2018 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE

MASTER LIST
Cases Reported from June 1, 2017 to June 1, 2018

I. CRIMINAL PROCEDURE

BAIL

Virginia Supreme Court

Commonwealth v. Duse: February 13, 2018
Fauquier: The Commonwealth appeals the granting of bail in a First Degree Murder case.

Facts: The defendant murdered his supervisor at work after learning that a central claim in his age discrimination suit against his employer had been dismissed and his attorney had moved to withdraw. The lawsuit had been going on for one and a half years and several supervisors and corporate officers, including the victim, had testified against the defendant in depositions. The defendant hid behind a dumpster at the rear of the pharmacy and shot the victim as he was throwing away the store's trash. The defendant then, on video, leaned over the victim, shooting him in the face at close range. The defendant took the victim's cell phone, wallet, and store keys and walked away calmly, heading back to a vehicle and ultimately to his home in Fairfax County. Police arrested him six days later.

The Commonwealth charged the defendant with first-degree murder and use of a firearm in the commission of that murder. His trial is set for March 19, 2018. At a bond hearing, the Commonwealth demonstrated that the defendant had a long history of employment disputes, litigation and accusations of persecution and conspiracies against him by co-workers and supervisors. The Commonwealth also established that co-workers had found the defendant to be mentally unstable and a threat to managers and co-workers; his current supervisors at the pharmacy feared him "a great deal." The Commonwealth also shared evidence of a 1991 psychiatric evaluation that found the defendant to suffer from paranoid personality disorder. The Commonwealth revealed that the defendant owned a home in the Philippines and had failed to disclose that he and his wife had planned to relocate to that home.

At the bond hearing, the defendant countered that he was 76 years old, had resided in Virginia for 22 years, had been married for 15 years and had a Master's degree in business from Harvard. He claimed he had no history of mental illness and no history of drug or alcohol abuse. He presented testimony from a bail bond company who claimed that they could monitor the defendant's movements.

The defendant also called a psychiatrist to testify. The psychiatrist had examined the defendant for 2 hours at the jail, administered no tests, and concluded that the defendant did not have a personality disorder related to the litigation and that he was not a threat "right now." The psychiatrist admitted, however, that he did not believe that "paranoid personality disorder" should be in the DSM at all.

The trial court granted the defendant bail, finding that the defendant "is entitled to the presumption of innocence", that there was little risk of failure to appear, and that there was no evidence of specific threats to anyone or history of violence with the defendant. The Commonwealth appealed. The Court of Appeals denied the appeal.

Held: Reversed, bail improperly granted. The Court began by agreeing that under §19.2-120, the circuit court was required to presume, subject to rebuttal, that no condition or set of conditions will reasonably assure the defendant's appearance or the safety of the public. However, the Court ruled that, by applying the presumption of innocence, the circuit court utilized an erroneous legal standard to guide its consideration of the Code § 19.2-120 factors, and its decision regarding bail, premised on that consideration, was an abuse of discretion.

The Court also found that the circuit court gave no meaningful weight to the relevant statutory factors directing focus upon the nature and circumstances of the murder and the nature and seriousness of the danger to any person or to the community that the defendant's release would pose. The Court wrote: "The court inexplicably stated that Duse had no history of violence, ignoring that he currently was under indictment for the execution-style murder of his work supervisor", and further critiqued the circuit court because it "never discussed Duse's long history of mental health disorders, his history of protracted litigation against former employers, or the evidence that former co-workers, supervisors, and a customer had reported fearing him." The Court held that the circuit court abused its discretion by wholly discounting and according no weight to the defendant's well-documented prior history of mental health disorders.

The Court also found that the trial court's conjecture, without evidence, that the defendant was too old to be a flight risk was "clearly an error in judgment. Given his age, his apparent ownership of a home in the Philippines, and the specter of a murder conviction, Duse has every incentive, along with the means, to flee prosecution."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180173.pdf

DISCOVERY & BRADY

U.S. Supreme Court

Turner v. United States: June 22, 2017
582 U.S. ____ (2017)
Certiorari to the District of Columbia Court of Appeals: Defendants appeal their convictions for Murder, Robbery and Kidnapping on *Brady* grounds.

Facts: In 1984, the defendants abducted a woman from the street, dragged her into an alley, robbed her and sodomized her to death. At trial, several witnesses described seeing the mob attack the woman, including two of the attackers, who cooperated and testified for the government. The trial court convicted the defendants of murder, robbery, and kidnapping. 25 years later, the defendants learned that the government had failed to turn over a number of facts prior to trial. There were seven facts at issue in this case:

1. The identity of one of two men who a witness saw run into the alley after the assault

2. A witness walked by the alley around the time of the attack and did not see anyone in the alley.
3. Another witness stated that she saw the attack, but that there were only two attackers.
4. A witness stated that she heard the defendant confess, but later recanted.
5. One of the trial witness appeared to be high on PCP during a meeting with prosecutors.
6. One of the trial witnesses "vacillated" during an interview and made the detective angry.
7. A witness stated that she had not heard one of the trial witnesses ever tell her what he saw happen.

The defendants' main argument was that, had they known these facts, they could have challenged the Government's basic theory that a large group attacked and killed the victim. They also argued that they could have used the investigators' failure to follow up some of the leads and impeachment evidence to suggest that an incomplete investigation had ended up accusing the wrong persons.

The D.C. courts denied the defendant's *Habeas* petitions.

Held: Affirmed. In a 6-2 ruling, the Court agreed that there was not a "reasonable probability" that the withheld evidence would have changed the outcome of the defendant's trial. The Court acknowledged, as did the government, that the withheld evidence was favorable to the defendants, either because it was exculpatory, or because it was impeaching. The Court also acknowledged, as did the government, that the government had suppressed the evidence and failed to turn it over.

However, the Court ruled that the evidence was not sufficiently material to require re-trial. The Court examined the evidence in detail and noted that the witnesses may have differed on minor details, but virtually every witness to the crime itself agreed that a large group of perpetrators killed the victim in this case. The Court rejected the possibility that the defendants would have argued that the murder was committed by perpetrators acting alone. With respect to the undisclosed impeachment evidence, the Court found that it was largely cumulative of impeachment evidence that the defendants already had and used at trial. Thus, the cumulative effect of the withheld evidence was insufficient to "undermine confidence" in the jury's verdict.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/15-1503_4357.pdf

Fourth Circuit Court of Appeals

In Re Grand Jury Subpoena: August 18, 2017
No. 16-4096, 2017 WL 3567824 (4th Cir., 2017)
Western District of North Carolina: Defense counsel appealed the denial of a motion to quash Grand Jury subpoenas on the Work-Product privilege.

Facts: After a criminal trial, the government noticed that one of the exhibits introduced by the defendant—a photocopy of a document—appeared to be a forgery. Upon request, the defendant's attorney provided the prosecutors with a better quality copy of the exhibit. The better-quality copy

appeared to confirm the government's suspicion but also raised new questions, and the prosecutors requested interviews with the defense attorney and her investigator, who declined to be interviewed. The Grand Jury then issued subpoenas compelling their testimony. The defendant's original attorneys sought to quash the Grand Jury subpoenas, as did the defendant. During a hearing, the government explained that it was planning to ask three questions:

(1) Who gave you the fraudulent documents?

(2) How did they give them to you, specifically?

(3) What did [the witnesses] tell you?

The district court held that the testimony sought constituted fact work product but that the government had made a prima facie case that the crime-fraud exception applied. The district court ruled that the prosecutors could ask the questions of the witnesses.

Held: Affirmed in part, reversed in part. The Court held that that the prosecutors could ask defense counsel and investigator the first two questions, but not the third question.

The Court ruled that the government had made a prima facie showing of crime or fraud and noted that the questions sought information that is exempted from the work product privilege because of crime or fraud. The Court found that, where the government seeks "fact work product", as opposed to "opinion work product", the government must only show that:

(1) The client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme; and

(2) The documents containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud.

The Court explained that "fact work product" has less protection because it is a "transaction of the factual events involved" and may be obtained upon a mere "showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.

However, the Court reversed the District Court's ruling regarding the third question and quashed that portion of the subpoena. The Court found that the third question sought "opinion work product" material, in that it sought recollections of witnesses' statements and therefore contained the fruit of the attorney's mental processes. The Court repeated that opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. Thus, the Court noted that the government would also have had to demonstrate that that the defense team had knowledge of, or knowingly participated in, their client's crime.

The Court explained that it was drawing a line between asking an attorney to divulge facts—either noticed by or communicated to her—and asking an attorney to recall generally what was said in an interview. The Court wrote: "While it may be characterized as a "fact," the latter requires the attorney to expose her mental processes by revealing which witness statements she deemed important enough to commit to memory and is therefore opinion work product."

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/164096.P.pdf

Juniper v. Zook: November 16, 2017
876 F.3d 551 (4th Cir., 2017)
Norfolk: Defendant appeals his conviction for Capital Murder on *Brady* grounds.

Facts: The defendant murdered his girlfriend, her brother, and her two young children. After the murder, a witness called 911 about 12:44 p.m., which was some time after the murder had already happened. Police responded, but left after initially not being able to identify the source of the reported gunshots. However, witnesses later summoned police to return. Officers found that the defendant had stabbed and shot his girlfriend and shot the other three victims. DNA evidence and a fingerprint linked the defendant to the knife found at the scene. Police never located the firearm used for the murders.

At trial, several witnesses testified, describing how the defendant became angry with the victim and then murdered her and her family. Witnesses testified seeing the defendant with a gun after he committed the murders. One witness described how the defendant confessed that he killed the victims. The Commonwealth contended at trial that the murders took place around 11:45 a.m.. After trial, the defendant raised several claims on *habeas* but the state court dismissed the defendant's *habeas* claims without a hearing.

However, during Federal *habeas* proceedings, the defense learned that police had interviewed two other witnesses. Those witnesses had told police that they had seen someone going to and from the area of the apartment before hearing "loud pops" after 1:30 p.m. One of the witnesses also selected someone other than the defendant from a photo array as a person she saw going to the victim's apartment and threatening her before the murder. The Commonwealth explained that it had not disclosed this information because it was not consistent with the facts of the murder. The defendant obtained affidavits from these witnesses that provided several new allegations the witnesses had never made before and which potentially implicated another unknown person in the homicide.

The Federal District Court concluded that the materials were exculpatory and impeaching and improperly withheld, but nonetheless denied the defendant relief because it concluded that the materials failed to satisfy *Brady*'s "materiality" requirement.

Held: Reversed. The Court held that the district court abused its discretion in dismissing the defendant's *Brady* claim without holding an evidentiary hearing to assess the plausibility of that claim. The Court repeated that a petitioner who has diligently pursued his *habeas* corpus claim in state court is entitled to an evidentiary hearing in federal court on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend*:

(1) the merits of the factual dispute were not resolved in the state hearing;

(2) the state factual determination is not fairly supported by the record as a whole;

(3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequately developed at the state-court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

In this case, the Court found that the defendant aggressively pursued additional discovery during his state *habeas* proceedings and found that the state court did not afford the defendant the opportunity to conduct discovery, dismissing his claim without a hearing. While the Court agreed that the withheld evidence was not consistent with the facts, the Court ruled that the inconsistency made the information exculpatory and impeaching for purposes of *Brady*. The Court also reasoned that the evidence could have been used to blame the homicide on another suspect or to simply impeach the investigation itself as a way of arguing that the police rushed to judgment. For example, the defense could have critiqued the thoroughness and even the good faith of the investigation.

The Court criticized the district court for making a credibility determination about the witness' statements without a hearing.

Full Case At:
http://www.ca4.uscourts.gov/opinions/137.P.pdf

Virginia Court of Appeals
Published

Brown v. Commonwealth: May 22, 2018
Dinwiddie: Defendant appeals his conviction for Capital Murder and related offenses on Denial of Grand Jury Information, Denial of Change of Venue, Jury Selection, Jury Instruction, and Sufficiency issues.

Facts: The defendant murdered a Virginia State Trooper and attempted to kill a second Trooper. The first Trooper pulled over to assist the defendant on the side of the road, but the defendant opened fire and killed the Trooper before he could even put his car in park. The defendant continued to fire on the Trooper's car as it rolled off the road. When a second Trooper arrived, the defendant fired at him and then escaped into the woods, discarding his rifle and clothes. Officers later found him hiding and arrested him. Without any questioning, the defendant gave an extensive statement explaining what he did and why he did it.

Prior to trial, the defendant sought disclosure of all grand juror information for the preceding five years in order to prepare a potential Sixth Amendment fair cross-section challenge to the grand jury selection process. The trial court denied the motion, except for the data from the previous year. The defendant also moved to change venue, but the trial court denied that motion as well.

Jury selection took six days and required a panel of 120 jurors. Almost all the jurors had heard publicity about the case. Though the court struck some jurors due to publicity, it struck more prospective jurors for their views on the death penalty, difficulty understanding the burdens of proof, and other reasons unrelated to prejudice against the defendant.

During jury selection, one juror indicated that she believed "he did it" based on media reports, but added that she would need "to hear the facts would decide my decision once everything is laid out… because that was then; this is now … I can come to a clear conclusion after everything is said and done." Another juror conceded that he had "followed the case pretty heavily when it happened" and that "it would be hard not to form an opinion" about the case based on the media exposure. However, he also

affirmed that he would be able to decide the case based solely on the evidence presented in the courtroom and would not let the media reports about the case affect his judgment. The trial court denied the defendant's motion to strike those two jurors.

At trial, the defendant argued that he was not guilty by reason of insanity. He presented evidence from his own expert, Dr. Sara Boyd, and the Commonwealth's expert, Dr. Evan Nelson. Both experts opined that the defendant understood the criminal nature of his acts, but opined that the defendant thought that the nature of his actions was not wrongful because he believed he was acting for God.

On rebuttal, over the defendant's objection, the trial court admitted testimony from a deputy that the defendant stated at his arraignment: "I'm guilty. Go ahead and stick the needle in my arm." The defendant objected that this evidence was not relevant and also objected that the Commonwealth did not disclose this statement in discovery under 3A:11 as a statement to law enforcement.

The trial court also denied the defendant's request for a 2nd Degree Murder instruction.

Held: Affirmed. Regarding the defendant's request for grand jury information, the Court agreed that the trial court properly denied the defendant's request. The Court explained that a criminal defendant in Virginia is not automatically entitled to grand juror lists and that the defendant's expansive request implicated recognized juror privacy concerns. The Court also repeated that a petit jury's verdict of guilt renders harmless beyond a reasonable doubt any claim of defect in the composition of the grand jury, unless a structural error is shown, such as might arise in a claim of intentional discrimination in violation of the Equal Protection Clause under the Fifth or Fourteenth Amendments.

Regarding the defendant's request for a change of venue, the Court ruled that the defendant failed to overcome the presumption that he would receive a fair trial in the jurisdiction in which the crime occurred. The Court rejected the argument that factual reporting of a victim's life and community standing or the defendant's past conduct is inherently inflammatory. The Court also noted that reporting on the offense was generally accurate and largely took place three years before trial.

Regarding the defendant's motion to strike the two specific jurors, the Court ruled that the prospective juror's responses indicated that they had not formed "fixed and decided opinions" about the defendant's sanity, the issue upon which his guilt or innocence turned. Because they were not otherwise disqualified, the Court held that the trial court did not err.

Regarding sufficiency, the Court found sufficient evidence that the defendant acted with the intent to interfere with the officer's performance of his official duties. The Court pointed out that the officer was in uniform when he pulled over his marked police cruiser with lights activated, and the defendant's own words indicate that he knew he attacked and killed a law enforcement officer acting in his official capacity.

The Court also agreed that the trial court properly denied an instruction for 2nd degree murder. Though there is a presumption that all homicides are second-degree murders, in this case the Court observed that no evidence supported a finding that the defendant acted without willfulness, deliberation, or premeditation. The Court pointed out that the defendant was camouflaged, armed with a powerful hunting rifle, and had enough ammunition to kill one Trooper, carry on an extended gunfight with another, and then flee and conceal his gun and clothing.

Regarding the defendant's statement offered in rebuttal, the Court held that the defendant's statement at his arraignment was not subject to discovery disclosure and was relevant to contradict the defendant's argument that he did not know his actions were wrong. Though Rule 3A:11(b)(1) provides for disclosure of a defendant's "oral statements or confessions" he or she makes "to a law enforcement officer," the Court found that the rule contemplates disclosure only of those statements made either in response to police questions or at least volunteered to an officer, but not those an officer merely happens to hear.

Lastly, the Court rejected the argument that the trial court improperly rejected his insanity defense. The Court repeated that, once the Commonwealth has adduced proof that "the accused committed the act, it is not sufficient for the accused to raise a reasonable doubt as to his sanity; he must go one step further and prove to the satisfaction of the jury that he was insane at the time of the commission of the act."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0434172.pdf

Virginia Court of Appeals
Unpublished

Kumar v. Commonwealth: September 5, 2017
Fairfax: Defendant appeals his conviction for Child Sexual Assault on failure to preserve evidence, Fifth Amendment, chain of custody, and jury instruction issues.

Facts: The defendant sexually assaulted a four-year-old child in 1994. The child reported the attack to her mother, who brought the child to the hospital. There, the child underwent an examination while wearing the same underwear she wore during the crime. Nurse Sue Rotolo collected a PERK kit and the victim's underwear, and later collected a suspect PERK kit from the defendant. Police also collected a towel and bedding from the apartment. Police arrested the defendant, who then fled the United States and remained a fugitive until 2014.

The Department of Forensic Science analyzed the evidence and found sperm and DNA matching the defendant from the crotch of the victim's underwear. However, in 2006, mistakenly believing that the perpetrator had been arrested and the appeal period had expired, a police sergeant ordered the destruction of all of the evidence in the property room relating to the defendant's case, including both PERKs, the victim's clothing, and the towel and bedding.

In 2013, a detective learned that the defendant was still a fugitive and that the case was still open. He located the investigating detective's original case file and discovered that the original detective from the case had never put the swab of the victim's clothing or the defendant's blood swabs in the property room. Instead, he had kept them in his personal case file, where they remained. The new detective sent the clothing and swabs back to DFS, where the scientists conducted additional DNA analysis and found results consistent with those in 1995.

Police extradited the defendant back to the United States in 2014. Using an Urdu-Hindi interpreter, police advised the defendant of his *Miranda* rights. During the advisement, the defendant and the interpreter had the following exchange:

Interpreter: Whatever you say may be used against you in the court.

Defendant: Okay.

Interpreter: As evidence. You have the right to talk to your lawyer when we question you. You can say that you cannot answer.

Defendant: I have to talk to the lawyer.

Interpreter: I have to talk to the lawyer. He will talk to you.

Defendant: Okay.

Later, the interpreter and the defendant had this exchange as well:

Interpreter: If you don't want to answer any question, you feel bothered by any question, you can say you want to talk to your attorney.

Defendant: Okay, I will talk to the attorney and then answer.

The defendant then indicated that he was willing to talk to the detective. He told the detective that "I did the mistake and so I left." The defendant then requested an attorney and the police terminated the interview.

Prior to trial, the defendant moved to dismiss the indictment, arguing that the Commonwealth had destroyed potentially exculpatory evidence. The defendant argued that the towel and bedding that the Commonwealth destroyed could have been tested and, if they did not contain the defendant's DNA, that fact would have been exculpatory. The trial court denied the motion.

At trial, the nurse, Sue (Brown) Rotolo testified that she collected blood from the defendant, but could not recall collecting hair samples. However, she identified her initials on the evidence. The detective who received the evidence from Nurse Rotolo also testified and explained that after he received the evidence, he delivered it to the Department of Forensic Science. When DFS returned the evidence, the detective placed it in his case file folder, which he stored in an unlocked filing cabinet. He explained that both his floor and the building were secured by key codes.

Another detective, who pulled the file in 1999, testified that the plastic bags of evidence showed no signs of tampering in 1999. Similarly, the final detective, who pulled the file in 2013, testified that the items were stored in sealed packages, and bore no signs of tampering.

The DFS employees who testified at trial could not independently recall all of their actions at the time they handled the PERK evidence in 1994 and 1995, but they testified that when they examined the evidence again in 2013, they recognized their initials, the case number, and the dates that they handled or tested the evidence. The analysts also testified that, upon examining the exhibits in 2013, they appeared to be in the same condition as they were in 1995.

At trial, the defendant denied sexually assaulting the child. He claimed that he had sexual intercourse with a neighbor that day and that he cleaned himself off with a towel in his room.

The defendant requested an instruction to the jury that stated that the jury could infer that the destroyed evidence was beneficial to the defendant. The trial court denied the instruction.

Held: Affirmed. First, the Court rejected the defendant's motion to dismiss, finding that the defendant failed to show that the destroyed evidence "possessed an apparent exculpatory value" and

failed to show that the Commonwealth, in failing to preserve the evidence, acted in bad faith, as required. The Court noted that no one testified that the towel or bedding were even present at the crime scene, and also pointed out that the defendant's own testimony indicated that his DNA would be present on the towel. The Court saw no reason that DNA on the bedding would have been relevant to the case.

Second, the Court rejected the defendant's motion to suppress his statement, finding that a reasonable police officer could have concluded that the defendant was not invoking his right to counsel. The Court found that the evidence indicated that, when he said "I have to talk to the lawyer" and "Okay, I will talk to the attorney and then answer," the defendant was merely repeating the explanation of his rights that the interpreter was providing to him.

The Court also found that, even if admitting the statement was error, it was harmless, noting that the statement could have been interpreted as his "mistake" in leaving the country, rather than his "mistake" in committing the aggravated sexual battery. The Court found that the value of the statement was relatively insignificant in comparison to the evidence identifying him as the perpetrator.

Third, the Court agreed that the evidence concerning chain of custody was sufficient. Regarding the handling of the exhibits before they reached DFS, the Court found that the defendant's "mere speculation that contamination or tampering could have occurred" only went to the weight, and not the admissibility, of the DNA evidence. The Court acknowledged that there was no evidence regarding how the evidence traveled from the investigator's office to a storage facility, or how it was handled between 1999 and 2013. However, the Court found that such concerns were irrelevant when the witnesses testified that the item was in the same condition as when it had been sealed and there was no indication of tampering or contamination.

The Court also rejected the defendant's complaint that Nurse Rotolo did not remember collecting hair and pubic swabs, noting that she did not deny collecting the evidence and that other evidence at trial indicated that she collected this evidence.

Regarding the defendant's objections to the chain of custody regarding how the exhibits were handled, stored, and transported after DFS employees took custody of the exhibits, the Court found that §19.2-187.01 resolved the issue. The Court noted that once DFS took custody of the exhibits, the certificate of analysis served as prima facie evidence of the chain of custody.

Finally, the Court found it was proper to deny the defendant's proposed jury instructions directing an inference related to the Commonwealth's destruction of evidence, because the proposed instructions were not supported by more than a mere "scintilla of credible evidence." As the Court had noted earlier, there was no reason to believe that the towel and bedding were pertinent or germane to the case at all.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1636154.pdf

EIGHTH AMENDMENT & DEATH PENALTY

U.S. Supreme Court

Dunn v. Madison: November 6, 2017
583 U. S. ____ (2017).
Writ of Certiorari to the Eleventh Circuit Court of Appeals: Defendant appeals his conviction for Capital Murder on Eighth Amendment grounds.

Facts: The defendant snuck up on a police officer and shot him in the back of the head, killing him. After the trial, the defendant claimed that several strokes caused him to lose his memory of the murder. Psychologists who examined the defendant found that, while he claimed he did not remember committing the crime, the defendant understood both that he was tried and imprisoned for murder and that the state will put him to death as punishment for that crime. On *habeas*, the Eleventh Circuit Court of Appeals ruled that the defendant was incompetent to be executed because he "does not rationally understand the connection between his crime and his execution."

Held: Death Sentence Affirmed. The Court agreed that, under *Ford* and *Panetti*, the Eighth Amendment would entitle the defendant to relief if he suffered from a mental illness which deprived him of the mental capacity to rationally understand that he is being executed as a punishment for a crime. However, the Court ruled that it was not unreasonable to conclude that the defendant was competent to be executed because—notwithstanding his memory loss—he recognizes that he will be put to death as punishment for the murder.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/17-193_6j37.pdf

FIFTH AMENDMENT: COLLATERAL ESTOPPEL

Virginia Supreme Court

Commonwealth v. Leonard: October 19, 2017
294 Va. 233, 805 S.E.2d 245 (2017)
Rev'd Court of Appeals Ruling of April 26, 2016

Virginia Beach: Defendant appeals his conviction for DUI 3rd Offense on Collateral Estoppel and sufficiency grounds.

Facts: Defendant drove while intoxicated, hit a mailbox, and then went home. The defendant had two prior convictions for DUI. One conviction, in 2010, was from the General District Court, where the trial judge had failed to check the box noting that the guilty plea was voluntary and intelligent. The

second conviction, in 2010, was in Circuit Court. In the 2012 case, the General District Court reduced the offense from DUI 2nd to DUI 1st offense, after which the defendant appealed to Circuit Court, where the Circuit Court convicted him of DUI, 1st offense. The 2012 record did not reflect the reason for the reduction. However, during the trial in this case, the Commonwealth Attorney stated:

> "I'll stipulate. I – it's my understanding that that was the reason for why Judge Hutchens reduced the charges to a DUI first. I don't think there's any evidence before the court. I will make it evidence now as part of that stipulation that [the general district court judge] reduced that because she did not find that first prior to be [valid for purposes of sentence enhancement under Code § 18.2-270].

At trial, the defendant argued that the evidence was insufficient, that he could not be convicted of DUI 3rd offense without first being convicted of DUI 2nd, and lastly that the 2012 ruling expressly found that the 2010 order was invalid. The Court of Appeals ruled that Collateral Estoppel barred the Commonwealth from re-litigating the issue decided in 2012, to wit: the inherent validity of the 2010 order.

