



COMMONWEALTH of VIRGINIA

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The Honorable Scott A. Surovell
Member, House of Delegates
Post Office Box 289
Mount Vernon, Virginia 22121

Dear Delegate Surovell:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether House Bill No. 2338, now codified as § 19.2-324.1 of the *Code of Virginia*, violates the Fifth Amendment to the U.S. Constitution or Article I, § 8, of the Constitution of Virginia.

Response

It is my opinion that House Bill No. 2338, as codified in § 19.2-324.1, is constitutional; the enactment does not infringe upon any protection afforded by either the Fifth Amendment to the U.S. Constitution or Article I, § 8, of the Constitution of Virginia. It is further my opinion that the Constitution of Virginia expressly permits the General Assembly to legislate on matters of procedural as well as substantive law;¹ therefore, no amendment to the Constitution of Virginia was necessary for this enactment to take effect on July 1, 2013.

Background

House Bill No. 2338 was duly enacted by the General Assembly during the 2013 Regular Session and subsequently was signed into law by the Governor in March of 2013.² The law, now codified as § 19.2-324.1, became effective on July 1, 2013.³ In your request, you posit that this piece of legislation may improperly place an accused person twice in jeopardy for the same offense. Specifically, you express concern that the legislation could be unconstitutional because you believe the Supreme Court of

¹ VA. CONST. art. IV, § 14.

² See 2013 Va. Acts ch. 675. See also VA. CONST. art. IV, § 11 (setting forth the procedure by which a bill may become duly-enacted law); VIRGINIA GENERAL ASSEMBLY LEGISLATIVE INFORMATION SYSTEM, HB 2338, 2013 Reg. Sess. (Va. 2013), *Criminal conviction; appeals to Court of Appeals, etc., based on erroneously admitted evidence, available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=131&typ=bil&val=hb2338> (setting forth the complete legislative history of House Bill No. 2338).

³ VA. CONST. art. IV, § 13.

Virginia case to which it responds, *Rushing v. Commonwealth*,⁴ was based on the state Constitution. You further posit that, assuming those circumstances, an amendment to the Constitution of Virginia was necessary to give force to the enactment.

Applicable Law and Discussion

At the threshold, all legislative acts “are presumed to be constitutional.”⁵ “Indeed, ‘[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.’”⁶ Under this presumption, courts must “resolve any reasonable doubt regarding the constitutionality of a statute in favor of its validity.”⁷ Moreover, “the Legislature has the power to legislate on any subject unless the Constitution says otherwise”⁸

Section 19.2-324.1, the new code provision created by the legislation you question, provides for the following:

In appeals to the Court of Appeals or the Supreme Court, when a challenge to a conviction rests on a claim that the evidence was insufficient because the trial court improperly admitted evidence, the reviewing court shall consider all evidence admitted at trial to determine whether there is sufficient evidence to sustain the conviction. If the reviewing court determines that evidence was erroneously admitted and that such error was not harmless, the case shall be remanded for a new trial if the Commonwealth elects to have a new trial.

This provision abrogates *Rushing*⁹ and codifies U.S. Supreme Court jurisprudence addressing the proper procedure for evaluating challenges to the sufficiency of the evidence when evidence is improperly admitted or rejected at trial.¹⁰ You express concern that remanding a case for a new trial under the circumstances presented in § 19.2-324.1 runs afoul of constitutional protections against double jeopardy.¹¹

⁴ 284 Va. 270, 726 S.E.2d 333 (2012).

⁵ *In re Phillips*, 265 Va. 81, 85, 574 S.E.2d 270, 272 (2003); *see also Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 336, 689 S.E.2d 679, 684 (2010) (“[D]uly enacted laws are presumed to be constitutional.”); *Yamaha Motor Corp., U.S.A. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002) (“[A]ll acts of the General Assembly are presumed to be constitutional.”).

⁶ *FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 590, 701 S.E.2d 795, 799 (2010) (alteration in original) (citation omitted); *see also Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959).

⁷ *In re Phillips*, 265 Va. at 85-86, 574 S.E.2d at 272.

⁸ *FFW Enters.*, 280 Va. at 592, 701 S.E.2d at 801 (citation omitted).

⁹ 284 Va. 270, 726 S.E.2d 333.

¹⁰ *See McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (per curiam); *see also Lockhart v. Nelson*, 488 U.S. 33, 40-41 (1988).

