, J., dissenting). It should be noted that while Chief Justice Hassell refers to the Commonwealth as the "appellant" in this quote, the defendant Buck was actually the appellant. Buck's conviction had been overturned by the court of appeals, after which it was reinstated by the court of appeals sitting en banc. Buck then appealed this decision to the Supreme Court of Virginia. *Id.* at 414-15.

147. *Id.* at 418.

should be prohibited from arguing a new theory of guilt on appeal that it did not present at trial.[148]

B. Criminal Cases

On appeal, theories of innocence and guilt are reviewed under the familiar standard that appellate courts do not act as fact-finder, but rather evaluate whether "*any* rational trier of fact could have found the elements of the crime beyond a reasonable doubt."[149] This may seem to be a mundane matter. However, continuing on appeal the theory of guilt espoused at trial gives the respective courts of appeal the ability to review the trial courts' rationales for finding the elements of the crimes charged. The fundamental principle is that in order for the trial court argumentation to be given the deferential appellate review inherent in the "*any* rational trier of fact"[150] standard, that theory of guilt must actually have been presented at trial.

A corollary here is that when a theory of guilt sufficient to meet the elements of the crime charged is espoused at trial, and that theory is the one under which the defendant is convicted, the evidence at trial must actually support the theory presented. In *Crowder v. Commonwealth*,[151] the defendant was convicted of felony destruction of crops when he "did donuts" in a patch of farmland.[152] The Commonwealth argued at trial that the value of the crops destroyed was greater than the minimum amount required to attain a felony conviction.[153] The court of appeals reversed the conviction because the section of testimony relied upon by the Commonwealth and the trial court in finding the statutory minimum was met did not actually contain the monetary value of the crops destroyed.[154] By reading *Crowder* together with cases like *Haskins* and *Barnes*, the

148. For a discussion of the dangers inherent in allowing new theories of guilt on appeal, see *infra* Part IV.B.

149. Haskins v. Commonwealth, 602 S.E.2d 402, 405 (Va. Ct. App. 2004) (quotation omitted); *see also* Barnes v. Commonwealth, 622 S.E.2d 278, 279-80 (Va. Ct. App. 2005).

150. *Haskins*, 602 S.E.2d at 405.

151. 588 S.E.2d 384 (Va. Ct. App. 2003).

152. *Id.* at 385-86.

153. *Id.* at 386-88. Crowder was convicted of felony destruction of property in excess of $1000. *Id.* at 386.

154. *Id.* at 387-88.

Virginia case law clearly shows that not only must the defendant be presented with the theory of guilt under which the Commonwealth seeks conviction, but the Commonwealth must also provide the evidence necessary to support the asserted theory of guilt. The Virginia Court of Appeals should reverse any conviction involving a defendant convicted under a theory of guilt that does not fit the elements of the crime charged or when the evidence is insufficient to support a theory of guilt that matches the elements of the crime charged.

C. "Right for the Wrong Reason"

In criminal cases, "Rule 5A:18 [or 5:25] does not require an appellee to raise an issue at trial before it may be considered on appeal where the issue is not offered to support the *reversal* of a trial court ruling."[155] Stated more bluntly, "the Commonwealth is not subject to the provisions of Rule 5A:18 [and 5:25]"[156] because in a criminal appeal the Commonwealth is always arguing to affirm the conviction below. Rules 5:25 and 5A:18, therefore, do not apply because of the judicially created "right for the wrong reason" rationale. This rationale states that

> [a]n appellate court cannot vacate a criminal conviction that violates no recognizable legal principle simply on the ground that the prosecutor (or, for that matter, the trial judge) did not articulate the proper legal basis for it. Thus, an appellee may argue for the first time on appeal any legal ground in support of a judgment ....[157]

There are several well-noted limitations to the "right for the wrong reason" rationale. First, it cannot be applied if the reason for affirming the decision was not raised in any way at trial.[158] Second, if further factual development is needed before the right reason can be found to affirm the decision, the rationale is inapplicable.[159]

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155. Driscoll v. Commonwealth, 417 S.E.2d 312, 313 (Va. Ct. App. 1992).
156. Mason v. Commonwealth, 373 S.E.2d 603, 607 (Va. Ct. App. 1988).
157. Blackman v. Commonwealth, 613 S.E.2d 460, 465 (Va. Ct. App. 2005).
158. *Driscoll*, 417 S.E.2d at 313-14.
159. *Id.* at 313.

