

Selected Appellate Decisions for Law Enforcement Officers

June 1, 2016– June 1, 2017

- **U. S. Supreme Court**
- **Fourth Circuit Court of Appeals**
- **Virginia Supreme Court**
- **Virginia Court of Appeals**



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Please refer to

2017 Appellate Update Master List

for a complete listing of new cases
of interest to law enforcement officers.



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Topics for Presentation

- Fourth Amendment
- Fifth Amendment
- Crimes Against Persons
- Crimes Against Property
- Drug & Gun Offenses
- DUI and Traffic Offenses
- Evidentiary Issues



New Cases on Interviews & Interrogations

FIFTH AMENDMENT



COMMONWEALTH'S ATTORNEYS' SERVICES COUNCIL
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Taylor v. Commonwealth

- Court of Appeals, September 2016
- Defendant sexually assaulted an unconscious child.
- Police asked the defendant if he would come to the police station to answer questions and he agreed.
- Police gave him a ride to the station and brought him back to an interview room in a secured area, where they closed the door and interviewed the defendant.
- During the interview, the defendant asked to leave to make a phone call and police agreed to let him.



Court: Initial Statements Admissible

- Court: Initial Interview was not “Custodial” and therefore no *Miranda* warning required
- Defendant’s statements appeared relaxed, calm, and voluntary.
- Police did not engage in misconduct, the interview was not particularly long, and the police did not exert “any moral and psychological pressures.”



Taylor continued

- Police served a search warrant on the defendant and collected DNA from his penis and mouth.
- When police told the defendant that his story did not match the facts, the defendant began to panic and requested to leave.
- The police continued to ask him to stay and answer questions, however, and he continued to answer their questions.
- Ultimately, the defendant confessed.



Court: Confession Suppressed

- The Court ruled that police subjected the defendant to “custodial interrogation” when the police served the defendant with a search warrant, confronted the defendant as the primary suspect, and kept questioning him and did not tell him that he was free to leave after the defendant asked to go home.
- While the Court pointed out that each of these factors, standing alone, would not have transformed the interrogation into a “custodial” interrogation, in the totality of the circumstances the defendant was in “custody” at that point & Police should have read *Miranda*



Secret v. Commonwealth

- Court of Appeals, February 2017
- A deputy found the defendant, surrounded by residents of the building he just set on fire.
- The deputy detained the defendant and placed him in handcuffs.
- The deputy asked the defendant if he would be willing to come to the Sheriff's Department to talk to a State Police Investigator. The defendant agreed.
- The deputy told the defendant he would have to transport him handcuffed, per policy, but that he was not under arrest.
- The deputy removed the handcuffs when the defendant arrived at the Department.



Confession

- Defendant and Deputy spoke for an hour
- Defendant Confessed
- Only after the confession did the Deputy read *Miranda*
- Court: Statement admissible without *Miranda* warnings.



Garcia-Tirado v. Commonwealth

- Court of Appeals, March 2017
- Defendant raped a 14-year-old child.
- Defendant's native language was "Mam", a Mayan language.
- Defendant had only lived in the United States for 2 years, but had learned Spanish in school in Guatemala and had approximately 12 years of experience with Spanish.
- During an interview, police asked the defendant if he would be willing to speak with them in Spanish. The defendant stated "Spanish would be fine."
- The officers read him *Miranda* in Spanish
- Defendant confessed to the offense, mostly in Spanish but occasionally also speaking in English. He also wrote an apology letter to the victim in Spanish.



Court: Confession Admissible

- The Court reviewed the video and the defendant appeared to understand his rights and the conversation with the officers.
- The Court noted that he gave no indication that he did not understand the questions posed to him, and his answers in Spanish were responsive and consistent with the questions asked.
- The Court found that the defendant's spelling and grammatical errors in his written apology letter do not show he did not understand Spanish or the words he selected to write the letter.



New Cases on Search & Seizure

FOURTH AMENDMENT



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Utah v. Strieff

- U.S. Supreme Court, June 2016
- Police stopped defendant
- The stop lacked reasonable suspicion and therefore was unlawful.
- However, during the stop, the officer learned that the defendant had an outstanding warrant and arrested the defendant on that warrant.
- The officer searched the defendant incident to arrest and recovered methamphetamine.



Supreme Court: Evidence Admissible

- Held: The evidence discovered on the defendant's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant.
- Court: The officer was, at most, negligent in stopping the defendant unlawfully, but also found that his error in judgment did not rise to a purposeful or flagrant violation of the defendant's Fourth Amendment rights, nor was it part of any systemic or recurrent police misconduct.
- In addition, the officer's intrusion by running a wanted check on the defendant was a "negligibly burdensome precaution" for officer safety.



Court: “Attenuation” Explained

- “Attenuation Doctrine”: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.
- The doctrine has three factors:
 1. The timing of the violation vis-à-vis the timing of finding the evidence;
 2. The presence of intervening circumstances;
 3. The flagrancy of the official misconduct.