¹¹ The federal Double Jeopardy Clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. This provides a defendant with protection against a second prosecution for the same offense after acquittal or conviction, as well as protection against multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Blythe v. Commonwealth*, 222 Va. 722, 725, 284 S.E.2d 796, 797 (1981). The Constitution of Virginia also guarantees that an individual subject to criminal prosecution “shall not . . . be put twice in jeopardy for the same offense.” VA. CONST. art. I, § 8. The protections of the Virginia Constitution with respect to double jeopardy are the same as those of the federal Constitution. *See Stephens v. Commonwealth*, 263 Va. 58, 62, 557 S.E.2d 227, 230 (2002); *Martin v. Commonwealth*, 221 Va. 720, 722, 273 S.E.2d 778, 780 (1981).

Based on a review of the precedent that follows, I conclude that § 19.2-324.1 does not violate the protections against double jeopardy contained in the federal and state constitutions.

I first offer an explanation of how the U.S. Supreme Court views the Double Jeopardy Clause in cases involving evidentiary issues. Significantly, the Court repeatedly has held that the Double Jeopardy Clause “does not preclude the Government’s retrying a defendant whose conviction is set aside because of an *error in the proceedings* leading to conviction.”¹² In *Lockhart v. Nelson*, the Court articulated the policy reasoning behind this doctrine:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.^[13]

In *United States v. Tateo*, the Court explained how this principle also serves to protect a defendant at the trial court level:

From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants’ rights as well as society’s interest.^[14]

An exception exists to the general rule that the government may retry a defendant whose conviction has been reversed for error. This exception, recognized in *Burks v. United States*, is available “when a defendant’s conviction is reversed by an appellate court on the *sole* ground that the evidence was insufficient to sustain the jury’s verdict.”¹⁵ In such instances, “the Double Jeopardy Clause bars a retrial on the same charge.”¹⁶ Consequently, the government is precluded from retrying the defendant in an attempt “to supply evidence which it failed to muster in the first proceeding.”¹⁷ Nonetheless, the U.S. Supreme Court has noted the fundamental distinction, “for double jeopardy purposes,” between a reversal based solely on insufficient evidence and a reversal based on “ordinary trial errors” like the improper admission or rejection of evidence.¹⁸

¹² *Burks v. United States*, 437 U.S. 1, 14 (1978) (quoting *United States v. Tateo*, 377 U.S. 463, 465 (1964)).

¹³ *Lockhart*, 488 U.S. at 38 (1988) (quoting *Tateo*, 377 U.S. at 466); *see also* *Garrett v. United States*, 471 U.S. 773, 796 (1985) (“[T]he finality guaranteed by the Double Jeopardy Clause is not absolute, but instead must accommodate the societal interest in prosecuting and convicting those who violate the law.”) (O’Connor, J., concurring).

¹⁴ *Tateo*, 377 U.S. at 466.

¹⁵ *Lockhart*, 488 U.S. at 39 (emphasis added) (citing *Burks*, 437 U.S. at 18).

¹⁶ *Id.*

¹⁷ *Burks*, 437 U.S. at 5, 11.

¹⁸ *Lockhart*, 488 U.S. at 40 (internal quotation marks omitted). *See* *United States v. Dionisio*, 503 F.3d 78, 83 (2d Cir. 2007) (“[I]n identifying whether jeopardy attache[s], it is necessary to distinguish . . . between determinations that relate to a defendant’s culpability and those that are merely procedural and do not bear on the defendant’s blameworthiness . . .”) (internal quotation marks omitted); *Ex parte Grantham*, 613 So.2d 1260 (Ala. 1993) (discussing and explaining the “*Burks/Lockhart* rule”).

While the former [recognizes] ‘that the government has failed to prove its case’ against the defendant, the latter ‘implies nothing with respect to the guilt or innocence of the defendant,’ but is simply ‘a determination that he has been convicted through a judicial process which is defective in some fundamental respect.’¹⁹

Given this fundamental distinction, “where the evidence offered by the State and admitted by the trial court – whether erroneously or not – would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.”²⁰ Rather, “[i]t has long been settled . . . that the Double Jeopardy Clause’s general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction.”²¹ In sum, a reversal for trial error, rather than the sufficiency of the evidence, does not operate as an acquittal but recognizes that a breakdown in the judicial process occurred. In such instances, “the accused has a strong interest in obtaining a fair adjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.”²²

Accordingly, the U.S. Supreme Court has held that, in considering a defendant’s challenge to his conviction based on the sufficiency of the evidence, a reviewing court must consider *all* the evidence examined at trial, whether or not such evidence was admitted erroneously.²³ The reason for this is that the

¹⁹ *Lockhart*, 488 U.S. at 40 (alteration in original) (emphasis omitted) (quoting *Burks*, 437 U.S. at 15).