Third, it may not be used when the trial court has confined its decision to a specific ground and more facts are needed to find the right reason.[160] Fourth, the Commonwealth cannot use the rationale as a "subterfuge for a constitutionally prohibited cross-appeal."[161] Whether these exceptions to the "right for the wrong reason" rationale are going to apply to a particular case is heavily fact-dependent.

The "right for the wrong reason" rationale should not permit the Commonwealth to present new theories of guilt. Under the first limitation, the Commonwealth is required to raise the factual theory in at least some fashion for it to be considered on appeal. If they do, the defendant has the right and responsibility to reply to the theory. If it is not raised, a defendant should not be required to preempt a theory of guilt at trial. Because the facts of a criminal case are often unclear, they can be subject to any number of interpretations. Requiring a criminal defendant to respond to theories not presented against her at trial would effectively require a defendant to concoct all the possible interpretations of the facts under which she might be found guilty, communicate them to the judge or jury, and then present evidence and arguments against those theories while the Commonwealth sits silently. Unfortunately, by refusing to restrict the Commonwealth to its trial theory in *Bolden*,[162] this is the reality that criminal defendants face in Virginia today.

Under the second limitation, if the trial court rejected the rationale that the Commonwealth then attempts to assert more completely on appeal, it should be prohibited by Rules 5A:18 and 5:25.[163] Therefore, if the prosecution at trial begins to assert a theory of guilt, which is then rejected by the court, the Commonwealth should not be allowed to bring it back to life on appeal. Although this may sound like an unlikely occurrence, comparing the *Bolden* trial record[164] with the appellate argumentation[165] demonstrates how this could happen.

160. *Id.* at 314.
161. *Id.* at 313; *see also supra* note 58.
162. 654 S.E.2d 584, 586 (Va. 2008).
163. *Driscoll*, 417 S.E.2d at 313.
164. Transcript of Record, *supra* note 19, at 43.
165. Brief of the Commonwealth, *supra* note 32, at 12.

At trial in *Bolden*, when one of the Commonwealth's witnesses attempted to connect the gun to the drugs found on Bolden, unprompted by a question from the Commonwealth's attorney, Bolden's counsel objected and the trial court agreed with defense counsel's interpretation of the testimony as meaning only that a gun was found in the vehicle.[166] The prosecutor then continued with his proximity theory, never to return to the connection between guns and drugs.[167] At this point in the trial, the trial court rejected the theory of guilt that the Commonwealth later asserted on appeal. As the Commonwealth pushed the theory no further at trial, and the only testimony making the link was rejected by the trial court, Bolden no longer needed to put on evidence or argument to disprove this claim. On appeal, however, the Commonwealth reasserted this theory of guilt because it was the only one that actually proved constructive possession.[168] By refusing to restrict the Commonwealth to its trial court theories with its decision in *Bolden*,[169] the Virginia Supreme Court has encouraged the Commonwealth to sandbag its most incriminating theories until it is before the appellate court, where significant procedural advantages virtually prohibit a defendant from responding.[170] As long as a prosecutor can make a defendant "look guilty" enough to secure a conviction at trial, the conviction can be upheld on appeal if the new theory asserted later sufficiently satisfies the statutory or common law requirements.

The third and fourth limitations to the "right for the wrong reason" rationale will only apply to new theories of guilt in very limited circumstances. If a trial court, in pronouncing guilt, specifically states the interpretation of the facts under which the defendant is found guilty, then the third exception to the rationale should prohibit the Commonwealth from raising a new interpretation on appeal.[171] The fourth exception will only apply when the Commonwealth attempts to perform a cross-appeal[172] in which it promotes a new theory of guilt.

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166. *See supra* notes 30-35 and accompanying text.

167. *See supra* notes 30-35 and accompanying text.

168. Eckhart v. Commonwealth, 281 S.E.2d 853, 855 (Va. 1981) (holding proximity is insufficient to prove constructive possession).

169. 654 S.E.2d 584, 586 (Va. 2008).

170. *See supra* Part II.D.

171. Driscoll v. Commonwealth, 417 S.E.2d 312, 314 (Va. Ct. App. 1992).

172. *Id.* at 313; *see also supra* notes 55-59 and accompanying text.