U.S. v. Graham

- Fourth Circuit En Banc May 2016
- Lower court had suppressed evidence of historical cell-site data obtained with a Court order, rather than with a search warrant that demonstrated Probable Cause.
- *Held:* Court reversed lower court. Government may obtain this information with a lawful court order under the existing law.
 - No reasonable expectation of privacy in information held by cellphone providers.



Warning:

- The U.S. Supreme Court will take up this issue in the 2017-2018 term in ***Carpenter v. United States***
- The Court will resolve "[w]hether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 127 days is permitted by the Fourth Amendment."



Bland v. Commonwealth

- Virginia Supreme Court, June 2016
- An anonymous caller gave police a very detailed description of a man near a Richmond intersection “waving a gun.”
- When officers arrived about two minutes later, the defendant, who matched the description, “looked in their direction, then patted his front right pocket, his right rear pocket, then pulled his shirt down on the right side . . . Consistent with a ‘weapons check’”
- After a brief chase and struggle when police attempted to frisk him, police recovered a handgun from his rear pocket.



Bland v. Commonwealth: Court Holding

- “The observations made by the officers [including the defendant’s ‘weapons check’] combined with the information conveyed by the eyewitness informant not only provided the requisite suspicion to stop defendant, but also authorized the officers to frisk defendant’s person for weapons.”



Collins v. Commonwealth

- Virginia Supreme Court, September 2016
- Police had probable cause to believe defendant possessed a stolen motorcycle, covered by a tarp in his driveway.
- Police lifted the tarp and viewed the VIN #
- The Vin # came back stolen.
- Defendant objected that the police entered his driveway without a warrant.



Collins: Search Lawful

- The automobile exception is a “bright-line rule” that applies whenever a vehicle is clearly operational and therefore readily movable
- A vehicle’s inherent mobility—not the probability that it might actually be set in motion—is the foundation of the automobile exception’s rationale.
- Also: Moving a tarp to see a Vin# was lawful
 - *See New York v. Class* (moving papers on dashboard)



Edmond v. Commonwealth

- Court of Appeals, August 2016
- Seeking a murderer, Virginia police learned that the defendant was in North Carolina and contacted North Carolina police.
- In NC, an officer located the defendant's vehicle.
- Based on a Virginia detective's request, a U.S. Marshall directed the North Carolina officer to stop the vehicle and identify the occupants



Edmond: Affirmed

- Virginia adopted “collective knowledge doctrine,” whereby an officer’s action is proper as long as the officer directing such action “has the requisite knowledge to justify the action under the appropriate legal standard.”



Taylor v. Commonwealth

- Court of Appeals, September 2016
- The Court ruled anticipatory warrants must be supported by probable cause establishing:
 1. That the triggering condition of the warrant is likely to occur, and
 2. That contraband or evidence of crime will likely be found on or in the premises to be searched upon the occurrence of the triggering condition.
- The Court of Appeals concluded that the “sure course” requirement it had set forth in *McNeil* was an unnecessary requirement; although it noted that, in some cases, an affiant may demonstrate probable cause by demonstrating that the contraband is on a “sure course” to the premises.



Campbell v. Commonwealth

- Court of Appeals, October 2016
- The Court ruled that a search is invalid and evidence obtained in the search is inadmissible under §19.2-54 if the search warrant affidavit, including the sworn statements providing probable cause, is not filed with the clerk within a period of thirty days from the issuance or execution of the warrant.



Salahuddin v. Commonwealth

- Court of Appeals, January 2017
- Defendant gets his friend to rent a room at a hotel so defendant can deal heroin
- The defendant's friend signed a registration card that permitted the hotel to enter the room at any time to conduct inspections of the room.
- The agreement also stated that, should the occupant violate any laws, the agreement was subject to immediate termination, without regard to landlord-tenant laws.



Hotel Clerk Becomes Suspicious

- After watching several people enter the room in a suspicious manner, the hotel clerk waited until the room was empty and entered the hotel room.
- Inside, she found a large amount of drugs and drug paraphernalia.
- The clerk summoned the police, who responded and entered the room along with the clerk.
- While police were present, the clerk continued to search the room and found additional evidence.
- The clerk showed the evidence to the police, who photographed it, left the room, and obtained a search warrant.



Salahuddin: Evidence Admissible

- Defendant did not have a reasonable expectation of privacy once his host, the registered occupant, allowed the hotel staff to enter.
- Hotel manager's act of telephoning the police—after observing suspicious “foot traffic” and then seeing drugs in plain view during an authorized inspection of the room—constituted an invocation of the express provision of the rental agreement permitting the hotel to exclude a renter from the premises for unlawful behavior.
- The Court ruled that the defendant no longer had a reasonable expectation of privacy in that room once the clerk found the drugs and summoned the police.



Hairston v. Commonwealth

- Court of Appeals, April 2017
- Defendant passed several cars over a double-yellow line in view of an officer who was on her way to work.
- The officer took a photograph of the driver and recorded the license plate of the vehicle, but was not immediately able to identify the driver.
- Later in the day, she saw the defendant again, driving the same vehicle.
- She and another officer stopped the defendant, learned his identity, smelled the odor of marijuana inside the vehicle, searched it, and located cocaine and other contraband.