Held: Affirmed, Court of Appeals ruling reversed. The Court focused on a crucial distinction in the concept of collateral estoppel: Collateral estoppel, as applied in criminal proceedings, becomes applicable only when the defendant's prior acquittal necessarily resolved a factual issue that the Commonwealth seeks to litigate again in a subsequent proceeding.

In this case, the Court found that when the general district court ruled in 2012 that the Commonwealth could not use the 2010 conviction to support DUI, second offense, the factual question it decided in the defendant's favor was that the defendant had not been advised of his constitutional rights prior to pleading guilty to the 2010 DUI. That fact, the Court pointed out, has no bearing on the issues in this case.

The Court pointed out that the defendant had no viable legal ground to collaterally attack the 2010 DUI conviction, since only convictions obtained in violation of the Sixth Amendment right to counsel are subject to collateral attack in recidivist proceedings. The Court reasoned that, instead of precluding the Commonwealth from re-litigating a factual finding made in the 2012 proceeding, the defendant was attempting to bind the Commonwealth to an evidentiary ruling made in the 2012 proceeding in connection with sentencing on a different offense. However, to the extent the general district court actually concluded the 2010 conviction was constitutionally invalid for purposes of sentencing enhancement, the Court noted that any such conclusion was a determination of law.

The Court ruled that the 2010 DUI conviction remains a valid and existing conviction and that the general district court's ruling in 2012 did "not operate to 'acquit'" the defendant of the 2010 conviction or change the fact that the prior conviction does still exist.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160952.pdf

Commonwealth v. Pijor: December 28, 2017
294 Va. 502, 808 S.E.2d 408 (2017)
Rev'd Court of Appeals Ruling of May 26, 2015
Fairfax: The Defendant appeals his conviction for Perjury on Collateral Estoppel grounds.

Facts: Defendant stole his girlfriend's dog. Although no one could find the dog, the Commonwealth charged the defendant with stealing the dog. The offense date alleged in the indictment was the date on which the dog first went missing. At trial, the defendant testified that he had no information regarding the dog's whereabouts and that he had not seen the dog since the theft. A jury acquitted the defendant of stealing the dog.

After the acquittal, witnesses saw the defendant with the dog on several occasions. Finally, five months later, police stopped the defendant in his car and found the dog in the car. The Commonwealth indicted the defendant again for stealing the dog; the offense date charged the date that the police found the dog in the car. The trial court dismissed the indictment on double jeopardy grounds and the Court of Appeals affirmed the dismissal in an unpublished opinion in 2015.

Next, the Commonwealth indicted the defendant for perjury, alleging that he lied at the first trial about knowing where the dog was after the dog went missing. The trial court convicted the defendant, rejecting his argument that Collateral Estoppel precluded the prosecution.

Held: Affirmed. The Court examined the elements of larceny and found that, even if the jury had accepted the defendant's perjured testimony at the original trial as to whether he took the dog, that finding would not support his argument that the jury also decided the precise issue he sought to preclude, that is, whether he had seen the dog since the day of the theft or knew where the dog was.

The Court also found the evidence to be sufficient.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161346.pdf

Winder v. Commonwealth: February 6, 2018
Norfolk: Defendant appeals his convictions for Perjury on Collateral Estoppel and Sufficiency grounds.

Facts: The defendant failed to appear on a felony charge. The Commonwealth indicted the defendant for failure to appear. At a bond hearing, the defendant claimed that he had been hospitalized during his previous court date and produced a medical bill from the hospital. At trial for the failure to appear, the defendant again claimed to have been hospitalized and produced the same bill. However, the Commonwealth introduced testimony from the hospital's risk manager that the bill was not a genuine document and that the defendant had not been a patient on that date. The trial court stated "I think there's enough reasonable doubt on that charge" and dismissed the failure to appear charge.

The Commonwealth then indicted the defendant for perjury, regarding his testimony at the bond hearing and at the trial for failure to appear. During this trial, the Commonwealth introduced testimony from the hospital's custodian of records, who testified that the reference number on the bill

belonged to a patient other than the defendant and that there was no record of the defendant ever being a patient at the hospital. The trial court rejected the defendant's claim of collateral estoppel and convicted the defendant.

Held: Affirmed. The Court first reaffirmed that the acquittal of one charged with a crime is no bar to a prosecution for perjury for testimony given by him at the trial, even though a conviction would necessarily import a contradiction of the verdict in the former case. The Court then noted that § 19.2-128 does not require the Commonwealth to prove where someone was, only where someone was not. Thus, the Court observed that, although a court dismissing a failure to appear charge is free to announce a finding that the defendant was present in a certain location instead of in court, it is not required to make such a finding. In this case, the Court found no clear indication from the record that the trial court in the failure to appear trial used the defendant's claim that he was at another location to arrive at its decision in the failure to appear trial.

In a footnote, the Court also rejected a contention that the parties had raised on appeal that a trial court may find evidence sufficient to prove failure to appear but nevertheless dismiss the charge. The Court wrote that: "courts do not have such latitude in deciding whether to convict a defendant of the crime of failure to appear."

The Court then held that the evidence was sufficient to prove perjury in this case. The Court also ruled that the defendant had failed to preserve his argument that the Commonwealth did not present two corroborating witnesses to prove the perjury charge.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1813161.pdf

FIFTH AMENDMENT: DOUBLE JEOPARDY

Virginia Supreme Court

Commonwealth v. Gregg: April 5, 2018
Aff'd Court of Appeals Ruling of February 28, 2017
Fauquier: Defendant appeals his convictions for Involuntary Manslaughter on Double Jeopardy grounds.

Facts: The defendant shot at a tow truck that was repossessing his vehicle as it drove away, killing the driver. The trial court convicted the defendant of both common law involuntary manslaughter and of involuntary manslaughter in violation of Code § 18.2-154, "unlawfully shooting at an occupied vehicle wherein death resulted." The Court of Appeals reversed the convictions on Double Jeopardy grounds.

Held: Convictions Reversed. The Court ruled that involuntary manslaughter under Code § 18.2-154 is the "same offense" as common law involuntary manslaughter. The Court reasoned that the General Assembly did not intend to permit simultaneous punishment for both common law involuntary

manslaughter and manslaughter under Code § 18.2-154, observing that the General Assembly did not draw a distinction between species of involuntary manslaughter. The Court also pointed out that the defendant's mental state and his acts were the same for both common law involuntary manslaughter and manslaughter under Code § 18.2-154, and there was one victim. The Court found that both common law involuntary manslaughter and involuntary manslaughter under Code § 18.2-154 constitute the one crime of involuntary manslaughter.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170586.pdf
Original Court of Appeals Ruling at:
http://www.courts.state.va.us/opinions/opncavwp/0047164.pdf

Virginia Court of Appeals-
Unpublished

Saunders v. Commonwealth: October 31, 2017
Virginia Beach: Defendant appeals his convictions for Possession with Intent to Distribute on Double Jeopardy grounds.

Facts: The defendant simultaneously possessed two bags of Oxycodone with the Intent to Distribute. The Commonwealth indicted the defendant for two counts of that offense, one for each bag, and the defendant pled guilty to both of those offenses. The trial court sentenced the defendant to two concurrent sentences. The defendant appealed on double jeopardy grounds.

On appeal, the Attorney General agreed that the defendant committed only a single offense by possessing two bags of the drug and that his conviction and punishment for a second count violated double jeopardy. However, the Attorney General did not agree that the defendant should receive a new sentencing; instead, the Attorney General asked that the Court of Appeals simply vacate one of the two concurrent sentences.

Held: Reversed. The Court first agreed that the defendant did not waive his right to assert double jeopardy by pleading guilty, as a double jeopardy claim survives a guilty plea if it is obvious from the indictment and the existing record that the second offense is one that the Commonwealth may not constitutionally prosecute. In this case, as in *Lane*, the evidence did not differentiate between the two bags of oxycodone by time, location, or intended purpose.

Regarding a remedy, though, the Court agreed that the defendant was not entitled to a re-sentencing. Instead, the Court sought to vacate one of the two convictions. The Court rejected the defendant's argument that if had one, and not two, convictions, his sentencing guidelines would have been lower. The Court repeated that the guidelines are discretionary and not mandatory, and thus no prejudice could exist because the statutory scheme expressly provides that the manner of application of the guidelines or the failure to follow them shall not be reviewable on appeal or serve as the basis of any other post-conviction relief.

However, the Court observed that, due to the language of the sentencing order, it was unable to discern from the record, because of the way the suspended time was pronounced, whether the punishments were identical. It remanded the case to the trial court for clarification.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1828161.pdf

Schmidt v. Commonwealth: January 23, 2018
Prince William: Defendant appeals his convictions for Felony Murder and Child Abuse on *Crawford* hearsay and Double Jeopardy grounds.

Facts: The defendant killed his infant child through a "severe catastrophic trauma-type injury" by violently shaking the child, causing the infant's head to whip back and forth so violently that the blood vessels between the brain and skull sheared and caused blood leakage, resulting in the subdural hematoma.

During the medical examiner's investigation, she contacted Dr. Bennet Omalu, an internationally renowned neuropathologist, and asked him to conduct additional analysis on samples taken from the victim's brain. Dr. Omalu prepared stain slides of the samples taken from the victim's brain, which he sent to his lab in California. Dr. Omalu later provided his observations to the medical examiner, which documented various data findings but contained no conclusions about cause of death or the relative age of the brain injuries. The information contained in Dr. Omalu's report consisted of observational data collected during his neuropathological examination of the victim's tissue and organs. Nowhere in the report did Dr. Omalu opine about a probable cause of death, nor did he render any estimation about the age of the victim's injuries. The medical examiner included Dr. Omalu's notes in her final autopsy report.

At trial, the medical examiner testified as an expert for the Commonwealth. The medical examiner testified about her conclusions but did not reference Dr. Omalu's findings. Dr. Omalu did not testify. The defendant objected on *Crawford* and *Melendez-Diaz* grounds, arguing that the report should not have been admitted unless Dr. Omalu testified, but the trial court overruled the objection.

The defendant also objected to his convictions for both felony child abuse and felony murder on Double Jeopardy grounds, but the trial court rejected that argument.

Held: Affirmed. The Court likened this case to *Aguilar* and *Robertson* and held that the trial court did not err in admitting the autopsy report. The Court found that nothing within Dr. Omalu's report could be considered a "solemn declaration" or an "affirmation" of an element of an offense, as occurred in *Melendez-Diaz*, and *Robertson*. The Court noted out that the defendant confronted the author of the autopsy report at trial and had the opportunity to cross-examine her.

The Court also found that, because the defendant objected to the introduction of evidence that discussed medical information and data but then later sought to re-interpret in his own favor through his experts, the defendant could not raise his Constitutional argument at all under the "approbate-reprobate" rule.

Regarding the Double Jeopardy argument, the Court first found that the language of the two statutes of which the trial court convicted the defendant apply to distinct forms of actions. While the Court noted that that fact alone was sufficient to deny the defendant's Double Jeopardy claim, the Court also found that the offenses were separate under *Blockburger*, given that committing a felonious act is not an element within the offense of felony child abuse.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1104164.pdf

Moore v. Commonwealth: May 1, 2018
Hampton: The defendant appeals her conviction for Unlawful Wounding alleging a violation of § 19.2-294

Facts: The defendant had an argument with the victim, her ex-boyfriend, who left on a bicycle. The defendant followed the victim in her car and, finding him, turned the car around toward the victim. She waited until the victim was in the path of the car and then accelerated in his direction. She struck the victim, sending him to the hospital. While her charge of malicious wounding was pending, the defendant was also found guilty in District Court of improper driving in violation of §46.2-869. Thereafter, she moved to dismiss the Malicious Wounding charge under § 19.2-294, which provides:

> "If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others."

The trial court denied the motion. The defendant later pled guilty to unlawful wounding under a conditional guilty plea.

Held: Affirmed. The Court first repeated that the prohibition of § 19.2-294 only forbids multiple prosecution of offenses springing from the same criminal act; if the statutory violations involve different acts, the prohibition is not applicable. The Court analogized this case to the *Jefferson* and *Davis* cases, finding that the same evidence was not required to sustain defendant's two convictions.

The Court observed that the mere act of driving straight at the victim, standing alone, was sufficient to constitute improper driving § 46.2-869. Thus, while proof of the overall act of driving was common to the prosecution of both offenses, the nature of the specific act peculiar to each prosecution was separate and distinct.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0662171.pdf

FIFTH AMENDMENT: INTERVIEWS & INTERROGATIONS

Fourth Circuit Court of Appeals

U.S. v. Giddins: June 6, 2017
858 F.3d 870 (2017)
Baltimore: Defendant appeals his conviction for Bank Robbery on Fifth Amendment grounds.

Facts: Defendant robbed three banks over three days. After the third robbery, police located and arrested two of his co-conspirators and seized the defendant's car, which he had used in the robberies. Officers obtained a warrant for the defendant's arrest.

Soon thereafter, the defendant visited the police department to retrieve his car. When he did, police led him to an interview room, where they had him sit down. Officers locked the door to the room behind him and began to ask him about the vehicle. Another door, behind the officers, remained closed but unlocked. The officers told him that he was free to go, but that they had some questions for him.

The defendant asked if he was "in trouble", but the police told him that he was not and they were only asking about the car's involvement in the offenses. Officers briefly took the defendant's phone from him, but then returned it and told him to turn it off. When the officers asked the defendant to sign a *Miranda* waiver, the defendant asked if this was the procedure to get his car back. He explained that the car was essential to his livelihood and something he needed returned to him. The officers told him "Yeah—in order for us to ask you questions, because the vehicle was used in a crime, by law, we have to go over these rights… Before I release the car to you, I would like to know some answers . . . I would like to know some answers before we release your car back to you."

After questioning, the defendant confessed. The trial court denied the defendant's motion to suppress the statements.

Held: Reversed. The Court found that a reasonable person would have felt unable to cease the interview and thus forfeit the opportunity to obtain the return of the vehicle. While the Court agreed that, individually, each of the circumstances in this case would not suffice to establish custody, the situation here was custodial based on the totality of the circumstances. The Court also found that the detectives' false statement, that the defendant was not "in trouble", added to the compulsion in this case. The Court agreed that "ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns." However, the Court found that the detectives in this case affirmatively deceived the defendant to obtain his *Miranda* waiver by failing to inform him that he was the subject of the investigation when he asked whether he was "in trouble."

Having found that the police used coercion, the Court then found that the coercion rose to a level such that the defendant's will was overborne or his capacity for self-determination critically impaired." Thus, the defendant's *Miranda* waiver was invalid and his statements inadmissible.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/154039.P.pdf

Virginia Court of Appeals
Published

Champion v. Commonwealth: October 24, 2017
Virginia Beach: Defendant appeals his convictions for Murder and related charges on Fifth Amendment grounds.

Facts: The defendant shot and murdered a man. A few days after the murder, police visited the defendant at his house, in plain clothes, and asked if he would join them at the police department for a voluntary interview. He agreed. The interview remained consensual until the officers told him that he was "not leaving here tonight." They read him *Miranda* warnings and he agreed to continue to speak with the officers.

The officers confronted him with the evidence they had collected, and noted that they had been respectful and did not, as they could have, execute a search warrant at his parent's home in the middle of the night with a SWAT team or handcuff him in the middle of the street. The defendant confessed to the murder. At no point during the interview did the defendant attempt to invoke his right to silence or counsel or otherwise reference the *Miranda* warnings he had received. The officers asked the defendant to tell them where the firearm was, asking "do I have to get a search warrant for your parent's house and wake everyone up?" The defendant told them where the firearm was.

At a motion to suppress, the defendant's father testified that the defendant had been in special education classes from his early school days through high school and that he had a hard time understanding or comprehending things, although he graduated from High School.

Held: Affirmed. The Court first noted that the record clearly demonstrated that the defendant understood the *Miranda* warnings and the consequences of his confession. The Court then rejected the defendant's argument that the officers had "threatened him" by referencing the potential search warrant or arrest. The Court repeated that a confession's validity "is not equated with the absolute absence of intimidation," but also pointed out that the "threats" about which the defendant complained were merely "retrospective suggestions that the detectives had already been more courteous than necessary."

The Court also rejected the defendant's argument that, by threatening to search the parent's house, the officers unlawfully overbore the defendant's will. Lastly, the Court rejected the argument that the officers unlawfully used a "two-step" interrogation technique, finding that the defendant was not in custody until he received his *Miranda* warnings.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1596161.pdf

Virginia Court of Appeals –
Unpublished

Kumar v. Commonwealth: September 5, 2017
Fairfax: Defendant appeals his conviction for Child Sexual Assault on failure to preserve evidence, Fifth Amendment, chain of custody, and jury instruction issues.

Facts: The defendant sexually assaulted a four-year-old child in 1994. The child reported the attack to her mother, who brought the child to the hospital. There, the child underwent an examination while wearing the same underwear she wore during the crime. Nurse Sue Rotolo collected a PERK kit and the victim's underwear, and later collected a suspect PERK kit from the defendant. Police also collected a towel and bedding from the apartment. Police arrested the defendant, who then fled the United States and remained a fugitive until 2014.

The Department of Forensic Science analyzed the evidence and found sperm and DNA matching the defendant from the crotch of the victim's underwear. However, in 2006, mistakenly believing that the perpetrator had been arrested and the appeal period had expired, a police sergeant ordered the destruction of all of the evidence in the property room relating to the defendant's case, including both PERKs, the victim's clothing, and the towel and bedding.

In 2013, a detective learned that the defendant was still a fugitive and that the case was still open. He located the investigating detective's original case file and discovered that the original detective from the case had never put the swab of the victim's clothing or the defendant's blood swabs in the property room. Instead, he had kept them in his personal case file, where they remained. The new detective sent the clothing and swabs back to DFS, where the scientists conducted additional DNA analysis and found results consistent with those in 1995.

Police extradited the defendant back to the United States in 2014. Using an Urdu-Hindi interpreter, police advised the defendant of his *Miranda* rights. During the advisement, the defendant and the interpreter had the following exchange:

Interpreter: Whatever you say may be used against you in the court.

Defendant: Okay.

Interpreter: As evidence. You have the right to talk to your lawyer when we question you. You can say that you cannot answer.

Defendant: I have to talk to the lawyer.

Interpreter: I have to talk to the lawyer. He will talk to you.

Defendant: Okay.

Later, the interpreter and the defendant had this exchange as well:

Interpreter: If you don't want to answer any question, you feel bothered by any question, you can say you want to talk to your attorney.

Defendant: Okay, I will talk to the attorney and then answer.

The defendant then indicated that he was willing to talk to the detective. He told the detective that "I did the mistake and so I left." The defendant then requested an attorney and the police terminated the interview.

Prior to trial, the defendant moved to dismiss the indictment, arguing that the Commonwealth had destroyed potentially exculpatory evidence. The defendant argued that the towel and bedding that the Commonwealth destroyed could have been tested and, if they did not contain the defendant's DNA, that fact would have been exculpatory. The trial court denied the motion.

At trial, the nurse, Sue (Brown) Rotolo testified that she collected blood from the defendant, but could not recall collecting hair samples. However, she identified her initials on the evidence. The detective who received the evidence from Nurse Rotolo also testified and explained that after he received the evidence, he delivered it to the Department of Forensic Science. When DFS returned the evidence, the detective placed it in his case file folder, which he stored in an unlocked filing cabinet. He explained that both his floor and the building were secured by key codes.

Another detective, who pulled the file in 1999, testified that the plastic bags of evidence showed no signs of tampering in 1999. Similarly, the final detective, who pulled the file in 2013, testified that the items were stored in sealed packages, and bore no signs of tampering.

The DFS employees who testified at trial could not independently recall all of their actions at the time they handled the PERK evidence in 1994 and 1995, but they testified that when they examined the evidence again in 2013, they recognized their initials, the case number, and the dates that they handled or tested the evidence. The analysts also testified that, upon examining the exhibits in 2013, they appeared to be in the same condition as they were in 1995.

At trial, the defendant denied sexually assaulting the child. He claimed that he had sexual intercourse with a neighbor that day and that he cleaned himself off with a towel in his room.

The defendant requested an instruction to the jury that stated that the jury could infer that the destroyed evidence was beneficial to the defendant. The trial court denied the instruction.

Held: Affirmed. First, the Court rejected the defendant's motion to dismiss, finding that the defendant failed to show that the destroyed evidence "possessed an apparent exculpatory value" and failed to show that the Commonwealth, in failing to preserve the evidence, acted in bad faith, as required. The Court noted that no one testified that the towel or bedding were even present at the crime scene, and also pointed out that the defendant's own testimony indicated that his DNA would be present on the towel. The Court saw no reason that DNA on the bedding would have been relevant to the case.

Second, the Court rejected the defendant's motion to suppress his statement, finding that a reasonable police officer could have concluded that the defendant was not invoking his right to counsel. The Court found that the evidence indicated that, when he said "I have to talk to the lawyer" and "Okay, I will talk to the attorney and then answer," the defendant was merely repeating the explanation of his rights that the interpreter was providing to him.

The Court also found that, even if admitting the statement was error, it was harmless, noting that the statement could have been interpreted as his "mistake" in leaving the country, rather than his "mistake" in committing the aggravated sexual battery. The Court found that the value of the statement was relatively insignificant in comparison to the evidence identifying him as the perpetrator.

Third, the Court agreed that the evidence concerning chain of custody was sufficient. Regarding the handling of the exhibits before they reached DFS, the Court found that the defendant's "mere speculation that contamination or tampering could have occurred" only went to the weight, and not the admissibility, of the DNA evidence. The Court acknowledged that there was no evidence regarding how the evidence traveled from the investigator's office to a storage facility, or how it was handled between 1999 and 2013. However, the Court found that such concerns were irrelevant when the witnesses

testified that the item was in the same condition as when it had been sealed and there was no indication of tampering or contamination.

The Court also rejected the defendant's complaint that Nurse Rotolo did not remember collecting hair and pubic swabs, noting that she did not deny collecting the evidence and that other evidence at trial indicated that she collected this evidence.

Regarding the defendant's objections to the chain of custody regarding how the exhibits were handled, stored, and transported after DFS employees took custody of the exhibits, the Court found that §19.2-187.01 resolved the issue. The Court noted that once DFS took custody of the exhibits, the certificate of analysis served as prima facie evidence of the chain of custody.

Finally, the Court found it was proper to deny the defendant's proposed jury instructions directing an inference related to the Commonwealth's destruction of evidence, because the proposed instructions were not supported by more than a mere "scintilla of credible evidence." As the Court had noted earlier, there was no reason to believe that the towel and bedding were pertinent or germane to the case at all.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1636154.pdf

Granado v. Commonwealth: December 5, 2017
Chesapeake: The defendant appeals his conviction for DUI on Fourth and Fifth Amendment grounds.

Facts: The defendant drove while intoxicated. Officers received radio calls about a disorderly person who was intoxicated, possibly armed, and driving a light-colored Cadillac DeVille. Two officers spotted the vehicle stopped on the side of the road and they approached the vehicle. The officers told the defendant to show his hands as they approached the parked vehicle. The officers observed that the defendant smelled of alcohol and had bloodshot eyes. His speech was slurred, and his face was flushed.

The defendant repeatedly refused to show his hands when ordered to do so. When the defendant did not comply with the repeated commands and reached forward, the officers drew their weapons and forcibly removed him from the car. They handcuffed him until they could determine whether he had any weapons. The two officers did not use threatening language. The officers did not tell the defendant that he was under arrest, nor did they put him in a police car.

The defendant told the officers that he "just parked [his] car and was going to sleep it off" and that he had removed his keys from the ignition and threw them in the back seat. When asked if he had been drinking, the defendant replied, "It doesn't matter, I wasn't driving."

In a motion to suppress, the defendant argued that once the officers determined he was not armed, they should have released him. The defendant argued that he was in custody for purposes of *Miranda* and that the officers should have read him *Miranda* warnings prior to questioning.

Held: Affirmed. Regarding the *Miranda* issue, the Court ruled the defendant was not in custody for purposes of *Miranda* and that the officers merely put him in investigative detention. The Court distinguished the *Dixon* and *Hasan* cases, finding that a reasonable person would not have believed that

he was under arrest at the time that he made the statements. The Court repeated that drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into custody.

In this case, the Court pointed out that the officers physically restrained the defendant only to the extent necessary to ensure their safety, briefly drew their weapons, did not put him in a police car, and used no threatening language before asking him any questions. The Court also pointed out that, unlike in *Dixon*, the officers did not communicate any particular suspicion of a crime.

Regarding the Fourth Amendment issue, the Court ruled that the officers had reasonable suspicion that the defendant had been driving while intoxicated. The Court pointed out that the initial detention was necessary to investigate a report about an intoxicated driver in a car of the same make and model as the defendant's vehicle.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1354141.pdf

Diggs v. Commonwealth: January 30, 2018
Hampton: Defendant appeals his conviction for Attempted Rape Accomplished through the Use of the Victim's Mental Incapacity or Physical Helplessness on Fifth Amendment and sufficiency grounds.

Facts: The defendant was a patient at a secure mental health treatment facility. The defendant is hydrocephalic, has a 9th-grade education, and suffered from emotional and psychiatric problems; he arrived at the facility after a suicide attempt. While there, he met the victim, who was a frequent patient at the facility. She suffered from tuberous sclerosis and other conditions that affected her physical and cognitive abilities and her emotional state, such that she often could not tell the difference between right and wrong. The victim often suffered from episodes of hallucinations and delusions, mood swings, and agitation and aggression, and functioned at the age level of an eight to ten year old child.