This Note does not argue that the "right for the wrong reason" rationale should be abolished, just that it should not be grounds for the Commonwealth to assert new theories of guilt on appeal. The "right for the wrong reason" rationale should be restricted to cases like *McClellan v. Commonwealth*.[173] In that case, McClellan was in his car in an apartment building's parking lot when he was approached by a police officer.[174] This encounter eventually led to the police officer finding a concealed weapon in the vehicle because McClellan kept reaching for the jockey box.[175] The trial court held that the gun was admissible, because McCellan had been seized based on the police officer's reasonable suspicion.[176] The court of appeals, however, affirmed the suppression because it found that McClellan was never seized, meaning the evidence was found during a consensual encounter.[177] Appellate courts are able to "'affirm the judgment of a trial court when it has reached the right [decision] for the wrong reason,' [only] so long as the correct reason and its factual basis [are] presented at trial."[178] Therefore, "[b]ecause the prosecutor at trial argued there was no detention, [the court found] that the trial court in this case was right for the wrong reason."[179] Unlike in *McClellan*, the prosecution in *Bolden* never argued that there was constructive firearm possession because of the drug possession.[180] Neither the correct reason nor its factual basis were ever presented at trial, and therefore the "right for the wrong reason" rationale was inapplicable to Bolden's appeal.[181]

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173. 554 S.E.2d 699, 704 (Va. Ct. App. 2001).
174. *Id.* at 701.
175. *Id.* at 701-02.
176. *Id.* at 704.
177. *Id.*
178. *Id.* (quoting Driscoll v. Commonwealth, 417 S.E.2d 312, 313-14 (Va. Ct. App. 1992)).
179. *Id.*
180. *See* Transcript of Record, *supra* note 19, at 43-44.
181. It should be noted that the Commonwealth never argued the "right for the wrong reason" rationale as an exception to Rule 5:25 in its brief. *See* Brief of the Commonwealth, *supra* note 32, at 6-13.

IV. THE ADVERSARIAL SYSTEM OF JUSTICE

A. Case Law

The single factor demanding that the Commonwealth present its theory of guilt at trial, that the evidence support that theory of guilt, and that the appellate argumentation must contain that same theory of guilt, is Virginia's adversarial system of justice.[182] The adversarial system relies on the parties to know their case best and demands that they, not the judge, present the facts and arguments on their behalf.[183] An adversarial system requires a litigant to present evidence at trial to establish facts, and to use those facts to make arguments with respect to how they wish the applicable law to apply to the facts of the case.[184] Under an adversarial model, courts must respect the argumentative and strategic choices made by attorneys, and not supplement them with their own theories as to how the case should be run.[185]

These same principles apply in criminal trials.[186] Furthermore, criminal defendants are not guaranteed that their trial counsel will make every possible argument at trial, and failure to do so is not considered ineffective assistance of counsel.[187] That a defense attorney should not be reasonably expected to advance every possible argument in her client's defense is significant because it demonstrates that defense attorneys are not constitutionally required to conceive of every possible theory of guilt not advanced

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182. *See infra* notes 210-13 and accompanying text.

183. *See* Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

184. *See id.*; Sanchez-Llamas v. Oregon, 548 U.S. 331, 357 (2006).

185. *See* Strickland v. Washington, 466 U.S. 668, 681 (1984) ("Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected ...."); *see also Castro*, 540 U.S. at 386-87 (Scalia, J., concurring) ("The injustice caused by letting the litigant's own mistake lie is regrettable, but incomparably less than the injustice of *producing* prejudice through the court's intervention.").

186. Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversar[ial] system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

187. *See* Engle v. Isaac, 456 U.S. 107, 133-34 (1982).

at trial.[188] The *Bolden* decision,[189] on the other hand, requires defense attorneys to do exactly that.[190] In an adversarial criminal justice system, it is the responsibility of prosecutors to collect the evidence, marshal the facts, and present arguments applying those facts to the law under which a criminal defendant is being prosecuted.[191] Likewise, it is the criminal defense attorney's responsibility to "aggressively challenge[ ] the evidence presented by the other side."[192] A fundamental principle of this system of criminal justice is that a criminal defendant must be able to fully confront the prosecution's case.[193] Only by forcing the Commonwealth to flesh out its theory of guilt in open court, and therefore giving the criminal defendant a full opportunity to rebut that theory, may a trial perform its fact-finding function while assuring "fairness in the adversar[ial] criminal process."[194]

A party to litigation, including the Commonwealth in criminal cases,

> voluntarily [chooses its] attorney as [its] representative in the action, and ... cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of [her] lawyer-agent ....[195]

As such, the Commonwealth should be bound by the facts and arguments its representatives present at trial in criminal cases.