²⁰ *Id.* at 34.

²¹ *Id.* at 38. See also *Tibbs v. Florida*, 457 U.S. 31, 40 (1982) (discussing the “narrow exception” *Burks* created to the general rule that retrial upon reversal of a conviction is permissible).

²² *Burks*, 437 U.S. at 15.

²³ *McDaniel*, 558 U.S. at 131; *Lockhart*, 488 U.S. at 41. See also *Langevin v. State*, 258 P.3d 866, 874 (Alaska Ct. App. 2011) (“[A] defendant who successfully contends on appeal that the trial judge should have excluded a portion of the government’s evidence can not [sic] then argue that the government’s remaining evidence was insufficient to withstand a motion for judgement of acquittal. Rather, the sufficiency of the evidence is assessed in light of *all* the evidence presented at the defendant’s trial — even the evidence that was wrongfully admitted.”); *People v. Story*, 204 P.3d 306, 316 (Cal. 2009) (“[W]hen reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted.”); *People v. Williams*, 183 P.3d 577, 581 (Colo. App. 2007) (“[I]n determining whether the evidence in this case is sufficient to support defendant’s conviction, it is permissible for us to consider the laboratory report despite the fact that we have concluded it was improperly admitted.”); *Carr v. State*, 934 N.E.2d 1096, 1109 (Ind. 2010) (“Here, although reversal is required because of trial error in the admission of evidence, clearly *with* that evidence, there was enough to support the jury’s verdict of guilty and the resulting conviction.”) (internal quotation marks omitted); *State v. Wright*, 690 So. 2d 850, 855 (La. Ct. App. 1997) (“[I]f the overall evidence, including the [erroneously admitted evidence], is sufficient to support the conviction, the state is entitled to retry the defendant.”); *Emory v. State*, 647 A.2d 1243, 1266 (Md. Ct. Spec. App. 1994) (“For double jeopardy purposes, one does not subtract the inadmissible evidence and then measure the legal sufficiency of the remainder. One measures, rather, the legal sufficiency of all of the evidence, the inadmissible as well as the admissible.”); *Commonwealth v. Hanson*, 945 N.E.2d 409, 412 (Mass. App. Ct. 2011) (“If evidence, when considered in totality, is sufficient, even where a conviction is reversed on appeal because of the erroneous introduction of a certain piece or pieces of evidence, a retrial is not barred by principles of double jeopardy.”); *State v. Cox*, 779 N.W.2d 844, 853 (Minn. 2010) (“[I]n view of all the evidence presented by the State, including erroneously-admitted evidence, we conclude that the evidence . . . was legally sufficient, and therefore the Double Jeopardy Clause does not preclude a retrial.”); *State v. McCulloch*, 742 N.W.2d 727, 733 (Neb. 2007) (“The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.”); *Stephans v. State*, 262 P.3d 727, 734

reviewing court stands in no greater position with respect to the quantum of evidence than that of the trial court. When a defendant argues on appeal that his conviction should be reversed due to insufficient evidence, he essentially argues that the trial court should have acquitted him at the close of the evidence.²⁴ The reviewing court therefore must examine the exact evidence that was considered by the trial court, without regard to whether such evidence was properly or improperly admitted. To do otherwise would place the reviewing court on a different analytical balance than the trial court, thus potentially skewing the reviewing court's determination as to whether the evidence was sufficient at the trial court level.²⁵

As a result, the reviewing court must treat any evidence improperly admitted at the trial court level as "ordinary trial error" rather than error affecting the sufficiency of the evidence.²⁶ If the overall quantum of evidence (both admissible and inadmissible)²⁷ supports conviction, the reviewing court will not reverse due to insufficiency of the evidence. If a reviewing court concludes that, absent the impermissible evidence, there was insufficient evidence to support a conviction, it should reverse the conviction for "ordinary error," i.e., error lying in the improper admission of evidence rather than the

