Procedural Defaults in Virginia Trial Courts:

The Adversarial Model & The Imperative of Neutrality

by The Honorable D. Arthur Kelsey

The Underlying Rationale

Procedural default law is sometimes thought of as little more than a spoiler—an antonym of justice made worse by its occasional arbitrary application. Without expressly acknowledging it, some judges subscribe to this thesis. They may enforce procedural defaults, but only reluctantly, as if to signal their disapproval of this seemingly necessary evil. I do not share this view of the subject. Though not every procedural default rule can be justified as a balanced application of higher principles, I believe most can. These justifying principles cluster around two core features of American law, neither of which we can do without.

The first arises out of the very structure of our courts. Unlike continental courts governed by civil law codes, common law judicial systems use an adversarial model of adjudication. The litigants—not the judges—determine the issues to be decided, the facts to be presented, and the range of remedies to be sought. By necessity, the adversarial model "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." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). In contrast to the "inquisitorial legal system" prevalent in European countries, where the civil law judge conducts the "factual and legal investigation himself," the American adversarial model "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685 (2006) (Roberts, C.J.) (emphasis in original and citation omitted).

Procedural default rules "take on greater importance" in an adversarial model because they assign the sole responsibility for carrying out a litigable task to the person assigned the task: the litigant. *Id.* at 2686. In this sense, procedural default rules represent the carefully calculated price litigants pay for the freedom of participating in self-directed litigation. Those who think the price too high should consider the alternative: a system where the judge acts more like an "inquisitor," *id.*, unilaterally selecting the facts to be heard, the issues to be addressed, and the law to be considered. True, an inquisitorial judge would hardly countenance a procedural default. Doing so, after all, would be an admission of his mismanagement of the litigation. But a common law judge should have no such disinclination, since he merely decides the case solely "on the basis of facts and arguments pro and con adduced by the parties." *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991)). To many, myself included, the neutrality of the judge in our litigant-centric model of justice is well worth the price we pay for it.

The second justifying principle also involves the concept of neutrality—not of the judge as the decisionmaker, but of the law as the rule of decision. No competitive contest takes place without time limits, boundaries, and agreed-upon methods of recording the score. The existence of these rules is a truism we accept as inherent to any contest. Truly neutral procedural rules allow courts to set limits and mark off boundaries without regard to which side stands to gain or lose. At whatever time the official clock stops, it does so at the appointed moment no matter which side has the higher score. And at whatever place the out-of-bounds lines have been marked, they remain fixed no matter who steps over them.

This is as it should be, for procedural rules lose their legitimacy the moment they lose their neutrality. Selectively suspending procedural rules in the hope of achieving some abstract notion of as-applied fairness in every case would devolve, if consistently done, into an *ad hoc* exercise of subjective justice: one which would not only armor-up any outcome-determinative biases of jurists, but also deploy these predispositions into open conflict with neutral principles of law.

On the other hand, when courts apply procedural rules neutrally to every litigant, to every lawyer, to every case—without partiality—everyone else knows exactly what is expected of them. To be sure, there is little point in having procedural rules "if they amount to nothing more than a juristic bluff—obeyed faithfully by conscientious litigants, but ignored at will by those willing to run the risk of unpredictable enforcement."[1] The more unbending the rules, therefore, the less likely anyone will ever be tempted to bend them.

That said, the courtroom contest presumes advocates know well the rules of engagement. This presumption includes not only the many written rules, but also the interlinear caveats and qualifications that bedevil even the best among us. I offer no opinion on whether any given rule faithfully represents the shared ideals of our adversarial model or best serves the imperative of neutrality. I leave that judgment to others. Instead, I hope merely to restate some (but not all) of the rules that often result in procedural default in one form or another—so that, if for no other reason, the presumption of knowledge not be in vain.

Waiver Before Trial[2]

Affirmative Pleadings

Virginia law treats the affirmative pleading as the "*sine qua non* of every judgment or decree,"[3] making a litigant's pleading "as essential as his proof."[4] A "court may not award particular relief unless it is substantially in accord with the case asserted" in the pleadings.[5] "Thus, care must be taken that the pleading sets forth all of the material facts."[6] Both in principle and in practice, Virginia courts take seriously the maxim that "every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense."[7]

Raise-or-waive examples include claims for punitive damages,[8] spousal support,[9] implied and express warranties,[10] fraud,[11] express contract,[12] quasi-contract,[13] as well as claims inadequately addressing specific types of easements,[14] whether a trespass occurred on surface waters rather than submerged land,[15] property boundaries,[16] unlawful exclusion from access to corporate records,[17] and mistaken interpretation by county officials of a zoning ordinance.[18]

If a litigant discovers his mistake early in the litigation, the liberality of rules authorizing amendments may save him. But if he forgets altogether or simply waits too late in the process, he may find the claim forever forfeited. A jury verdict in an amount higher than the *ad damnum* request, for example, must be vacated to the extent of the excess because the *ad damnum* cannot be remedied by a post-verdict amendment.[19]

Even the amendment process, however, involves the risk of procedural default. If a plaintiff loses a demurrer and chooses to file an amended pleading in conformity with the trial court's ruling, he does not forfeit any later appeal of the adverse demurrer ruling if the order reflects his objection to it. "On any appeal of such a case the demurree may insist upon his original pleading, and if the same be held to be good, he shall not be prejudiced by having made the amendment."[20] The Virginia Supreme Court, however, has held that "when a circuit court sustains a demurrer to an amended motion for judgment which does not incorporate or refer to any of the allegations that were set forth in a prior motion for judgment, we will consider only the allegations contained in the amended pleading to which the demurrer was sustained."[21]

Another variant of procedural default, *res judicata*, should also be considered. In 2003, a divided Virginia Supreme Court held the narrow "same evidence test" exclusively governed claim preclusion principles under Virginia law.[22] That holding has been superseded by the recent promulgation of Rule 1:6, which broadened *res judicata* to cover, with some

exceptions, all unpled claims arising out of the same "conduct, transaction, or occurrence."[23] Such unpled claims will be "extinguished regardless of whether the claimant is prepared in the second action to present evidence or theories of the case not presented in the first action, or to seek remedies or forms of relief that were available but not demanded in the first action."[24]

Defensive Pleadings

Not filing any defensive pleadings triggers one of the most notorious of all procedural defaults: a default judgment. A party in default, if not relieved from it, will be deemed to have admitted liability, conceded the facts in the complaint, waived all objections to the admissibility of evidence, and waived any right to a jury trial.[25] The default, moreover, can be partial. If the defendant files a demurrer as to some counts in a complaint, but not others, the others will be in default absent a timely responsive pleading directly addressing them. "Rule 3:8 provides no shelter from the obligation to draft and file a timely answer with respect to the counts that are not demurrable."[26]

Procedural default principles likewise extend to matters of personal jurisdiction, service of process and venue. A general appearance waives "defects in the process and the service thereof"[27] unless an "objection to jurisdiction is made prior to or simultaneously with" a responsive pleading addressing the merits.[28] Venue too "is a privilege which may be waived" and, if it is not claimed, "will be lost."[29] Similar forfeitures result from the failure to plead affirmative defenses like contributory negligence[30] and the statute of limitations.[31] A request for a jury trial may also be forfeited if not timely made. As applied to any party, "the failure to serve and file a demand as required by Rule 3:21 constitutes a waiver of the right to jury trial."[32]

Discovery Defaults

A claim or defense can be forfeited during the discovery process almost as easily as in the pleadings stage. Violation of an order compelling discovery can lead to a dismissal or default.[33] Short of that, discovery violations may cause the trial court to deem facts "as established" or to prohibit a party "from introducing designated matters in evidence."[34]