One day, a nurse had to repeatedly tell the defendant and the victim to stop having physical contact in violation of the facility rules. Later that day, she found the victim and defendant alone in a room. The victim was partially unclothed and the defendant was rushing to put his clothes back on. The facility summoned the police. A sexual assault nurse examiner examined the victim and discovered injuries to the victim's vagina that could have been caused by penetration or "any kind of blunt [force] trauma." At trial, the nurse-examiner also noted that the victim did not understand what the nurse was asking her and answered inappropriately.

An officer interviewed the defendant at the facility. The officer did not read *Miranda* warnings. The officer told the defendant that he was not under arrest and made clear that he was free to leave. The interview lasted about a half an hour. During the interview, the defendant confessed that he tried to have sex with the victim.

The defendant moved to suppress his statements, arguing that since he was not free to leave the "locked" facility, the interview was a custodial interrogation. Further, the defendant argued, even if the interview was non-custodial in nature, the circumstances surrounding it—including his emotional

and mental disabilities, his commitment following a suicide attempt, and the fact that he was on medication— rendered his statements involuntary.

At trial, a doctor who was familiar with the victim testified. Although he had not evaluated or treated the victim on the date of the offense, he testified that he had reviewed some of her records from her stay and had treated her for the preceding six to seven years. The victim's mother also testified. They explained the victim's condition, including that the victim is unable to live independently and has never been able to hold a job, despite having once earned a special education diploma.

Held: Affirmed. The Court first rejected the defendant's *Miranda* argument. The Court explained that the relevant question is not whether a reasonable person would believe that he was not free to leave a police interview because it occurred in a mental health facility to which he had been civilly committed, but rather, under the totality of the circumstances, whether police subjected him to "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." In this case, the Court ruled that the interview by a single officer in a neutral setting was not a custodial interrogation and therefore did not require *Miranda* warnings.

The Court then rejected the defendant's argument that his statement was involuntary. The Court noted that the trial court had found, based upon the defendant's own testimony, that he was extremely intelligent and acquainted with *Miranda* rights. The Court also found no evidence that any medication impaired the defendant's ability to refuse to answer the officer's questions. Lastly, the Court repeated that, for a suspect's statement to be found involuntary in nature, some level of coercive police activity must occur. The Court found that the record was devoid of evidence of such coercion.

Regarding sufficiency of the evidence, the Court reviewed § 18.2-61(A)(ii). The Court distinguished this case from *Adkins* and instead likened it to *Sanford*. The Court repeated that when a mentally impaired or mentally retarded person has sufficient cognitive and intellectual capacity to comprehend or appreciate that they are engaging in intimate or personal sexual behavior which later may have some effect or residual impact upon them, their partner, or upon others, that person lacks the "mental incapacity" that would make the statute apply.

In this case, however, the Court pointed out that the victim's adaptive skills for daily living, personal independence, self-sufficiency, and communication were markedly impaired on the day of the attempted rape. The Court found that the victim's limited adaptive functioning, together with the evidence of her general mental incapacity, made the evidence sufficient to demonstrate her mental incapacity under the law.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2125161.pdf

Nichols v. Commonwealth: March 20, 2018
Portsmouth: Defendant appeals his conviction for Possession of a Firearm by Convicted Felon on Fifth Amendment *Miranda* grounds, Speedy Trial, and on the setting of his Motion to Suppress.

Facts: A local resident complained to an officer that the defendant was in her residence, refusing to leave, and that he may have taken her firearm. The officer went to look for the defendant and soon found him arguing with the complainant about the firearm. Although the defendant denied having the firearm, the officer stated: "Listen, nobody is in trouble. If you give me the gun, that can be the end of it. Just give me the gun back." The defendant admitted that he had the gun hidden in the glove compartment of his car. The officer retrieved the firearm, but then learned that the defendant was a convicted felon and arrested him for that offense.

Six business days before trial, the defendant moved to suppress his statements he made during the investigation, arguing that the officer should have read him *Miranda* warnings prior to asking him about the firearm. The defendant asked to have his motion to suppress heard on the same day as his jury trial. However, on the day of trial, the trial court denied the motion and then entered an order stating "on motion of defense, for good cause shown, it is Ordered that the trial of this case be continued." The defendant signed the order: "I ask for this." The defendant later objected on speedy trial grounds.

Held: Affirmed. The Court first ruled that the defendant was not in custody at the time that the officer spoke with him. Thus, the Court found that the officer did not need to read the defendant *Miranda* warnings during whatever detention that was incidental to the officer's investigation. The Court then rejected the defendant's argument § 19.2-266.2 entitled him to have both his suppression motion and trial heard on the same day. Lastly, the Court found that the defendant acquiesced in the continuance granted on the day of trial and therefore waived speedy trial. The Court also repeated that the defendant's lack of personal acquiescence in his counsel's motion to continue was immaterial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0304171.pdf

Spinner v. Commonwealth: April 3, 2018
Campbell County: Defendant appeals his conviction for Robbery and Murder on Fifth Amendment *Miranda* grounds.

Facts: The defendant robbed and murdered an 89-year-old man. Prior to interviewing him, the police informed the defendant of his *Miranda* rights. An officer read the standard rights, but included the statement: "If you cannot afford to hire a lawyer, one will be appointed to represent you before any question and if you wish one . . . [i]f you're charged with a crime." The defendant admitted to involvement in the crime.

Prior to trial, the defendant moved to suppress the statement, arguing that the *Miranda* warning he received implied that he did not have the right to an appointed attorney during the interrogation, but only if he was "charged with a crime."

Held: Affirmed. The Court likened this case to the U.S. Supreme Court's *Duckworth* case and held that the *Miranda* warnings effectively informed him of his constitutional rights and were a "fully

effective equivalent" of the warning mandated by *Miranda*. The Court found that the officer simply described the procedure for the appointment of counsel to indigent persons in Virginia.

Full Case At:
www.courts.state.va.us/opinions/opncavwp/1070163.pdf

FOURTH AMENDMENT – SEARCH AND SEIZURE

U.S. Supreme Court

Byrd v. United States: May 14, 2018
584 U.S. ___ (2018)
Certiorari to the 3rd Circuit Court of Appeals: Defendant appeals his convictions for Drug Distribution on Fourth Amendment grounds.

Facts: The defendant's girlfriend rented a car and allowed him to drive it, even though he was not an authorized driver and allowing him to do so violated the rental agreement. During a traffic stop, a police officer discovered that the defendant possessed body armor and 49 bricks of heroin in the rental car. The defendant moved to suppress the evidence, but the trial court and the appeals court concluded that, because the defendant was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car.

Held: Reversed. The Court held that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it, even if the rental agreement does not list him or her as an authorized driver. The Court explained that, although the *Katz* case introduced the "reasonable expectation of privacy" as a basis for a Fourth Amendment claim, that test supplements, rather than displaces, "the traditional property-based understanding of the Fourth Amendment."

The Court quoted Blackstone, writing that one of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude. Thus, the Court determined that central inquiry turns on the concept of lawful possession. The Court qualified that the defendant's "wrongful" presence at the scene of a search would not enable him to object to the legality of the search. Thus, the Court pointed out that if the defendant had obtained the vehicle by theft or subterfuge, he may not be entitled to raise a Fourth Amendment claim.

The Court remanded the case to address two additional arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/16-1371_1bn2.pdf

Collins v. Commonwealth: May 29, 2018

Rev'd Virginia Supreme Court Ruling of September 15, 2016

Albemarle: Defendant appeals his conviction for Possession of Stolen Property on Fourth Amendment grounds.

Facts: Defendant purchased a stolen motorcycle. Police first observed the motorcycle when it eluded police, and next when it eluded police again about a month later at over 140 miles per hour. Recording the license plate number, police traced the vehicle to its previous owner, who had sold it to the defendant and told police that the defendant knew it was stolen. Police then found the defendant's Facebook page, where he had a photo of the motorcycle in front of his house.

An officer went to the defendant's home, where he saw the same motorcycle, now partially covered with a tarp in the driveway. The officer walked up the driveway, past the point where he would normally turn to approach the front door, lifted the tarp, and discovered that the motorcycle now had different plates, which came back to another vehicle. The officer ran the Vin # and confirmed that it was stolen.

The officer then found the defendant at the front door of the house. The defendant first denied knowing about the motorcycle, then admitted he purchased it from the previous owner, then admitted he had driven it recently and obtained new tires for it. Prior to trial, the defendant argued that the officer's examination of the motorcycle violated the Fourth Amendment. The trial court denied the motion to suppress. The Court of Appeals affirmed the trial court's ruling under the "exigent circumstances" exception to the Fourth Amendment, but did not address the "automobile exception" to the Fourth Amendment. The Virginia Supreme Court affirmed based on the "automobile exception" to the Fourth Amendment, rather than the "exigent circumstances" exception.

Held: Reversed and remanded. Although the Court reaffirmed that, in general, officers may search an automobile without having obtained a warrant so long as they have probable cause to do so, the Court ruled that the automobile exception to the Fourth Amendment does not permit a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein.

In this case, the Court first determined that the defendant's driveway was within the "curtilage" of the defendant's home. The Court observed that a visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the enclosure and instead proceed up a set of steps leading to the front porch. Here, the officer walked further forward to examine the motorcycle, rather than turning to approach the front door. Thus, the Court concluded that the officer invaded the defendant's Fourth Amendment interest in the curtilage of his home.

The Court then ruled that the automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage. The Court found that the automobile exception extends no further than the automobile itself and does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage. The Court likened this case to a situation where an officer sees contraband inside a home through a window, which would also require a warrant.

The Court remanded the case to determine whether, as the Court of Appeals had originally ruled, the "exigent circumstances" exception to the warrant requirement applied in this case.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/16-1027_7lio.pdf

Fourth Circuit Court of Appeals

U.S. v. McLamb: January 25, 2018
880 F.3d 685 (2018)
E.D. Va: Defendant appeals his conviction for Possession of Child Pornography on Fourth Amendment grounds.

Facts: The defendant downloaded child pornography to his personal computer from a child pornography website called "Playpen," a hidden services message board located on the "dark web." The "dark web" is a collection of encrypted networks providing strong privacy protections to its users, one that operates like, but is separate from, the normal Internet.

After locating and seizing the Playpen servers in February 2015, the FBI sought a warrant to deploy a special technique called "NIT" to locate users accessing the website. The NIT is a computer script designed to overcome the anonymity protections of the "dark web" and collect identifying information from computers accessing the "Playpen" website. The boundaries of a federal magistrate judge's jurisdiction for remote access warrants were unclear at the time of the warrant; a rule change to permit such warrants did not take place until 2016. However, in writing the warrant, the FBI consulted with U.S. D.O.J. attorneys.

A federal magistrate judge in the Eastern District of Virginia issued the warrant, authorizing use of the NIT on "Playpen" visitors for 30 days. The NIT identified thousands of computers across the world that accessed "Playpen" during the 30- day period. After the NIT identified the defendant as one such visitor, the FBI obtained a search warrant for and seized the defendant's hard drive and charged him with receipt and possession of child pornography.

The defendant moved to suppress based on the warrant's particularity and its execution, as well as the jurisdiction of the magistrate judge to authorize such a search. The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court found that, even if the warrant violated the Fourth Amendment, it was clearly protected by "good faith" reliance under *Leon*. The Court noted that, even though there was a split of authority at the time of the warrant about whether a magistrate judge could issue a warrant that would search computers outside the jurisdiction, the location of the "Playpen" server, the Eastern District of Virginia, was the most sensible single district to identify as the "location" of the contraband. The Court also rejected the argument that the agent misled the magistrate about the location of the

search, pointing out that the affidavit made clear that the NIT would cause activating computers "wherever located" to transmit data to the FBI.

Regarding the lack of supporting authority for the warrant, the Court wrote: "in light of rapidly developing technology, there will not always be definitive precedent upon which law enforcement can rely when utilizing cutting edge investigative techniques. In such cases, consultation with government attorneys is precisely what *Leon*'s 'good faith' expects of law enforcement. We are disinclined to conclude that a warrant is 'facially deficient' where the legality of an investigative technique is unclear and law enforcement seeks advice from counsel before applying for the warrant."

The Court also refused to suppress the evidence on the grounds that the magistrate lacked jurisdiction, ruling that suppressing evidence merely because it was obtained pursuant to a warrant that reached beyond the boundaries of a magistrate judge's jurisdiction would not, under the facts of this case, produce an "appreciable deterrence" on law enforcement.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174299.P.pdf

U.S. v. Bowman: March 1, 2018
884 F.3d 200 (2018)
Western District of North Carolina: Defendant appeals his conviction for PWID Methamphetamine on Fourth Amendment grounds.

Facts: After he received a DEA tip regarding a vehicle suspected of transporting Methamphetamine, an officer saw the vehicle driving by. The officer watched the vehicle speeding and cross the fog line repeatedly. He stopped the vehicle based on suspicion of DUI and speeding. During the stop, he noted that the driver and passenger gave inconsistent accounts of their journey and appeared nervous. The defendant was driving an older vehicle and admitted that he regularly bought and sold vehicles and rarely drove the same vehicle for very long. However, the officer did not believe the defendant was driving under the influence and issued him a warning for speeding and unsafe movement of the vehicle. The officer returned the defendant's license to him and told him that he was free to go.

However, the officer then re-approached the defendant and asked him a few more questions about his journey and how he had arrived in the area. The officer then told the defendant "just hang tight right there, okay." The defendant agreed. The officer called a K-9 unit, who led police to the Methamphetamine in the vehicle. The trial court denied the defendant's motion to suppress.

Held: Reversed. While the Court agreed that the initial conversation that took place after the traffic stop was consensual, the Court found that the officer seized the defendant again by stating: "just hang tight right there, okay." The Court then ruled that the officer lacked reasonable suspicion to detain the defendant further at that point. The Court rejected the significance of the defendant's nervousness and inconsistent statements, finding that the officer did not sufficiently explain why the defendant's behavior was out of the norm for a typical traffic stop or why it led him to believe the defendant was engaged in criminal activity. Lastly, the Court also rejected the significance of the defendant's vehicle.

Full Case At:
http://www.ca4.uscourts.gov/opinions/164848.P.pdf

Sims v. Labowitz: March 14, 2018
E.D.Va.: Plaintiff appeals the dismissal of his lawsuit for unlawful seizure under the Fourth Amendment and for using him as a subject of child pornography.

Facts: As a 17-year-old child, the defendant sent sexually-explicit photos and videos of himself to his 15-year-old girlfriend. Although the Commonwealth obtained a petition against the child for production and distribution of child pornography, the Commonwealth elected to enter a nolle prosequi on the charges and instead seek more evidence. The detective obtained a search warrant for: "Photographs of the genitals, and other parts of the body of [Sims] that will be used as comparisons in recovered forensic evidence from the victim and suspect's electronic devices. This includes a photograph of the suspect's erect penis."

After transporting the child from his home to a juvenile detention center, the detective asked the defendant to pull down his pants and, according to the plaintiff, told him "to use his hand to manipulate his penis in different ways" to obtain an erection. The child indicated that he was not able to achieve an erection; the detective photographed the plaintiff's non-erect penis. The detective obtained a second search warrant in an effort to successfully obtain a picture of the defendant's erect penis, but before he could execute it, the police department and Commonwealth's Attorney stepped in and stopped him.

At trial, the court found the plaintiff guilty of possession of child pornography and took the case under advisement for one year, dismissing it after the plaintiff complied with the conditions. The plaintiff then sued the detective for violation of the Fourth Amendment and for creating child pornography. The detective died; the plaintiff carried on the lawsuit against the court-appointed administrator of the detective's estate. The district court dismissed the lawsuit, but the plaintiff appealed.

[*Note:* The plaintiff also sued the prosecutor involved in the search warrant, but the district court granted the prosecutor's motion to dismiss, holding that he was absolutely immune from suit because his conduct was performed in the course of his prosecutorial duties.]

Held: Reversed. The Court ruled that a reasonable police officer would have known that attempting to obtain a photograph of a minor child's erect penis, by ordering the child to masturbate in the presence of others, would unlawfully invade the child's right of privacy under the Fourth Amendment.

Although the Court agreed that a search warrant authorized the search, the Court found that the search was sexually-invasive and therefore also must be "reasonable" under *Bell v. Wolfish*. The Court examined whether it was reasonable under *Bell's* four factors: (1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place in which the search was performed. The Court found the scope of the search was "outrageous," the manner was intimidating, and that there was no evidentiary need to seek a photograph of the plaintiff's erect penis.

The Court also, without any discussion, reversed the dismissal of the plaintiff's claim for damages under 18 U.S.C. § 2255 as an alleged victim of child pornography. The Court agreed, however, with the dismissal of the plaintiff's claim that, prior to obtaining the second search warrant, the detective threatened to forcibly inject him with erection-producing medication, finding that such a threat did not yield any Fourth Amendment violation because the detective never executed that warrant.

Full Case At:
http://www.ca4.uscourts.gov/opinions/162174A.P.pdf

U.S. v. Kolsuz: May 9, 2018
E.D.Va: Defendant appeals his convictions for Attempted Firearms Smuggling on Fourth Amendment grounds.

Facts: The defendant tried to smuggle firearms parts out of Dulles Airport in his luggage. Agents, aware of the defendant's numerous attempts to do that in the past, discovered the parts and arrested the defendant. After arresting the defendant, the agents seized his smartphone and sent it to a laboratory for forensic analysis. After a month of examination, agents obtained the contents of the device, which contained communications about his smuggling scheme.

At trial, the defendant moved to suppress the search of his phone on the grounds that the warrantless search exceeded the scope of the "border search" exception to the Fourth Amendment. He argued that the forensic search of his phone, and the associated invasion of his privacy, was not justified under the border search exception. The trial court denied the motion.

Held: Affirmed. The Court relied on the "border search" exception to the Fourth Amendment's warrant requirement; that exception provides that at a border – or at a border's "functional equivalent," like an international airport– the government may conduct "routine" searches and seizures of persons and property without a warrant or any individualized suspicion. This exception applies even if the person is leaving the United States, because with respect to exit searches, the Court explained that the border search exception is justified by the government's power to regulate the export of currency and other goods. The Court pointed out that this exception also still applies after a traveler is arrested and no longer in a position to cross the border.

The Court agreed that a forensic search was more intrusive than a "manual" search of the phone, to confirm that it is what it purports to be, and therefore a forensic border search of a phone must be treated as "non-routine", permissible only on a showing of individualized suspicion. The Court likened this search to strip searches, alimentary-canal searches, x-rays, and the like, all of which are permitted only with reasonable suspicion. However, in this case the Court found that the link between the search of the defendant's phone and the interest that justified the border search was sufficient to trigger the border exception, because the agents had evidence that the defendant was attempting to export firearms illegally and without a license.

The Court refused to set any further boundaries or standards for these searches. Instead, the Court repeated that, even if a search is judged to be constitutionally flawed in some way, its fruits need not be suppressed if the agents acted "in reasonable reliance on binding precedent." In this case, the Court judged that it was reasonable for the officers who conducted the forensic analysis of the phone to rely on the established and uniform body of precedent allowing warrantless border searches of digital devices based on reasonable suspicion. Thus, the Court refused to consider whether more than reasonable suspicion was required for this search.

The Court also did not address whether the Fourth Amendment would permit an extended confiscation of a traveler's phone without suspicion.

Full Case At:
http://www.ca4.uscourts.gov/opinions/164687.P.pdf

Virginia Supreme Court

Commonwealth v. White: June 1, 2017
Rev'd Court of Appeals published decision of May 10, 2016
293 Va. 411, 799 S.E.2d 494 (2017)
Norfolk: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: Police responded to an anonymous tip that the defendant was selling drugs near a motel. The area was a "high-crime" area known for drug distribution and officers observed the defendant engage in what appeared to be a hand-to-hand drug transaction. They approached the defendant and he gave them consent to search his person. While an officer patted the defendant down, the officer felt a "powdery substance" in the defendant's sock that the officer believed was illegal drugs. The defendant attempted to stop the officer from removing the item, but the officer recovered it and found that it was heroin.

The defendant then asked the officer to go tell his girlfriend about his arrest. The girlfriend was in a motel room and she gave the officers consent to search the room. The officers did not check to see who had rented the room. The officers "assumed" that the girlfriend was "the lessee" because she "seemed to have control" of it. The officers saw a bag on a bed in the room. Before an officer opened the bag, the girlfriend told him that the bag belonged to the defendant. Inside the bag, the officers found drugs and distribution paraphernalia.

The Court of Appeals affirmed in part and reversed in part. The Court of Appeals ruled that the initial detention was reasonable, but the search of the bag was unlawful because the officers could not rely on the girlfriend's consent.

Held: Conviction affirmed, Court of Appeals decision reversed.

Unlike the Court of Appeals, the Virginia Supreme Court focused on "harmless error" analysis. The Court found that the incriminating evidence found during the officer's personal search of the

defendant was both overwhelming and uncontested. On the other hand, the evidence found in the plastic bag in the motel room had marginal importance in the prosecutor's case and there was no indication that it played a role of any significance at trial. Thus, the Court saw "no reason to resolve this nuanced contest over apparent-authority principles governing consent searches under the Fourth Amendment."

Full case at:
http://www.courts.state.va.us/opinions/opnscvwp/1160879.pdf

Cole v. Commonwealth: November 16, 2017
294 Va. 342, 806 S.E.2d 387 (2017)
Alexandria: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment and sufficiency grounds.

Facts: The defendant carried cocaine, for sale, in his anus. An officer arrested him on an outstanding warrant and discovered that the defendant possessed marijuana, but did not discover the cocaine. The officer brought the defendant to the jail and advised the jail that he had arrested the defendant for a drug offense. The jail's policy was to strip search only those new detainees charged with offenses involving drugs, weapons, or violence, and only with approval from a supervisor. The jail, pursuant to their procedures, conducted a strip search of the defendant.

During the search, the defendant would not comply with the instruction to "turn around and squat." The officer noticed a white plastic baggy hanging out of the defendant's anus, and told the defendant to put his hands up. The defendant began to struggle with the officers, took the bag out of his anus, and put it in his mouth. However, the officers recovered the bag and found that it contained 14 bag-corners of cocaine, weighing over 5 grams, packaged for sale.

The trial court granted a motion to suppress the evidence, on the grounds that a "higher standard" applies to the strip search of a detainee prior to him or her being taken before a magistrate, and that "without any particularized suspicion as to whether or not [the defendant] was hiding drugs on his person," the search was be a violation of his Fourth Amendment rights. However, the Court of Appeals reversed that ruling in an interlocutory appeal.

At trial, a police expert testified that the "possession of approximately 5 plus grams of crack cocaine broken into individually wrapped baggies held by a defendant in his buttocks," as well as $600 in cash and no smoking device, was inconsistent with personal use.

The defendant appealed again to the Court of Appeals, who refused to reconsider its original ruling and affirmed the defendant's conviction.

Held: Affirmed. The Court first held that the Court of Appeals was incorrect to have refused to re-hear the Fourth Amendment issue on direct appeal. However, the Court then agreed with the Court of Appeals original ruling that the evidence was admissible.

The Court reviewed the U.S. Supreme Court's ruling in *Florence* and noted the legitimate concerns that a jail has in its booking area, such as the dangers of disease, gang-based violence, and the

disruption of jail safety due to an underground economy trading in contraband. The Court noted those concerns are heightened when, as here, prisoners are generally kept in group cells, are not handcuffed, and are able to move around the waiting area with some degree of freedom, such as going to the restroom unescorted.

The Court ruled that, in the absence of "substantial evidence demonstrating that the Jail's response to the situation is exaggerated," the jail's policy was reasonable and the trial court should have deferred to the policy. The Court pointed out that, during argument, the defendant had contended that the evidence was not subject to inevitable discovery, thereby admitting that he would have had the opportunity to surreptitiously dispose of his cocaine in the jail if officers had not located it.

The Court also agreed that the evidence was sufficient to demonstrate the defendant's intent to distribute his cocaine.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161113.pdf

Commonwealth v. Campbell: December 14, 2017
294 Va. 486, 807 S.E.2d 735 (2017)
Rev'd Court of Appeals ruling of October 25, 2016
Amherst: Defendant appeals his conviction for Possession with Intent to Distribute Methamphetamine on violation of the Search Warrant statute.

Facts: The defendant and several others cooked methamphetamine at their home. Police received a detailed series of tips from a known reliable informant about a "meth cook" that was about to take place in the next few hours. During the night, while other officers obtained a search warrant, police officers approached the residence and, from a concealed location, observed as the "cook" took place.

Police obtained a search warrant for the defendant's residence. Police executed the search warrant and seized evidence of the defendant's methamphetamine operation. The next day, the Magistrate transmitted the paperwork to the clerk's office, but failed to send the entire affidavit. The clerk's office only received one page of the affidavit, a page that lacked most of the relevant information.

At a motion to suppress, officers testified about the highly toxic nature of the chemicals employed in the process and the grave danger that exposure to meth-related substances can present. They also explained the serious risk of fire or explosion that inheres in the enterprise. The officers explained that the officers could hear the voices of individuals either inside or immediately outside of the shed where the "meth cook" was allegedly taking place, and they knew that multiple persons were in danger of fire, explosion, or toxic exposure.

The trial court denied the defendant's motion to suppress the evidence on the grounds that the complete affidavit supporting the warrant had not been filed within thirty days as required by §19.2-54. The Court of Appeals also ruled that law enforcement could not rely on the exigent circumstances exception while still obtaining a search warrant.