(Nev. 2011) ("Assessing the record with the erroneously admitted price tag testimony, the evidence was sufficient to sustain Stephans's grand larceny conviction. The remedy for the evidentiary error committed here thus is reversal and remand for a new trial, not acquittal.") (citation omitted); *State v. Horak*, 986 A.2d 596, 601 (N.H. 2010) ("In determining whether the evidence was sufficient, however, we consider all the evidence, including the testimony of the complainant that we previously concluded was erroneously admitted; thus, we adopt for purposes of our state constitutional analysis the United States Supreme Court's standard under the Federal Double Jeopardy Clause."); *State v. Brewer*, 903 N.E.2d 284, 291 (Ohio 2009) ("As the United States Supreme Court held in *Lockhart*, we hold that when evidence admitted at trial is sufficient to support a conviction, but on appeal, some of that evidence is determined to have been improperly admitted, the Double Jeopardy Clauses of the United States and Ohio Constitutions will not bar retrial."); *State v. Frazier*, 622 N.W.2d 246, 261 (S.D. 2001) ("[W]e review all the evidence admitted at trial, including . . . statements that were wrongfully admitted."); *State v. Longstreet*, 619 S.W.2d 97 (Tenn. 1981) (permitting retrial where some of the evidence should have been suppressed because of an invalid search warrant).

²⁴ *McDaniel*, 558 U.S. at 131; *Lockhart*, 488 U.S. at 39.

²⁵ See *Lockhart*, 488 U.S. at 39.

²⁶ *Id.* at 40.

²⁷ The standard of examining all evidence upon review for sufficiency of the evidence is also set forth in *Jackson v. Virginia*: "Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." 443 U.S. 307, 318-19 (1979) (footnote omitted) (citation omitted). The Supreme Court of Virginia has cited the *Jackson* standard many times as controlling sufficiency of the evidence review on appeal in Virginia: see, e.g., *Commonwealth v. McNeal*, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011); *Sullivan v. Commonwealth*, 280 Va. 672, 676, 701 S.E.2d 61, 63 (2010); *Williams v. Commonwealth*, 278 Va. 190, 193, 677 S.E.2d 280, 282 (2009); *Jones v. Commonwealth*, 277 Va. 171, 182, 670 S.E.2d 727, 734 (2009); *McMillan v. Commonwealth*, 277 Va. 11, 19, 671 S.E.2d 396, 399 (2009); *Young v. Commonwealth*, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008); *Maxwell v. Commonwealth*, 275 Va. 437, 442, 657 S.E.2d 499, 502 (2008). See also *Hubbard v. Commonwealth*, 276 Va. 292, 295, 661 S.E.2d 464, 466 (2008) ("[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.") (alteration in original) (quoting *Jackson*, 443 U.S. at 316); *Washington v. Commonwealth*, 273 Va. 619, 629, 643 S.E.2d 485, 490 (2007); *Powell v. Commonwealth*, 268 Va. 233, 237, 602 S.E.2d 119, 121 (2004) (Koontz, J., dissenting) (noting constitutional import of the "beyond a reasonable doubt" standard of proof); *Smith v. Commonwealth*, 220 Va. 696, 703, 261 S.E.2d 550, 555 (1980) (Poff, J., dissenting) (finding insufficient proof of premeditation to sustain first degree murder conviction).

sufficiency thereof.²⁸ As the U.S. Supreme Court has stated, reversal of a conviction on the grounds of “ordinary error” does not preclude the Government from retrying the defendant.²⁹ No double jeopardy principles are offended by a retrial after reversal for ordinary trial error, as opposed to trial error based on the grounds of insufficient evidence.³⁰

Like the U.S. Supreme Court, the Virginia Supreme Court also has dealt with the issue of retrial after reversal for evidentiary error at the trial court level. In *Rushing*, the Virginia Supreme Court considered the case of a defendant who challenged his conviction for criminal gang participation on the grounds of insufficient evidence.³¹ While acknowledging the precedent for evaluating challenges to the sufficiency of the evidence set by the U.S. Supreme Court in *Lockhart*, the Virginia Supreme Court nevertheless found that Virginia had adopted a contrary standard of appellate review.³² Citing *Crawford v. Commonwealth*,³³ the Court stated that the applicable rule in Virginia is that “on appellate review of the sufficiency of the evidence, ‘an appellate court may *not* consider evidence illegally admitted at trial.’”³⁴

Upon finding that some evidence had been erroneously admitted at trial, the *Rushing* Court held that:

[I]f the record is considered *without* the erroneously admitted evidence . . . the Commonwealth proved only one predicate crime committed by a gang member rather than the two required by the statute. Therefore, the Commonwealth failed to prove an essential element of the crime and the Court of Appeals erred in affirming Rushing’s conviction for gang participation.^[35]

The Court then reversed Rushing’s conviction for gang participation and entered final judgment based on insufficient evidence at trial,³⁶ thus barring a retrial.³⁷

The Virginia Supreme Court’s holding in *Rushing* afforded the defendant in that case greater protection against double jeopardy than that delineated by the U.S. Supreme Court in *Lockhart*.³⁸

²⁸ See *Lockhart*, 488 U.S. at 40-42 (reversing defendant’s conviction and permitting retrial due to the erroneous admission of evidence, when – absent such erroneously admitted evidence – the evidence was insufficient to support defendant’s conviction).