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Seeking to provide uniformity and predictability, Rule 1:18 authorizes the use of pretrial scheduling orders. They appear to be "gaining favor among the bar and the trial courts" of Virginia.[35] "To be effective," however, "pretrial deadlines in Rule 1:18 scheduling orders must be enforced by Virginia trial courts."[36] "To be sure, a policy of not enforcing such orders would undermine the reliability of the judicial process and jeopardize the legitimacy of a host of other procedural rules which, like a mere scheduling order, provide a quieting predictability to litigants and courts alike."[37]

Before the advent of Rule 1:18's pretrial scheduling order, the most common defaults involved the untimely disclosure of expert witnesses. Even when the order is used, this problem persists. Some litigants mistakenly treat the scheduling order's expert witness cutoff date as a failsafe, providing protection against a charge of untimeliness irrespective of the earlier due date of an interrogatory seeking expert disclosures or the receipt of an opinion from a retained expert. Instead, "the deadlines in the Pretrial Order serve as ultimate limits. Depending on the circumstances, the duty to supplement required by Rule 4:1(e) may nonetheless require an earlier disclosure."[38]

Similarly, some who violate the expert discovery deadlines appear to think the exclusion of an inadequately or untimely disclosed expert opinion should still be the exception, not the norm. Rule 1:18's pretrial scheduling order, however, warns that experts "will not *ordinarily* be permitted to express any non-disclosed opinions at trial . . . . To determine if [your case] is an ordinary case (where the non-disclosed opinion should be excluded) or the extraordinary case (where it should not), at least five factors should be taken into account:

- the 'surprise' to the other party;
- the ability of the offending party to 'cure that surprise';
- the possibility that the 'testimony would disrupt the trial';
- the party's 'explanation' for not providing a timely disclosure; and
- the alleged 'importance' of the testimony."[39]

Motions That Must Be Raised Before Trial

In civil cases, Rule 3:8(a) covers the timing of preliminary defense motions. Rule 3:20 addresses motions for summary judgment. Two lesser-known deadlines, however, appear in Rule 1:18's pretrial scheduling order. This order provides that any motion in limine "which requires argument *exceeding five minutes*" must be noticed for a hearing and presented to the trial court for decision before the day of trial.[40] The order also requires that all "dispositive motions shall be presented to the court for hearing as far in advance of the trial date as practical."[41]

In criminal trials, challenges asserting defects in the written charge or prosecution "shall be filed before a plea is entered and, in a circuit court, at least 7 days" before trial.[42] "The motion shall include all such defenses and objections then available to the accused. Failure to present any such defense or objection as herein provided shall constitute a waiver thereof."[43]

Similarly, motions to suppress alleging constitutional violations are to be filed no later than seven days before trial.[44] "Absent a showing of good cause and the interests of justice, trial courts should not relieve defendants of this statutory mandate because doing so compromises the Commonwealth's right to an interlocutory appeal of an adverse ruling."[45]

Waiver At Trial

Contemporaneous Objections

The contemporaneous objection rule has casualty rates among the highest of all procedural default rules. It requires a litigant to object to any perceived error in the trial court to preserve appellate review of that error. "Not just any objection will do. It must be both *specific* and *timely*—so that the trial judge would know the particular point being made in time to do something about it."[46]

Sometimes, an objection alone is not enough. It often must be followed with a request for some kind of remedial response by the court. When opposing counsel makes objectionable comments during closing argument, for example, "the objecting party must expressly seek the action that it desires the judge to take."[47] If the objecting party disagrees with the court's ruling, the objecting party must also, in order to preserve the point for appeal, move for a cautionary instruction or for a mistrial.[48]

Expert testimony involves some anfractuous applications of the contemporaneous objection rule. Objections to an expert's qualifications go to the "admissibility of the expert's opinion."[49] "The law recognizes no 'degrees' of qualifications" for expert witnesses.[50] The failure to object to an expert's qualifications waives the issue on appeal.[51] In addition, all objections to an expert's testimony because it "is not stated to a reasonable degree of medical probability, lacks an adequate factual foundation, or fails to consider all the relevant variables" go to the *admissibility* of the evidence—requiring the objection to be made "when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike made after the opposing party has rested."[52]

Sometimes, though not "true in most instances," the objectionable quality of an expert's testimony "may not be apparent until the testimony of that witness is completed. Hence, an objection raised at that first opportunity is timely."[53] This unusual situation, however, should not lure a litigant into thinking a missed opportunity to object during the testimony can be cured later by moving to strike the testimony. A litigant may not, in a motion to strike evidence, "raise for the first time a question of admissibility of evidence. Such motions deal with the sufficiency rather than the admissibility of evidence."[54] Even so, a motion to strike an expert's testimony (after it has been delivered without objection from the witness stand) might be adequate if the moving party previously alerted the trial judge to the anticipated objection.[55]

Finally, the contemporaneous objection rule can almost never be satisfied merely by indorsing a court order "seen and objected to."[56] Only if "the ruling made by the trial court was narrow enough to make obvious the basis of appellant's objection" will the otherwise inadequate indorsement suffice to preserve the issue on appeal.[57]

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New or Different Arguments on Appeal

Innumerable cases reaffirm that Virginia "appellate courts will not entertain matters raised for the first time on appeal."[58] A criminal defendant, for example, cannot argue a hypothesis of innocence not presented to the factfinder in the trial court.[59] This prohibition applies to all types of arguments and imposes a high degree of specificity. "A general argument or an abstract reference to the law is not sufficient to preserve an issue."[60] And, even if specific, the argument at trial must be the same as that asserted on appeal. Thus, "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."[61]

Virginia appellate courts recognize an exception in cases where "good cause" or "ends of justice" excuse the waiver.[62] The exception, however, is "narrow" and "used sparingly."[63] In criminal cases, for example, the exception can be invoked only if the defendant can "affirmatively show that a miscarriage of justice has occurred, not that a miscarriage *might* have occurred."[64] Thus, the ends-of-justice argument for avoiding waiver of a sufficiency challenge cannot be simply the assertion of a valid sufficiency challenge. Such a "tautological construct" would require the appellate court, as a precondition to finding waiver, to "rule the sufficiency challenge invalid on the merits—which would make the presence or absence of a Rule 5A:18 waiver entirely superfluous, since waiving a losing argument is no better or worse than losing it outright."[65] In this respect, Virginia appellate courts "do not simply review the sufficiency of the evidence under the usual standard, but instead determine whether the record contains affirmative evidence of innocence or lack of a criminal offense."[66] This showing cannot be made except in "extraordinary" situations.[67]

Even a change in law is insufficient to overcome the contemporaneous objection requirement. "The perceived futility of an objection does not excuse a defendant's procedural default at trial."[68] Moreover,

"the fact that the law in effect at the time of a trial sets out a particular method for proceeding does not prevent a defendant from arguing that method should be different and does not excuse him from registering an objection in order to comply with Rule 5A:18."[69]

Beware, too, of double waiver. An appellant must argue for the application of the good-cause and ends-of-justice exception. Appellate courts do not invoke the exception *sua sponte* on behalf of the defaulting party.[70] Doing so "would compromise the Court's role and place it in the position of becoming a *de facto* advocate."[71]

Proffering Rejected Evidence

Appellate courts will not consider error assigned to the rejection of testimony unless the proffered testimony has been "made a part of the record."[72] An appellate court has "no basis for adjudication unless the record reflects a proper proffer."[73] A proper proffer may consist of "a unilateral avowal of counsel, if unchallenged, or a mutual stipulation of the testimony expected."[74] It may also take the form of questions and answers from a witness, conducted out of the presence of the jury. The proffer must identify the specific testimony or other evidence precluded by the sustained objection. Offering only counsel's theory of his case usually will be deemed an insufficient proffer.[75]