Under an adversarial model, "[i]t is fundamental ... that the selfish interest of the litigant provides the best guarantee that a claim will be effectively asserted."[196] Judges act inappropriately

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188. *See id.*

189. Bolden v. Commonwealth, 654 S.E.2d 584, 585-86 (Va. 2008).

190. *See supra* text accompanying note 162.

191. *See, e.g.*, Wheatley v. Wicomico County, 390 F.3d 328, 335 (4th Cir. 2004) ("Lawyers have a duty not just to submit evidence, but to provide some focus [as] to their argument.").

192. Granviel v. Texas, 495 U.S. 963, 964 (1990) (Marshall, J., dissenting).

193. *See* Simmons v. South Carolina, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring) ("[O]ne of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against [her].").

194. United States v. Morrison, 449 U.S. 361, 364 (1981).

195. Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962).

196. Piper v. Chris-Craft Indus., 430 U.S. 1, 62 (1977) (Stevens, J., dissenting).

when they consider arguments outside those put forth by the litigants.[197] Not only does the judge lack an intricate knowledge of the facts of the case,[198] but the judge is meant to be a neutral arbiter, not a wing of either party.[199] A criminal defendant is presumed innocent, and does not have to put on evidence in her own defense.[200] For a trial court to infer a theory of guilt not presented by the prosecution is contrary to the underlying theories of the adversarial system[201] and violates the concept that a criminal defendant does not have to present evidence in her own defense.[202] If a criminal defendant had to respond to new theories of guilt considered sua sponte by the trial court, criminal defense attorneys would have to predict the theories swimming around in the mind of the judge, present those arguments against their client in open court, and then rebuff them. This scenario is such a perversion of the adversarial model that it hardly requires refutation.

The possibility that a trial court might convict a criminal defendant under a theory not presented is obscurely, yet essentially, related to the Commonwealth's ability to present a new theory of guilt on appeal. Particularly where the prosecution's trial theory was insufficient to meet the doctrinal requirements to secure a conviction,[203] an appellate court then affirming a conviction based on a new theory sends the message not only that the trial court could have considered that new theory, but that the court did in fact consider it. If the trial court did not consider the theory, and simply convicted based on the inadequate trial court presentations of the prosecution, theoretically the conviction should be reversed.[204] This

197. *See* Eriline Co. v. Johnson, 440 F.3d 648, 654 (4th Cir. 2006) (quoting United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring)).

198. "[T]he party who brings a suit is master to decide what law he will rely upon ...." The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913).

199. *See Eriline*, 440 F.3d at 654; Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 279 (2002).

200. *See* Dotson v. Commonwealth, 199 S.E. 471, 473 (Va. 1938).

201. *See Eriline*, 440 F.3d at 654.

202. *See Dotson*, 199 S.E. at 473.

203. This is precisely what happened in *Bolden*. The prosecution's trial strategy was to argue that Bolden's proximity to the weapon proved he constructively possessed it, but under Virginia law proximity is doctrinally insufficient to prove constructive possession. *See supra* notes 30-37 and accompanying text.

204. *See* Kelly v. Commonwealth, 584 S.E.2d 444, 450 (Va. Ct. App. 2003) (Elder, J., dissenting) (quoting Archer v. Commonwealth, 492 S.E.2d 826, 832 (Va. Ct. App. 1997))

is how the Virginia Supreme Court should have resolved *Bolden*, but it did not.[205] By allowing the Commonwealth to present new theories of guilt on appeal,[206] the court in *Bolden* implicitly held that trial judges may convict criminal defendants under their own interpretation of the facts. The trial judge need never make this alternate theory available to the defendant to refute, and the Commonwealth may then use this theory on appeal in order to supplant faulty trial advocacy and save the case. Allowing a judge to convict a defendant based on an unarticulated theory is not only contrary to an adversarial system of justice, but also it plainly violates the constitutional due process requirement that a defendant be afforded the opportunity to confront the case against him.[207]

Rules 5A:18 and 5:25 prohibit an appellate court from assuming that reasons supporting a particular position "were proffered but not made part of the record."[208] The presumption that the Commonwealth may supplement its trial court advocacy with additional theories of guilt on appeal seems to be directly at odds with a fundamental precept of the American adversarial system of justice, namely that "a judge ... does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides [the case] on the basis of *facts and arguments pro and con adduced by the parties*."[209] Put simply, an appellate court should not be able to affirm a conviction by assuming that the trial court considered an argument never presented, especially when the record itself would otherwise demand reversal.[210] This principle distinguishes adversarial and inquisitorial judicial systems, and also paves the way for the even application of procedural default rules that is essential to a just appellate system.[211]

The adversarial process does not end once a trial is concluded. On appeal, appellants are required to submit assignments of error and

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(noting that theories of innocence shall not be upheld on appeal if plainly wrong).