Held: Affirmed, Court of Appeals reversed. The Court assumed but did not rule that the magistrate's incomplete faxing rendered the search warrant invalid under Code § 19.2-54. However, the Court ruled that the search was lawful under the "exigent circumstances" exception to the search warrant requirement. The Court reviewed the dangers of the operation and the risk to both safety and of destruction of evidence. The Court reasoned that, even if the police had not obtained a warrant under the circumstances, and had instead assembled the law enforcement team and raced to the scene of the "meth cook" that was either on the cusp of, or actually was, taking place, such a warrantless search would be justified under the exigent circumstances exception.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161676.pdf

Neal v. Fairfax Police: April 26, 2018
Fairfax: The plaintiff appeals the dismissal of his request for an injunction to prohibit the use of passive license plate readers.

Facts: The Fairfax County Police Department uses automated license plate readers ("ALPRs). The ALPRs use cameras, which can be stationary or mounted on a police vehicle, and which capture images of passing vehicles' license plates. The police have an electronic ALPR database that stores the captured images, the alpha-numeric conversion of the license plate number, and the time, date, and location from which the image was captured for 364 days. Officers may only search the ALPR database by license plate number, although the police also have regular access to DMV's database.

The plaintiff filed a request for an injunction to prohibit the Fairfax County Police Department from using ALPRs in "passive" mode, collecting and storing license plate data in their database. The plaintiff argued that the ALPRs violate the Virginia Government Data Collection and Dissemination Practices Act, §§ 2.2-3800 to -3809 (the "Data Act"), including the requirement in § 2.2-3800(C)(2) that information not be collected "unless the need for it has been clearly established in advance" of collecting that information.

The trial court ruled, on summary judgment, that the retention of information gathered and stored by a police department using ALPRs in that manner did not constitute a violation of the Data Act, and dismissed the case. [*Note: This case did not concern the "active" use of ALPRs, to search for a particular license plate at a particular time – EJC*].

Held: Reversed. The Court ruled that the pictures and associated data stored in the ALPR database meet the statutory definition of "personal information" under § 2.2-3801. The Court held that the police department's "sweeping randomized surveillance and collection of personal information" do not fall under the exception for "investigations and intelligence gathering related to criminal activity" and, therefore, if the ALPR database is an information system, it is not exempt from the Data Act. However, the Court explained that, on the record established in the trial court, it was unable to determine whether the police department's retention and "passive use" of information generated by

ALPRs is an "information system" governed by the Data Act. Because the Court could not determine that, the Court found that summary judgment was improper.

The Court explained that a license plate number stored in the ALPR database is not "personal information" because it does not describe, locate or index anything about an individual. On the other hand, the Court concluded that the pictures and data associated with each license plate number do constitute "personal information" as defined by § 2.2-3801, because the images of the vehicle, its license plate, and the vehicle's immediate surroundings, along with the GPS location, time, and date when the image was captured "afford a basis for inferring personal characteristics, such as things done by or to" the individual who owns the vehicle, as well as a basis for inferring the presence of the individual who owns the vehicle in a certain location at a certain time under § 2.2-3801.

The Court remanded the case to the trial court for a determination of whether the total components and operations of the ALPR record-keeping process provide a means through which a link between a license plate number and the vehicle's owner "may be readily made." The Court stated that, if such a means exists, then the police department's "passive use" of ALPRs is not exempt from the operation of the Data Act under the law enforcement exception of § 2.2- 3802(7), because the police department collected and retained personal information without any suspicion of criminal activity at any level of abstraction, and thus created an information system that does not "deal with investigations and intelligence gathering related to criminal activity."

In a footnote, the Court made clear that the phrase "investigations and intelligence gathering related to criminal activity," as used in § 2.2-3802(7), is not necessarily limited to past or present criminal activity to the exclusion of future criminal activity, as the Fourth Amendment does not make that distinction.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170247.pdf

Virginia Court of Appeals
Published

Brown v. Commonwealth: August 1, 2017
(note case by same name, different defendant, decided on the same day)
68 Va. App. 58, 802 S.E.2d 197 (2017)
Albemarle: The defendant appeals his convictions for Distribution of Drugs on Fourth Amendment and Sixth Amendment grounds.

Facts: The defendant sold cocaine over several months to a police informant. Officers observed multiple sales by the defendant and watched him return to his apartment after several of the sales. None of the sales took place at the defendant's apartment. At the end of the investigation, officers arrested the defendant while he was driving from a recent sale and recovered additional cocaine and evidence from the defendant.

Just after the arrest, a detective obtained a search warrant for the defendant's apartment. While that detective obtained a search warrant, other detectives entered the defendant's apartment without a warrant and conducted a "protective sweep" of the apartment, to make sure that no one was present. Once they determined that no one was inside, they left and guarded the apartment, waiting for the warrant to arrive.

At a motion to suppress, each of the detectives testified that the detective who wrote the affidavit for the search warrant had no communication with the detectives who conducted the protective sweep, between the time the sweep that they conducted the sweep and when he obtained the search warrant. Police did not find any evidence during the protective sweep. All the evidence located by police was located while executing the search warrant.

Over the course of the proceedings, the defendant obtained and then fired four court-appointed attorneys. He fired his first two court-appointed attorneys after complaining that they were not acting in his interests. The defendant continued to complain about his third attorney, so the trial court appointed a fourth attorney to assist the third attorney. The defendant then asked the trial court to remove both lawyers. The Court agreed, but denied his request for a fifth attorney, setting the matter for trial. The defendant objected, but the trial court ruled that he had effectively waived his right to an attorney.

On the day of trial, the defendant entered a conditional *Alford* plea of guilty, *pro se*. In his guilty plea, the defendant signed the guilty plea form stating, "I understand that by pleading guilty I waive all objections to the admissibility of evidence and to the legality of my arrest and any search and seizure of my property, except as to this Court's ruling on December 16, 2014 regarding the legality of the search of my residence." The plea agreement further provided, "I understand that by pleading guilty I waive any right of appeal from the decision of the court, except as noted above."

Held: Affirmed. The Court first held that the protective sweep did not taint the issuance of the search warrant and that the circuit court did not err when it denied the motion to suppress. The Court rejected the argument that the sole reference to the protective sweep in the search warrant affidavit, a statement in the affidavit that "[t]he residence is currently secured by law enforcement officers", was relevant to the magistrate's determination of whether probable cause existed to issue the search warrant.

The Court also examined the search warrant and found that it established probable cause to search the defendant's residence. The Court noted that the affidavit described several drug sales and that the officers saw the defendant coming from and returning to the area where his apartment was located. The affidavit included a confirmation that the defendant actually lived at the apartment. The Court also noted that the affidavit stated that, "based on affiant's training and experience, persons involved in the sale of illegal drugs often keep quantities of drugs in their residence" and the apartment would "likely contain further evidence of the crime of distribution of cocaine." The Court found that these facts supported probable cause for the issuance of the search warrant.

Regarding the defendant's request for an attorney, the Court held that the defendant failed to reserve the right to appeal that issue in his conditional guilty plea and therefore the Court had no statutory authority to review whether the trial court erred in declining to appoint him a fifth attorney. The Court pointed out that Code § 19.2-254 required the defendant to specify in his plea agreement exactly which issues he wished to have reviewed on appeal; otherwise, by pleading guilty, the defendant

waived and may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1998152.pdf

Aponte v. Commonwealth: October 10, 2017
68 Va. App. 146, 804 S.E.2d 866 (2017)
Bedford: Defendant appeals her conviction for Involuntary Manslaughter and DUI 2nd Offense on admission of the certificate of analysis.

Facts: The defendant, while driving intoxicated, crashed into another vehicle, crippling the driver and killing her six-year-old child, who had been a passenger in her own car. When an eyewitness told the defendant that she would call 911, the defendant asked her not to, stating "please don't, I've been drinking." The witness called 911 anyway and watched as the defendant discarded beer cans in the woods nearby. A trooper arrived but the scene was hectic; a helicopter transported the child to the hospital and the defendant followed. Only after the defendant left did the trooper discover the role that alcohol may have played in the crash.

The trooper found the defendant at the hospital and learned that the defendant had not consumed any alcohol since the crash. She claimed that she had consumed her last drink approximately 15 hours before. A PBT revealed the defendant's BAC to be .130. Believing the result to be unusually high, the trooper offered another PBT, which returned a result of .109 seven minutes later.

Since more than three hours had passed since the crash, the Trooper asked the defendant if she would consent to a blood draw. He explained that if she did not, he would take the defendant before a magistrate and attempt to obtain a search warrant, and offered that her consent would allow her to stay in the hospital with her son. The defendant consented to the blood draw. The certificate of analysis later demonstrated that the defendant's BAC was .116. At trial, a toxicologist testified that she extrapolated the defendant's BAC to between 0.156 and 0.196 at the time of the crash.

Prior to trial, the defendant moved to suppress the results of the certificate of analysis on the grounds that the trooper coerced her into consenting to the blood draw.

Held: Affirmed. The Court ignored the consent issue and instead concluded that exigent circumstances existed to justify the nonconsensual, warrantless blood draw from the defendant. The Court acknowledged that the general rule under the U.S. Supreme Court ruling in *Missouri v. McNeely* is that most DUI cases do not constitute a exigent circumstances. However, the Court likened this case to the case of *Schmerber v. California*. The Court explained that, as in *Schmerber,* unlike *McNeely*, the blood draw arose from a serious automobile crash with attendant complications, not from a "routine DWI" traffic stop. Also, like the officer in *Schmerber*, the Court noted that the trooper in this case was delayed in pursuing the usual procedures for obtaining a valid blood draw by the need to investigate the crash. The Court also pointed out that the defendant's act of concealing beer cans may have delayed the discovery that alcohol played a role in the crash.

The Court also reasoned that, based on what the trooper learned from the defendant at the hospital, the defendant may have consumed alcohol so long ago that any further delay in obtaining a blood sample would have affected the accuracy, and thus the probative value, of blood alcohol test results. The Court pointed out that, even under *McNeely,* the detrimental effects of the passage of time upon the reliability of a blood test may alone be sufficient to justify a warrantless, nonconsensual blood draw. Given the potential for the destruction of evidence through dissipation and the other "special facts" specific to this situation, the Court found that exigent circumstances justified the warrantless blood draw.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0052173.pdf

Stickle v. Commonwealth: December 27, 2017
68 Va. App. 321, 808 S.E.2d 530 (2017)
Williamsburg: Defendant appeals his conviction for Possession of Child Pornography and Possession with Intent to Distribute Child Pornography on Fourth Amendment and joinder grounds.

Facts: The defendant downloaded child pornography to his computer using a "Peer-to-Peer" file-sharing network. The defendant also possessed and shared child pornography that depicted him and another child. Police monitored the file-sharing network using special software and identified the defendant's IP address using their monitoring software. Using the software, they specifically downloaded child pornography from the defendant's computer. They obtained a search warrant for the defendant's residence and executed it.

Searching the defendant's computer, the police located a password-protected user account on the defendant's laptop that bore the defendant's name. Inside that account, police found images and videos of child pornography, the peer-to-peer software, personal and family photos related to the defendant, and a folder regarding a relative's baptism. Three video files located in the folder portrayed the defendant performing sexual acts on a prepubescent eight-year-old child.

In a motion to suppress, the defendant argued that the police software used to locate and download child pornography from a computer in the defendant's home violated his Fourth Amendment rights. Prior to trial, the defendant objected to the joinder of the offenses involving the child pornography that he created with the child pornography that he downloaded. The defendant argued that the files were placed on the computer at different dates over a range of years and were thus separate crimes that were not part of a common scheme or plan.

At trial, the defendant presented testimony that other people, including his fiancé and roommates, had access to his computer at various times. The trial court rejected all of the defendant's arguments.

Held: Affirmed. After spending 3 pages explaining what the "Internet" is, the Court reaffirmed its holding in *Rideout*, that the defendant does not have a reasonable expectation of privacy in files that he openly shares on a peer-to-peer file-sharing network. The Court found that the *Jones* and *Jardines* cases

did not change the law regarding whether law enforcement engaged in a warrantless search in this case. Instead, the Court repeated that viewing items deliberately exposed to public view does not constitute a search.

The Court also rejected the argument that law enforcement's software constituted the kind of "sophisticated equipment" prohibited by *Kyllo*. Instead, the Court observed that the software was only slightly modified from the basic program, with a modification to allow direct connection to a single user. The Court pointed out that this feature is not an unknown advancement but rather a regression in technology to earlier file sharing protocols, such as "Napster." Again, however, the Court found that law enforcement never engaged in a Fourth Amendment "search" at all.

The Court also rejected the defendant's challenge to the joinder of the offenses. The Court first noted that possession is, by nature, a continuing offense. The Court expressed concern that, if the defendant were correct that each file is a separate act of possession, his "argument slides easily down a slippery slope which, if adopted, would serve no purpose beyond devastating judicial economy."

The Court also rejected the argument that admitting the video that he created was impermissibly prejudicial to the other child pornography charges. Instead, the Court observed that the evidence of the videos in which the defendant personally appeared was directly related to the other charges and highly probative of both his knowledge that child pornography was on his computer and that he intended for child pornography to be distributed. As the court pointed out: "Evidence in criminal cases is usually prejudicial, otherwise it would not normally be relevant."

The Court also found the evidence was sufficient for a conviction.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0660161.pdf

Brown v. Commonwealth: March 20, 2018
Albemarle: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: Officers arrested the defendant for possession with intent to distribute marijuana during a "buy-bust" operation and recovered more than five pounds of marijuana and a firearm. An officer obtained a search warrant for the defendant's residence. In the warrant, the officer detailed that the defendant had been the victim of an attempted robbery at his residence the week before and that an informant had repeatedly seen the defendant with large quantities of drugs and money. The officer detailed why the facts indicated that the defendant's residence was the "base of operations" for his drug distribution.

Held: Affirmed. The Court held that a substantial basis to find probable cause existed to issue a search warrant for the defendant's home. The Court quoted *Gwinn*, where it had written: "The magistrate need not determine that the evidence sought is, in fact, on the premises to be searched or that the evidence is more likely than not to be found where the search is to take place. The magistrate

need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit."

The Court made clear that the officer "was not required to definitively prove that evidence would be found in the home;" instead, he "only needed to state objective facts that would enable a magistrate to find that a 'fair probability' existed that evidence of drug distribution would be found in the home." In a footnote, the Court detailed numerous cases in which courts have upheld warrants where magistrates made reasonable inferences from the facts alleged in a warrant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0184172.pdf

Hill v. Commonwealth: April 24, 2018
Portsmouth: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: Defendant sat alone in a "high-crime" area in his car with drugs in the backseat. Detectives were patrolling the area in response to specific complaints of narcotics activity and had personal experience making drug arrests in the immediate vicinity. The detectives testified that drug dealers often wait for their clients in secluded locations, such as where the defendant was sitting. Although the defendant was sitting motionless when the detectives first observed him, he changed his behavior significantly when he saw them approach in their unmarked car. He engaged in "a bunch of movements inside of his vehicle," looking "up and down" repeatedly. When the detectives parked and walked towards him, the defendant immediately turned away and began reaching repeatedly next to his seat, which prompted the detectives to demand that he show both hands. He "dug down into the seats," "tucking his right hand into the rear bottom of the driver's seat," and he refused to show his hands despite being told to do so "at least ten times."

Finally, the detectives grabbed the defendant, physically removed him from the vehicle, and placed him in handcuffs. Looking in the backseat of the car, the detectives found the defendant's cocaine. The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court first pointed out that the defendant did not comply with the detectives' requests to show his hands and did not submit to their authority while sitting in the vehicle. Thus, the Court found that no seizure occurred until the detectives physically removed him from the vehicle and placed him in handcuffs.

The Court held that, when they seized the defendant, the detectives had reasonable articulable suspicion that the defendant possessed a concealed weapon and was armed and dangerous, justifying the seizure and subsequent protective search of the vehicle. The Court directly referred back to *Terry v. Ohio* and relied upon the level of crime in the area, the defendant's furtive movements, the location where the defendant had parked alone, and the other facts to make its ruling.

Justice Humphreys wrote a long dissent in which he stated: "I find it sadly ironic that the shield the Fourth Amendment once provided from warrantless governmental intrusions for the innocent and

guilty alike, has been diluted here in the place of its birth to the point that the majority today can seriously conclude that it provides no protection for a citizen, legally parked on a city street at 2:30 in the afternoon, who is dragged from his car for failing to follow police "commands" that he had no legal obligation to obey and then handcuffed while his vehicle is searched—all based upon his presence in what is only generally described as a "high crime, drug area" and on what even an officer involved described as a "hunch" that he might be involved in drug activity."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0482171.pdf

Virginia Court of Appeals
Unpublished

Gibbs v. Commonwealth: June 6, 2017
Hampton: Defendant appeals his conviction for Habitual Offender on Fourth Amendment grounds.

Facts: The defendant drove a car after having been adjudicated to be a habitual offender. An officer saw that the defendant's car had an inspection sticker that was dirty and "excessively taped" to the windshield with heavy clear tape on each corner. The officer suspected that someone had removed the sticker from another vehicle and placed it on the car. The officer stopped the defendant and learned that he was a Habitual Offender.

During a motion to suppress, the officer specifically explained that the adhesive side of the sticker gets dirty when it is removed from one windshield and placed on another. The officer explained that inspection stickers are self-adhesive and usually clean, but if one is taken off of a windshield and then used again, the adhesive "catches dirt." He also testified that a new sticker "will stick to the windshield until it's taken off."

The trial court denied the defendant's motion to suppress the stop.

Held: Affirmed. The Court held that the totality of the circumstances supports the conclusion that the officer had a reasonable, articulable suspicion that the inspection sticker had been illegally moved from another vehicle to the one driven by the defendant. The Court distinguished the *Moore* case, where the officer knew that the defendant had been driving a rental car and therefore would be unlikely to be aware of the inspection sticker. In this case, the Court noted that the officer did not possess any knowledge at the time of the stop that undermined his suspicion that the defendant had tampered with the inspection sticker.

The Court also repeated that the fact that there were possible innocent explanations for having an inspection sticker taped to a car windshield did not affect the officer's authority to stop the vehicle to confirm or dispel his suspicions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1115161.pdf

Harris v. Commonwealth: July 5, 2017
Louisa: Defendant appeals his convictions for Drug Possession on Fourth Amendment grounds.

Facts: While carrying drugs in his pockets, the defendant engaged in an altercation with his brother. Police received a 911 call reporting the altercation, which reportedly involved an individual armed with a knife outside of a home. When an officer arrived at that exact address, he observed two males standing on opposite sides of a narrow roadway separated by about twenty feet. The defendant was holding a three to four-inch folding knife in his right hand with the blade open. When the defendant saw the officer approach in his marked police cruiser, the defendant immediately removed the knife from his hand and placed it on the hood of the vehicle next to him.

The officer immediately detained the defendant and patted him down. The officer felt two objects in the defendant's pockets that he removed. At a motion to suppress, he testified that he did not know what the items were when he felt them, but he believed that they may be weapons. One item was a glass vial containing PCP. The other was a cigarette pack that contained a glass tube with cocaine residue.

The officer then interviewed the brother as part of his investigation. The brother told the officer that the defendant had threatened to stab him if he did not drive the defendant away. The brother also stated that he felt fear when the defendant displayed the knife. The officer arrested the defendant for assault.

Held: Affirmed. The Court bypassed the issue of whether the officer lawfully located the drugs during the frisk. Instead, the Court ruled that assuming, without deciding, that the officer improperly searched the defendant, the officer would have inevitably discovered the drugs by lawful means, given that the officer possessed the information and leads making the discovery inevitable at the time of the search. Because the officer had probable cause to believe that the defendant had committed an assault, the officer had authority to arrest the defendant for assault and would have logically conducted a search of the defendant's person incident to the arrest, finding the drugs inevitably.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1149162.pdf
Harrod v. Commonwealth: August 8, 2017
Newport News: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: The defendant had marijuana for sale in his vehicle. The defendant encountered a police officer, who was stopped at an intersection at a stop sign. Although the defendant had no stop sign and had the right of way, the defendant also stopped at the intersection. The officer waited for the defendant to go, but after the defendant waited for a significant amount of time, the officer initiated a traffic stop. The officer obtained the defendant's license. While waiting for the defendant's license information to come back, he requested back-up officers and a K-9 unit. The officer testified that these actions did not prolong the stop.

The officer learned that the defendant's license was suspended. While he wrote the defendant a summons for that offense, other officers responded and spoke to the defendant at his vehicle. They asked him for the rental agreement for the car. The defendant opened the glove compartment and officers observed a scale inside the glove compartment. They asked him to step out, searched the car and found marijuana inside the car.

The defendant argued that the officer lacked reasonable suspicion for the stop and that he impermissibly extended the stop, under *Rodriguez*.

Held: Affirmed. The Court held that the officer had reasonable articulable suspicion to stop the defendant for a violation of Code § 46.2-888 because he saw the defendant stop his vehicle in the road in a way that could have impeded traffic. The Court then explained that once the officer had stopped the defendant and learned that he was driving on a revoked license, that fact changed the nature of the stop and the officer was entitled to continue writing a new summons for driving on a revoked license while the other officers spoke with the defendant.

The Court then found that the other officers in no way prolonged the duration of the stop by their speaking with the defendant, during which they developed probable cause that the defendant possessed marijuana, while the officer was busy working on paperwork related to charging the defendant with driving on a revoked license. Unlike *Matthews*, the Court found no evidence that the officer created any delay by calling for back-up or calling for a K-9 officer.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1297161.pdf

Commonwealth v. Collins: August 8, 2017
Wise: The Commonwealth appeals the granting of a motion to suppress on Fourth and Fifth Amendment grounds.

Facts: Social Workers arrived unannounced at the defendant's mother's home to conduct an inspection regarding the defendant's child. The defendant's mother, who was the homeowner, gave the social workers permission to enter and "look around" the residence. The social workers found narcotics paraphernalia strewn about the room where the child slept. They called the police at the mother's request.

When the police arrived shortly thereafter, the mother also consented to their search of the home. The officers located a backpack and shaving kit in a bedroom where the defendant's child slept; the mother stated that the backpack belonged to the defendant. The backpack contained numerous items that, together, were the precursors for a methamphetamine laboratory. Another man later told police that the backpack belonged to him.

Officers located the defendant and two other men hiding in the basement. Police brought the three of them up to the porch and collectively advised them of their rights under *Miranda*. However, the testimony was not clear about who advised them of their rights and no one testified that the defendant

waived her rights at that time. The defendant made several statements on the porch. Later she formally waived her *Miranda* rights while in a police car and made additional statements.

At a motion to suppress, the defendant testified that she neither lived at the residence nor stayed there overnight and "a lot" of people had access to the bedroom. There was no evidence that the defendant took any precautions to maintain her privacy in the room or its contents. The defendant stated that she was merely holding the backpack for someone else.

The trial court suppressed the evidence in the backpack and suppressed the statements that the defendant made on the porch, before she waived her rights in the police car.

Held: Affirmed in part, reversed in part. The Court first reversed the trial court's suppression of the evidence in the backpack on Fourth Amendment grounds. The Court ruled that, although the defendant was legitimately on the premises at her mother's residence, this fact alone was insufficient to meet her burden to show that she had standing to object to the search.

In a footnote, the Court also rejected the argument that the Commonwealth, by arguing lack of standing but also arguing that the defendant was in possession of the backpack, was attempting to approbate and reprobate. The Court pointed out that the determination of whether evidence is sufficient to convict a defendant of possessing illicit drugs requires a different inquiry than the test to determine if a defendant has a reasonable expectation of privacy in an item.

Regarding the defendant's statements prior to her *Miranda* waiver in the car, however, the Court affirmed the granting of the motion to suppress. The Court noted that the testimony was not clear regarding who gave what warnings to the defendant and that no one could testify that the defendant had waived her rights.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0411173.pdf

Kersey v. Commonwealth: August 29, 2017
Chesterfield: Defendant appeals his conviction for Drug Possession on Fourth Amendment grounds.

Facts: The defendant visited the police department, where an officer arrested her on an outstanding capias. While the officer was arresting the defendant, the officer noted that the defendant surreptitiously handed an item to her companion, concealing it. The defendant's companion then attempted to hide the item. The officer asked if he could "see" the item. The companion handed the officer the item, a dollar bill folded in an "apothecary" fold. The officer opened the item and discovered cocaine inside.

The trial court denied the defendant's motion to suppress the search.

Held: Affirmed. The Court held that the officer's initial seizure of the bill was proper based on the companion's consent to the officer's request to "see" the bill, finding that the defendant's companion had the authority to consent and that she did not object to him handing the item to the officer. The Court agreed that the officer did not have authority to search the dollar bill based on

consent, because he only asked to "see" the dollar bill. The Court also pointed out, in a footnote, that mere probable cause to search the folded dollar bill would not have been sufficient to search the contents of the item.

The Court then held that the unusual way the bill was folded, combined with additional suspicious circumstances, provided probable cause to arrest the defendant and her companion for possession of contraband, leading to a lawful search incident to arrest. The Court likened the folded bill to a glassine envelope or a corner baggie, and found that its configuration, the fact that it was the only item of value that the defendant handed to her companion for safekeeping, and the manner in which the defendant and her friend concealed the item, gave the officer probable cause to believe the item was contraband.

The Court noted that independent constitutional authority to search the dollar bill required not only probable cause but also exigent circumstances or a search warrant; however, in this case the officer was entitled to search the item incident to arrest. The Court distinguished the *Grandison* case, pointing out that, in this case, the officer also observed the defendant attempt to conceal the item.

Judge Humphreys filed a concurrence, agreeing with the result but arguing that the defendant lacked standing to challenge the search at all. However, the Court disagreed, finding that the defendant had a "diminished" expectation of privacy that nevertheless gave her the right to object to the search.