Failure to Obtain a Ruling

A litigant must specifically request a trial court to rule on any pending, but unaddressed, matters because failing to do so may forfeit an appellate challenge to the trial court's indecision.[76] This result stems from the proposition that the complaining party has been "denied nothing by the trial court" since "there is no ruling" against him.[77] Despite the natural reluctance not to do so, therefore, a litigant simply must "insist that the court rule" in order to preserve the issue for appeal.[78]

"Same Character" Evidence Waiver

A litigant may waive an objection to evidence at trial, and *a fortiori* on appeal, when he unsuccessfully objects to evidence offered by his opponent and then offers evidence of the same character.[79] As the Virginia Supreme Court recently explained, the rule applies when the same-character evidence appears in the objecting party's "own case-in-chief,"[80] but does not apply to matters elicited in the "cross-examination of a witness or the introduction of rebuttal evidence."[81] Nor does the rule apply when the objecting party offers evidence on a "different subject."[82]

In jury trials, a litigant must assert a motion to strike at the close of all the evidence or, failing that, a motion to set aside after the verdict.

The rule relies on no particular sequence. "Although the rule is most often applied in cases when the party making the objection later introduces the same evidence, 'it is properly and logically applicable in any case, regardless of the order of introduction, if the party who has brought out the evidence in question, or who has permitted it to be brought out, can be fairly held responsible for its presence in the case.'"[83] This particular procedural default can be understood as either an application of the "harmless" error doctrine or as a simple "waiver of the objection."[84] "Whether it be placed upon one ground or the other," the Virginia Supreme Court has explained, "the result is the same."[85]

Challenging the Sufficiency of the Evidence

Lower court factfinding, whether by a trial judge or jury, receives on review "the highest degree of appellate deference."[86] This deferential standard "comes from Code § 8.01-680—the basis for our appellate review of factfinding in civil and criminal cases as well as bench and jury trials."[87] The standard examines only the threshold rationality of the factfinder's decision.

"When a jury decides the case," the Virginia Court of Appeals has explained, "Code § 8.01-680 requires that we review the jury's decision to see if reasonable jurors could have made the choices that the jury did make. We let the decision stand unless we conclude no rational juror could have reached that decision."[88] "The same standard applies when a trial judge sits as the factfinder because the 'judgment of a trial court sitting without a jury is entitled to the same weight as a jury verdict.'"[89] In perfect symmetry, the same threshold rationality standard also applies to a trial court's review of a motion to strike evidence as insufficient[90] and a motion to set aside a jury verdict as factually insupportable.[91]

As hard as it is to win a sufficiency challenge, it becomes nearly impossible if the litigant fails to preserve the issue for appeal by making the appropriate motion at trial. In jury trials, a litigant must assert a motion to strike at the close of all the evidence or, failing that, a motion to set aside after the verdict. Unlike federal practice, however, Virginia law does not require a motion to strike at the close of the opponent's case in chief as a precondition for later sufficiency challenges in civil[92] or criminal[93] cases.

On the other hand, if a litigant unsuccessfully moves to strike at the close of his opponent's case-in-chief and then introduces evidence on his own behalf, he must renew his motion to strike separately at the conclusion of all evidence.[94] In bench trials, the waiver rule relaxes somewhat to permit a defendant to assert a sufficiency challenge in closing argument in addition to arguing the merits of the case. "To be effective, however, the sufficiency challenge must be clear enough for a trial judge to discern its presence and be able to distinguish it from the argument on the merits. Not every closing argument accomplishes this objec-

tive."[95] In a criminal case, for example, a "mere contest over the 'weight of the evidence' favoring or disfavoring a conviction does not suffice. If arguments of this sort were adequate, the rule would be rendered meaningless, for every closing argument in a criminal case (short of a concession of guilt) does as much."[96]

In sum, a defendant in a bench trial can preserve a sufficiency challenge for appeal by making "a motion to strike at the conclusion of all the evidence," by presenting "an appropriate argument in summation," or by making "a motion to set aside the verdict."[97] In jury trials, only a motion to strike or a motion to set aside will suffice. And in bench and jury trials, the presentation of evidence after an unsuccessful motion to strike waives that motion and requires the sufficiency issue to be renewed by other means.

Invited Error—
Approbate & Reprobate

A litigant who fails to raise the right argument at trial waives it on appeal. All the more, successfully raising the wrong argument at trial precludes the litigant from later complaining about it. "The principle is long standing in Virginia that an appellate court will not 'notice error which has been invited by the party seeking to take advantage thereof on appeal.'"[98] The invited error doctrine originated with the Scottish maxim that a man shall not be allowed to approbate and reprobate. He cannot "invite error" and then later attempt to "take advantage of the situation created by his own wrong."[99]

Sometimes this occurs when a litigant argues an incorrect legal theory at trial and then challenges on appeal the trial court's acquiescence to the error.[100] Other examples include complaining about prejudicial answers to one's own "strategic" *voir dire* questions[101] or overly "energetic"[102] or "unreasonable"[103] cross-examination. Invited error has also been found when a litigant invites the trial court to improperly take factual issues from the jury,[104] when a criminal defendant voluntarily chooses to appear at trial in jail clothing,[105] and when a criminal defendant "himself injected into the trial reference to [his] other offenses" and then later complains evidence of these offenses should not have been admitted against him.[106]

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Invited Error—Jury Instructions

An agreed jury instruction, even if it imposes an "inappropriate" legal standard,[107] becomes the law of the case and thus "binding" on the parties as well as the courts.[108] "Right or wrong," an agreed instruction cannot be challenged on appeal.[109] This doctrine applies to both "civil and criminal" cases.[110] "Under a corollary principle, a litigant waives any evidentiary sufficiency challenge to a particular issue by not objecting to submitting that issue to the jury and by expressly agreeing to an instruction directing the jury to decide the issue."[111] To avoid this form of waiver, a litigant should ensure "the record is clear" that his acquiescence to the jury instruction does not waive his objection to any prior ruling.[112] A post-verdict motion to set aside, by itself, "does not relieve a litigant from this form of procedural default."[113]

The inverse proposition is likewise true. A litigant must object to the trial court's failure to give an instruction.[114] A trial court "ordinarily does not have an affirmative duty to give a jury instruction" not requested by either party.[115] An exception is sometimes made when "the principle of law is materially vital to a defendant in a criminal case."[116] But that exception applies only in "extraordinary" circumstances and does not apply merely because the jury instructions may "improperly" state the elements of an offense.[117]

Conclusion

The only alternative to a judicial system that permits procedural defaults, as bad as that may be, is one that does not, which is worse by far. For there to be no procedural defaults in the trial court, litigants would have to concede control over their cases to inquisitorial trial judges and depend upon them to raise the winning arguments which only the judges (so far as the decision is theirs) know in advance to be winners. Understandably so, those on the losing side of this form of *sua sponte* intervention would be tempted to question the impartiality of the judges and their commitment to neutral principles of law. The adversarial model wisely preserves the neutrality of the judges and the law by placing the responsibility to litigate solely on the litigants.

That said, I have no doubt that some procedural default principles may need to be recalibrated, either more tightly or loosely, to better balance the equities of particular forms of waiver. But whether that is true or not, this much is certain: No procedural default principle has ever produced even the slightest injustice to litigants who know the principles well enough to stay out of trouble. The benign goal of procedural default law, therefore, is to render itself harmless by being so well known. ⚖

The endnotes for this article begin on page 57.