Hairston: Evidence Admitted

- The Court held that the officers had probable cause to arrest the defendant for the earlier offense of reckless driving.
- The fact that several hours passed after the officer saw the defendant commit the reckless driving offense and before she seized him for further investigation or arrest did not defeat the existence of probable cause.
- The Court also found that it was irrelevant that the defendant ultimately never faced charges for the reckless driving offense.



Commonwealth v. Donald

Commonwealth v. Sampio

- Court of Appeals, August 2016
- Reversed a conviction where the search was based on a stop for Jaywalking in violation of § 46.2-923
- Court: Only 2 ways to violate the statute by:
 1. By carelessly or maliciously interfering with the orderly passage of vehicles when crossing a highway; or
 2. By failing to cross at an intersection or marked crosswalk where it is possible to do so.



Court's Reasoning on Jaywalking

- The defendants were not negligent in crossing between intersections, so long as the route they took was the most direct.
 - “It is not reasonable for pedestrians to be expected to walk one-tenth of a mile out of the way to cross at a congested intersection with no crosswalk where approximately twenty lanes of traffic meet, and then walk one-tenth of a mile back to their destination.”



Carter v. Commonwealth

- Court of Appeals, November 2016
- Defendant shoots his wife, but claims that it was suicide.
- Police obtained a search warrant for the defendant's phone.
- The affidavit noted that the defendant's explanation for his wife's death was not consistent with the facts and that witnesses had stated they were having drug and financial problems.
- In the affidavit, the officer wrote that the defendant's claims were inconsistent with the facts and therefore he was seeking to seize the phone or any devices that may contain electronic data, as well as records and documents.



Carter: Search Lawful

- “The question of what evidence may be relevant to a criminal prosecution is ultimately determined at trial and not by a magistrate at the time a search warrant is issued when it is often unknown what evidence the search will uncover.”
- The Court ruled that the evidence of the drug use permitted a magistrate to conclude that the request to seize computers, cell phones, and other electronic devices was relevant.



Johnson v. Commonwealth

- Court of Appeals, November 2016
- Police stopped a vehicle for a defective taillight.
- The defendant was a passenger in the vehicle.
- Upon retrieving the vehicle registration and identifying information from the two male passengers, the officer returned to his vehicle and, prior to running the information through DMV and VCIN/NCIC, he immediately called for a K9 officer.
- He learned that the driver was licensed, but never ran any other checks on the occupants of the vehicle.



Focus on Mr. Johnson

- Six minutes later, the K9 officer arrived.
- For about 4 minutes, the officer assisted a citizen with an unrelated issue, and then for the next 6 minutes, the officer assisted the K9 officer in conducting a dog sniff of the vehicle.
- Thereafter, the officer spoke to the defendant and other passengers for a couple of minutes until the defendant confessed he had drugs on his person.
- The officer seized the drugs and searched the car.
- He never addressed the defective taillight again and never completed any other computer checks on any of the occupants.



Court: Conviction Reversed

- The Court repeated that, under *Rodriguez*, that a police officer “may conduct certain unrelated checks during an otherwise lawful traffic stop,” but “may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual;”
- “Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.”
- The officers’ drug investigation leading to the defendant’s confession violated the defendant’s Fourth Amendment rights and likewise, the search was tainted by the illegal investigation and arrest.



Johnson Reasoning

- The Court concluded that, because the officer performed no further computer checks on the driver or the two other occupants after the K9 officer's arrival, he must have had all the information reasonably necessary to complete the equipment violation citation process by the time the K9 officer arrived.
- At that point, approximately ten minutes into the stop, the Court ruled that the justification for the traffic stop no longer existed.
- The stop must be “sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.”



Matthews v. Commonwealth

- Court of Appeals, November 2016
- Officer stopped defendant for Dangling Object, and gave him a warning ticket.
- The Officer engaged in a brief conversation with the defendant about his criminal history and tattoos, which were unrelated to the stop
- During that conversation, the defendant consented to a search of the vehicle
- Officers discovered drugs



Held: Evidence Obtained Unlawfully

- The Officer “did not have a reasonable articulable suspicion that Matthews possessed illegal drugs to justify the extension of the stop by inquiring into his criminal record, discussing his tattoos, and requesting a K-9 unit.”
- Because the “detention exceeded the time reasonably necessary to address the dangling object traffic violation, the seizure violated the Fourth Amendment and consequently invalidated Matthews’s consent to the search”



But...

- Court applied the U.S. Supreme Court's *Rodriguez* case.
- “Officer Mocello’s delay in completing the traffic stop violated the Fourth Amendment and consequently invalidated Matthews’s consent to search the vehicle.”
 - BUT: Since the stop pre-dated *Rodriguez*, the Court refused to exclude the evidence



Commonwealth v. Simpson

- Court of Appeals, January 2017
- While standing outside a vehicle he had stopped, an officer observed a firearm in the center console of the vehicle.
- Although it was difficult to see, the officer could see the firearm with the aid of a flashlight.
- The officers seized the gun and learned the defendant was a felon.