Lastly, in a footnote, the Court stated that it was explicitly not ruling on whether the underlying arrest on the capias itself gave the officer authority to search the folded dollar bill incident to that arrest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1137164.pdf

Wells v. Commonwealth: October 17, 2017
Waynesboro: Defendant appeals his conviction for Possession with Intent to Distribute Synthetic Marijuana on Fourth Amendment grounds.

Facts: Police executed a search warrant at the defendant's residence seeking evidence of narcotics distribution. The warrant authorized the search of the described dwelling and "all persons inside the residence including all vehicles associated with the residence." When they approached the residence, officers saw the defendant *concealing* himself in the backyard. The defendant attempted to flee, but officers captured him, detained him, and brought him back to the residence. Searching him, they found synthetic marijuana.

Inside the home, officers found additional evidence implicating the defendant in the distribution of synthetic marijuana. The defendant moved to suppress the search of his person.

Held: Affirmed. The Court began by agreeing that the question of whether "inside the residence" is a clear limitation on who may be searched or a broader interpretation of the phrase is warranted presents an interesting question that has not been addressed directly in prior cases. However, the Court decided to resolve this case without answering that question.

Instead, the Court first pointed out that, under *Michigan v. Summers*, police officers executing a search warrant for a physical location may seize and detain people they encounter at the location and its immediate vicinity. The Court ruled that, coupled with the officer's independent ability to seize and detain the defendant, the ultimate discovery of the synthetic marijuana on the defendant's person was the product of inevitable discovery.

The Court reasoned that once the search of the bedroom was complete, there was no question that probable cause existed to arrest the defendant. The only difference the Court recognized from the *Summers* scenario was that here, the officers searched the defendant before completing the search of the bedroom. However, in this case, the Court found that the sequence of events did not affect the admissibility of the seized contraband because it was a certainty that the synthetic marijuana found on the defendant's person would have been discovered by lawful means after his lawful detention.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0201173.pdf

Lewis v. Commonwealth: October 31, 2017
Richmond: Defendant appeals his conviction for possession of a firearm after having been convicted of a felony on Fourth Amendment grounds.

Facts: The defendant, a felon, carried a gun in his vehicle. While following the defendant's car from a distance of between fifty feet and fifty yards, an officer saw the car had two lights that were intended to illuminate the license plate; however, only the left light was lit and the right light was not functioning. The officer was nevertheless able to read the license plate. The officer stopped the car and found the gun. The defendant moved to suppress the stop, arguing that because one of the two lights illuminating his license plate was functioning and the license plate could be read from a distance of fifty feet, the stop was unlawful.

Held: Affirmed. The Court ruled that the officer had reasonable articulable suspicion for the stop. The Court likened this case to the *Otey* case, which had involved a faulty brake light. Here, the Court pointed out that the fact that the license plate was visible from fifty feet did not mean there was no defect in the lights illuminating the license plate. Thus, applying the "defective equipment" code section, §46.2-1003, the Court reasoned that if both lights illuminating the license plate are not operational, the equipment is defective, "no matter how minimal."

Finally, the Court also found that even if the officer misinterpreted the requirements of Code §46.2-1013, under *Heien,* no Fourth Amendment violation occurred because the officer's interpretation was reasonable.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1089162.pdf

Mathis v. Commonwealth: October 31, 2017
Colonial Heights: Defendant appeals his convictions for Possession of Marijuana, Carrying a Concealed Firearm, Possession of a Firearm by a Felon, and related charges on Fourth Amendment grounds.

Facts: The defendant, a felon, sat in a car in a parking lot, smoking marijuana, while carrying a concealed firearm. An officer saw the defendant and approached alone on foot. The officer did not activate his emergency lights or siren and he parked some distance from the defendant's car. The officer did not obtain any papers or identification from the defendant and, although he did not expressly inform the defendant he was free to leave, neither did the officer state that the defendant was required to stay.

During the encounter, the defendant moved around in the car somewhat and reached into his pockets, although the officer asked the defendant not to do so. The defendant put his window down, but the officer asked him to put the window back up. The officer made these requests in a conversational, non-directive tone. The defendant then got out of the car and, as he did, the defendant put something under the seat. The officer saw that it was a firearm, drew his own weapon, and ordered the defendant out of the vehicle. He discovered the drugs and other offenses and arrested the defendant.

The defendant moved to suppress the evidence.

Held: Affirmed. The Court ruled that the initial encounter was consensual. The Court noted that, despite the fact that the defendant complied with the officer's initial minimal requests, he continued to move about the vehicle and appeared to attempt to leave the vehicle by opening the car door. The Court reasoned that the defendant appeared to believe he was free to leave the scene even after the officer told him to show his hands and close the window.

The Court found that the fact that the defendant willingly complied with the officer's requests did not, in itself, convert the consensual encounter into a seizure because, based on the totality of the circumstances, a reasonable person in the defendant's position would have felt free to disregard the instructions or leave the scene.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1309162.pdf

Ames v. Commonwealth: November 7, 2017
Virginia Beach: Defendant appeals his convictions for Possession of a Concealed Weapon, Possession of a Firearm by a Convicted Felon, and Possession of Marijuana, on admission of his assertion of Fourth Amendment rights and sufficiency of the evidence.

Facts: The defendant, a felon, sat in a car with marijuana and a concealed handgun. Officers noticed the car and began to approach, noting the strong odor of unburned marijuana. The officers saw that he had his hands inside the center console. When the officers confronted him, the defendant removed his hands from the console, got out of the vehicle, abruptly closed the door, appeared "very nervous," and tried to walk away. The officers asked him about the smell of marijuana and the

defendant then tried to run. As the officers detained him and began to search the car, the defendant asked why he was being arrested and yelled, "You can't do that. You can't search my car."

Officers searched the car and found marijuana in a front center compartment of the car and a firearm just beneath the closed lid of the console. The vehicle was registered to another person and someone else's identification card was in the car. Officers also charged the defendant with resisting arrest, but the trial court dismissed that charge at the motion to strike.

At trial, the defendant argued that the trial court should not admit his question to the officers why he was being "arrested" and his statement that they could not search his car, arguing that doing so would be an impermissible "penalty for asserting a constitutional privilege" and that admitting the statements was more prejudicial than probative.

Held: Affirmed. The Court first rejected the concept of a *per se* bar on admitting a defendant's alleged assertion of Fourth Amendment rights. The Court also found that the statements were not prejudicial, as they did not tend to "inflame irrational emotions" or give rise to "impermissible inferences," particularly in the context of a bench trial. Instead, the Court found the statements to be probative. The Court found that the defendant's question why he was "arrested" was relevant to the charge of resisting arrest. The Court also found his declaration that the officers could not search "his" car was probative of his connection to the vehicle and consequently relevant to the charges relating to possession of the contraband inside it.

Regarding sufficiency, the Court found that the odor of marijuana and the defendant's behavior sufficiently demonstrated his possession of marijuana. The Court also determined that, for an appreciable length of time, the firearm was both hidden from common view and about the defendant's person, accessible for his use, and therefore he was guilty of violating Code § 18.2-308 and possessing the firearm as a felon.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0526161.pdf

Smith v. Commonwealth: December 5, 2017
Prince George: Defendant appeals his conviction for Drug Possession on Fourth Amendment grounds.

Facts: An officer stopped the defendant for a traffic violation and learned that DMV had suspended his privilege to operate a motor vehicle. Despite the cool temperature outside, the defendant was sweating, though he denied being ill. He had a white, powdery substance on his nose and his nose was running. He also possessed a large quantity of cash and denied having anything in his "watch pocket" despite an obvious bulge.

After the officer asked the defendant to empty the "watch pocket," the defendant stuck two fingers into it and removed a cut-off piece of straw that the defendant tossed aside. The officer took the defendant into custody and searched him, finding cocaine and heroin. The defendant argued that the officer did not have authority to detain him.

Held: Affirmed. The Court ruled that the officer lawfully detained and searched the defendant because he had probable cause to believe the defendant possessed illegal drugs. The Court first observed that, upon learning that the defendant's license was suspended, the officer had the authority to detain the defendant. The Court then found that the defendant removed the straw voluntarily and when he did, the officer obtained probable cause to arrest the defendant. Thereafter, he was entitled to conduct a search incident to arrest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1709162.pdf

Commonwealth v. Lemus: December 5, 2017
Alexandria: The Commonwealth appeals the suppression of a DUI arrest.

Facts: An officer found the defendant stopped in a vehicle on the side of a highway on-ramp. The officer detected an odor of alcohol and noted that the defendant had slurred speech and glassy eyes. She gave inconsistent explanations about why she had stopped and that she tried multiple times to put her vehicle in reverse. When the officer asked the defendant for ID, the defendant was unable to distinguish her driver's license from other ID cards—including one belonging to her son.

The officer discovered that the defendant had a restricted license, though the defendant repeatedly denied that. The officer also discovered that the defendant had prior DUI convictions. The defendant refused any field sobriety tests. The officer arrested the defendant and obtained a search warrant for her blood. Prior to trial, the trial court granted the defendant's motion to suppress, although it did not explicitly rule on whether it was excluding the DUI arrest.

Held: Reversed, motion to suppress improperly granted. The Court first ruled that the Commonwealth was entitled to appeal the trial court's ruling, even though the court had not explicitly stated it was excluding the evidence from the DUI arrest. The Court noted that the trial court granted the defendant's motion, which was to exclude all evidence obtained as a result of the arrest.

The Court then held that the totality of the circumstances in this case was sufficient for probable cause, that is, a "probability, or substantial chance" that the defendant had committed the offense of DUI. The Court pointed out that the officer was not required to consider all possible alternative explanations for the defendant's behavior, and then give credence only to those explanations not related to consumption of alcohol. The Court repeated that an officer is "not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight. They must be judged by their reaction to circumstances as they reasonably appeared to trained law enforcement officers."

In this case, the Court also ruled that the officer could consider the defendant's prior DUI convictions when determining probable cause of DUI. The Court also repeated that a court may consider a subject's refusal to perform field sobriety tests in making a probable cause determination.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1024174.pdf

Slentz v. Commonwealth: December 12, 2017
Accomack: Defendant appeals his conviction for DUI on Fourth Amendment grounds.

Facts: The defendant drove while intoxicated. An officer watched the defendant's vehicle twice cross the white fog line of the roadway and briefly drive onto the grass shoulder. The officer stopped the defendant and learned he was intoxicated. In a motion to suppress, the defendant argued that he did not leave the travel lane and that there was no basis for the stop.

Held: Affirmed. The Court ruled that it was entirely reasonable for the officer to believe that the defendant violated Code § 46.2-804(2) by weaving over the fog line and onto the shoulder of the road, even if the actions were brief. The Court pointed out that, while the defendant may very well have had an explanation for his actions or could have provided a basis for the officer to conclude that it was not "practicable" to stay within the lane of travel when the vehicle briefly crossed the fog line onto the shoulder, such explanations did not negate objective reasonable suspicion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2102161.pdf

Roberts v. Commonwealth: December 12, 2017
Richmond: The defendant appeals his conviction for Possession of Cocaine on Fourth Amendment grounds.

Facts: The defendant carried cocaine while walking through a motel parking lot. An officer saw the defendant and thought he strongly resembled a suspect in a robbery that had just taken place earlier in the evening nearby. As the defendant left the parking lot and then returned, the officer also noted that the motel had numerous "No Trespassing" signs and thought the defendant may be trespassing. After watching the defendant knock on a motel room door and receive no answer, the officer asked the defendant if he was staying at the motel and if he had any identification. The defendant stated "no" to both questions.

When the officer exited his car to speak to the defendant further, the defendant fled. The officer chased him and caught him. While handcuffing the defendant, he noticed that the defendant was clutching a folded piece of a lottery ticket, which the officer recognized as an "extremely common" method of packaging illegal drugs. The officer seized the item, opened it, and discovered it was cocaine.

Held: Affirmed. The Court first found that the brief encounter with the defendant on the motel property before the defendant ran was consensual and not a seizure. The Court then found that the officer had reasonable suspicion to investigate whether the defendant was a robbery suspect, reaffirming that if a person matches the physical description of a criminal suspect, the police have reasonable suspicion to effect an investigatory stop of that individual. The Court also found that the officer had reasonable suspicion to investigate the offense of trespassing.

The Court rejected the argument that, by handcuffing the defendant, the officer transformed the detention into an arrest. Instead, the Court ruled that the officer's use of handcuffs was reasonable under the circumstances.

Finally, the Court ruled that the officer had probable cause to seize and open the lottery ticket. The Court distinguished this case from *Grandison*, finding that the fact that the defendant engaged in headlong flight while clutching the marble-sized folded lottery ticket significantly distinguished this case from *Grandison*. In addition, the Court noted that the defendant only had a piece of a lottery ticket, which negated the premise that it was possessed for its intended legal purpose of winning money and increased the likelihood that it was being used for an illegal purpose.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1265162.pdf

Commonwealth v. Yen: January 23, 2018
Fairfax: The Commonwealth appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: An officer stopped the defendant for a traffic violation. The officer believed the defendant may have been intoxicated and did a DUI investigation. After completing that investigation, the officer informed the defendant that he had sufficiently completed the field sobriety tests, that the officer did not believe Yen was intoxicated, and "that the evaluation for DUI was over." The officer issued warning ticket for the traffic offense and then asked the defendant for consent to search his vehicle. The defendant agreed. The officer also asked the defendant to raise his shirt and the defendant did so. The officer discovered the defendant was carrying cocaine.

The trial court granted a motion to suppress, finding that the officer did not obtain valid consent from the defendant because the defendant was still "seized" and, under the circumstances, a reasonable person would not have felt free to leave.

Held: Reversed, motion to suppress improperly granted. The Court ruled that, because the officer indicated to the defendant that the investigations related to the initial seizure were over, the officer validly obtained the defendant's consent to search both his car and his person. The Court reviewed two contrasting cases from the Virginia Supreme Court, *Harris* and *Dickerson*, and observed that this case fell in between the two. Unlike the circumstances in *Dickerson*, the Court noted that the officer never expressly informed the defendant he was free to leave. However, unlike the situation in *Harris*, the Court found that the defendant in this case was aware that the officer had concluded his investigation.

In a footnote, the Court explicitly rejected the argument that the officer's activated police lights vitiated the defendant's consent. The Court pointed out that, while the use of emergency lights will often be the dispositive factor in determining whether a seizure has occurred, when, as here, it is undisputed that a seizure occurred and the question is whether the seizure has evolved into a consensual encounter, the use of the emergency lights takes on less importance.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1452174.pdf

Commonwealth v. Rivera: January 30, 2018
Chesapeake: The Commonwealth appeals a motion to suppress granted on Fourth Amendment grounds.

Facts: An officer stopped the defendant for a traffic violation and learned the defendant was suspended. The officer began writing a summons for the offenses and also called for additional officers and a K-9 unit. As the officer completed the summons, the other officers arrived. The officer first approached the other officers to learn more about the defendant's criminal history and learned that he had a violent past. The officer then asked the K-9 officer to conduct an "open-air sniff" around the vehicle.

When the officers approached the defendant's van, the defendant got out of the vehicle. The K-9 officer explained what he was going to do with the dog, which lasted seven seconds. The officer then patted the defendant down for weapons. The officer explained to the defendant what was happening and while they spoke, the dog "alerted to" the van. Police searched the van and found a .38 caliber revolver. The Commonwealth charged the defendant for Possession of a Firearm by Convicted Felon, but the trial court suppressed the search as violating the Fourth Amendment.

Held: Affirmed, motion to suppress properly granted. The Court repeated that, under *Rodriguez,* an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but he may not do so in a way that prolongs the stop, absent the independent reasonable suspicion ordinarily demanded to justify detaining an individual.

The Court agreed that, even under *Rodriguez,* a police officer's safety interest stems from the mission of the stop itself and therefore, an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. Thus, the Court found that the officer did not violate *Rodgriguez* when he chose to confer briefly with the other police officers to learn more about the defendant's criminal history before re-approaching him, as it was in accordance with maintaining officer safety during the stop.

However, the Court then addressed the timing of the request for the police dog and its use. The Court observed that the officer, instead of delivering the summons to the defendant and obtaining his signature, diverted from that purpose and pursued the K-9 "open air" sniff. The Court ruled that the police K-9 investigation extended the stop, however briefly, in a manner that violated the defendant's Fourth Amendment rights.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1376171.pdf

Dodson v. Commonwealth: February 20, 2018
Richmond: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: While the defendant was carrying cocaine for sale, two officers stopped him on the street. Seeing a bulge in his pocket, the officers attempted to pat him down. However, the defendant objected and fought the officers, hitting an officer in the face with his elbow and knocking the body camera from the officer's chest. The officers arrested the defendant for assault on a police officer and searched him, finding the cocaine.

The defendant argued that the stop and the arrest were unlawful. The trial court denied the defendant's motion to suppress.

Held: Affirmed. The Court sidestepped the issue of whether the stop was lawful and instead simply noted that the defendant was not entitled to resist an investigative detention. The Court repeated that the right to use reasonable force to resist an illegal arrest does not include the right to use force to resist an unlawful detention or 'pat down' search. Once the defendant struggled with and assaulted the officers, they had probable cause to arrest him for assault on an officer or obstruction of justice and search him incident to arrest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0460172.pdf

Bonilla v. Commonwealth: February 20, 2018
Alexandria: Defendant appeals his conviction for Robbery on Fourth Amendment grounds.

Facts: The defendant and his confederate robbed a man on the street at night at gunpoint. The victim notified police and described his attackers as two Hispanic males with a black shirt and black hat and gave their direction of travel. An officer responded to the area and saw two Hispanic men walking away from the area, along the same direction of travel. The two men were the only visible people in the area. The officer noted that the neighborhood's residents were almost exclusively white or African-American, and that Hispanic residents tended to live in another neighborhood in that city.

The officer ordered the men to stop and threatened to release his K-9 unit if they did not comply. The defendant complied, while his confederate fled. The officer captured the defendant and placed him in handcuffs. The defendant confessed to the robbery. The defendant moved to suppress the stop but the trial court denied the motion.

Held: Affirmed. The Court found that the facts, while amenable to a potentially innocent explanation, gave an objective officer a reasonable suspicion that the two may have been involved in the robbery. In a footnote, the Court emphasized that while the robbers' race was a factor, it can never be the only factor for a stop. The Court discounted the argument that neither man wore the clothes described by the victim, noting that it would be reasonable to discard or change clothes after a robbery.

The Court also rejected the defendant's argument that, by employing a dog and handcuffing the defendant, the officer elevated his detention to an arrest and therefore the stop required probable

cause. The Court found that the officer's use of his dog and handcuffs were reasonable and did not convert a legitimate investigatory stop into a custodial arrest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0424174.pdf

Commonwealth v. Cockrill: May 1, 2018
Commonwealth v. Smith: May 1, 2018
Spotsylvania: The Commonwealth appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: Responding to an anonymous tip, police responded to a home where the defendants resided. They learned from witnesses that the children had reported marijuana was growing in the basement. The officers also smelled marijuana from outside the home. The officers entered the home and conducted a "protective sweep" of the rooms looking for anyone with a gun. They did not observe any contraband, but they stopped their search at a locked door that led to the basement of the home.

The officers obtained a search warrant for the residence. They then entered the basement and found an extensive marijuana grow operation. The trial court granted the defendants' motion to suppress on the basis that the officers' entry into the home and protective sweep were unconstitutional. The Commonwealth appealed.

Held: Reversed; Motion to suppress improperly granted. The Court pointed out that the defendants' motion to suppress challenged only the police entry into the house and the protective sweep, even though law enforcement did not observe any contraband or seize anything during the initial entry or protective sweep. As the defendants did not challenge the magistrate's determination of probable cause, the Court held that the trial court erred in granting the motion to suppress because the officers obtained the marijuana and other inculpatory evidence through the unchallenged search warrant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1841172.pdf
and
http://www.courts.state.va.us/opinions/opncavwp/1840172.pdf

Commonwealth v. Spencer: May 1, 2018
Richmond: The Commonwealth appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: Two officers approached the defendant, who was walking through an apartment complex. The officers were carrying flashlights but otherwise did not draw any weapons. They "casually" asked the defendant if he would provide them with his ID and he agreed to do so. An officer then noticed that

the defendant had a pill bottle in his pocket. The officer asked if he could "see" the pill bottle. The defendant handed the bottle to the officer, who opened it and discovered that it contained marijuana. The officers placed the defendant in custody and, searching him, found a concealed firearm.

The trial court granted the defendant's motion to suppress on the grounds that the defendant reasonably believed he was not free to leave while the officers checked his identification card. The Commonwealth appealed.

Held: Reversed, motion to suppress improperly granted. The Court first concluded that the officers had not seized the defendant for Fourth Amendment purposes when the defendant provided the officer with the bottle. The Court likened this case to the *Branham* case, where the Virginia Supreme Court reached a similar result and ruled that complying with an officer's request for a license, standing alone, does not convert a consensual encounter into a seizure. In this case, the Court reasoned that the officer's request to see a driver's license was no more than a request, and the defendant's compliance was voluntary and not coerced.

The Court then found that, although the word "see" can have various meanings, in this case a typical reasonable person would conclude that the officer's request to "see" the pill bottle was not a request to look at it from a distance but was a request to have the bottle "presented for observation or consideration." Judge Malveaux filed a dissent, agreeing that the officers did not obtain sufficient consent by merely asking to "see" the bottle.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1821172.pdf

Martin v. Commonwealth: May 8, 2018
Rockbridge: The defendant appeals his conviction for DUI on Fourth Amendment grounds.

Facts: The defendant drove his vehicle while intoxicated. A VMI campus police officer noticed the defendant speeding and began to follow him. However, the officer did not stop the defendant until after the defendant left the VMI police jurisdiction. The officer arrested the defendant and obtained a breath test at the local jail.

The defendant asked the court to suppress the arrest, arguing that it was beyond the officer's territorial jurisdiction and without authority under Code § 19.2-77 as incorporated by Code § 23-234(A) [*Note: Effective October 1, 2016, the General Assembly amended and reenacted Code § 23-234(A) as Code § 23.1-815(B), with no substantive changes affecting this case – EJC].* The trial court denied the motion.

Held: Affirmed. The Court sidestepped the question of whether the officer was in "close pursuit" under Code § 19.2-77 and § 23-234(A). Instead, the Court held that that the issuance of an arrest warrant by the magistrate cured any defect in the officer's original arrest. The Court ruled that, even if the officer had no more power than an average citizen, the conviction was predicated on an entirely valid arrest warrant and therefore was valid.

The Court repeated that the exclusionary rule applies only to constitutional violations, not to alleged violations of state arrest law. Thus, though extraterritorial arrests may violate a state statute, they do not warrant the suppression of evidence in most cases. In particular, the Court concluded that neither Code § 19.2-77 nor § 23-234(A) provide for a suppression remedy for procedural violations.

The Court agreed that a procedural violation such as the one in this case should offer the defendant a full and fair opportunity for the defendant to prove or disprove any prejudicial effect of the violation. However, in this case, the Court found no legal basis for the defendant's assertion that he was denied procedural due process.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1219173.pdf

IDENTIFICATIONS - PRETRIAL

Fourth Circuit Court of Appeals

United States v. Tulin: May 2, 2018
E.D. Va: Defendant appeals his convictions for Conspiracy, Hostage-Taking, and Use of a Firearm on admission of a Pretrial Identification.

Facts: The defendant and several other men kidnapped a woman in Haiti and held her captive for seven days. The victim was able to see her captors and speak with them repeatedly before she escaped. After she escaped, the police searched the house where she had been held. There, they located a poster of a local rap group and showed it to her. The victim identified two of her captors in the poster, but not the defendant, even though he was also pictured in the poster.

Three months later, the FBI created a photo-array by clipping the defendant's photo from the original poster and arranging it with other individuals in a standard photo-array. The FBI altered the other photos in the array so that they appeared similar in style to the photo from the poster. The victim identified the defendant in that photo-array, recalling that the defendant had told her that he needed money because he was poor and she was rich.

Prior to trial, the defendant objected that his right to due process was violated because the FBI's photo array was impermissibly suggestive, which in turn resulted in an unreliable identification. However, the trial court overruled his objection.

At trial, the victim could not identify the defendant. However, an FBI agent testified to the victim's previous identification of the defendant.

Held: Affirmed. The Court first rejected the defendant's argument that the photo-array was impermissibly suggestive because his photo was slightly darker than the others in the photo-array. The Court also repeated that a photo array is not unduly suggestive merely because it includes a photo of the suspect that the witness has already seen.

The Court also found that, even if the photo-array had been impermissibly suggestive, the victim's identification was nevertheless reliable and admissible under *Neil v. Biggers*. The Court found that the witness's opportunity to view the defendant and her degree of attention at the time of the crime strongly support a finding of reliability. The Court also relied on the victim's certainty of her identification. Although the Court agreed that the length of time before her identification of the defendant did not support the reliability of her identification, especially since she could not identify him at first, the Court found that the victim's identification was reliable and thus the trial court did not err in admitting the evidence.

The Court also noted that, even when law enforcement uses an unnecessarily suggestive procedure, "suppression of the resulting identification is not the inevitable consequence." Rather, the Court observed that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." In this case, the Court pointed out that the defendant used those means extensively to attack the victim's identification at trial.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174199.P.pdf

Virginia Court of Appeals
Published

Scott v. Commonwealth: January 30, 2018
Portsmouth: Defendant appeals his convictions for Robbery on admission of an Out-of-Court Identification.

Facts: The defendant, wearing a ski mask, robbed a couple at gunpoint, stealing various items. Police quickly located the defendant and took him into custody, recovering both a gun and also the couple's property.