²⁹ *Burks*, 437 U.S. at 14.

³⁰ *Id.* at 14.

³¹ See *Rushing v. Commonwealth*, 58 Va. App. 594, 608, 712 S.E.2d 41, 48 (2011) (“The evidence at trial amply supports the rationality of the jury verdict finding Rushing guilty of [gang participation]. Testifying as a gang expert, the detective described the bandannas, colors, hand signs, and other unique indicia of membership associated with the Gangsta Disciples gang. The evidence showed Rushing wore a bandanna in Gangsta Disciples colors during the home invasion. The picture of him flashing the pitchfork hand sign, a symbol unique to the gang, further confirms his status. The evidence also showed Rushing planned and executed the crime with Newton—who also wore a telltale bandanna during the crime, had evidence in his home of the pitchfork and other gang symbols, and used the secret Gangsta Disciples greeting.”).

³² *Rushing*, 284 Va. at 278, 726 S.E.2d at 339.

³³ 281 Va. 84, 704 S.E.2d 107 (2011).

³⁴ *Rushing*, 284 Va. at 278, 726 S.E.2d at 339 (emphasis added) (quoting *Crawford*, 281 Va. at 112, 704 S.E.2d at 123-24).

³⁵ *Rushing*, 284 Va. at 278, 726 S.E.2d at 339 (emphasis added).

³⁶ *Id.* at 279, 726 S.E.2d at 339.

³⁷ See *Burks*, 437 U.S. at 16-17.

Although a state, as a matter of state law, may extend greater constitutional safeguards to its citizens than those afforded by the federal Constitution,³⁹ Virginia has not chosen to do so with respect to double jeopardy protections.⁴⁰ As a result, the holding of the U.S. Supreme Court in *Lockhart* is applicable to constitutional double jeopardy jurisprudence in Virginia. Consequently, the Virginia Supreme Court's holding in *Rushing* represents a deviation from applicable federal precedent.⁴¹

As you note, the Virginia Supreme Court, in *Rushing*, referenced "Constitutional protections"⁴² in its opinion, but did not specify them. Rather, the Court disclaimed that it was reaching the constitutional issue, noting that "[t]he only issues before us in this appeal involve questions of the interpretation of Virginia statutes, Virginia appellate procedure, and Virginia's rules of evidence."⁴³ The Court then reiterated that it was not reaching the constitutional issue.⁴⁴

By its express terms, *Rushing*'s rule of decision did not implicate constitutional grounds. Accordingly, it was and remains within the purview of the General Assembly to change the underlying rules of evidence/appellate procedure in a way that would lead to a different result.⁴⁵ As you note, the

³⁸ The underlying circumstances of *Rushing* are quite similar to those in *Lockhart*. In both cases, a conviction order used to prove a predicate offense ultimately was held inadmissible. *Lockhart*, 488 U.S. at 37; *Rushing*, 284 Va. at 277, 726 S.E.2d at 337-38.

³⁹ Cf. *Virginia v. Moore*, 553 U.S. 164, 174 (2008) ("A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.").

⁴⁰ As stated in Note 11, *supra*, the double jeopardy protections afforded by the Constitution of Virginia are coextensive with Fifth Amendment protections against double jeopardy. See *Stephens*, 263 Va. at 62, 557 S.E.2d at 230 ("Virginia's constitutional guarantee against double jeopardy affords a defendant the same guarantees as the federal Double Jeopardy Clause."); see also *Martin*, 221 Va. at 722, 273 S.E.2d at 780. Cf. *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 134, 704 S.E.2d 365, 369 (2011) (Second Amendment) ("This Court has stated that provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning.").

⁴¹ I note that "a state supreme court has no discretion to disregard" applicable constitutional holdings of the U.S. Supreme Court. See *Jaynes v. Commonwealth*, 276 Va. 443, 458, 666 S.E.2d 303, 311 (2008); see also *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 220-21 (1931) (holding that state courts may not lawfully adopt their own rules and procedures contrary to decisions of the U.S. Supreme Court on questions of federal law; rather, a determination by that Court on a matter of federal law "is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding."). Only the U.S. Supreme Court can overrule one of its precedents. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam).