205. Bolden v. Commonwealth, 654 S.E.2d 584, 585-87 (Va. 2008).

206. *Id.*

207. *See* U.S. CONST. amend. VI; Simmons v. South Carolina, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring).

208. Lee v. Lee, 404 S.E.2d 736, 738 (Va. Ct. App. 1991) (en banc).

209. McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991) (emphasis added).

210. *See supra* note 204 and accompanying text.

211. Sanchez-Llamas v. Oregon, 548 U.S. 331, 357 (2006) (citing *McNeil*, 501 U.S. at 181 n.2).

supply briefs supporting those assignments, while appellees brief their responses.[212] Parties are then limited to those errors and arguments as briefed when pressing their appeal.[213] There is a clear link between a party's responsibility to develop arguments at trial and the appellate court's responsibility to refuse to entertain arguments not developed by fact *and* argument. As the Fourth Circuit recently stated:

> The adversary system cannot function properly if lawyers are allowed to dump arguments on a ... court at the last minute, without developing them during the course of litigation....
>
> ....
>
> ... [I]t is insufficient that the evidentiary basis for their ... argument may exist somewhere in the record. An appellate court "cannot assume the functions of a special master and roam at large over the record, ... any attempt on its part to do so would probably do a great deal more harm than good."[214]

The principles of Virginia's adversarial system of justice demand that the theory of guilt upon which the Commonwealth relies on appeal in a criminal case must have been presented to the trial court.[215] A trial court acts recklessly and irresponsibly when it assumes the Commonwealth meant to assert or insinuated a theory of guilt that the evidence may or may not show upon close examination when that theory is not clearly espoused.[216] Likewise, it is simply not the responsibility of appellate courts to scour the trial court record looking for statements or evidence to support an alternate theory of guilt on appeal.[217]

When the record fails to establish that a particular theory of guilt was raised in the trial court, Rules 5A:18 and 5:25 should prevent an appellate court from assuming that the "reasons were proffered but not made a part of the record."[218] Given that criminal defendants

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212. *See, e.g.*, VA. SUP. CT. R. 5A:20-21; VA. SUP. CT. R. 5:27-28; VA. SUP. CT. R. 5:17(c).

213. *See, e.g.*, Buck v. Commonwealth, 443 S.E.2d 414, 418 (Va. 1994) (Hassell, J., dissenting).

214. Wheatley v. Wicomico County, 390 F.3d 328, 335 (4th Cir. 2004) (quoting Hutchinson v. Fidelity Inv. Ass'n, 106 F.2d 431, 436 (4th Cir. 1939)).

215. *See id.*

216. *See supra* notes 205-09 and accompanying text.

217. *See Wheatley*, 390 F.3d at 335.

218. Lee v. Lee, 404 S.E.2d 736, 738 (Va. Ct. App. 1991) (en banc).

do not have the right to surprise the Commonwealth with new evidence at trial,[219] and that *Hudson* prohibits criminal defendants from presenting new theories of innocence on appeal,[220] equity, symmetry, and basic fairness demand that the Commonwealth be prohibited from surprising a criminal defendant with a new theory of guilt on appeal.

B. Risks of Allowing New Theories of Guilt on Appeal

One of the most logical reasons for prohibiting the Commonwealth from presenting new theories is judicial economy. Presenting all reasonable theories of guilt at trial reduces the burden placed upon appellate courts. When the Commonwealth presents a new theory on appeal, in order to effectively adjudicate the issue, the appellate court must search the trial record to see whether the evidence supports the new theory proposed by the Commonwealth's brief.[221] Like the reasons that justify rejecting new appellate arguments by defendants, requiring prosecutors to present all reasonable theories of guilt promotes "efficient judicial administration"[222] by guarding against reversals and mistrials,[223] particularly when a court of appeals accepts a new theory, which then must be reversed, or at a minimum, reevaluated by the Virginia Supreme Court.[224]

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219. In the context of a surprise argument brought on by the defendant in a criminal trial, at which point the Commonwealth requested and received a continuance, the Virginia Supreme Court stated:

> Uncovering the truth is the paramount goal of the adversary system. All the rules of decorum, ethics, and procedure are meant to aid the truth-finding process. Ambush, trickery, stealth, gamesmanship, one-upsmanship, [and] surprise have no legitimate role to play in a properly conducted trial.... We agree with what Justice White said, writing in *Williams*: "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."