Judge D. Arthur Kelsey serves on the Virginia Court of Appeals. He previously served as a judge in the Fifth Judicial Circuit of Virginia and as a litigation partner with Hunton & Williams LLP. (Author's note: The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B). These remarks, therefore, should not be mistaken for any official view of the Court of Appeals or my opinion as an appellate judge in the context of any specific case.)

Endnotes:

1 *Rahnema v. Rahnema,* 47 Va. App. 645, 658, 626 S.E.2d 448, 455 (2006).

2 Scores of Virginia cases refer to procedural defaults as examples of the "waiver" concept. The better word would be forfeiture. While waiver denotes an "intentional relinquishment of a known right," forfeiture may occur either inadvertently or intentionally. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(c), at 923 n.82 (2d ed. 1999) (citation omitted).

3 *Cirrito v. Cirrito*, 44 Va. App. 287, 315, 605 S.E.2d 268, 281 (2004) (citation omitted); *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935).

4 *Bd. of Supervisors v. Robertson*, 266 Va. 525, 538, 587 S.E.2d 570, 578 (2003) (quoting *Jenkins v. Bay House Assocs., L.P.*, 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003)); *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141, 277 S.E.2d 228, 229-30 (1981) (quoting *Potts*, 165 Va. at 207, 181 S.E. at 525). *See also Bd. of Supervisors v. Miller & Smith, Inc.*, 222 Va. 230, 238, 279 S.E.2d 158, 162 (1981) ("[Courts] have no power to adjudicate issues which are not presented by the parties in their pleadings unless the parties voluntarily try an issue beyond the pleadings." (quoting *Landcraft Co., Inc. v. Kincaid*, 220 Va. 865, 870, 263 S.E.2d 419, 422 (1980))).

5 *Robertson*, 266 Va. at 538, 587 S.E.2d at 578 (citation omitted); *see also Ted Lansing Supply Co.*, 221 Va. at 1141, 277 S.E.2d at 229-30 (citation omitted).

6 1 CHARLES E. FRIEND, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 6-3, at 210 (1998).

7 *Jenkins*, 266 Va. at 43-44, 581 S.E.2d at 512 (indirectly quoting *Potts*, 165 Va. at 207, 181 S.E. at 525).

8 FRIEND, *supra* note 6, § 23-5, at 738 (1998) (citing *Harrell v. Woodson*, 233 Va. 117, 353 S.E.2d 770 (1987)).

9 *Fleming v. Fleming*, 32 Va. App. 822, 826, 531 S.E.2d 38, 40 (2000); *Reid v. Reid*, 24 Va. App. 146, 149-50, 480 S.E.2d 771, 772 (1997); *Boyd v. Boyd*, 2 Va. App. 16, 18-19, 340 S.E.2d 578, 580 (1986).

10 *Ted Lansing Supply Co.,* 221 Va. at 1142, 277 S.E.2d at 230 (finding the trial court could not consider an "implied warranty theory" where the pleadings alleged only a breach of express warranty).

11 KENT SINCLAIR & LEIGH B. MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE § 8.1(B), at 374 (3d ed. 2005) (citing *Tuscarora, Inc. v. B.V.A. Credit Corp.*, 218 Va. 849, 241 S.E.2d 778 (1978); *Koch v. Seventh St. Realty Corp.*, 205 Va. 65, 135 S.E.2d 131 (1964); *Lloyd v. Smith*, 150 Va. 132, 142 S.E. 363 (1928)). *See also Pittman v. Pittman*, 208 Va. 476, 479, 158 S.E.2d 746, 748 (1968) (finding assertions of fraud were "vague, involved and uncertain").

12 *City of Norfolk v. Vaden*, 237 Va. 40, 44, 375 S.E.2d 730, 732-33 (1989) (reversing trial court for enforcing a contractual agreement when no such agreement had been pleaded).

13 *Lee v. Lambert*, 200 Va. 799, 803, 108 S.E.2d 356, 358-59 (1959) (quoting and approving trial court's opinion that granting recovery based in quantum meruit would permit a recovery on a "different contract from the one alleged in the pleadings").

14 *Laughlin v. Morauer*, 849 F.2d 122, 126 (4th Cir. 1988) (finding a Virginia trial court's ruling that there was no public easement did not have a collateral estoppel or *res judicata* effect because the public easement issue had not been pleaded and thus the trial court's decision on that issue was not binding).

15 *Jenkins v. Bay House Assocs.*, L.P., 266 Va. 39, 44, 581 S.E.2d 510, 512-13 (2003) (finding the pleadings "did not contain any assertions" that the trespass occurred on the waters, only the "land beneath the pond").

16 *E.g., Matney v. McClanahan*, 197 Va. 454, 458, 90 S.E.2d 128, 130-31 (1955).

17 *Bank of Giles County v. Mason*, 199 Va. 176, 182-83, 98 S.E.2d 905, 909 (1957) (dismissing a petition for writ of mandamus to inspect corporate records because of failure to allege or prove a demand and refusal).

18 *Bd. of Supervisors v. Robertson*, 266 Va. 525, 537-38, 587 S.E.2d 570, 578-79 (2003) (ruling a court may not interpret zoning ordinance in a manner not pleaded by either party).

19 *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 467, 344 S.E.2d 916, 917 (1986).

20 VA. CODE § 8.01-273(B) ("Wherever a demurrer to any pleading has been sustained, and as a result thereof the demurree has amended his pleading, he shall not be deemed to have waived his right to stand upon his pleading before the amendment, provided the order of the court shows that he objected to the ruling of the court sustaining the demurrer. On any appeal of such a case the demurree may insist upon his original pleading, and if the same be held to be good, he shall not be prejudiced by having made the amendment.").

21 *Hubbard v. Dresser, Inc.*, 271 Va. 117, 119-20, 624 S.E.2d 1, 2 (2006) (citations omitted); *see also Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 129-30, 575 S.E.2d 858, 860 (2003); *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 129, 523 S.E.2d 826, 829 (2000). *But cf.* VA. CODE § 8.01-273(B) (granting protection against waiver "[w]herever a demurrer to *any pleading* has been sustained" (emphasis added)).

22 *See Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003).

23 VA. SUP. CT. RULE 1:6(a).

24 KENT SINCLAIR, GUIDE TO VIRGINIA LAW & EQUITY REFORM & OTHER LANDMARK CHANGES § 11.07, at 264 (2006) [hereinafter SINCLAIR, LAW & EQUITY].

25 W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE 266 (3d ed. 1997).

26 SINCLAIR, LAW & EQUITY, *supra* note 24, § 7.05, at 175.

27 MARTIN P. BURKS ET AL., BURKS PLEADING AND PRACTICE § 204, at 336 (4th ed. 1952).

28 BRYSON, *supra* note 25, at 142.

29 BURKS, *supra* note 27, § 37, at 45-46 (quoting *Moore v. Norfolk & W. Ry.*, 124 Va. 628, 634, 98 S.E. 635, 637 (1919)); *see also* VA. CODE § 8.01-264(A).

30 VA. SUP. CT. RULE 3:18(c).

31 VA. CODE § 8.01-235.

32 SINCLAIR, LAW & EQUITY, *supra* note 24, § 8.04, at 204.

33 *Am. Safety Cas. Ins. Co. v. C. G. Mitchell Constr., Inc.*, 268 Va. 340, 351, 601 S.E.2d 633, 639 (2004); *Brown v. Black*, 260 Va. 305, 309-11, 534 S.E.2d 727, 728-30 (2000) (defining discretionary authority to dismiss an action and distinguishing *Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) (interpreting FED. R. CIV. P. 37(d)). *Cf. NHL v. Metro Hockey Club*, 427 U.S. 639 (1976).