After capturing the defendant, the officers told the victims that they needed to determine whether the potential suspect in their custody was involved in the robbery. The officers separated the victims to conduct separate "show-up" identifications and told them that the suspect may or may not be the robber. When each of them arrived at the location where the defendant was in custody, both victims immediately identified the defendant as the man that robbed them approximately twenty minutes earlier. They specifically noted the defendant's facial features, height, weight, body structure, and clothing. The defendant was in handcuffs, but both victims denied that officers made any suggestions or encouraged a positive identification.

The trial court denied the defendant's motion to suppress the identification, where he alleged that police conducted an impermissibly suggestive show-up identification in violation of his right to due process.

Held: Affirmed. The Court found that the facts in this case did not make the identifications unconstitutional under *Wade, Gilbert,* and *Stovall.* The Court ruled that that, because the "show-up" identifications were not unconstitutionally suggestive, there was no reason to examine the factors for admissibility under *Neil v. Biggers.* The Court rejected the argument that a show-up like the one in this case requires exigent or special circumstances. Instead, the Court repeated that a court must look to the totality of the circumstances to determine whether there was a substantial likelihood of misidentification.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1900161.pdf

Virginia Court of Appeals
Unpublished

McClain v. Commonwealth: October 17, 2017
Richmond: Defendant appeals his convictions for Malicious Wounding and Use of a Firearm.

Facts: The defendant shot the victim after a failed drug transaction. Eleven days after the shooting, the victim identified the defendant in a "double-blind," sequential photo array with "95%" confidence. The defendant argued that the identification was insufficiently reliable for admission under *Neal v. Biggers*, but the trial court overruled the objection.

Held: Affirmed. The Court noted that the defendant misconstrued *Neal v. Biggers*, pointing out that it is not a general appellate test for the credibility of witnesses. Rather, the Court explained that it outlines factors that a trial court should consider in evaluating the admissibility of an in-court eyewitness identification when there has been a previous, possibly tainted out-of-court identification that violated due process. In this case, however, the defendant never raised a constitutional objection or sought to suppress the out-of-court identification procedure used by the police. In addition, the defendant failed to timely object to the in-court identification by the victim of the shooting.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1838162.pdf

Smith v. Commonwealth: December 19, 2017
Fredericksburg: The defendant appeals his convictions for Robbery and related offenses on admission of an out-of-court identification and sufficiency of the evidence.

Facts: The defendant and several of his confederates robbed and murdered a man. According to witnesses, the defendant and his confederates pulled up alongside the victim's car. The defendant

pulled a gun from his waist as he opened the victim's car door. The defendant told the victim to "get on the floor." The defendant's confederates on the other side of the vehicle ransacked the car while the defendant threatened the victim with a gun. The defendant then said to the victim "I told you don't." A witness heard a gunshot and heard the victim yell. The defendant shot the victim repeatedly. Police found items taken from the car nearby.

After the murder, police confronted a witness but the witness repeatedly lied. Police arrested and charged the witness with obstruction of justice. Afterwards, police showed the witness photo arrays on three separate occasions. In the last set, the defendant's photo was among the photos and the witness identified the defendant, indicating that he was fifty or sixty percent sure that the defendant was involved in the incident. A few weeks later, the Commonwealth requested dismissal of the witness' charge.

Prior to trial, the defendant moved to suppress the witness' out-of-court identification of him. At a hearing on the motion, the defendant argued that the witness' identification in the photo lineup was unduly suggestive because the witness was facing criminal charges.

Held: Affirmed. The Court repeated that an out-of-court identification "will be admitted if either (a) the identification was not unduly suggestive, or (b) the procedure was unduly suggestive, but the identification is nevertheless so reliable that there is no substantial likelihood of misidentification." The Court also emphasized that the burden is on a defendant to establish that the photographic lineup procedure was impermissibly suggestive.

In this case, the Court found that the procedure was not unduly suggestive. The Court pointed out that the witness only stated that he was somewhat certain of his identification, and never definitively pointed to the defendant as the perpetrator in order to relieve himself of the obstruction of justice charge. Moreover, the Court noted that the police interviewed the defendant four times, and showed him photo lineups at three of the interviews. Only at the third photo lineup did the defendant make his identification.

The Court also agreed that the evidence sufficiently demonstrated that the defendant shot the victim while stealing property from him and after forming the intent to rob him.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1938152.pdf

Cooke v Commonwealth: February 20, 2018
Petersburg: Defendant appeals his convictions for Robbery and Carjacking on Admission of a Pretrial Identification.

Facts: The defendant robbed two people in a vehicle at gunpoint and stole their car. After leading police on a high-speed chase, he wrecked the car and fled on foot. Police captured him and found the victims' property under the defendant, where he was hiding. Minutes after the robbery and chase, officers brought the victims to the crash scene to do a "show-up" identification. Both victims identified the defendant as the person who robbed them.

The defendant moved to suppress the identifications, arguing that they were unconstitutionally suggestive because of the defendant's proximity to the stolen vehicle, because he was handcuffed in the police cruiser, and because the victims were both present for, and thus could hear, each other's identifications. The trial court denied the motion.

Held: Affirmed. The Court repeated that the question is not if the circumstances were suggestive, but whether they were unduly so, because "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." In this case, the Court found that the identification procedures, albeit suggestive, were not unduly so, as they served a practical and necessary function of quickly confirming that the defendant was the person who had committed the robbery.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1976162.pdf

JOINDER & SEVERANCE

Virginia Court of Appeals -
Published

Stickle v. Commonwealth: December 26, 2017
68 Va. App. 321, 808 S.E.2d 530 (2017)

Williamsburg: Defendant appeals his conviction for Possession of Child Pornography and Possession with Intent to Distribute Child Pornography on Fourth Amendment and joinder grounds.

Facts: The defendant downloaded child pornography to his computer using a "Peer-to-Peer" file-sharing network. The defendant also possessed and shared child pornography that depicted him and another child. Police monitored the file-sharing network using special software and identified the defendant's IP address using their monitoring software. Using the software, they specifically downloaded child pornography from the defendant's computer. They obtained a search warrant for the defendant's residence and executed it.

Searching the defendant's computer, the police located a password-protected user account on the defendant's laptop that bore the defendant's name. Inside that account, police found images and videos of child pornography, the peer-to-peer software, personal and family photos related to the defendant, and a folder regarding a relative's baptism. Three video files located in the folder portrayed the defendant performing sexual acts on a prepubescent eight-year-old child.

In a motion to suppress, the defendant argued that the police software used to locate and download child pornography from a computer in the defendant's home violated his Fourth Amendment rights. Prior to trial, the defendant objected to the joinder of the offenses involving the child

pornography that he created with the child pornography that he downloaded. The defendant argued that the files were placed on the computer at different dates over a range of years and were thus separate crimes that were not part of a common scheme or plan.

At trial, the defendant presented testimony that other people, including his fiancé and roommates, had access to his computer at various times. The trial court rejected all of the defendant's arguments.

Held: Affirmed. After spending 3 pages explaining what the "Internet" is, the Court reaffirmed its holding in *Rideout*, that the defendant does not have a reasonable expectation of privacy in files that he openly shares on a peer-to-peer file-sharing network. The Court found that the *Jones* and *Jardines* cases did not change the law regarding whether law enforcement engaged in a warrantless search in this case. Instead, the Court repeated that viewing items deliberately exposed to public view does not constitute a search.

The Court also rejected the argument that law enforcement's software constituted the kind of "sophisticated equipment" prohibited by *Kyllo*. Instead, the Court observed that the software was only slightly modified from the basic program, with a modification to allow direct connection to a single user. The Court pointed out that this feature is not an unknown advancement but rather a regression in technology to earlier file sharing protocols, such as "Napster." Again, however, the Court found that law enforcement never engaged in a Fourth Amendment "search" at all.

The Court also rejected the defendant's challenge to the joinder of the offenses. The Court first noted that possession is, by nature, a continuing offense. The Court expressed concern that, if the defendant were correct that each file is a separate act of possession, his "argument slides easily down a slippery slope which, if adopted, would serve no purpose beyond devastating judicial economy."

The Court also rejected the argument that admitting the video that he created was impermissibly prejudicial to the other child pornography charges. Instead, the Court observed that the evidence of the videos in which the defendant personally appeared was directly related to the other charges and highly probative of both his knowledge that child pornography was on his computer and that he intended for child pornography to be distributed. As the court pointed out: "Evidence in criminal cases is usually prejudicial, otherwise it would not normally be relevant."

The Court also found the evidence was sufficient for a conviction.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0660161.pdf

JURY INSTRUCTIONS

Virginia Supreme Court

Howsare v. Commonwealth: June 1, 2017
293 Va. 439, 799 S.E.2d 512 (2017)

Stafford: Defendant appeals his conviction for Murder on the Jury Instruction regarding Intent.

Facts: The defendant shot and killed his nephew as a result of a dispute over an air mattress. The defendant told police that he merely wanted to scare the nephew and did not intend to kill him. At trial, over the defendant's objection, the Court adopted the Commonwealth's instruction that read: "Intent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances of a particular case. The state of mind of the defendant may be shown by his acts and conduct." The defendant objected that the instruction was not a model instruction and that it was an incomplete statement of the law because it failed to mention inferences that could be drawn from the defendant's statements.

The Court also instructed the jury that: "The statements presented to you as having been made by the defendant are submitted for your consideration along with all the other evidence. The weight, value, credibility and reliability of those statements are questions for your determination", and that "You may infer that every person intends the natural and probable consequences of his acts."

Held: Affirmed. The Court ruled that the jury instructions, taken as a whole, stated the law clearly and covered all issues fairly raised by the evidence and did not improperly emphasize certain evidence over other evidence. The Court agreed that although the instruction did not inform the jury that the defendant's intent could be inferred from his statements as well as from his acts and conduct, the other instructions adequately addressed that issue.

The Court also rejected the argument that, because it was not the model instruction, the intent instruction was inherently flawed.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160414.pdf

Virginia Court of Appeals
Unpublished

Kumar v. Commonwealth: September 5, 2017
Fairfax: Defendant appeals his conviction for Child Sexual Assault on failure to preserve evidence, Fifth Amendment, chain of custody, and jury instruction issues.

Facts: The defendant sexually assaulted a four-year-old child in 1994. The child reported the attack to her mother, who brought the child to the hospital. There, the child underwent an examination while wearing the same underwear she wore during the crime. Nurse Sue Rotolo collected a PERK kit and the victim's underwear, and later collected a suspect PERK kit from the defendant. Police also collected a towel and bedding from the apartment. Police arrested the defendant, who then fled the United States and remained a fugitive until 2014.

The Department of Forensic Science analyzed the evidence and found sperm and DNA matching the defendant from the crotch of the victim's underwear. However, in 2006, mistakenly believing that the perpetrator had been arrested and the appeal period had expired, a police sergeant ordered the

destruction of all of the evidence in the property room relating to the defendant's case, including both PERKs, the victim's clothing, and the towel and bedding.

In 2013, a detective learned that the defendant was still a fugitive and that the case was still open. He located the investigating detective's original case file and discovered that the original detective from the case had never put the swab of the victim's clothing or the defendant's blood swabs in the property room. Instead, he had kept them in his personal case file, where they remained. The new detective sent the clothing and swabs back to DFS, where the scientists conducted additional DNA analysis and found results consistent with those in 1995.

Police extradited the defendant back to the United States in 2014. Using an Urdu-Hindi interpreter, police advised the defendant of his *Miranda* rights. During the advisement, the defendant and the interpreter had the following exchange:

Interpreter: Whatever you say may be used against you in the court.

Defendant: Okay.

Interpreter: As evidence. You have the right to talk to your lawyer when we question you. You can say that you cannot answer.

Defendant: I have to talk to the lawyer.

Interpreter: I have to talk to the lawyer. He will talk to you.

Defendant: Okay.

Later, the interpreter and the defendant had this exchange as well:

Interpreter: If you don't want to answer any question, you feel bothered by any question, you can say you want to talk to your attorney.

Defendant: Okay, I will talk to the attorney and then answer.

The defendant then indicated that he was willing to talk to the detective. He told the detective that "I did the mistake and so I left." The defendant then requested an attorney and the police terminated the interview.

Prior to trial, the defendant moved to dismiss the indictment, arguing that the Commonwealth had destroyed potentially exculpatory evidence. The defendant argued that the towel and bedding that the Commonwealth destroyed could have been tested and, if they did not contain the defendant's DNA, that fact would have been exculpatory. The trial court denied the motion.

At trial, the nurse, Sue (Brown) Rotolo testified that she collected blood from the defendant, but could not recall collecting hair samples. However, she identified her initials on the evidence. The detective who received the evidence from Nurse Rotolo also testified and explained that after he received the evidence, he delivered it to the Department of Forensic Science. When DFS returned the evidence, the detective placed it in his case file folder, which he stored in an unlocked filing cabinet. He explained that both his floor and the building were secured by key codes.

Another detective, who pulled the file in 1999, testified that the plastic bags of evidence showed no signs of tampering in 1999. Similarly, the final detective, who pulled the file in 2013, testified that the items were stored in sealed packages, and bore no signs of tampering.

The DFS employees who testified at trial could not independently recall all of their actions at the time they handled the PERK evidence in 1994 and 1995, but they testified that when they examined the evidence again in 2013, they recognized their initials, the case number, and the dates that they handled

or tested the evidence. The analysts also testified that, upon examining the exhibits in 2013, they appeared to be in the same condition as they were in 1995.

At trial, the defendant denied sexually assaulting the child. He claimed that he had sexual intercourse with a neighbor that day and that he cleaned himself off with a towel in his room.

The defendant requested an instruction to the jury that stated that the jury could infer that the destroyed evidence was beneficial to the defendant. The trial court denied the instruction.

Held: Affirmed. First, the Court rejected the defendant's motion to dismiss, finding that the defendant failed to show that the destroyed evidence "possessed an apparent exculpatory value" and failed to show that the Commonwealth, in failing to preserve the evidence, acted in bad faith, as required. The Court noted that no one testified that the towel or bedding were even present at the crime scene, and also pointed out that the defendant's own testimony indicated that his DNA would be present on the towel. The Court saw no reason that DNA on the bedding would have been relevant to the case.

Second, the Court rejected the defendant's motion to suppress his statement, finding that a reasonable police officer could have concluded that the defendant was not invoking his right to counsel. The Court found that the evidence indicated that, when he said "I have to talk to the lawyer" and "Okay, I will talk to the attorney and then answer," the defendant was merely repeating the explanation of his rights that the interpreter was providing to him.

The Court also found that, even if admitting the statement was error, it was harmless, noting that the statement could have been interpreted as his "mistake" in leaving the country, rather than his "mistake" in committing the aggravated sexual battery. The Court found that the value of the statement was relatively insignificant in comparison to the evidence identifying him as the perpetrator.

Third, the Court agreed that the evidence concerning chain of custody was sufficient. Regarding the handling of the exhibits before they reached DFS, the Court found that the defendant's "mere speculation that contamination or tampering could have occurred" only went to the weight, and not the admissibility, of the DNA evidence. The Court acknowledged that there was no evidence regarding how the evidence traveled from the investigator's office to a storage facility, or how it was handled between 1999 and 2013. However, the Court found that such concerns were irrelevant when the witnesses testified that the item was in the same condition as when it had been sealed and there was no indication of tampering or contamination.

The Court also rejected the defendant's complaint that Nurse Rotolo did not remember collecting hair and pubic swabs, noting that she did not deny collecting the evidence and that other evidence at trial indicated that she collected this evidence.

Regarding the defendant's objections to the chain of custody regarding how the exhibits were handled, stored, and transported after DFS employees took custody of the exhibits, the Court found that §19.2-187.01 resolved the issue. The Court noted that once DFS took custody of the exhibits, the certificate of analysis served as prima facie evidence of the chain of custody.

Finally, the Court found it was proper to deny the defendant's proposed jury instructions directing an inference related to the Commonwealth's destruction of evidence, because the proposed instructions were not supported by more than a mere "scintilla of credible evidence." As the Court had

noted earlier, there was no reason to believe that the towel and bedding were pertinent or germane to the case at all.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1636154.pdf

Capers v. Commonwealth: October 31, 2017
Richmond: Defendant appeals his conviction for Robbery on refusal of an eyewitness testimony instruction and admission of video identification testimony.

Facts: The defendant robbed a local pharmacy. At trial, the Commonwealth presented a videotape of the incident. Over the defendant's objection, the trial court permitted a store manager who knew the defendant but hadn't been present at the scene of the crime to identify the defendant as the person on the videotape. The defendant had objected on hearsay grounds and on the grounds that the witness had not been present.

The defendant requested that the trial court give elaborate jury instructions on eyewitness testimony, including one that listed each of the *Neil v. Biggers* factors for the jury to consider. The trial court denied the instructions, giving the model instructions instead.

Held: Affirmed. Regarding the witness who was not present but identified the defendant on the video to the jury, the Court ruled that this evidence did not constitute hearsay. Because the surveillance video was not an assertion by an out-of-court declarant, the Court reasoned that the witness' testimony was not a mere recitation of a third party's assertion. Rather, the Court described the testimony as a "technological reproduction of an existing reality."

The Court also rejected the defendant's other objection to this testimony, which was that the witness had no personal knowledge of the crime. The Court explained that, as the manager of the store, the witness was familiar with the store's interior. The Court also noted that the witness was familiar with the defendant's appearance, having seen him often inside the store and in the neighborhood. Thus, as in *Bowman,* the Court found that her testimony was both relevant, as tending to establish the defendant's guilt of the crime, and based upon her own personal knowledge.

Regarding the jury instruction issue, the Court ruled that the model instructions appropriately instructed the jury regarding the Commonwealth's burden of proving the defendant's identity beyond a reasonable doubt, as well as on the presumption of innocence. The Court explained that the model instructions given by the trial court addressed the theory of the defense that the eyewitness testimony lacked credibility. As such, granting one of the defendant's proposed instructions would have been duplicative.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1893162.pdf

Johnson v. Commonwealth: May 1, 2018
Richmond: Defendant appeals her conviction for Robbery and Use of a Firearm on refusal of a mistrial and a jury instruction.

Facts: The defendant and an accomplice robbed a taxi driver. After the robbery, the defendant and her accomplice used the victim's credit card. Police found the victim's property in the defendant's hotel room. The defendant had also committed two other robberies, but the trial court denied the Commonwealth's motion to join those offenses.

At trial, the Commonwealth asked an officer "Where was it that you went looking for them?" The officer replied: "There was previous a robbery—." The defendant objected. The trial court instructed the jury to disregard the answer. The defendant then asked for a mistrial, but the trial court denied the motion.

The defendant asked the trial court to give a jury instruction that stated, *inter alia*: "The mere unexplained possession of stolen property by the defendant, without more, is not sufficient evidence to support a conviction of robbery, but is merely one circumstance that may be considered." The trial court refused the instruction.

Held: Affirmed. Regarding the motion for mistrial, the Court pointed out that the officer simply stated that there had been a previous robbery; his answer did not explicitly link the defendant to a prior criminal act. In view of the presumption that the jury followed an explicit cautionary instruction promptly given, unless the record clearly shows that the jury disregarded it, the Court found it proper to deny the motion for mistrial.

Regarding the refused jury instruction, the Court first agreed that it was a correct statement of the law under *Bazemore*. However, the Court repeated that, even if an instruction is a correct statement of the law, it does not follow that it was reversible error to refuse it. Instead, the Court pointed out that the Robbery instruction adequately explained that the Commonwealth must prove that the defendant took property or money and the taking was from the victim or in his presence. The Court observed that, under the Robbery instruction, the jury could not have found the defendant guilty based solely upon the defendant's "unexplained" possession of the victim's stolen credit card.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0699172.pdf

JURY SELECTION

Virginia Court of Appeals -
Unpublished

Manzano v. Commonwealth: July 25, 2017
Norfolk: Defendant appeals his conviction for Possession with Intent to Distribute on refusal to strike jurors for cause.

Facts: During voir dire, three jurors responded affirmatively to the question of whether they believed the testimony of a police officer was inherently more credible than that of non-police witnesses. The attorneys followed up by individually asking the three jurors more questions.

The first juror agreed that, despite his answer, he would follow the judge's instructions to treat the witnesses equally and judge them on their own merits. The second juror explained that he would believe police officers because they are third parties, whom he would believe "over a friend or a relative or somebody else who may be biased." The second juror also answered the question of, if "there's any doubt as to the police officer and an ordinary witness, you're going to favor the police because of your experience with the police officers?" with the response "All things being equal, I probably would." The third juror indicated that, at first, she would give more weight to an officer's testimony, but further stated that she would not do so if there were "holes in the testimony." She explained: "I have to have some standard to start with."

The defendant requested that the trial court strike the three jurors for cause. The trial court refused.

Held: Affirmed. The Court found that it was proper to deny the motions to strike these jurors for cause, ruling that they appeared sufficiently impartial. The Court reviewed the juror's answers in detail.

In particular, the Court noted that the second juror was merely noting that he would believe police officers over specific types of witnesses who have a close connection to the defendant. The juror did not state that he believes all police testimony is more credible than that of any non-police witness. The Court explained that a positive view of the police based on prior experience does not *per se* disqualify someone from serving as an impartial juror, so long as the person does not indicate that he is unwilling or unable to individually evaluate the credibility of either police or non-police witnesses.

Regarding the third juror, the Court noted that she appeared to acknowledge that a police officer's testimony may or may not be adequate to prove the accused's guilt, and did not indicate that she would ultimately credit police testimony over that of other witnesses.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0936161.pdf

Hubbard v. Commonwealth: August 1, 2017
Amherst: The defendant appeals his conviction for Distribution of Cocaine, 3rd Offense on admission of prior convictions and jury selection.

Facts: The defendant sold cocaine after having 2 prior convictions for that offense. Prior to trial, the Commonwealth filed a motion in limine asking the trial court to deem admissible a certified copy of pages from the Lynchburg Circuit Court order book dated November 26, 1984 that demonstrated one of the defendant's prior convictions. During that hearing, the trial court determined that, based on the sequence of the various orders and the respective signatures of the two judges at the time, Judge

Norman Moon had presided over the defendant's case. The trial court found that the pages from the order book were admissible, over the defendant's objection.

During *voir dire*, a juror revealed that he had been charged with Possession with Intent to Distribute several decades ago, although he ultimately received a misdemeanor conviction. The juror further explained that his libertarian values led him to believe that possession of or distribution of a controlled substance should not be illegal and that the government should get "off your back and let society deal with the problems." However, he acknowledged that distributing a controlled substance is against the law and indicated that he could be fair and follow the judge's instructions and vote for a conviction under the appropriate circumstances. The trial court struck the juror for cause, over the defendant's objection.

Held: Affirmed. The Court first ruled that the Lynchburg Circuit Court order book was maintained in conformity with Code § 17.1-123(A)(ii), and thus the pages offered into evidence by the Commonwealth were admissible as the records of a judicial proceeding and as official records of a court of this Commonwealth under Code § 8.01-389.

The Court rejected the argument that the conviction order did not contain the name of the trial judge and therefore the order was invalid. In fact, the Court noted that Code § 17.1-123(A)(iii) presumes that the judge's signature will not appear on an individual order book entry, requiring instead only that "an order [be] recorded in the order book on the last day of each term showing the signature of each judge presiding during the term." The Court agreed that the signatures for both judges were shown in the order book, and therefore, the requirements of Code § 17.1-123(A)(ii) were satisfied.

Regarding the juror struck for cause, the Court ruled that the trial court did not abuse its discretion in striking the prospective juror, based on his professed views about drug policy and the resultant potential bias, even though that juror stated that he could be fair, follow the law, and vote for convictions if convinced of guilt beyond a reasonable doubt.

Interestingly, in a footnote, the Court noted that it was declining to address the greater question of whether striking a juror for cause *ever* could constitute reversible error. The Court cited a 1944 case that held that that the dismissal of a qualified venireman does not constitute reversible error when another competent and qualified juror is selected in the stead of one so excluded and discharged.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0865163.pdf

Bell v. Commonwealth: August 8, 2017
Halifax: Defendant appeals his conviction for Distribution of Drugs, 3rd or Subsequent Offense, on failure to strike a juror for cause.

Facts: The defendant sold cocaine to a police informant after having 2 prior distribution convictions. One of the police witnesses at trial was the officer who provided the informant with money and a recording device and who collected the cocaine and the recording after the transaction.

During voir dire, one of the potential jurors testified that he had known the police officer for his entire life, because the officer's father was the juror's first cousin. The juror stated that he would be more likely to believe the officer than a stranger. He further explained that he could be impartial and make a decision based solely on the evidence presented in court. However, when asked if he would give any undue weight to the officer's testimony just because of their family relationship, the juror replied "Well, I would rather not be here."

The defendant's attorney then asked the potential juror: "Let's say that [the officer's] testimony is in direct conflict with some other person in a case, let's say it's a traffic case and he says the light is green and somebody else says the light is red, are you more likely to believe him over someone else?" the juror answered: "Probably." The juror ultimately stated "if it's just word against word, I'm probably going with [the officer], law enforcement."

The trial court refused a defense request to strike the juror for cause.

Held: Reversed. The Court began by repeating that a trial court is not required to strike a juror who has a relationship to a law enforcement witness if the trial court is satisfied that the juror can set aside considerations of the relationship and evaluate all the evidence fairly. However, in this case, the Court found that the juror's answers did not demonstrate that he could be fair and impartial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1765162.pdf

Madonia v. Commonwealth: October 17, 2017
Virginia Beach: Defendant appeals his conviction for Rape on chain of custody and voir dire issues.

Facts: In 1987, the defendant raped the victim. A nurse collected forensic evidence from the victim and provided the evidence an investigating officer. That officer then provided the evidence to an officer who transported the evidence to DFS. At DFS, a forensic scientist examined the evidence, once in 1987 and then again in 2014. The 2014 examination identified the defendant as the attacker.