Bennett v. Commonwealth, 374 S.E.2d 303, 311 (Va. 1988) (quoting Williams v. Florida, 399 U.S. 78, 82 (1970)).

220. Commonwealth v. Hudson, 578 S.E.2d 781, 786 (Va. 2003).

221. *See, e.g.*, *Wheatley*, 390 F.3d at 335 (discussing the inadvisability of such a task for appellate courts).

222. *Lee*, 404 S.E.2d at 737.

223. *See* Woodson v. Commonwealth, 176 S.E.2d 818, 820 (Va. 1970).

224. *See, e.g.*, Bolden v. Commonwealth, 654 S.E.2d 584, 585-86 (Va. 2008).

More significantly, requiring the Commonwealth to present its strongest theories of guilt at trial discourages the Commonwealth from sandbagging its best arguments and interpretations of the evidence until a point where the ability of a criminal defendant to refute them is severely limited.[225] When the Commonwealth presents one theory of guilt at trial and then changes it on appeal, the defendant's arguments and evidence presented at trial will be inapplicable because they were necessarily targeted to respond to the previous theory.[226] In this way, the *Bolden* decision[227] allows the Commonwealth "to play 'fast and loose'"[228] with the Virginia criminal justice system.

Allowing the Commonwealth to switch theories of guilt is particularly troubling considering that, in criminal appeals, the evidence is viewed in the "light most favorable ... to the Commonwealth."[229] At trial, the Commonwealth's evidence must be viewed as if the defendant is innocent until proven guilty.[230] In contrast on appeal, it is viewed in the light most favorable to the Commonwealth.[231] The "light most favorable" appellate standard would make any new Commonwealth theory of guilt appear even more incriminating than it would have looked at trial because the facts are interpreted in a way disadvantageous to the defendant.[232] Furthermore, on appeal, the question is not whether a defendant is guilty beyond a reasonable doubt, but whether "*any* rational trier of fact" could have found the defendant guilty beyond a reasonable doubt.[233] By combining the "light most favorable" and the "rational trier of fact" standards, the Commonwealth is given incredible advantages on appeal, which could be used in combination with new theories of guilt to bolster what might have been a questionable theory of guilt at trial.

225. *See Wheatley*, 390 F.3d at 335; Bennett v. Commonwealth, 374 S.E.2d 303, 311 (Va. 1988).

226. See *supra* notes 131-35 and accompanying text for an explanation of why criminal defendants cannot postulate new arguments in response to the Commonwealth's new theories.

227. 654 S.E.2d at 586.

228. Buck v. Commonwealth, 443 S.E.2d 414, 418 (Va. 1994) (Hassell, J., dissenting).

229. Commonwealth v. Hudson, 578 S.E.2d 781, 786 (Va. 2003).

230. Dotson v. Commonwealth, 199 S.E. 471, 473 (Va. 1938).

231. *Hudson*, 578 S.E.2d at 786.

232. *Compare id.* (describing the appellate standard), *with Dotson*, 199 S.E. at 473 (describing the trial standard).

233. Haskins v. Commonwealth, 602 S.E.2d 402, 405 (Va. Ct. App. 2004) (quotation omitted).

Combining these procedural advantages with a new theory of guilt would effectively eviscerate the burden of proof and the presumption of innocence that are sacred to the criminal justice system.[234] This combination removes the requirement that the Commonwealth prove a defendant guilty beyond a reasonable doubt when the court replaces the innocent until proven guilty standard at trial with a "light most favorable" standard on appeal.[235]

C. Theories of Guilt as a Matter of Law

In its brief to the Virginia Supreme Court in *Bolden*, the Commonwealth suggested that, although a theory of guilt may not have been presented at trial, a trial court should be able to consider that theory "as a matter of law once the requisite evidence ... was adduced at trial" if that theory exists in case law.[236] The consequences of such a rule would gravely damage Virginia's adversarial system.[237] Additionally, allowing trial courts to consider arguments or theories sua sponte would quickly spiral far beyond simple theories of guilt.[238]

Allowing judges to consider theories of guilt that exist within the case law but not presented at trial is more than absurd and it blatantly contradicts a defendant's due process rights.[239] If a trial judge could convict a defendant based on an unarticulated theory, the defendant in a criminal trial would never even hear the arguments being used to convict her of a crime.[240] Such an outcome would obviously obliterate "one of the hallmarks of due process in our adversary system[,] ... the defendant's ability to meet the State's

234. *See Dotson*, 199 S.E. at 473 (noting the importance of the presumption of innocence).