34 VA. SUP. CT. RULE 4:12(b)(2).

35 D. Arthur Kelsey & William H. Baxter II, *Judicial Supervision and Enforcement*, *in* CIVIL DISCOVERY IN VIRGINIA, ¶ 11.11, at 283 n.186 (Wyatt B. Durrette, Jr. et al. eds., 2d ed., 2005) ("The United States District Court for the Eastern District of Virginia is widely known as the 'Rocket Docket' in no small part because its judges have adopted and implemented very aggressive pretrial scheduling orders. While state court pretrial scheduling orders do not necessarily need to be as forceful, they can nevertheless achieve a desirable degree of uniformity that helps prepare cases for trial and promotes judicial economy 'by expediting discovery and eliminating the need to return to [trial courts] during the discovery process.'").

36 *Rahnema v. Rahnema,* 47 Va. App. 645, 658, 626 S.E.2d 448, 455 (2006). *Cf. Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 274 (4th Cir. 2005) ("Litigants who fail to comply with court scheduling and discovery orders should not expect courts of appeal to save them from the consequences of their own delinquence.").

37 *Riverside Hosp., Inc. v. Stroube*, 58 Va. Cir. 541, 543 (Williamsburg 2002).

38 *Kirk Timber & Farming Co. v. Union Camp Corp.*, 56 Va. Cir. 335, 339 (Suffolk 2001). Likewise, in federal court, the disclosure of experts who may testify must be submitted "at the times and in the sequence directed by the court." FED. R. CIV. P. 26(a)(2)(C). In the absence of other court instructions or stipulation by the parties, this disclosure must be made ninety days before the trial date or, if a rebuttal expert, within thirty days of the opponent's disclosure. *Id.*

39 *Kirk Timber & Farming Co.,* 56 Va. Cir. at 341-42 (citation omitted).

40 VA. SUP. CT. RULE 1:18 (accompanying Form 3) (emphasis added).

41 *Id.*

42 VA. SUP. CT. RULE 3A:9(c).

43 VA. SUP. CT. RULE 3A:9(b)(1); *see also Harris v. Commonwealth*, 39 Va. App. 670, 674, 576 S.E.2d 228, 230 (2003) (*en banc*).

44 VA. CODE § 19.2-266.2(B).

45 *Stevenson v. Commonwealth*, No. 1210-05-1, 2006 Va. App. LEXIS 245, at *3 n.1 (May 30, 2006) (unpublished).

46 *Thomas v. Commonwealth*, 44 Va. App. 741, 750, 607 S.E.2d 738, 742, *adopted on reh'g en banc*, 45 Va. App. 811, 613 S.E.2d 870 (2005); *see also Kelly v. Commonwealth*, 42 Va. App. 347, 354, 592 S.E.2d 353, 356 (2004) ("A trial court must be alerted to the precise 'issue' to which a party objects.") (citation omitted)).

47 *Bennett v. Commonwealth*, 29 Va. App. 261, 280-81, 511 S.E.2d 439, 448 (1999) (citations omitted); *see also Thomas*, 44 Va. App. at 751 n.2, 607 S.E.2d at 742 n.2; *Kingsley v. Commonwealth*, No. 0587-03-2, 2004 Va. App. LEXIS 384, at *8-9 (Aug. 10, 2004) (unpublished); *Southard v. Commonwealth*, No. 2706-02-4, 2003 Va. App. LEXIS 384, at *3-4 (July 8, 2003) (unpublished); *Morris v. Commonwealth*, 14 Va. App. 283, 287, 416 S.E. 2d 462, 464 (1992) (*en banc*).

48 *Thomas*, 44 Va. App. at 751 n.2, 607 S.E.2d at 742 n.2; *see also* CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 8-4, at 295 (6th ed. 2003) (citations omitted).

49 *Cook v. Waynesboro Police Dep't*, 225 Va. 23, 29, 300 S.E.2d 746, 749 (1983).

50 FRIEND, *supra* note 48, § 17-15, at 676; *see also* 1 JOHN W. STRONG, ET AL., MCCORMICK ON EVIDENCE § 13, at 71 (6th ed. 2006) ("The question is not whether this witness is more qualified than other experts in the field; rather, the issue is whether the witness is more competent to draw the inference than the lay jurors and judge.").

51 *See, e.g.*, *Vinson v. Commonwealth*, 258 Va. 459, 466, 522 S.E.2d 170, 175 (1999) (concluding defendant waived objection to testimony of mental health expert "for lack of proper objection in the trial court"); *Cook*, 225 Va. at 29, 300 S.E.2d at 749. *See generally* FRIEND, *supra* note 48, § 17-15, at 677.

52 *Bitar v. Rahman*, 272 Va. 130, 139, 630 S.E.2d 319, 324 (2006) (citation omitted).

53 *Id.* at 140, 630 S.E.2d at 324-25 (citations omitted).

54 *Id.* at 140, 630 S.E.2d at 325 (citations omitted).

55 *Vasquez v. Mabini*, 269 Va. 155, 162, 606 S.E.2d 809, 813 (2005) ("The trial court was advised, before any evidence had been presented, of the probability of an objection and the grounds for it. The trial court deferred a ruling until the evidence was presented. At the first opportunity, after the flaws in the expert testimony had become apparent on cross-examination, the defendants moved to strike it.").

56 *Lee v. Lee*, 12 Va. App. 512, 514-15, 404 S.E.2d 736, 737-38 (1991) (*en banc*) (finding that neither Code § 8.01-384 or Rule 5A:18 is "complied with merely by objecting generally to an order" as in stating the order is "seen and objected to"); *see also Courembis v. Courembis*, 43 Va. App. 18, 26, 595 S.E.2d 505, 509 (2004).

57 *Mackie v. Hill*, 16 Va. App 229, 231, 429 S.E.2d 37, 38 (1993).

58 *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003) (citing VA. SUP. CT. RULES 5:25, 5A:18); *see also Bell v. Commonwealth*, 264 Va. 172, 196, 563 S.E.2d 695, 711 (2002) ("Bell did not object to the seating of jurors . . . . Thus, any claim on appeal regarding those jurors is waived."); *Kelly v. Commonwealth*, 42 Va. App. 347, 354, 592 S.E.2d 353, 356 (2004) ("Kelly raised no constitutional arguments in his motion to strike the evidence. Accordingly, Rule 5A:18 bars our consideration of this question on appeal. The record reflects no reason to invoke the good cause or ends of justice exceptions to Rule 5A:18."). *Cf. Holly Hill Farm Corp. v. United States*, 447 F.3d 258, 267 (4th Cir. 2006) (finding "issues raised for the first time on appeal are generally not considered absent exceptional circumstances").

59 *Hudson*, 265 Va. at 514, 578 S.E.2d at 786; *Bolden v. Commonwealth*, No. 0500-03-4, 2004 Va. App. LEXIS 585, at *9-10 (Nov. 30, 2004) (unpublished).

60 *Edwards v. Commonwealth*, 41 Va. App. 752, 760, 589 S.E.2d 444, 448 (2003) (*en banc*), *aff'd by order*, No. 040019 (Va. Sup. Ct., Oct. 15, 2004).