Court: Suppressed Evidence

- Note: Commonwealth agreed the gun was NOT in plain view
- The Court found that the mere existence of a weapon, without more, does not automatically equate to probable cause to seize it pursuant to the Fourth Amendment.



United States v. Robinson

- Officers stopped a car where the defendant was a passenger for traffic violation.
- Officers developed reasonable suspicion that he was carrying a concealed handgun and patted him down.
- Defendant argued pat down was unlawful, because as far as the officers knew, the State could have issued him a permit to carry a concealed firearm.



Court: Proper to Pat Down the Defendant

- January 2017, 4th Circuit *En Banc*
- Court: “a law enforcement officer is justified in frisking a person whom the officer has lawfully stopped and whom the officer reasonably believes to be armed, regardless of whether the person may legally be entitled to carry the firearm.”
- Court: “it is inconsequential that the passenger may have had a permit to carry the concealed firearm.”
- The danger justifying a protective frisk arises from the combination of a forced police encounter and the presence of a weapon, not from any illegality of the weapon’s possession.



Williams v. Commonwealth

- Court of Appeals, March 2017
- Officers stopped a vehicle in which the defendant was a back-seat passenger for a traffic violation.
- The officers noticed the defendant furtively moving around in the back seat.
- A K-9 alerted on the vehicle and the officers searched the inside, finding marijuana residue throughout the floorboard in the front and back of the vehicle.
- The officers searched the defendant and found cocaine.



Court: Search Was Lawful

- The officers had probable cause that the defendant possessed marijuana, and therefore, the officers had probable cause to believe that the defendant possessed marijuana either individually or jointly with the other occupants of the vehicle.
- The Court ruled that this probable cause entitled the officers to search the defendant.
- The Court also held that the officers had probable cause to arrest the car's occupants, including the defendant, and therefore the search was also justified as a search incident to arrest.



Porter v. Commonwealth

- Court of Appeals, May 23, 2017
- While speaking with a defendant, officer asked to see a pill bottle in his hand.
- The bottle, labeled “morphine”, indicated that the prescription had been filled with ninety pills seven days prior. The bottle only had two pills.
- The defendant stated that he had been taking two to three pills a day.



Held: Reasonable Suspicion to Detain the Defendant

- The Court agreed it was proper to deduce that, based on the prescription label noting that it had been filled seven days earlier, the bottle should have been mostly full rather than containing only two pills.
- The Court rejected the defendant's argument that there might have been an innocent explanation for his pill bottles
- The possibility of an innocent explanation for the suspicious conduct does not necessarily forbid an officer from making a brief, investigatory stop or detention to confirm or dispel his suspicion.



PART TWO: CRIMES AND OFFENSES



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ABDUCTION



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Harper v. Commonwealth

- Defendants intercepted a restaurant employee at gunpoint outside and ordered her to “Go to the back door.”
- The men led the woman to the back door at gunpoint and entered the restaurant’s office, where they then pointed guns at two assistant managers and a cook.
- One of the robbers “grabbed” the cook and moved him to an area just outside the office door.
- The assistant manager opened the safe in the office, the defendants took the money, and fled.



Court: Split Ruling

- Affirmed conviction for the cook's and waitress' abductions.
- The forced movement of the cook and of the waitress constituted abduction.
- Reversed conviction for the manager's abduction.
- The movement of the managers within the office was incidental to the robbery and did not prove the separate offense of abduction with intent to extort money.



Lunceford v. Commonwealth

- Court of Appeals, October 2015:
- Court reversed a conviction for a defendant who argued with the victim in a car.
- Although the victim explained that she “was not scared of him” during their argument, the victim was concerned that the argument might have devolved into her initiation of a physical fight that would be embarrassing



DOGFIGHTING



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Hawkins v. Commonwealth

- Court of Appeals, December 2016
- At trial, two expert witnesses testified about the physical evidence seized from the defendant's property, including a breeding stand, spring pole, and flirt pole, which they described as items used in the breeding of fighting dogs.
- The defendant had numerous dogfighting publications and journals at his property, some of which contained the defendant's own advertisement for puppies in which he used language relating to dogfighting.
- Court agreed evidence sufficient to prove dogfighting.



ARSON



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Yergovich v. Commonwealth

- Court of Appeals, September 2016
- Defendant purposely set his belongings on fire to “erase the memories” of his girlfriend and took only minimal steps to contain it.
- The house caught on fire.
- Defendant fought his father when he tried to stop the fire.
- The Court the Court explained that, while the defendant’s explanation may have addressed his *motive*, his conduct established “malice,” through the defendant’s conduct resulting in injury to his father and damage to the family home as well as destruction of personal property of others.