Unfortunately, in the intervening years, the officer who transported the evidence to DFS died. In a pretrial motion to determine the admissibility of the forensic analysis, the Commonwealth presented evidence that the forensic scientist received the evidence from the deceased officer in the same sealed condition as the first officer had described. The trial court overruled the defendant's argument that the Commonwealth failed to establish chain of custody.

During voir dire, the defendant sought leave of court to ask potential jurors the following question:

> "If there are two reasonable explanations that can be drawn from the evidence, one consistent with innocence, one consistent with guilt, you are bound by law to accept the explanation consistent with innocence and find the defendant not guilty. Do any of you feel that it would be difficult to apply this principle in a case before you?"

The trial court refused the question, instead permitting counsel to ask whether it would be more difficult to apply the standard of "beyond a reasonable doubt" in this case, rather than a shoplifting case. The Court also explained the presumption of innocence to the jury.

Held: Affirmed. The Court first agreed that the Commonwealth's chain of custody evidence addressed the state of the physical evidence at every stage in the investigation, beginning with the initial collection through the 2014 retesting. The Court rejected the argument that the chain of custody evidence consisted of hearsay, pointing out that under Virginia Rule of Evidence 2:1101(c), trial courts are not required to adhere strictly to the rule against hearsay in pretrial motion hearings. The Court found that the defendant's mere speculation that contamination or tampering could have occurred went to the evidence's weight, not its admissibility.

Regarding the voir dire issue, the Court found that the trial court adequately permitted the defendant to ascertain whether potential jurors (1) understood that the Commonwealth must exclude every reasonable hypothesis of innocence, and (2) would be biased against appellant because he was on trial for rape as opposed to a less provocative offense. Thus, the form of the question was irrelevant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1716161.pdf

Bethea v. Commonwealth: February 20, 2018
Prince William: Defendant appeals his conviction for First Degree Murder on Batson and Jury Misconduct grounds.

Facts: The defendant murdered a man. At trial, during jury selection, the Commonwealth struck an African-American juror. The defendant objected on Batson grounds. The Commonwealth explained that the juror seemed very emotional, did not answer all the questions, and did not raise her hand when asked if she would consider all the evidence as all the other jurors had. The Judge indicated that he had watched all the jurors to see if they raised their hands to the question and had not noticed anyone fail to do so, but nevertheless found that the Commonwealth's proffered reasons were race-neutral.

During jury deliberations, a juror told the bailiff "through tears that she feels she's being bullied." The defendant made a motion for a mistrial, but the trial court gave the jurors an Allen instruction instead. The jury returned a guilty verdict and during polling, all jurors affirmed their finding. The trial court denied the defendant's request to question the juror individually.

After trial, the defendant examined the transcript, which demonstrated that the prosecutor's voir dire question did not call for the jurors to raise their hands at all. The trial court denied the defendant's motion to set aside the verdict.

Held: Affirmed. Regarding the Batson issue, the Court pointed out that a prosecutor may have been both mistaken and genuine. The Court examined the record and found that the represented question was sufficiently similar to the question asked and was race-neutral. The Court concluded that the race-neutral reasons given were not pretextual as a matter-of-law.

Regarding the motion for to examine the juror and for a mistrial, the Court quoted Virginia Rule of Evidence 2:206 and reaffirmed that a juror is precluded from testifying as to any matter or statement occurring during the course of the jury's deliberations. In this case, the Court pointed out that the trial court polled each juror for a yes or no vote to confirm the jury verdict and explained that the defendant was not entitled to further inquiry regarding how a particular juror arrived at the verdict.
In a footnote, the Court agreed that the rule would be different under the Supreme Court's 2017 Pena-Rodriguez ruling and noted that as of July 1, 2018, Rule 2:206 will allow a juror to testify if, during deliberations, another juror made a statement "exhibiting overt racial/national origin bias – tending to show that a racial/national origin stereotype or animus was a significant motivating factor in the juror's vote and casting serious doubt on the fairness and impartiality of the jury's deliberations or the verdict."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2014164.pdf

Munford v. Commonwealth: March 27, 2018
Brunswick: Defendant appeals his conviction for Eluding on refusal to permit a Voir Dire question.

Facts: Defendant recklessly eluded police. The defendant proceeded to trial *pro se.* Prior to trial, the Commonwealth moved to require the defendant to wear leg shackles during the jury trial. The trial court granted the motion. On the day of trial, the defendant wore his jail attire and shackles. The Commonwealth had asked the trial court to give a cautionary instruction to the jury, but the trial court declined to do so.

During voir dire, the defendant requested to ask: "Are the jurors biased by pre-seeing me in my previous attire of jail clothes?" Although the Commonwealth made no objection to the question, the trial court declared: "I'm not going to allow that question because—I'm not going to allow that question."

Held: Reversed. While the Court agreed that, under certain circumstances, a trial court may require a defendant to wear shackles or jail attire, in this case the defendant's jail attire was potentially prejudicial and the answer to his question regarding the clothing could have disclosed such prejudice. Therefore, the Court held that the trial court erred in not permitting the question. The Court agreed that, had the trial court given the Commonwealth's cautionary instruction, or included a question regarding the jail attire in its preliminary questions, the potential prejudice as a result of the attire would have been sufficiently addressed.

The Court also rejected the Commonwealth's "harmless error" argument, finding that, even if the evidence for guilt was overwhelming, the record lacked "fair assurance" that the defendant's appearance in jail clothes did not sway the jurors in determining his punishment.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1114162.pdf

JUROR MISCONDUCT

U.S. Supreme Court

Tharpe v. Sellers: January 8, 2017
582 U. S. ___ (2017)
Writ of Certiorari to the 11th Circuit Court of Appeals: Defendant seeks *Habeas* relief for his conviction for Murder on the grounds of a juror's racial prejudice.

Facts: The defendant used his vehicle to force his estranged wife's car off the road, shot and killed her sister, and then kidnapped and raped his wife. A jury convicted the defendant and sentenced him to death. The defendant later publicly apologized for the murder.

However, during a *Habeas* proceeding, the defendant produced a sworn affidavit, signed by one of the jurors, indicating the juror's view that "there are two types of black people: 1. Black folks and 2. [*Racial Slur Redacted – EJC*]; that the defendant, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." The state court ruled that there was insufficient evidence that the juror's presence on the jury prejudiced the defendant and the District Court and Eleventh Circuit refused to reverse that finding.

Held: Reversed. The Court agreed that the state court's factual determination was binding on federal courts, in the absence of clear and convincing evidence to the contrary, but found that the juror's affidavit constituted clear and convincing evidence to the contrary of the state court's ruling. The Court remanded the case to the District Court to determine whether the defendant is entitled to a "certificate of appealability" and may continue to pursue his *habeas* claim of improper racial prejudice at trial.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/17-6075_p8k0.pdf

Virginia Court of Appeals – Published

Bethea v. Commonwealth: February 20, 2018
Prince William: Defendant appeals his conviction for First Degree Murder on *Batson* and Jury Misconduct grounds.

Facts: The defendant murdered a man. At trial, during jury selection, the Commonwealth struck an African-American juror. The defendant objected on *Batson* grounds. The Commonwealth explained that the juror seemed very emotional, did not answer all the questions, and did not raise her hand when

asked if she would consider all the evidence as all the other jurors had. The Judge indicated that he had watched all the jurors to see if they raised their hands to the question and had not noticed anyone fail to do so, but nevertheless found that the Commonwealth's proffered reasons were race-neutral.

During jury deliberations, a juror told the bailiff "through tears that she feels she's being bullied." The defendant made a motion for a mistrial, but the trial court gave the jurors an Allen instruction instead. The jury returned a guilty verdict and during polling, all jurors affirmed their finding. The trial court denied the defendant's request to question the juror individually.

After trial, the defendant examined the transcript, which demonstrated that the prosecutor's voir dire question did not call for the jurors to raise their hands at all. The trial court denied the defendant's motion to set aside the verdict.

Held: Affirmed. Regarding the *Batson* issue, the Court pointed out that a prosecutor may have been both mistaken and genuine. The Court examined the record and found that the represented question was sufficiently similar to the question asked and was race-neutral. The Court concluded that the race-neutral reasons given were not pretextual as a matter-of-law.

Regarding the motion for to examine the juror and for a mistrial, the Court quoted Virginia Rule of Evidence 2:206 and reaffirmed that a juror is precluded from testifying as to any matter or statement occurring during the course of the jury's deliberations. In this case, the Court pointed out that the trial court polled each juror for a yes or no vote to confirm the jury verdict and explained that the defendant was not entitled to further inquiry regarding how a particular juror arrived at the verdict.

In a footnote, the Court agreed that the rule would be different under the Supreme Court's 2017 Pena-Rodriguez ruling and noted that as of July 1, 2018, Rule 2:206 will allow a juror to testify if, during deliberations, another juror made a statement "exhibiting overt racial/national origin bias – tending to show that a racial/national origin stereotype or animus was a significant motivating factor in the juror's vote and casting serious doubt on the fairness and impartiality of the jury's deliberations or the verdict."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2014164.pdf

Virginia Court of Appeals
Unpublished

Rankin v. Commonwealth: April 24, 2018
Portsmouth: Defendant appeals his conviction for Voluntary Manslaughter on refusal to admit expert testimony and juror misconduct.

Facts: The defendant, a police officer, shot and killed a larceny suspect. The officer had attempted to detain the victim, but the victim fought with the officer. The officer used his Taser, but the victim knocked it away. The officer then drew his gun and ordered the defendant to get on the ground. However, the victim made a quick and aggressive gesture towards the officer and the officer shot and killed him.

At trial, the trial court denied the defendant's effort to admit testimony of an expert who would opine that the defendant's conduct was consistent with "well-established and widely-adopted police training and policies concerning use of force" as well as with the police department's use of force policy. Further, he unsuccessfully sought to have the expert testify about certain types of accepted police training.

During trial, a friend of the victim saw a juror entering the courthouse. They knew each other and exchanged greetings. They talked briefly and later testified that they did not discuss the case. A video of their interaction showed them talking briefly but then parting ways. The defendant learned of the interaction and asked the trial court to investigate. The trial court examined the juror and the victim's friend, as well as the deputy from the screening post, and also reviewed the video. The trial court refused the defendant's request to conduct additional investigation and also denied the defendant's motion for a mistrial.

Held: Affirmed. The Court first established the standard by which the trial court had to evaluate the officer's use of force. The Court, for the first time, explained in detail how to judge the use of deadly force by an officer in a case such as this one.

In determining the nature of the officer's acts, the Court explained that a jury must consider whether the officer's killing was first-degree murder, second-degree murder, voluntary manslaughter, or justifiable self-defense. Consequently, a jury has to decide the officer's state of mind: whether it was willful, deliberate, premeditated, malicious, intentional, or in the sudden heat of passion. The Court elucidated that, if the jury determines that the officer acted without malice but in fear of harm, the jury then must decide whether the officer acted in self-defense. The Court noted that this defense requires a finding that the force that the officer used was reasonable in relation to the threatened harm.

The Court agreed that evidence of the officer's actions in the context of his training and his police department policy on use of force was probative of his state of mind in the context of the crimes charged and his defense. The Court noted that the officer and the Assistant Chief testified regarding department training and policy regarding use of force and that the trial court admitted the department's policy manual. Thus, the Court found that the jury was able to consider the defendant's actions in light of his training and his department's policy on the use of force without the expert's testimony.

The Court concluded that the jury could determine intelligently whether the defendant acted in compliance with his department policy and that admitting the expert's opinion testimony on that point would not have assisted the trier of fact in understanding the evidence. The Court reasoned that whether the defendant acted in accordance with national standards on use of force was irrelevant to the considerations before the jury regarding the criminal charges and related defense. The Court pointed out that, even if the defendant followed general police policy, he could have been criminally culpable.

Further, the Court observed that there was no evidence that showed that the defendant was familiar with national policies on use of force, and thus such policies were not relevant. The Court also expressed concern that the rejected evidence posed the risk of distracting the jury from the determinative issue of whether the defendant used reasonable force in relation to the harm threatened by the victim.

Regarding the alleged juror misconduct, the Court embraced the 4th Circuit's test as articulated in the *Cheek* and *Basham* cases. The test first requires the party who is attacking the verdict to introduce competent evidence that the extrajudicial communications or contacts were more than innocuous interventions. For an exchange to qualify as a private communication that is innocuous, it cannot pertain to the matter before the jury. Only if the challenging party meets this initial burden that the burden shifts to the prevailing party, in this case the Commonwealth, to prove that there exists no reasonable possibility that the jury's verdict was influenced by an improper communication.

In this case, the Court ruled that the trial court had sufficient information to make a reasoned decision, and did not need to conduct additional scrutiny regarding the juror. The Court concluded that any discrepancies between the juror's and citizen's accounts and the video did not contradict that conclusion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1671161.pdf

JUVENILES

U.S. Supreme Court

Virginia v. LeBlanc: June 12, 2017
Rev'd Fourth Circuit ruling of November 7, 2016
582 U.S. ____ (2017)

Writ of Certiorari to the Fourth Circuit Court of Appeals: In a *Habeas* proceeding, Defendant appeals his life sentences, imposed while he was a juvenile, on Eighth Amendment grounds pursuant to *Graham v. Florida*.

Facts: At the age of 16, the defendant committed Rape and Abduction with the Intent to Defile. The Virginia Beach Circuit Court sentenced the defendant to two life terms without the possibility of parole. After the U.S. Supreme Court's ruling in *Graham v. Florida*, the defendant filed a *Habeas* claim. *Graham* had held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."

In the 2011 case of *Angel v. Commonwealth*, the Virginia Supreme Court had ruled that Virginia courts could nevertheless lawfully impose a life sentence in a non-homicide juvenile case, because DOC still retains discretion to release the defendant early pursuant to §53.1-40.01. In *Angel*, the Virginia Supreme Court held that the "geriatric release" provisions provide the "meaningful opportunity" for release required by the Eighth Amendment.

The Virginia trial court denied *Habeas* relief, concluding that Virginia's "geriatric release" constituted an appropriate mechanism under *Graham*. The defendant appealed to the Federal District Court, which reversed the decision. The Fourth Circuit affirmed the District Court's ruling and held that

Virginia's parole procedures do not comply with *Graham*, remanding the case with instructions to resentence the defendant in accordance with *Graham* and the Eighth Amendment. The Commonwealth appealed.

Held: Reversed, sentence affirmed.

In a unanimous ruling, the Court held that that the Virginia Beach circuit's ruling denying *Habeas* relief, which rested on the Virginia Supreme Court's earlier ruling in *Angel*, was not "objectively unreasonable" and therefore the Federal courts should have affirmed that decision. The Court repeated that, in order to reverse a state court's ruling that is based on an application of Supreme Court precedent, the ruling must be "objectively unreasonable, not merely wrong; even clear error will not suffice." Therefore, the Fourth Circuit erred by failing to accord the state court's decision the deference the Federal courts owed it under Federal *Habeas* law.

The Court ruled a mere seven months after the *LeBlanc* ruling by the Fourth Circuit, but the Court explained its quick action: "rather than waiting until a more substantial split of authority develops—spares Virginia courts from having to confront this legal quagmire

Unlike the Fourth Circuit, the Supreme Court did not make a finding regarding whether Virginia's "geriatric parole" provisions comply with *Graham*. Instead, the Court simply noted that, because the geriatric release program instructs Virginia's Parole Board to consider factors like the "individual's history", "the individual's conduct during incarceration," "inter-personal relationships with staff and inmates," and "changes in attitude toward self and others," consideration of these factors *could* allow the Parole Board to order a former juvenile offender's conditional release in light of his or her "demonstrated maturity and rehabilitation." The Court did not rule out the possibility that the Virginia statute does not comply with *Graham*. Instead, the Court explained that, since there are reasonable arguments on both sides of this issue, these arguments cannot be resolved on Federal *Habeas* review.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/157151.P.pdf

PRELIMINARY HEARINGS & INDICTMENT

Virginia Supreme Court

Epps v. Commonwealth: June 1, 2017
Aff'd Ruling of Court of Appeals of May 31, 2016
293 Va. 403, 799 S.E.2d 516 (2017)
Danville: Defendant appeals his convictions for Abduction and Assault and Battery on Presentment of the Indictment.

Facts: Defendant assaulted his girlfriend and prevented her from escaping the residence. He first attempted to strangle her and then chased her to the door, where he pushed her away from the door, told her that he would not allow her to leave, and punched her.

The grand jury indicted the defendant in October, 2014, and on that day the indictment was presented in open court. Trial took place in November, 2014. However, the trial court did not enter an order memorializing the grand jury's actions, i.e. the "presentment order", until January of 2015, which was after the trial had taken place.

After trial, the defendant argued that the indictment was invalid because, at the time of trial, the trial court had not entered the presentment order.

Held: Affirmed. The Court first reviewed the defendant's argument regarding the presentment order, which was based on a case from 1826 and another case from 1892. The Court distinguished those cases, pointing out that in this case, the grand jury handed down a true bill in open court, unlike the facts in those cases.

Like the Court of Appeals, the Court noted that the requirement that a case begin with an indictment is merely statutory and the defendant can waive the requirement. The Court repeated that reading the indictments aloud, verbatim, is not required for an indictment to be valid; what is important is that the indictment be presented in court. Although the Court likened the failure to enter a presentment order to a mere procedural defect, the Court also noted that § 17.1-123 does not set a time limit for the Court to enter a presentment order at all. Thus, even if the indictment was not valid before the recording order was entered after the trial, the defect in the indictment would not have deprived the circuit court of jurisdiction to try the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161002.pdf

Virginia Court of Appeals –
Unpublished

Bland v. Commonwealth: November 14, 2017
Norfolk: The defendant appeals his convictions for First-Degree Murder, Aggravated Malicious Wounding, Robbery, and related charges on denial of a preliminary hearing and speedy trial grounds.

Facts: The defendant and another man robbed and murdered one man and wounded another. On October 3, the Commonwealth arrested the defendant on warrants charging second-degree murder and malicious wounding, as well as use of a firearm in those offenses. However, while the defendant was in custody on those warrants, on October 16, the Commonwealth obtained direct indictments for first-degree murder and aggravated malicious wounding regarding the same incident. The Commonwealth arrested the defendant on those indictments on October 23 and entered a *nolle prosequi* regarding the previous warrants on November 27.

The trial court set the defendant's case for trial on January 27, but the Commonwealth obtained a continuance to March 19 due to discovery problems. On March 10, the Commonwealth moved to *nolle prosequi* the indictments. The trial court granted that motion over the defendant's objection. The Commonwealth obtained a second set of direct indictments on April 2 for the same offenses.

Prior to trial, the defendant objected that the direct indictments denied him the right to a preliminary hearing and also objected on speedy trial grounds. The defendant's speedy trial argument was that the period for measuring the permitted time began when the charges were first initiated either by warrant on October 3, 2013 or by the first indictments on October 16, 2013.

Held: Affirmed. The Court first rejected the defendant's complaint that he did not receive a preliminary hearing. The Court noted that, while the defendant was entitled to a preliminary hearing on the original charges made in the warrants, those were not the charges for which he was later indicted and on which he was tried. The Court found that the defendant was not arrested on any felony charge for which an indictment was returned without first having been provided a preliminary hearing on the charge.

Regarding the speedy trial argument, the Court rejected the defendant's theory and instead only considered the time that ran from the direct indictments returned on April 2. The Court held that the speedy trial time period began April 9, the day after the defendant's arrest on the direct indictments. Thereafter, the trial took place within the speedy trial deadline.

The Court also rejected the defendant's argument that the Commonwealth violated the defendant's Constitutional right to speedy trial. The Court noted that the length of delay was not presumptively prejudicial, and the defendant failed to allege any prejudice arising from the delay.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0937161.pdf

Brooks v. Commonwealth: December 26, 2017
Hampton: Defendant appeals his conviction for Larceny by False Pretense on variance with the indictment.

Facts: The defendant convinced a friend to cash a check for him and give him the money. Although the defendant claimed the check was legitimate, in fact the check had been stolen. After the defendant's friend received the money from the bank and gave it to the defendant, the bank discovered the fraud, reversed the charge and forced the defendant's friend to pay them back. The defendant's friend reported the offense to the police. The Commonwealth indicted the defendant for larceny by false pretense from his friend. At trial, the defendant argued that the larceny was from the bank, not the friend.

Held: Affirmed. The Court reasoned that, unlike in *Gardner*, the money obtained by false pretense was from the friend's own account at the bank, which she subsequently gave to the defendant.

When she obtained the money, she had possession of it; it no longer belonged to the bank, and therefore the Court found that the indictment correctly specified that the funds belonged to the defendant's friend.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1228161.pdf

RESTITUTION

Virginia Court of Appeals – Published

Ellis v. Commonwealth: May 8, 2018
Henry: The defendant appeals his sentence for Receiving Stolen Property on the award of Restitution.

Facts: Facing charges of Burglary and Grand Larceny, the defendant entered into a plea agreement whereby he would be found guilty of Receiving Stolen Property and the Commonwealth would dismiss the other charges. The statement of facts reflected that the defendant had received a stolen television worth $450. There was no written plea agreement, nor was there any mention of restitution in the agreement. The burglary victim submitted a victim impact statement stating that the total value of all of the items stolen was $1,500. At sentencing, over the defendant's objection, the trial court ordered the defendant to pay all $1,500 in restitution.

Held: Reversed. The Court repeated that, under *Howell*, a trial court may not award restitution that was not caused by the offense as required by Code §§ 19.2-303, -305(B), -305.1(A). In this case, the Court found that the defendant's conviction for receiving stolen property precluded him from being deemed the thief. The Court concluded that, since the only loss directly caused by the offense of Receiving Stolen Property was the loss of the television, valued at $450, the trial court erred by ordering the defendant to pay restitution in an amount exceeding the value of the television.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1111173.pdf

Virginia Court of Appeals – Unpublished

Keith v. Commonwealth: May 8, 2018
Carroll: Defendant appeals his sentence for Involuntary Manslaughter on the award of restitution.

Facts: The defendant crashed after he fell asleep while driving, killing his passenger. Prior to sentencing, the defendant's insurance carrier settled with the victim's estate. The settlement included payment for the victim's funeral expenses and released the defendant from all other claims by the victim's estate. At sentencing, the trial court imposed restitution, ordering the defendant to pay for the victim's funeral expenses. The defendant objected and proffered that the funeral expenses had already been paid through the insurance settlement, but offered no documentary evidence to corroborate that fact. The trial court overruled the objection.

Held: Affirmed. The Court first explained that restitution ordered by the circuit court is not a claim against the victim subject to a settlement order in another jurisdiction. Rather, the Court explained that restitution is a component of a criminal sentence and both a penal sanction and rehabilitative remedy. The Court pointed out that restitution is not dischargeable in bankruptcy because a restitution obligation is not a claim of the victim's estate. In this case, the Court found that this remedy was payable to the victim's mother in her capacity as a statutorily defined 'victim" of a criminal act and not as executor or beneficiary of her daughter's estate.

In this case, the Court also noted that the defendant did not argue that the trial court should consider his restitution burden already satisfied by the payments made through the civil settlement and offer evidence to that effect, but instead objected to the circuit court ordering the statutorily mandated restitution provision of his suspended sentence at all. The Court pointed out that the record had no evidence of any actual payment of the victim's expenses, such as copies of cancelled checks.

The Court also observed that, although the victim of a crime may recover damages from their own insurance carrier, such payments do not affect any court-ordered restitution for a number of reasons, including the fact that such payments are irrelevant to the rehabilitative and penal goals of restitution, and because, in that situation, the insurance proceeds are paid to and also on behalf of the victim of the crime – not the defendant who committed it. Conversely, the Court reasoned that when restitution is made by, or on behalf of, a defendant, the requirement for payment of restitution may be satisfied, but that determination can only be made if and when the Commonwealth seeks to execute a suspended portion of a sentence based upon an assertion that required restitution has not been paid.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0694173.pdf

RIGHT TO COUNSEL

Virginia Court of Appeals – Unpublished

Reyes v. Commonwealth: January 9, 2018
Fairfax: Defendant appeals his conviction for Robbery on denial of a continuance.

Facts: The defendant robbed a woman in her home at gunpoint. The trial court found that the victim was indigent and appointed counsel. The defendant pled guilty to the offense. At the initial sentencing hearing, the defendant asked for a continuance to explore a "youthful offender" program. The Commonwealth objected, noting that the victim was present, but the trial court granted the continuance.

The day before the new sentencing date, however, the defendant filed a motion to continue. A new attorney represented that his client had a change in circumstances and that the defendant was able to retain counsel. The defendant also informed the court that the defendant "may" want to withdraw his guilty plea, although he provided no reasoning or support for this possible action.

The trial court denied the continuance. The trial court told the new attorney that he could join with the previous attorney to represent the defendant at the sentencing, or handle it himself, but the new attorney declined. The trial court sentenced the defendant. Later, the defendant filed a motion to reconsider and to withdraw his plea, but the trial court denied the motions.

Held: Affirmed. The Court first pointed out that, because the defendant filed his motion at the last minute, the defendant was required to show exceptional circumstances to warrant the continuance. However, the Court found that the defendant failed to present any exceptional circumstances. The Court explained that the defendant's changed financial circumstances alone were insufficient to require the court to grant the continuance.

The Court also noted that, at the sentencing, "The Commonwealth's witness, the victim, was yet again present and ready to testify, which forced her to once again relive the trauma of the events that victimized her, and both the Commonwealth and appellant's appointed counsel were prepared to proceed."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2108164.pdf

SIXTH AMENDMENT: RIGHT TO COUNSEL

U.S. Supreme Court

Lee v. United States: June 27, 2017
582 U.S. ___ (2017)
Certiorari to the United States Court of Appeals for the Sixth Circuit: Defendant appeals his conviction for Possession with Intent to Distribute on Sixth Amendment Ineffective Assistance grounds.