61 *W. Alexandria Props., Inc. v. First Va. Mortgage & Real Estate Inv. Trust*, 221 Va. 134, 138, 267 S.E.2d 149, 151 (1980) (citations omitted); *see also Buck v. Commonwealth*, 247 Va. 449, 452-53, 443 S.E.2d 414, 416 (1994) (holding that appellant's failure to raise the same specific arguments "before the trial court precludes him from raising them for the first time on appeal"); *Floyd v. Commonwealth*, 219 Va. 575, 584, 249 S.E.2d 171, 176 (1978) (holding that appellate courts will not consider an argument that differs from the specific argument presented to the trial court, even if it relates to the same general issue); *Shenk v. Shenk*, 39 Va. App. 161, 169, 571 S.E.2d 896, 900 (2002) (ruling that the "specific argument" made on appeal must have been made below); *Clark v. Commonwealth*, 30 Va. App. 406, 411-12, 517 S.E.2d 260, 262 (1999) (preserving one argument on sufficiency of the evidence does not allow argument on appeal regarding other sufficiency questions).

Far different concerns, however, govern arguments by appellees in criminal cases. As the Virginia Court of Appeals has stated *en banc*, an "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." *Logan v. Commonwealth*, 47 Va. App. 168, 172 n.4, 622 S.E.2d 771, 773 n.4 (2005) (*en banc*) (quoting *Blackman v. Commonwealth*, 45 Va. App. 633, 642, 613 S.E.2d 460, 465 (2005)). "Thus, an appellee may argue for the first time on appeal any legal ground in support of a judgment so long as it does not require new factual determinations, or involve an affirmative defense that must be asserted in the pleadings, or serve as a subterfuge for a constitutionally prohibited cross-appeal in a criminal case. This disparity in treatment under Rule 5A:18 between appellants and appellees stems from the presumption of correctness of trial court rulings and the corresponding burden on appellants to rebut that presumption." *Blackman*, 45 Va. App. at 642-43, 613 S.E.2d at 465 (citations, footnotes, and internal quotation marks omitted).

62 VA. SUP. CT. RULES 5:25, 5A:18. In contrast, federal courts apply the "plain error" standard to determine exceptions to the waiver principle. *Jones v. United States*, 527 U.S. 373, 389 (1999) (reiterating that, under the federal standard, a party who has not properly preserved the issue will be denied relief "unless there has been (1) error; (2) that is plain, and (3) affects substantial rights"). Even if a party establishes all three requirements, "correction of the error" remains within the sound discretion of the appellate court, a discretion that should not be exercised "unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Shaw*, 313 F.3d 219, 223 (4th Cir. 2002) (criminal appeal). *See generally United States v. Olano*, 507 U.S. 725, 736 (1993); *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003).

63 *Tooke v. Commonwealth*, 47 Va. App. 759, 764-65, 627 S.E.2d 533, 536 (2006) (citation omitted).

64 *Redman v. Commonwealth*, 25 Va. App. 215, 221, 487 S.E.2d 269, 272 (1997) (citing *Mounce v. Commonwealth*, 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987); *see also Copeland v. Commonwealth*, 42 Va. App. 424, 442, 592 S.E.2d 391, 399 (2004); *Andrews v. Commonwealth*, 37 Va. App. 479, 494, 559 S.E.2d 401, 409 (2002).

65 *Kingsley v. Commonwealth*, No. 0587-03-2, 2004 Va. App. LEXIS 384, at *16-17 (Aug. 10, 2004) (unpublished).

66 *Tooke*, 47 Va. App. at 765, 627 S.E.2d at 536.

67 *Thomas v. Commonwealth*, 44 Va. App. 741, 751-52, 607 S.E.2d 738, 743, *adopted on reh'g en banc*, 45 Va. App. 811, 613 S.E.2d 870 (2005) (quoting *Bazemore v. Commonwealth*, 42 Va. App. 203, 218-19, 590 S.E.2d 602, 609-10 (2004) (*en banc*)).

68 *Commonwealth v. Jerman*, 263 Va. 88, 94, 556 S.E.2d 754, 757 (2002) ("Thus, we hold that Jerman's failure to state a timely objection to the circuit court's instruction bars his present challenge to that instruction. Rule 5:25. Our conclusion is not altered by the fact that the rule in *Coward* was still in effect on the date of Jerman's trial.").

69 *Riner v. Commonwealth*, 40 Va. App. 440, 456, 579 S.E.2d 671, 679 (2003), *aff'd*, 268 Va. 296, 601 S.E.2d 555 (2004). *But cf. Talbert v. Commonwealth*, 17 Va. App. 239, 246, 436 S.E.2d 286, 290 (1993); *Darnell v. Commonwealth*, 12 Va. App. 948, 953, 408 S.E.2d 540, 542 (1991).

70 *Luginbybl v. Commonwealth*, 48 Va. App. 58, 63 n.3, 628 S.E.2d 74, 77 n.3 (2006) (*en banc*); *Widdifield v. Commonwealth*, 43 Va. App. 559, 564, 600 S.E.2d 159, 162 (2004) (*en banc*).

71 *Widdifield*, 43 Va. App. at 564, 600 S.E.2d at 162; *see also Luginbybl*, 48 Va. App. at 63 n.3, 628 S.E.2d at 77 n.3.

72 *Evans v. Commonwealth*, 39 Va. App. 229, 236, 572 S.E.2d 481, 484 (2002).

73 *Id.* (quoting *Whittaker v. Commonwealth*, 217 Va. 966, 968, 234 S.E.2d 79, 81 (1977)); *see also Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 135, 509 S.E.2d 494, 497 (1999); *Williams v. Harrison*, 255 Va. 272, 277, 497 S.E.2d 467, 471 (1998); *Chappell v. Va. Electric & Power Co.*, 250 Va. 169, 173, 458 S.E.2d 282, 285 (1995); *Spencer v. Commonwealth*, 238 Va. 295, 305, 384 S.E.2d 785, 792 (1989); *Barrett v. Commonwealth*, 231 Va. 102, 108, 341 S.E.2d 190, 194 (1986); *Molina v. Commonwealth*, 47 Va. App. 338, 367-68, 624 S.E.2d 83, 97 (2006) ("The failure to proffer the expected testimony is fatal to his claim on appeal."); *Smith v. Hylton*, 14 Va. App. 354, 357-58, 416 S.E.2d 712, 715 (1992); *Klein v. Klein*, 11 Va. App. 155, 160, 396 S.E.2d 866, 869 (1990).

74 *Evans*, 39 Va. App. at 236, 572 S.E.2d at 484 (citation omitted).

75 *See Lockhart v. Commonwealth*, 34 Va. App. 329, 340, 542 S.E.2d 1, 6 (2001) (finding proffer inadequate where counsel provided argument rather than an individual's expected answers to potential questions).

76 *Juniper v. Commonwealth*, 271 Va. 362, 383, 626 S.E.2d 383, 398 (2006). *See, e.g.*, *Riner v. Commonwealth*, 268 Va. 296, 325, 601 S.E.2d 555, 571-72 (2004); *Lenz v. Commonwealth*, 261 Va. 451, 463, 544 S.E.2d 299, 306 (2001) (finding no evidence in the record that trial court had ruled on defendant's pretrial motion, his claim on appeal was waived); *see also United States v. Graves*, 11 Fed. Appx. 324, 325 (4th Cir. 2001) (unpublished) (finding that defendant "abandoned the issue and forfeited a ruling" by "failing to pursue a ruling on motion for a criminal history departure"); *Rice v. Cmty. Health Ass'n*, 203 F.3d 283, 286 (4th Cir. 2000) (finding waiver of objection to denial of motion *in limine* where "district court never 'ruled' on the issue" asserted by the party on appeal).

77 *Fisher v. Commonwealth*, 16 Va. App. 447, 454, 431 S.E.2d 886, 890 (1993) ("Fisher failed to obtain a ruling from the court. He requested no relief. Because he was denied nothing by the trial court, there is no ruling for us to review.") (citations omitted); *Otey v. Roanoke City Dep't of Soc. Servs.*, No. 2558-05-3, 2006 Va. App. LEXIS 324, at *6 (July 18, 2006) (*per curiam*) (unpublished) (stating a "circuit court's failure to rule" is treated "no differently than a ruling challenged on appeal" and both require a "specific, contemporaneous objection in the trial court") (citations omitted).