ASSAULTS



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ASSAULT ON LAW ENFORCEMENT



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Doscoli v. Commonwealth

- Court of Appeals, June 2016
- Officers responded to a 911 hang-up in a potential domestic situation, the defendant exited the residence and cursed the officers, demanding that they leave.
- After the defendant slammed the door and locked it, officers could hear the defendant cursing another person inside.
- When the elderly resident finally opened the door, that man appeared to have a recent injury, but denied being attacked.
- The defendant continued to be belligerent. Finally, the officers told the defendant to “shut the door, lower his voice and maintain the peace,” and left.



Defendant Makes It Worse

- However, as the officers walked away, the defendant cursed them and displayed an offensive gesture towards them.
- They returned to the residence and the defendant began to angrily curse the officers while they stood in a common area.
- They arrested the defendant for breach of the peace.
- The defendant then struck the officers and smeared one of the officers with feces.



Doscoli: Conviction Affirmed

- While a citizen has the right to resist an unlawful arrest, close questions as to whether an officer possesses probable cause “must be resolved in the courtroom and not fought out on the streets.”
- The officers had probable cause that the defendant had refused or neglected to assist the officers in the preservation of the peace in violation of Va. Code § 18.2-463.
- The Court also found probable cause that the defendant unlawfully cursed and abused the officers in violation of §18.2-416 and probable cause that the defendant obstructed justice in violation of §18.2-460(A).
- Court: When a law enforcement officer has probable cause to arrest a suspect for one crime, it is immaterial if the suspect is later charged with something else.



MALICIOUS WOUNDING



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Perkins v. Commonwealth

- The defendant struck the victim on the head with a gun with force sufficient to injure the victim.
- However, the Court did not find sufficient evidence from which the trial court could have inferred an intent to cause permanent disability.
- The Court noted that the co-defendant also struck the victim, and when he did, the victim fell to the ground, unconscious.
- The Court concluded that the trial court could not draw an inference of malice on the part of the defendant, despite the victim's injuries.



Caution: *Perkins* is on Appeal

- The reasoning in this case has been questioned and the Court may revisit it on appeal.



BATTERY



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Mayr v. Osborne

- Virginia Supreme Court, February 2017
- While performing back surgery the defendant, a doctor, accidentally performed the surgery on the wrong part of the plaintiff's spine.
- Court: Insufficient evidence of intentional battery.



Mayr Court Explanation

- The Court explained that, in medical cases, a technical battery is present where
 1. The patient placed terms or conditions on consent for a particular procedure, and the doctor ignored those terms or conditions;
 2. The physician intentionally performed an additional procedure beyond the procedure the patient consented to; or
 3. The physician intentionally performed a different procedure or one that differs significantly in scope from the procedure for which the patient provided consent.



BAD CHECK



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Watkins v. Commonwealth

- Court of Appeals, July 2016
- Dealership let defendant drive off in a car without a contract or paying for it.
- One month later, the parties finally signed a contract and the defendant paid for the deposit by check
- Check bounced.
- Defendant dodged the dealership and lied repeatedly about having the funds and having paid, but admitted to police she knew she didn't have sufficient funds.



Watkins: Conviction Affirmed

- Court: Defendant clearly had fraudulent intent, knew that her account lacked sufficient funds, and issued the \$2,500 check on March 21, 2014 to pay for the car pursuant to the signed contract with Gateway dated that same day.
- The Court determined that the defendant was not the legal owner of the car when she first took it; instead, the defendant was, at best, a bailee of the car.



BURGLARY



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Graves v. Commonwealth

- Court of Appeals, May 23, 2017
- A protective order that granted the wife exclusive possession of a residence and ordered the defendant to leave and stay away from the residence meant that the wife's house was no longer the defendant's residence and any interest that the defendant had in her home "was relegated to wife's superior possessory interest and right to exclusive habitation."
- The defendant's breaking and entering "offended wife's right of habitation" in violation of Code § 18.2-91 and he was guilty.



CARJACKING



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Hilton v. Commonwealth

- Virginia Supreme Court, April 2017
- The defendant and an accomplice robbed two men who had thought they were meeting to purchase a car.
- The two victims gave the defendant keys to their truck, but before the defendant could leave the area, one of the victims produced a firearm and ordered the defendant to drop the keys.
- The defendant dropped the keys and fled.
- Court: A perpetrator can commit carjacking without taking possession of it, by seizing control of the victim's vehicle, i.e., "exercising power" over it.



CHILD NEGLECT



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Coomer v. Commonwealth

- Court of Appeals, April 2017
- While out for the night, defendant and her boyfriend learned that their babysitter had to unexpectedly leave their child.
- By that point, the defendant and her fiancé had consumed about a pitcher and a half of beer.
- The defendant drove to the babysitter's residence, placed her daughter in the car, and drove away.
- It was dark and rainy and the defendant drove under the speed limit until another vehicle in front of her suddenly slowed down; although the defendant tried to stop, she crashed into that car.
- The crash did not significantly damage either car. Police investigated and learned that the defendant had a BAC of .10 to .11 at the time of the crash, which took place on a wet and curvy road.