235. *See Hudson*, 578 S.E.2d at 786.

236. Brief of the Commonwealth, *supra* note 32, at 12; *see also supra* note 32.

237. *See supra* Part IV.B (discussing essential elements of adversarial system).

238. Some scholars have already expressed concern that "raising issues sua sponte is not an uncommon practice." Milani & Smith, *supra* note 199, at 248-50.

239. *See* U.S. CONST. amend. VI.

240. This is conceivably exactly what transpired in Bolden's criminal trial. The Commonwealth's only theory at trial was that Bolden's proximity to the weapon meant that he possessed it. *See supra* note 32 and accompanying text. Despite proximity being an insufficient basis for finding constructive possession, Jones v. Commonwealth, 439 S.E.2d 863, 864 (Va. Ct. App. 1994), the trial court convicted Bolden of possessing the firearm without comment. Transcript of Record, *supra* note 19, at 46.

case against [her]."[241] Convicting a defendant under such an invisible theory would contravene the judicial mandate that "to retain the 'general atmosphere of impartiality' required of a fair tribunal, ... [a judge] must not—under any circumstance—become an advocate for the prosecution."[242]

There are a multitude of legal arguments that trial courts do not consider sua sponte,[243] and carving out an exclusion for theories of guilt makes no more sense than forcing courts to inject other legal theories into a trial when neither party has reason to resort to them. One common example is hearsay evidence. At times, although a party could object to hearsay evidence being offered by the opposition, that party does not object for tactical reasons.[244] Along the same lines, often attorneys will not request a cautionary instruction on possibly damaging evidence to avoid drawing the jury's attention to that evidence unnecessarily.[245] In accordance with a judge's responsibility to adjudicate and not advocate,[246] a trial court should refrain from challenging hearsay evidence or supplying a cautionary instruction unless it would be clear error to fail to do so.[247] Likewise, a court is not required to consider a statute of limitations defense without prompting by an attorney.[248] When a party fails to plead the

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241. Simmons v. South Carolina, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring).

242. United States v. Godwin, 272 F.3d 659, 678 (4th Cir. 2001).

243. *See, e.g.*, Eriline Co. v. Johnson, 440 F.3d 648, 654 (4th Cir. 2006) ("*Sua sponte* consideration of a statute of limitations defense should be done sparingly ... in those narrow circumstances where it is authorized."); Commercial Distribs. v. Blankenship, 397 S.E.2d 840, 847 (Va. 1990) (refusing to decide hearsay issue sua sponte).

244. *See* Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005).

245. One example occurred in *Commercial Distributors v. Blankenship*:

> Although opposing counsel was entitled to a cautionary instruction upon request, he was also free to wave it if he chose. As we commented in *Manetta v. Commonwealth*, counsel may wish to avoid such an instruction for sound tactical reasons. "The court [is] not required to give such an instruction *sua sponte*. Such instructions may sometimes give particular emphasis to the portions of testimony specifically mentioned by the judge, a result the parties may wish to avoid."

397 S.E.2d at 847 (quoting Manetta v. Commonwealth, 340 S.E.2d 828, 830 n.2 (Va. 1986)) (citations omitted); *see also* Thomas v. Commonwealth, 607 S.E.2d 738, 743 (Va. Ct. App. 2005) (citing the adversarial system as a reason not "[t]o compel a trial judge to give a cautionary instruction").

246. *See supra* notes 200-04 and accompanying text.

247. *See Thomas*, 607 S.E.2d at 743.

248. *See, e.g.*, *Eriline Co.*, 440 F.3d at 654 ("As a defense waivable by the inaction of a party, the statute of limitations bears the hallmarks of our adversarial system of justice, a

statute of limitations as a defense, that defense is waived.[249] Virginia courts should treat theories of guilt in the same manner. Indeed, theories of guilt not presented at trial should be waived on appeal.