⁴² *Rushing*, 284 Va. at 278, 726 S.E.2d at 339. *Crawford*, the case cited in *Rushing*, also fails to specify the "Constitutional protections" at issue. See *Crawford*, 281 Va. at 112, 704 S.E.2d at 124.

⁴³ *Rushing*, 284 Va. at 278, n.4, 726 S.E.2d at 339, n.4.

⁴⁴ *Id.* at 278, n.5, 726 S.E.2d at 339 n.5 ("Here, as in *Crawford*, we are concerned with the rules of appellate review in Virginia. The Supreme Court of the United States, in *Lockhart*, in a federal habeas corpus appeal, considered whether the *Double Jeopardy Clause* barred a resentencing proceeding after evidence used to support an enhanced penalty was found to have been improperly admitted. If the Commonwealth should seek to retry *Rushing*, a double jeopardy question may arise, but that question is not before us in this appeal.").

⁴⁵ The Virginia Supreme Court has the power to adopt evidentiary and other rules. See VA. CODE ANN. § 8.01-3 (Supp. 2013). Nevertheless, those rules are subject to revision by the General Assembly. Section 8.01-3(D) ("The General Assembly may, from time to time, by the enactment of a general law, modify or annul any rules adopted or amended pursuant to this section. *In the case of any variance between a rule and an enactment of the General Assembly such variance shall be construed so as to give effect to such enactment.*") (emphasis added).

General Assembly did exactly that when HB 2338 was adopted, with the House of Delegates doing so unanimously.⁴⁶

In closing, I make the following observations. It is well-established that the remedy for a violation of a criminal defendant's Sixth Amendment right to confrontation is a new trial.⁴⁷ The remedy for a violation of a criminal defendant's Sixth Amendment right to effective assistance of counsel is a new trial.⁴⁸ The remedy for a violation of a criminal defendant's Fifth Amendment right against self-incrimination is a new trial without the offending evidence.⁴⁹ None of these situations offends the Double Jeopardy Clause.⁵⁰ A violation of a mere state law rule of evidence, which is what was at issue in *Rushing*,⁵¹ entitles a criminal defendant to no greater remedy than he receives for a violation of a constitutional right.

Based on the foregoing, I conclude that § 19.2-324.1 requires nothing more than what the U.S. Supreme Court has said is required in precisely the circumstance *Rushing* presented. Therefore, the new statute fully comports with the Fifth Amendment of the U.S. Constitution and Article I, § 8, of the Constitution of Virginia. Furthermore, because the *Rushing* decision was not dictated by the constitutional principles you reference, the subsequent enactment of § 19.2-324.1 was and remains within the authority of the General Assembly and no constitutional amendment was necessary.

Conclusion

Accordingly, it is my opinion that House Bill No. 2338, as codified in § 19.2-324.1, is constitutional; the legislation does not infringe upon the protections against double jeopardy contained in the Fifth Amendment to the U.S. Constitution or Article I, § 8, of the Constitution of Virginia. It is further my opinion that no amendment to the Constitution of Virginia was necessary for this enactment to take effect.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁴⁶ See <http://leg1.state.va.us/cgi-bin/legp504.exe?131+vot+HV0608+HB2338>.

⁴⁷ See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327-29 (2009) (remanding the case for further proceedings in light of confrontation violation); *Cypress v. Commonwealth*, 280 Va. 305, 317-18, 320, 699 S.E.2d 206, 213-14 (2010) (remanding co-defendant's case for a new trial after finding Confrontation Clause violation).

⁴⁸ See, e.g., *Jackson v. Warden*, 270 Va. 269, 280, 619 S.E.2d 92, 97-98 (2005) (granting habeas corpus relief and remanding for a new trial).

⁴⁹ See, e.g., *Ferguson v. Commonwealth*, 52 Va. App. 324, 348, 663 S.E.2d 505, 516 (2008) (en banc) (finding defendant's statements were subject to suppression for a *Miranda* violation and remanding for new trial), *aff'd*, 278 Va. 118, 677 S.E.2d 45 (2009).

⁵⁰ The reason for this procedure is manifest: the price for adopting a contrary rule is too high to exact upon society and may ultimately infringe the rights of those subject to criminal prosecution. *Tateo*, 377 U.S. at 466.

⁵¹ 284 Va. at 278 n.4, 726 S.E.2d at 339 n.4.