78 *Taylor v. Commonwealth*, 208 Va. 316, 324, 157 S.E.2d 185, 191 (1967) ("There was no ruling by the court on the objection. Counsel for defendant did not insist that the court rule, nor did he request

the court to instruct the jury to disregard the remarks of the Commonwealth's attorney. Moreover, counsel did not move for a mistrial. Hence, the objection was not saved for our consideration.").

79 *Drinkard-Nuckols v. Andrews*, 269 Va. 93, 102, 606 S.E.2d 813, 818 (2005) (citation omitted); *see also Combs v. Norfolk & W. Ry.*, 256 Va. 490, 499, 507 S.E.2d 355, 360 (1998); *Hubbard v. Commonwealth,* 243 Va. 1, 9, 413 S.E.2d 875, 879 (1992).

80 *Pettus v. Gottfried*, 269 Va. 69, 79, 606 S.E.2d 819, 825 (2005) (citing *Drinkard-Nuckols,* 269 Va. at 102-03, 606 S.E.2d at 819 (holding plaintiff's use of testimony regarding physicians' expectations created waiver of objection to defendant's use of testimony on same subject); *Combs,* 256 Va. at 499, 507 S.E.2d at 360 (finding plaintiff's use of same exhibits in presenting demonstrative evidence created waiver of objection to defendant's use of those exhibits in presenting evidence); *Hubbard,* 243 Va. at 9-10, 413 S.E.2d at 879 (concluding defendant's use of reconstruction opinion evidence regarding speed of defendant's vehicle created waiver of objection to Commonwealth's use of evidence on same subject)); *see also Saunders v. Commonwealth*, 211 Va. 399, 401, 177 S.E.2d 637, 638-39 (1970) (holding that defendant attempted to turn the evidence to his advantage); *Stevenson v. Commonwealth*, No. 1210-05-1, 2006 Va. App. LEXIS 245, at *11-13 (May 30, 2006) (unpublished); *Abdul-Wasi v. Commonwealth*, No. 2901-03-1, 2005 Va. App. LEXIS 180, at *9-11 (May 3, 2005) (unpublished).

Though the Virginia Supreme Court has rejected arguments by appellants claiming they were "merely attempting to rebut" during their case-in-chief, *see, e.g., Hubbard*, 243 Va. at 9, 413 S.E.2d at 879, two Virginia Court of Appeals opinions have gone a different direction. *Compare Riner v. Commonwealth*, 40 Va. App. 440, 477-78, 579 S.E.2d 671, 689-90 (2003), *aff'd on other grounds*, 268 Va. 296, 601 S.E.2d 555 (2004) (stating, while nonetheless mooting the point by rejecting the objection on the merits, that the appellant did not waive his evidentiary objection by offering "rebuttal" evidence in his case in chief), *and McGill v. Commonwealth*, 10 Va. App. 237, 244, 391 S.E.2d 597, 601 (1990) (noting "the defendant only attempted to rebut the Commonwealth's evidence" during his case in chief) *with Bynum*, 28 Va. App. at 459, 506 S.E.2d at 34 (finding waiver where the defendant introduced in his case-in-chief the same evidence he had objected to in Commonwealth's case-in-chief).

81 *Drinkard-Nuckols,* 269 Va. at 102, 606 S.E.2d at 818 (citing *Snead v. Commonwealth*, 138 Va. 787, 801-02, 121 S.E.2d 82, 86 (1924) (other citations omitted)); *see also Combs*, 256 Va. at 499, 507 S.E.2d at 360; *Brooks v. Bankson*, 248 Va. 197, 207, 445 S.E.2d 473, 478-79 (1994).

82 *Pettus,* 269 Va. at 79-80, 606 S.E.2d at 826.

83 *Id*. at 79, 606 S.E.2d at 825 (quoting *Whitten v. McClelland*, 137 Va. 726, 741, 120 S.E. 146, 150 (1923)).

84 *New York Life Ins. Co. v. Taliaferro*, 95 Va. 522, 523, 28 S.E. 879, 879 (1898); *see also Bynum*, 28 Va. App. at 459, 506 S.E.2d at 34 ("Having testified about the substance of his previously suppressed statement, Mr. Bynum rendered harmless any error that may have occurred from the introduction of the statement in the Commonwealth's case-in-chief.").

85 *New York Life Ins.*, 95 Va. at 523, 28 S.E. at 879.

86 *Thomas v. Commonwealth*, 48 Va. App. 605, 608, 633 S.E.2d 229, 231 (2006).

87 *Barnes v. Commonwealth*, 47 Va. App. 105, 110, 622 S.E.2d 278, 280 (2005) (quoting *Seaton v. Commonwealth*, 42 Va. App. 739, 747 n.2, 595 S.E.2d 9, 13 n.2 (2004)).

88 *Crowder v. Commonwealth*, 41 Va. App. 658, 662, 588 S.E.2d 384, 386 (2003) (quoting *Pease v. Commonwealth*, 39 Va. App. 342, 355, 573 S.E.2d 272, 278 (2002) (*en banc*), *aff'd,* 266 Va. 397, 588 S.E.2d 149 (2003) (*per curiam* order adopting reasoning of the Court of Appeals)).

89 *Crowder*, 41 Va. App. at 662-63, 588 S.E.2d at 386 (citations omitted).

90 *Rahnema v. Rahnema,* 47 Va. App. 645, 662 n.7, 626 S.E.2d 448, 457 n.7 (2006) (citations omitted).

91 *Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 571, 587 S.E.2d 711, 715 (2003) (holding that the power to set aside a verdict under Code § 8.01-680 can be exercised only if no "reasonable" jurors could "differ in their conclusions of fact to be drawn from the evidence"). *See generally Seaton*, 42 Va. App. at 747 n.2, 595 S.E.2d at 13 n.2.

92 BRYSON, *supra* note 25, at 455 (citing *Gabbard v. Knight*, 202 Va. 40, 116 S.E.2d 73 (1960)); *see also Cotter v. Commonwealth*, 21 Va. App. 453, 454, 464 S.E.2d 566, 567 (1995) (*en banc*); *Brown v. Commonwealth*, 8 Va. App. 474, 480, 382 S.E.2d 296, 300 (1989). In contrast, federal civil law requires a party to raise "the reason for which it is entitled to judgment as a matter of law in its Rule 50(a) motion before the case is submitted to the jury and reassert that reason in its Rule 50(b) motion after trial if the Rule 50(a) motion proves unsuccessful." *Price v. City of Charlotte*, 93 F.3d 1241, 1248-49 (4th Cir. 1996) (citing *Singer v. Dungan*, 45 F.3d 823, 828-29 (4th Cir. 1995)); *see also Dennis v. Columbia Colleton Med. Ctr.*, 290 F.3d 639, 644-45 (4th Cir. 2002) (explaining standard for Rule 50(b) motion for judgment as a matter of law). The Rule 50(b) motion is equally indispensable to preserve the sufficiency argument for appeal. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980, 987 (2006) ("[R]espondent's failure to comply with Rule 50(b) forecloses its challenge to the sufficiency of the evidence.").