Coomer: Conviction Reversed

- The Court wrote: “Unquestionably, driving with a BAC over the legal limit with a child, particularly a very young child, in the car creates a potential danger to the child.”
- “Without additional evidence in the record of a substantial risk or probability of serious injury or death to the child arising from the accident, Coomer’s actions do not rise to the level required for a felony conviction pursuant to Code § 18.2-371.1(B)(1).”



Mott v. Commonwealth

- Virginia Court of Appeals, November 2016
- Defendant left her four children, ages one, three, five, and seven years old, alone in a hotel room for several hours, knowing the children would be alone in a room with a BB gun that appeared to be a real firearm, a pocketknife, an open beer can, and a cup that appeared to contain an alcoholic beverage, but nothing to eat.



Mott: Conviction Affirmed

- The Court agreed that the defendant's conduct constituted "virtual abandonment" of her children.
- The Court found that the evidence demonstrated that the defendant knew her conduct was likely to expose her children to substantial risk or the probability of serious injury or death.
- The defendant was gone for several hours, knowing the children would be alone in a room with many dangerous items and nothing to eat.



CHILD PORNOGRAPHY



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Kovach v. Commonwealth

- Court of Appeals, December 2016
- Court **AFFIRMED** convictions for child pornography in a “zip” file on his desktop computer, where the defendant had control over the desktop, the images were under the defendant’s user name, and the zip file had recently been opened on the desktop.
- Court **REVERSED** for child pornography found in the parts of the computer that were not accessible to the defendant.
 - In the computer’s “unallocated space”, a place that is generally inaccessible to users, where a computer stores “deleted” data



Coleman v. Commonwealth

- Court of Appeals, December 2016
- Defendant confessed that while looking for images of girls his own age, he had used the search term “kiddy porn” when other terms appeared to provide only adult pornography and that he refined his search terms to find images of women less than 16 years of age.
- Given the lack of evidence that someone else accessed the defendant’s personal “Pinterest” account and his admission that he posted the first photo of several photos on “Pinterest”, the only reasonable inference was that the defendant was responsible for the images.



CONTRIBUTING TO THE DELINQUENCY OF A MINOR



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Embry v. Commonwealth

- *Court of Appeals, March 2017*
- Held: Intentionally exposing a child to any condition that poses a substantial risk to the child's health or safety constitutes a violation of the statute, regardless of how long or how many times the child was exposed to that condition.
- The Court refused to require the Commonwealth to prove, as an element of an offense pursuant to Code § 18.2-371, that a child was exposed to a potential hazard for any particular period of time or on repeated occasions.



CONSTRUCTION FRAUD



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Johnson v. Commonwealth

- Court of Appeals, May 23, 2017
- Defendant defrauded a homeowner, pocketing an advance for construction work that he never performed.
- The homeowner sent a letter demanding the return of the funds. The homeowner sent the letter by certified mail, but did not request a return receipt.
- Court: Reversed Conviction.
- §18.2-200.1 requires that the letter be sent with a return receipt request.



CREDIT CARD THEFT



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Scott v. Commonwealth

- *Virginia Supreme Court, August 2016*
- Credit Card Theft does not require that the Commonwealth allege or prove the specific intent to use, sell or transfer a credit card that has been taken from a cardholder without consent.
- The Court overruled the previous holdings by the Court of Appeals in *Scott* and *Darnell*, in which the Court of Appeals had found the crime to be a specific intent crime.
- The Court held that credit card theft is a general intent crime completed upon an unlawful taking of the card, even if the card is in the victim's purse.



DRIVING SUSPENDED OR REVOKED



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Peters v. Commonwealth

- Court of Appeals, November 2016
- Held: Under §46.2-203.1, the notice sent by DMV by first-class mail to the defendant's home was "deemed to have been accepted by the person at that address."
- A DMV transcript that noted that the defendant was "Revoked" and noted "Notice of Suspension/Revocation Received" by first-class mail, along with the defendant's statement that he did not have a license, sufficiently proved the offense of Driving Revoked, DUI-Related.



DUI



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Birchfield v. North Dakota

- U.S. Supreme Court, June 2016
 1. DUI breath tests are a permissible search incident to the defendant's arrest.
 2. Implied Consent is a valid way to compel Blood Tests and Breath Tests.
 3. States may compel breath tests with criminal and/or civil consequences
 4. States may NOT compel blood tests with criminal consequences.
 5. States may compel blood tests with civil consequences.



Note: General Assembly Corrected Our Statutes this Spring

- Because eliminating the criminal penalty for refusing a blood test made our statute constitutional again, our forms are compliant
- A search warrant need only be obtained if:
 - 1) they refuse;
 - 2) you need blood on private property; or
 - 3) you are otherwise outside the parameters of implied consent, i.e. your defendant was not arrested within three hours of the offense.



Wolfe v. Commonwealth

- Court of Appeals, December 2016
- The Court reiterated that, in blood cases, the constitutional validity of the implied consent statute is well-established, even in light of *Birchfield*.
- The Court noted that the act of driving constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample. The defendant did not have to affirmatively consent to the blood test for the officer to take his blood.