As with evidentiary objections and statutory defenses, a judge should not consider a theory of guilt unless advocated by the prosecution at trial. In an adversarial system, the Commonwealth's attorneys are assumed to know the facts of the case and law surrounding those facts to a greater extent than the trial judge,[250] and to permit the judge to search the entire criminal case law for theories of guilt not argued by the Commonwealth at trial is truly an absurd proposition. A trial judge simply will not have the mastery of the factual circumstances of any given case that the prosecution and defense have.[251] Furthermore, the judge will generally lack a specific knowledge of the case law directly on point to provide her with potential theories of guilt not presented in open court.[252]

Taken to its extreme—but not illogical—conclusion, the idea that a trial judge may consider arguments that are not made on the record but may be inferred from the evidence adduced would render trial attorneys irrelevant. Under such a system, the judge would be presumed to have a complete grasp of all possibly applicable law to any given set of facts, those facts would be presented to the trial court in some fashion,[253] the judge would then consider the facts using her all-encompassing knowledge of the Commonwealth's case, constitutional law, and statutory provisions in pronouncing a judgment. An attorney would only be necessary on appeal to advance theories of the evidence and the points of law that the trial court could have considered. Conceivably, attorneys would not even be necessary on appeal, as appellate judges could be presumed to have the same body of knowledge as trial judges. Taken to this

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system in which the parties are obliged to present facts and legal arguments before a neutral and relatively passive decision-maker.").

249. *Id.* at 653-54.

250. *See supra* Part IV.A.

251. *See* Milani & Smith, *supra* note 199, at 278-79.

252. *See supra* note 198 and accompanying text.

253. Conveniently for the Commonwealth, "[o]ur system of justice is, and has always been, an inquisitorial one at the investigatory stage ..., and no other disposition is conceivable." McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991).

logical extreme, "[the Commonwealth] would never be responsible for the neglect of its ... attorney[s]"[254] because a trial or appellate judge could simply do their job for them. Such a regime would "undermine the adversarial system."[255]

Obviously the situation just described is an extreme distortion of the adversarial model of criminal adjudication. However, this scenario highlights the risks in removing the safeguards of the adversarial system and replacing them with an unchecked inquisitorial authority. The Virginia Supreme Court opened the door to an inquisitorial model in *Bolden* when it refused to restrict the Commonwealth to its trial court theories of guilt.[256] The *Bolden* decision allows criminal defendants to be convicted using theories of guilt considered sua sponte by the trial court judge, theories that are then articulated and argued for the first time on appeal.[257]

CONCLUSION

The danger posed by a failure to extend Rules 5A:18 and 5:25 to prevent new theories of guilt on appeal is not merely theoretical. Although Virginia case law supports an interpretation of Rules 5A:18 and 5:25 that prohibits the Commonwealth from arguing new theories of guilt on appeal,[258] the lack of a clear ruling by the Virginia Supreme Court has meant that the courts of appeals have been unable to apply that interpretation.[259] As recently as September 25, 2007, an appellate court allowed the Commonwealth to assert a new theory of guilt on appeal.[260] In that case, the court of appeals explicitly stated that although

> [t]he Commonwealth did not appear to advance exactly the same theory of guilt at trial as it [did] on appeal, ... Rule 5A:18 applies only to rulings of the trial court offered on appeal as a basis for reversal, and we are aware of no authority to prevent an

254. Smith v. Bounds, 813 F.2d 1299, 1304 (4th Cir. 1987).
255. *Id.*
256. Bolden v. Commonwealth, 654 S.E.2d 584, 586 (Va. 2008).
257. *See supra* Part I.
258. *See supra* Part II.A.
259. *See supra* Part II.C.
260. Franklin v. Commonwealth, No. 09868-06-2, 2007 WL 2766197, at *6 (Va. Ct. App. Sept. 25, 2007).

> appellee from raising a previously unexpressed theory of guilt on which the trial court may have relied.[261]

The essential fairness of every criminal trial and appeal is at risk in Virginia. In *Commonwealth v. Hudson*, the Virginia Supreme Court rightfully reaffirmed that a criminal defendant is restricted to the theories of innocence that he argued at trial.[262] It is time for the supreme court to rebalance the scales of justice and grant criminal defendants the same right to confront all legal theories and arguments for the first time at trial that the court grants to both parties in civil appeals and to the Commonwealth in criminal cases. Alternatively, in the event that current Virginia case law does not require new theories of guilt to be prohibited by Rules 5A:18 and 5:25, the Virginia Supreme Court should take the first opportunity it has to correct this injustice by reversing the holding in *Bolden* and expressly stating that the Commonwealth may not argue new theories of guilt on appeal in criminal trials. Only the adversarial system hangs in the balance.

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261. *Id.* at *6 n.2 (citations omitted).

262. 578 S.E.2d 781, 786 (Va.), *cert. denied*, 540 U.S. 972 (2003).

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