93 *Fontaine v. Commonwealth*, 25 Va. App. 156, 162, 487 S.E.2d 241, 244 (1997) ("Generally, the sufficiency of the evidence to support a conviction may be challenged by a motion to set aside the verdict, even where no motion to strike the evidence was filed at trial."), *overruled in part on other grounds by Edwards v. Commonwealth,* 41 Va. App. 752, 765, 589 S.E.2d 444, 450 (2003); *see also McGee v. Commonwealth*, 4 Va. App. 317, 321, 357 S.E.2d 738, 739-40 (1987) ("A prior motion to strike the evidence, however, is not a prerequisite to a motion to set aside the verdict." (citing *Gabbard*, 202 Va. at 43, 116 S.E.2d at 75)).

94 *Starks v. Commonwealth*, 225 Va. 48, 55, 301 S.E.2d 152, 156 (1983); *McQuinn v. Commonwealth*, 20 Va. App. 753, 755-56, 460 S.E.2d 624, 625-26 (1995) (*en banc*); *White v. Commonwealth,* 3 Va. App. 231, 233-34, 348 S.E.2d 866, 867-68 (1986).

95 *Jarvis v. Commonwealth*, No. 1634-04-1, 2005 Va. App. LEXIS 415, at *4 (Oct. 18, 2005) (unpublished) (citation and footnote omitted).

96 *Id*. (citations omitted).

97 *Barnes v. Commonwealth*, 33 Va. App. 619, 628-29 n.2, 535 S.E.2d 706, 711 n.2 (2000); *Howard v. Commonwealth*, 21 Va. App. 473, 478, 465 S.E.2d 142, 144 (1995); *see also Copeland,* 42 Va. App. at 441, 592 S.E.2d at 399; *Campbell v. Commonwealth*, 12 Va. App. 476, 478-81, 405 S.E.2d 1, 1-3 (1991) (*en banc*); *Jarvis*, 2005 Va. App. LEXIS 415, at *3.

98 *Rahnema v. Rahnema,* 47 Va. App. 645, 663, 626 S.E.2d 448, 457 (2006) (quoting *McBride v. Commonwealth*, 44 Va. App. 526, 529, 605 S.E.2d 773, 774 (2004)); FRIEND, *supra* note 48, § 8-14, at 56 (6th ed. Supp. 2005) (quoting *Saunders v. Commonwealth*, 211 Va. 399, 400, 177 S.E.2d 637, 638 (1970)); *see also Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181, 623 S.E.2d 889, 895 (2006); *Powell v. Commonwealth*, 267 Va. 107, 144, 590 S.E.2d 537, 559-60 (2004).

99 *Powell*, 267 Va. at 144, 590 S.E.2d at 560 (quoting *Fisher v. Commonwealth*, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988)).

100 *Rahnema,* 47 Va. App. at 663, 626 S.E.2d at 457 ("No litigant can 'be permitted to approbate and reprobate, ascribing error to an act by the trial court that comported with his representations." (quoting *Boedeker v. Larson*, 44 Va. App. 508, 525, 605 S.E.2d 764, 772 (2004) (other citations omitted))); *see also* Garlock Sealing Techs., *LLC v. Little*, 270 Va. 381, 388, 620 S.E.2d 773, 777 (2005).

101 *Powell*, 267 Va. at 144, 590 S.E.2d at 560.

102 *Clark v. Commonwealth*, 202 Va. 787, 791, 120 S.E.2d 270, 273 (1961).

103 *Hundley v. Commonwealth*, 193 Va. 449, 453, 69 S.E.2d 336, 338-39 (1952).

104 *Edmiston Homes, Ltd. v. McKinney Group*, 241 Va. 263, 268, 401 S.E.2d 875, 877-78 (1991).

105 *Moore v. Hinkle*, 259 Va. 479, 491, 527 S.E.2d 419, 426 (2000).

106 *Saunders v. Commonwealth*, 211 Va. 399, 400, 177 S.E.2d 637, 638 (1970).

107 *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 136, 413 S.E.2d 630, 635 (1992).

108 *Miles v. Commonwealth*, 205 Va. 462, 468, 138 S.E.2d 22, 27 (1964); *see also Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd.*, 237 Va. 649, 652, 379 S.E.2d 344, 346 (1989); *Med. Ctr. Hosps. v. Sharpless*, 229 Va. 496, 498, 331 S.E.2d 405, 406 (1985).

109 *Hilton v. Fayen*, 196 Va. 860, 867, 86 S.E.2d 40, 43 (1955) (citations omitted); *see also Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 137-38, 509 S.E.2d 494, 498 (1999); BURKS, *supra* note 27, § 299, at 536.

110 *Jimenez v. Commonwealth*, 241 Va. 244, 249-50, 402 S.E.2d 678, 680-81 (1991).

111 *Aylor v. Commonwealth*, No. 3366-02-2, 2004 Va. App. LEXIS 183, at *7-8 (Mar. 2, 2004) (unpublished) (citing *Holles,* 257 Va. at 137-38, 509 S.E.2d at 498 ("We observe the general rule that, when an issue has been submitted to a jury under instructions given without objection, such assent constitutes a waiver of any contention that the trial court erred in failing to rule as a matter of law on the issue.")).

112 *WJLA-TV v. Levin*, 264 Va. 140, 159, 564 S.E.2d 383, 395 (2002); *see also King v. Commonwealth*, 264 Va. 576, 582, 570 S.E.2d 863, 866 (2002) (holding appeal not procedurally barred for failure to object to a proffered jury instruction because appellant had clearly preserved his objections in the form of a motion to strike); *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998) (holding that the appellant preserved an issue for

appeal despite his failure to object to a proffered jury instruction implementing a prior ruling of the court, reasoning that "counsel made clear to the trial court his objection to the [challenged] ruling . . . and never abandoned or evidenced an intent to abandon the objection"); FRIEND, *supra* note 48, § 1-4, at 15.

113 *Aylor,* 2004 Va. App. LEXIS 183, at *8 (citing *Spitzli v. Minson*, 231 Va. 12, 19, 341 S.E.2d 170, 174 (1986) ("Here, the defendant did make a motion to set aside the verdict, but this does not save him from his failure to object to the instructions which submitted the issues . . . to the jury.")).

114 *See Breard v. Commonwealth*, 248 Va. 68, 83, 445 S.E.2d 670, 679 (1994) (explaining how defendant waived any allegation of error by not objecting to the denial of his proposed instruction).

115 *Commonwealth v. Jerman*, 263 Va. 88, 93, 556 S.E.2d 754, 757 (2002); *see also* Bazemore v. Commonwealth, 42 Va. App. 203, 214-15, 590 S.E.2d 602, 608 (2004) (*en banc*) ("Bazemore did not ask the judge to instruct the jury concerning the definition of 'wanton.' Therefore, we will not review the issue for the first time on appeal."); *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 448 (4th Cir. 2001) ("When the party asserting a legal theory could have requested a jury instruction on an alternate theory but did not, the argument that a jury charge which instructed on such a theory would have been valid becomes unavailable on appeal." (citations omitted)); *United States v. Carroll*, 710 F.2d 164, 169 n.2 (4th Cir. 1983) ("Because [the defendant] failed to request such an instruction, however, he has waived his objection to its omission, absent plain error. While such an instruction clearly would have been appropriate, neither this court nor any other court has ever held that the failure to give such instruction is plain error." (citations omitted)).

116 *Fishback v. Commonwealth*, 260 Va. 104, 117, 532 S.E.2d 629, 635 (2000) (finding "it is reversible error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form" when the "principle of law is materially vital to a defendant in a criminal case" (quoting *Whaley v. Commonwealth*, 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973))); *Campbell v. Commonwealth*, 14 Va. App. 988, 991-92, 421 S.E.2d 652, 654 (1992) (*en banc*) (holding trial court has an affirmative duty to properly instruct jury as to elements of offense).

117 *Bazemore*, 42 Va. App. at 219, 590 S.E.2d at 610 (citation omitted).