Staiger v. Commonwealth

- Court of Appeals, January 2017
- Defendant, who already had one DUI conviction, drove drunk to her AA meeting, crashed, returned home, drove back to the AA meeting in another car and crashed again.
- Held: Convictions for DUI 2nd and 3rd affirmed.
- The Commonwealth does not need to convict the defendant of a DUI 2nd first before pursuing the 3rd offense DUI



REFUSAL



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Kim v. Commonwealth

- Virginia Supreme Court, April 2017
- Defendant, under arrest for DUI, refused to submit to a breath sample.
- The officer arrested the defendant on a roadway located in the dead center of an apartment complex.
- The roadway intersects with a public highway, at one end and a private road in the apartment complex at the other end.
- The apartment complex was accessible by public roads, but the roads within the complex were privately maintained.



Kim: Barriers to Entry

- There were no physical barricades or security guards preventing entry by the public.
- There were signs located at every entrance and throughout the complex indicating that apartment complex was “Private Property.”
- The signs also stated “No Soliciting,” “No Loitering,” “No Trespassing” and “Violators Will Be Prosecuted.”



Court: Refusal Conviction Reversed

- The conspicuously posted “No Trespassing” signs established that the apartment complex’s roadways were not “open to the use of the public” for any reason.
- The signs negated any consent to access the roads within the apartment complex that may be implied by the lack of physical barriers or the fact that the roads are named, paved, curbed, bordered by sidewalks and have posted traffic signs.
- Since the roads were not “highways,” implied consent did not apply and the defendant was not required to submit a breath sample.



DRUG OFFENSES



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Kincaid v. Commonwealth

- Court of Appeals, July 2016
- Possession of the mere residue of methamphetamine was insufficient to prove that the defendant had the intent to distribute the controlled substance.



Broadous v. Commonwealth

- Court of Appeals, February 2017
- The Court addressed the meaning of § 18.2-251.03,
- The Code provides an affirmative defense to prosecution of an individual for the unlawful possession of a controlled substance **only if** that individual satisfies **each** of 6 requirements, the 1st of which is that the person “seeks or obtains emergency medical attention for himself, if he is experiencing an overdose, or for another individual, if such other individual is experiencing an overdose.”
- Court: The plain meaning of the phrase “obtains emergency medical attention for himself” requires a defendant to have actively planned and taken steps to gain medical treatment.



HIT & RUN



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Bunn v. Commonwealth

- Court of Appeals, May 16, 2017
- Defendant crashed into a parked car with a child inside.
- The child exited the car, crying, holding her head, and saying “my head hurt, my head hurt.”
- The defendant told the family: “don’t call the police, she will be all right,” but fled without asking if the child was injured to a house 500 feet away.
- When an officer arrived and located the defendant, the defendant denied that he was the driver.
- Court: Guilty of Hit & Run with Personal Injury



HOMICIDE



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Suter v. Commonwealth

- Court of Appeals, February 2017
- Defendant observed an altercation between the victim and her friend.
- After she witnessed her friend pull a gun and shoot at the victim, she immediately drove her friend away from the scene.
- The victim died two days later.
- The Court ruled that that a person cannot be convicted as an accessory after the fact to a murder because of aid given before the victim's death.



IDENTITY FRAUD



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Salazar v. Commonwealth

- Court of Appeals, August 2016
- Defendant used the victim's social security number to obtain a mortgage on a home.
- The victim, suspicious of strange mail that he received, decided to subscribe to a credit monitoring service at a cost of \$29/month.
- Court: Even though defendant made all his payments, the victim's monthly payments, which totaled more than \$200, did constitute a "loss" under the statute and therefore the offense was a felony.



LARCENY



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Petit Larceny 3rd or Subsequent

- *Pitts v. Commonwealth*:
- The Court rejected the argument that the larceny convictions must take place before the offense.
- The defendant is guilty of Petit Larceny 3rd if she has 3 or more convictions at the time of the trial, not the time of the offense.



OBSTRUCTION



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Fripp-Hayes v. Commonwealth

- Court of Appeals, October 2016
- Officer had reasonable suspicion to lawfully detain the defendant's son as a suspect in a larceny.
- Defendant prevented officer from photographing her son and tried to drive him away.
- Court: An officer who suspects that criminal activity has occurred has “full authority” to question a suspect about his identity, the Court found that the defendant unlawfully interfered with the officer's attempt to photograph the son.
- Obstruction conviction affirmed.



Epps v. Commonwealth

- Court of Appeals, December 2016
- Court affirmed conviction for defendant who turned on police, investigating him for public indecency, and squared his body up in a fighting stance.
- The defendant obstructed the officer's performance of his official duties as a law enforcement officer.
- The Court noted out that, to apprehend the defendant, the officer had to threaten him with the use of force.



SEXUAL ASSAULT



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Hutton v. Commonwealth

- Court of Appeals, November 2016
- Court: Child's adult neighbor did not have a "custodial" or "supervisory" relationship and therefore was not subject to Indecent Liberties conviction under 18.2-370.1(A).
- Defendant did not engage in supervisory or caretaking behavior, did not take responsibility for the safety or well-being of the victim, or establish a supervisory relationship between himself and the victim.



Bailey v. Commonwealth

- Court of Appeals, January 2017
- Court: When defendant told a ten-year-old boy that he would buy him an expensive ice cream if the boy would let the defendant smack the child's bare bottom, that was sufficient to prove Indecent Liberties under 18.2-370(A)(3)
- 18.2-370(A)(3) prohibits an adult from proposing that he "feel" the sexual parts of a minor, regardless of the degree of force applied or the duration of the contact



ROBBERY



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Small v. Commonwealth

- Court of Appeals, December 2016
- Defendant and his confederates visited an elderly man's home and offered to repair his driveway for a couple hundred dollars.
- However, after dumping some gravel on the victim's driveway and doing almost no work, the defendant and his confederates demanded over eight thousand dollars.
- When the victim balked, one of the men began tapping his shovel on the ground and told the victim that his "kids would find [him] behind the house that night if [he] didn't pay him."
- The victim agreed and drove with them to the bank and paid.



Court: Robbery Affirmed

- At trial, the victim testified that he paid the men because he was afraid of what they would do to him, given their previous threat.
- Though robbery is a taking that results from violence or intimidation, the Court reasoned that there is no requirement that the intimidation immediately precede the taking.
- The Court found that the elderly victim reasonably feared for his safety and that his fear overbore his will.



PART THREE: DEFENSES



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SELF-DEFENSE



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Small v. Commonwealth

- Virginia Supreme Court July 2016
- Court: To use the defense of duress or necessity, a defendant must show:
 - 1) A reasonable belief that the action was necessary to avoid an imminent threatened harm;
 - 2) A lack of other adequate means to avoid the threatened harm; and
 - 3) A direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.



Small: Affirmed Conviction

- In this case, the Court found no evidence of an ongoing threat that would support the defense of justification for Possession of a Firearm by Felon
- Defendant claimed that he possessed the firearm to protect himself from someone who had shot him and who had killed his friend just 4 days before his own arrest.



Hines v. Commonwealth

- Virginia Supreme Court, October 2016
- Defendant and the victim, who had been drinking, verbally argued in the defendant's home.
- During the argument, the defendant claimed that he saw the victim holding a gun.
- The defendant's wife and sister were both in the room as well.
- The defendant left the room, retrieved his own gun, and returned.
- The defendant claimed that the victim pointed the gun at him.
- The defendant shot and killed the victim.



“Castle Doctrine”

- Reaffirming the 1922 *Fortune* case, the Court wrote that, “when a party assaults a homeowner in his own home, as in this case, the homeowner has the right to use whatever force necessary to repel the aggressor.”
- The *Fortune* case had set forth the “castle doctrine”, stating “a man is not obliged to retreat if assaulted in his own dwelling but may use such means as are absolutely necessary to repel the assailant even to the taking of life.”
- The Court held that the victim was brandishing a weapon in the defendant’s own home, and the defendant exercised his right to defend himself, his family, and his home with appropriate force by shooting and killing the victim.



PART FOUR: EVIDENCE



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BEST EVIDENCE RULE



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Melice v. Commonwealth

- Court of Appeals, August 30, 2016
- Police arrested defendants for trafficking drugs.
- At trial, the officer testified that the defendant's phone was constantly receiving text messages and phone calls and that he remembered that some of the text messages asked if the defendant was still in the area.
- The officer could not remember the exact details and no one introduced the text messages themselves.
- The Court agreed that this evidence violated the "Best Evidence Rule" as codified in Rule 2:1002, and that the Commonwealth should have introduced the writings themselves, or explained why they could not.



HEARSAY



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Garnett v. Commonwealth

- Court of Appeals, December 2016
- The Court agreed that the Commonwealth can authenticate text messages and prove the ownership of a mobile phone with either direct or circumstantial evidence, citing numerous cases where Virginia and other courts had found a sufficient foundation for digital evidence.
- However, the Court ruled that mere proximity to a phone was insufficient to prove that the defendant owned the phone and authored the text messages.



Grady v. Commonwealth

- Court of Appeals, October 4, 2016
- Court found that evidence was sufficient to show that the person who confessed over the phone was the defendant.
- A statement during a phone call of the speaker's identity, standing alone, is not generally regarded as sufficient proof of such identity unless it is corroborated by other circumstances.



How the Commonwealth Proved It Was the Defendant on the Phone

- The defendant stole shoes from a store on video
- Police identified his vehicle using surveillance video.
- Officers called the company that owned the vehicle.
- The defendant called the police back and admitted that he stole shoes from the store.
- The defendant identified himself by name and provided his cellphone number.
- The officer then called the defendant back and told him that they had a warrant for his arrest, and soon thereafter the defendant turned himself in.



Thank you for your service!

- Questions?
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