Facts: Defendant, a citizen of Korea and a U.S. lawful permanent resident, distributed MDMA. Police executed a search warrant at his residence and found his drugs, as well as a firearm, and the defendant confessed. The defendant pled guilty to the offense of Possession with Intent to Distribute in exchange for a reduced sentence. However, the defendant then faced deportation due to the fact that his offense is an "aggravated felony" under Federal law.

On *Habeas*, both the defendant and his original attorney testified that the defendant had asked his attorney if he would be deported as a result of his conviction. They testified that his attorney erroneously assured him that he would not be deported. Both the defendant and his attorney testified that "deportation was the determinative issue in Lee's decision whether to accept the plea." However, the court denied the petition on the grounds that the defendant had no viable defense to the charge and therefore could not claim true prejudice under *Strickland*.

Held: Reversed. In a 6-2 ruling, the Court explained that when a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, the Court does not ask whether, had the defendant gone to trial, the result of that trial "would have been different" than the result of the plea bargain. Instead, the Court explained that it will consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." Thus,

In this case, the Court found that the defendant's backed his claim that he would not have accepted a plea had he known it would lead to deportation with substantial and uncontroverted evidence. The Court accepted the defendant's testimony that he would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial. The Court pointed out that the defendant had stopped the plea colloquy at his plea hearing to ask about deportation, although he continued after his attorney assured him he would not be deported.

However, the Court cautioned that Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded, but for his attorney's deficiencies. The Court instructed judges to instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/16-327_3eb4.pdf

Davila v. Davis: June 26, 2017
582 U.S. ___ (2017)

Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit: Defendant appeals his conviction for Capital Murder on Sixth Amendment Ineffective Assistance grounds.

Facts: Defendant opened fire during a birthday party and shot and killed a woman and her five-year old granddaughter. The defendant apparently thought he was shooting at a rival gang member and others gathered at the party. At trial, the trial court inaccurately instructed the jury that they could convict the defendant of capital murder even if he only intended to kill the intended target, and no one else. In fact, to be guilty of the relevant capital murder charge, the defendant had to have specific intent to murder more than one person. The defendant's attorney objected to the instruction at trial. However, the defendant's counsel did not present the issue on direct appeal, nor did his counsel raise the issue during his collateral state post-conviction proceeding.

When the defendant brought the claim regarding the jury instruction during Federal *habeas* proceedings, the District Court ruled that the defendant had defaulted on the claim because he had not presented it properly to the state courts. The defendant attempted to argue that his appellate counsel provided ineffective assistance, but the District Court refused to recognize such a claim.

Held: Affirmed. In a 5-4 decision, the Court declined to allow Federal courts to consider a defaulted claim of ineffective assistance of appellate counsel. The Court reaffirmed that, under *Coleman,* because a prisoner does not have a constitutional right to counsel in state post-conviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default.

The problem that the Court faced in this case was the nuanced difference between ineffective assistance at trial and on appeal. In the 2012 case of *Martinez v. Ryan*, the Court held that ineffective assistance in state post-conviction proceedings would excuse the failure to press an underlying trial-based ineffective assistance claim adequately — and would therefore allow a Federal *habeas* court to reach the merits of the original claim of ineffective assistance by a defendant's counsel during his criminal trial. On the other hand, in this case, the question was whether a failure to raise an ineffective-assistance claim in a state post-conviction proceeding could similarly be excused by the ineffective assistance of the post-conviction counsel when the underlying ineffective assistance was rendered on appeal, rather than at trial. In other words, *Martinez* addressed a situation where trial counsel was constitutionally ineffective, whereas this case addressed a situation where trial counsel was constitutionally effective, but nevertheless could not prevent an error at trial.

The Court wrote that "Ineffective assistance of appellate counsel is not a trial error" and noted that, in this case, a court addressed the error in the defendant's trial, albeit incorrectly. The Court also pointed out that, had trial counsel not objected at trial, the defendant would still have been able to raise the jury instruction issue on Federal *habeas* under *Martinez*, if the defendant's appellate counsel had also failed to raise the issue during state post-conviction proceedings.

The Court also expressed concern that accepting the defendant's argument "could flood the federal courts with defaulted claims of appellate ineffectiveness. For one thing, every prisoner in the country could bring these claims." The Court's concern was especially sharp, since any defaulted trial error could result in a new trial.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/16-6219_i425.pdf

McCoy v. Louisiana: May 14, 2018
Certiorari to the Supreme Court of Louisiana: The defendant appeals convictions for Murder on Sixth Amendment grounds.

Facts: The defendant murdered his estranged wife's mother, stepfather, and son. At trial, he maintained he was out of state at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. His attorney concluded that the evidence against was overwhelming and that,

absent a concession at the guilt stage that the defendant was the killer, a death sentence was inevitable. The defendant objected and attempted to fire his attorney, but the trial court overruled his objection and permitted defense counsel to pursue a strategy contrary to his client's wishes. At trial, the defendant pled not guilty but told the jury that there was no other conclusion than that his client had killed the victims.

Held: Reversed. In a 6-3 ruling, the Court held that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. The Court found that, like the decisions about whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal, the autonomy to decide to assert innocence is a decision left to the defendant. The Court contrasted its holding in *Florida v. Nixon*, where it had held that, when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, no blanket rule demands the defendant's explicit consent.

The Court found that the error was structural and required a retrial. The Court rejected the argument that its ruling created a conflict with the rules of ethics, although it agreed that Louisiana's ethical rules might have stopped the attorney from presenting the defendant's alibi evidence if the attorney knew that perjury was involved.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/16-8255_i4ek.pdf

SIXTH AMENDMENT: TRIAL BY JURY

Virginia Court of Appeals
Unpublished

Ramseur v. Commonwealth: December 12, 2017
Fairfax: Defendant appeals his convictions for Rape, Sodomy and Abduction on the enhancement of his punishment due to a prior conviction and on refusal to consider evidence of jury misconduct.

Facts: The defendant abducted and sexually assaulted a woman. While incarcerated, the defendant confessed to the offense in a series of recorded jail calls. At the time of the offense, the defendant was on post-release supervision for a prior aggravated sexual battery conviction. At trial, the Commonwealth obtained the sentence enhancement under Code § 18.2-67.5:2, although the defendant had argued that argued that "post-release supervision" is not included in the definition of "at liberty."

After his conviction, the trial court denied the defendant's request for a hearing on alleged juror misconduct and request for a new trial. The defendant alleged that, during deliberations, a juror had changed the audio settings on the computer provided to play the jail calls so that the jury could hear the recording more clearly.

Held: Affirmed. The Court first held that the term "at liberty" in § 18.2-67.5:2 includes post-release supervision. The Court then rejected the defendant's arguments regarding the allegation of jury misconduct. The Court pointed out that Rule of Evidence 2:606 prohibits the defendant from asking to introduce evidence about events that occurred during deliberations between the jurors themselves. The Court also found no authority holding that adjusting sound or volume settings on a playback device in order to better hear an audio exhibit constitutes the consideration of extraneous evidence. Thus, the Court found that the defendant failed to demonstrate either jury misconduct or improper prejudice.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1122164.pdf

SENTENCING

Virginia Supreme Court

Hackett v. Commonwealth: June 1, 2017
293 Va. 392, 799 S.E.2d 501 (2017)
Franklin: Defendant appeals his conviction for Felony Possession with Intent to Distribute on refusal to reduce his offense from a Felony to a Misdemeanor.

Facts: Defendant pled guilty to Felony Possession with Intent to Distribute Marijuana. In his plea agreement, both the Commonwealth and the defense agreed that the appropriate disposition was to "take the case under advisement for an extended period of time, under any terms and conditions imposed by the court," and if the defendant successfully completed all terms and conditions, the felony charge would be reduced to a misdemeanor. At sentencing, the trial court offered the defendant an opportunity to "walk out of the courtroom" with a felony conviction or "go the extra mile" and submit to the Court's requirements, thereby earning a reduction to a misdemeanor. The defendant asked for a misdemeanor conviction. The trial court agreed and remanded the defendant into custody to serve a 9-month jail sentence, followed by intensive supervision.

The trial court entered the conviction order in this case on January 9, 2009, and entered the sentencing order on April 28, 2009. Neither of these orders was modified, vacated or suspended within twenty-one days of their entry. Later, as the defendant entered probation, the trial judge told the defendant that if he complied with the court's conditions, that he would be "home-free from the felony."

The parties returned to court a year later on the defendant's motion to amend his conviction to a misdemeanor. The trial court repeated that he had intended to reduce the defendant's felony to a misdemeanor if the defendant complied with the terms set by the court. However, the judge explained that he had been under the "mistaken impression that it had the discretion to reduce the charge as requested." The trial court then ruled that it lacked the authority to amend the conviction after more

than 21 days had passed since entry of the conviction and sentencing orders. The defendant appealed, but the Court of Appeals denied the appeal in a *per curiam* opinion.

[*Note:* The Commonwealth's Attorney filed a brief agreeing that the trial court erred, but the Attorney General reversed that position and argued that the trial court was correct. The Commonwealth's Attorney filed an *amicus* brief in support of its position, however.]

Held: Affirmed. The Court ruled that the Court's conviction and sentencing orders became final and the trial court lost jurisdiction to modify the conviction in this case. The Court wrote: "This Court is aware that [the defendant] complied with all the terms and conditions set by the trial court, with the understanding that by doing so his felony conviction would be reduced to a misdemeanor. However, once the trial court's conviction and sentencing orders became final, the trial court lost its authority to modify the conviction." The Court found that the procedure the parties wanted the trial court to follow, to reduce the defendant's conviction after it became final, would have been a procedure the court could not lawfully adopt.

The Court also rejected the argument that a *nunc pro tunc* order would have been a lawful alternative, noting that there was no "scrivener's error" in this case that called for such an order.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160619.pdf

Williams v. Commonwealth: August 31, 2017
Richmond: Defendant appeals his sentence for Felony Assault and Battery on refusal to commit him pursuant to an NGRI finding.

Facts: Defendant committed an Assault and Battery, 3rd offense on his wife in July, and again in August. Pursuant to a plea agreement, the defendant pled guilty to the July offense, but the parties agreed that the defendant was temporarily insane at the time of the August offense and consented to an NGRI finding for that offense. At sentencing, the trial court sentenced the defendant to five years incarceration on the July offense, followed by involuntary commitment for NGRI on the August offense.

Although the defendant did not object at sentencing, on appeal the defendant argued that imposing his incarceration before his involuntary civil commitment was manifestly unjust because it deprived him of mental health treatment that he needs and because it violated the NGRI statute.

Held: Affirmed. The Court first noted that there is no statutory direction concerning the proper sequence of the imposition of incarceration for a criminal conviction, vis-à-vis an involuntary civil commitment for different crimes that a defendant committed during a subsequent period of temporary insanity. However, the Court found that the trial court lawfully imposed a five-year prison sentence for a crime the defendant committed and to which he pled guilty while he was sane and competent.

The Court explained that, in serving that five-year sentence, the defendant is not being punished because he has a mental illness, but because of a crime he committed before his alleged temporary state of insanity and to which he pled guilty after he had recovered from his purported temporary state

of insanity. The Court also pointed out that prisons are required to provide inmates with medical care and treatment.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160257.pdf

Virginia Court of Appeals -
Published

Logan v. Commonwealth: June 20, 2017
67 Va. App. 747, 800 S.E.2d 202 (2017)
Chesterfield: Defendant appeals his convictions for Maliciously Shooting at an Occupied Vehicle, Attempted Murder, and Use of a Firearm on sufficiency of the evidence and refusal to permit certain evidence at sentencing.

Facts: During a dispute with the victim outside a home, the defendant pointed a firearm at the victim and threatened him. The victim was in a vehicle and several other people were present. However, no one else had a firearm. The victim fled in his vehicle and while he did, someone shot at the victim's truck from the vicinity of the residence. Police found a bullet lodged in the passenger-side front windshield window visor, the back windshield glass broken, and bullet casings at the edge of the driveway and just in the road. The bullet narrowly missed the passenger's head. The trial court convicted the defendant.

At sentencing, the defendant called five witnesses. When the defendant was getting ready to call his sixth witness, the trial court cut him off and told him: "Five witnesses at the sentencing on these circumstances is enough." The defendant then asked to proffer the testimony of the last witness, but the trial court declared "Enough is enough" … "I'm not going to allow you to do that."

Held: Affirmed in part and reversed in part. The Court found the that the evidence was sufficient to conclude that the defendant was the person who shot at the victim's truck with malice. The Court distinguished this case from *Smith* and *Hines* and ruled that the factfinder was allowed "to draw reasonable inferences from" the facts in this case to conclude that the defendant was the shooter.

However, the Court found that it was reversible error for the trial court to prevent the defendant from proffering the testimony of his proposed additional sentencing witness. In this case, the Court ruled that the trial court erred when it failed to allow the defendant the opportunity to proffer his evidence so that the Court of Appeals could engage in appellate review of the trial court's decision to exclude the testimony. The Court therefore reversed the trial court's sentencing and remanded the case for re-sentencing.

In a footnote, the Court made sure to clarify that its ruling does not preclude a trial court from exercising its considerable discretion in limiting the number of witnesses at sentencing.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0867162.pdf

Robinson v. Commonwealth: April 3, 2018
Loudoun: Defendant appeals his sentence for Possession of Cocaine on admission of a conviction order at sentencing.

Facts: An officer arrested the defendant for public intoxication and found cocaine. The defendant had a prior conviction for petit larceny. The conviction record stated that the defendant had faced a charge of felony grand larceny, but the Commonwealth had amended the indictment to petit larceny, to which the defendant pled guilty and was found guilty.

At the sentencing hearing for Possession of Cocaine, the defendant asked the trial court to redact the references to the felony in the prior conviction record, but the trial court admitted the entire conviction record over the defendant's objection.

Held: Affirmed. The Court ruled that § 19.2-295.1 allows the Commonwealth to introduce copies of final orders of prior convictions in their entirety. The Court reviewed the *Byrd* and *Jaccard* cases and pointed out that the General Assembly amended the code in 2007, subsequent to those rulings. The current statute requires presentation of "the defendant's prior criminal history, including prior convictions and the punishments imposed . . . by certified, attested or exemplified copies of the final order." The Court reasoned that "interpreting the statute to require admission of evidence of criminal history, while simultaneously requiring any history not resulting in a conviction to be redacted would render the statute internally inconsistent and yield an absurd result."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1923164.pdf

Virginia Court of Appeals
Unpublished

Garret v. Commonwealth: September 5, 2017
Williams v. Commonwealth: September 5, 2017
Norfolk: Defendants appeal their sentences on grounds of abuse of discretion.

Facts: The defendants entered guilty pleas that permitted the trial courts to sentence them within a certain range of punishment. The trial courts sentenced the defendants within the range specified in their plea agreements. Nevertheless, the defendants appealed on the grounds that the trial courts abused their discretion, sentencing them to an inappropriate amount of time given the facts and circumstances of the cases.

Held: Affirmed. The Court repeated that it will not interfere with the sentence so long as it was within the range set by the legislature for the particular crime of which the defendant was convicted. The Court again stated that, unless a trial court strays from the range set by the General Assembly, it will not second-guess the trial court's exercise of judgment regarding the appropriate punishment.

Full Cases At:
http://www.courts.state.va.us/opinions/opncavwp/1931161.pdf
and
http://www.courts.state.va.us/opinions/opncavwp/1978161.pdf

Eggleston v. Commonwealth: September 12, 2017
Richmond: Defendant appeals the imposition of post-release supervision on the authority of the trial court to do so.

Facts: The trial court convicted the defendant of burglary and grand larceny. In its sentencing order, the trial court ordered that the defendant, "pursuant to Code §19.2-295.2," "be subject to a period of post-release supervision of three years." The order "suspended" that period of supervision contingent upon compliance with "terms and conditions" established by the Parole Board, as well as good behavior and various other conditions. The order did not specify any period of post-release confinement to accompany the three years of post-release supervision.

The defendant violated the terms of the order. The probation officer asked the circuit court to issue a capias to bring the defendant before the Parole Board, but the circuit court issued a show cause returnable to the circuit court instead. The circuit court also issued an order, *nunc pro tunc*, re-writing the sentencing order. The second order did not suspend the post-release supervision period as the original order had. It simply listed supervision as one of the terms to which the appellant was subject upon release. The second order, like the first, did not mention a period of post-release confinement to accompany the post-release supervision.

The defendant argued that only the Parole Board was authorized to enforce the terms of the supervision by re-incarcerating him and that the circuit court lacked concurrent jurisdiction to do so. The trial court rejected that argument, found the defendant in violation, revoked three years of post-release incarceration, and re-suspended the three years "for time served" upon various conditions.

Held: Reversed. The Court never addressed the defendant's argument, but instead held that the circuit court, in sentencing the defendant for the underlying offenses, ordered only a term of post-release supervision, not one of post-release incarceration. Accordingly, the Court found, there was no suspended term of confinement available for imposition.

The Court repeated that, in order for the post-release supervision of Code § 19.2-295.2(A) to be effective, the plain language of Code § 18.2-10 directs the court to impose an additional term of confinement and to suspend it in order to effectuate the terms and conditions of post-release supervision that the court pronounces pursuant to Code § 19.2-295.2(A). The Court also pointed out that the trial court must do so at the time it pronounces sentence for the underlying felony.

However, in this case, the Court found that, without the specific pronouncement of a term of suspended post-release confinement pursuant to Code §18.2-10, the circuit court lacked authority to add an additional period of incarceration to enforce the period of post-release supervision because such action would constitute an impermissible lengthening of the sentence after the order had become final.

The Court also pointed out that, at sentencing, the trial court stated orally that it was imposing "a period of post-release supervision -- post-release incarceration of three years." However, when the Commonwealth asked the trial court to enter an order reflecting that ruling, the trial court had refused to do so.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1347162.pdf

Overton v. Commonwealth: November 21, 2017
Virginia Beach: The defendant appeals the imposition of a suspended sentence on statutory grounds.

Facts: The defendant pled guilty to and was convicted of robbery, abduction, and use of a firearm in the commission of a felony. In addition to sentences for robbery and abduction, the trial court sentenced the defendant to three years' incarceration and to three years good behavior on the firearm charge.

Held: Reversed. The Court repeated, as in *Graves v. Commonwealth*, that the three-year term of confinement authorized in Code § 18.2-53.1 is both the mandatory minimum and the mandatory maximum sentence. Thus, any part of a sentence exceeding three years is void.

In this case, the Court ruled that, in the absence of a suspended term of post-release supervision, the three-year term of good behavior was unenforceable, and thus a nullity.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0268171.pdf

SPEEDY TRIAL

Virginia Court of Appeals
Published

Turner v. Commonwealth: August 8, 2017
68 Va. App. 72, 802 S.E.2d 814 (2017)
Augusta: Defendant appeals his convictions for Domestic Assault, 3rd or subsequent, and Telephone Threats on Speedy Trial grounds.

Facts: The defendant was held continuously on his offenses of Domestic Assault, 3rd or subsequent, and Telephone Threats. The Commonwealth held a preliminary hearing on October 14, 2015 and the district court certified the charges to the Grand Jury. The Grand Jury indicted the defendant on November 23, 2015. Thereafter, instead of setting the matter for trial, the parties held several hearings on a defense motion in limine. After several continuances of those hearings, the trial

court finally ruled on the defense motion. The trial court then held a hearing to set a date for trial on April 15, 2016. On that day, however, the defendant objected that the speedy trial deadline had already passed. The Court overruled the objection, set the matter for trial, and ultimately convicted the defendant at trial on May 2, 2016.

Held: Reversed as to felony conviction; Affirmed as to misdemeanor conviction. The Court first examined the relevant code sections regarding the misdemeanor conviction. The Court noted that 19.2-243, the speedy trial statute, says nothing about a time limit for misdemeanor charges that a district court certifies as "ancillary misdemeanors" pursuant to 19.2-190.1. The Court noted that the defendant offered no reason as to why the trial court violated any recognized speedy trial right regarding his misdemeanor offense.

However, regarding the felony conviction, the Court reversed the conviction on speedy trial grounds. The Court found that the Commonwealth was required to commence the defendant's trial within five months from the October 14, 2015 preliminary hearing, or by March 14, 2016. As in the *Adkins* case, the Court examined the record and found no orders that the trial court entered granting continuances before the time for speedy trial expired or showing why the case was not scheduled for trial within five months.

The Court rejected the argument that the defendant, by filing a motion in limine, tolled the speedy trial time clock. As in *Robbs*, the Court noted that the record failed to show that the defendant's motion delayed the trial court in setting the case for trial. The Court also noted that the record lacked a showing that the defendant concurred in or acquiesced in the continuance of trial. The Court distinguished a motion such as a motion for a psychiatric evaluation, as in *Heath*, which inherently would delay the setting of a trial date.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1284163.pdf

Virginia Court of Appeals
Unpublished

Stinnie v. Commonwealth: October 3, 2017
Hampton: Defendant appeals his convictions for Strangulation and Assault on Speedy Trial grounds.

Facts: The Commonwealth directly indicted the defendant for Strangulation and Assault. The defendant's arrest was on March 11 and after he made bond the defendant agreed to a May 29 bench trial. However, at a pre-trial conference on April 30, the defendant requested a jury trial. Due that request, the Court re-set the matter for trial on July 9.

After several more continuances, the matter finally proceeded to trial. However, just prior to the trial, the defendant moved to dismiss the indictment for violation of speedy trial. Among his arguments, he contended that the continuance caused by his request for a jury trial should count against the Commonwealth, and not against him.

Held: Affirmed. The Court ruled that the 41-day delay between the initial trial date and the subsequent trial date was the result of the defendant's request for a jury, and thus is chargeable to the defendant. The Court quoted a recent, unpublished order from the Virginia Supreme Court, where that court had written: "tolling applies not only to explicitly requested continuances but also continuances that are necessitated by other motions by or actions of the defendant" and "delays necessitated by the defense are not attributable to the Commonwealth and thus cannot violate the statute."

Having attributed that delay to the defendant, the Court examined the remaining days between arrest and trial and found that the Commonwealth had tried the defendant within the required time.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1719161.pdf

Bland v. Commonwealth: November 14, 2017
Norfolk: The defendant appeals his convictions for First-Degree Murder, Aggravated Malicious Wounding, Robbery, and related charges on denial of a preliminary hearing and speedy trial grounds.

Facts: The defendant and another man robbed and murdered one man and wounded another. On October 3, the Commonwealth arrested the defendant on warrants charging second-degree murder and malicious wounding, as well as use of a firearm in those offenses. However, while the defendant was in custody on those warrants, on October 16, the Commonwealth obtained direct indictments for first-degree murder and aggravated malicious wounding regarding the same incident. The Commonwealth arrested the defendant on those indictments on October 23 and entered a *nolle prosequi* regarding the previous warrants on November 27.

The trial court set the defendant's case for trial on January 27, but the Commonwealth obtained a continuance to March 19 due to discovery problems. On March 10, the Commonwealth moved to *nolle prosequi* the indictments. The trial court granted that motion over the defendant's objection. The Commonwealth obtained a second set of direct indictments on April 2 for the same offenses.

Prior to trial, the defendant objected that the direct indictments denied him the right to a preliminary hearing and also objected on speedy trial grounds. The defendant's speedy trial argument was that the period for measuring the permitted time began when the charges were first initiated either by warrant on October 3, 2013 or by the first indictments on October 16, 2013.

Held: Affirmed. The Court first rejected the defendant's complaint that he did not receive a preliminary hearing. The Court noted that, while the defendant was entitled to a preliminary hearing on the original charges made in the warrants, those were not the charges for which he was later indicted and on which he was tried. The Court found that the defendant was not arrested on any felony charge for which an indictment was returned without first having been provided a preliminary hearing on the charge.

Regarding the speedy trial argument, the Court rejected the defendant's theory and instead only considered the time that ran from the direct indictments returned on April 2. The Court held that the

speedy trial time period began April 9, the day after the defendant's arrest on the direct indictments. Thereafter, the trial took place within the speedy trial deadline.

The Court also rejected the defendant's argument that the Commonwealth violated the defendant's Constitutional right to speedy trial. The Court noted that the length of delay was not presumptively prejudicial, and the defendant failed to allege any prejudice arising from the delay.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0937161.pdf

Nichols v. Commonwealth: March 20, 2018
Portsmouth: Defendant appeals his conviction for Possession of a Firearm by Convicted Felon on Fifth Amendment *Miranda* grounds, Speedy Trial, and on the setting of his Motion to Suppress.

Facts: A local resident complained to an officer that the defendant was in her residence, refusing to leave, and that he may have taken her firearm. The officer went to look for the defendant and soon found him arguing with the complainant about the firearm. Although the defendant denied having the firearm, the officer stated: "Listen, nobody is in trouble. If you give me the gun, that can be the end of it. Just give me the gun back." The defendant admitted that he had the gun hidden in the glove compartment of his car. The officer retrieved the firearm, but then learned that the defendant was a convicted felon and arrested him for that offense.

Six business days before trial, the defendant moved to suppress his statements he made during the investigation, arguing that the officer should have read him *Miranda* warnings prior to asking him about the firearm. The defendant asked to have his motion to suppress heard on the same day as his jury trial. However, on the day of trial, the trial court denied the motion and then entered an order stating "on motion of defense, for good cause shown, it is Ordered that the trial of this case be continued." The defendant signed the order: "I ask for this." The defendant later objected on speedy trial grounds.

Held: Affirmed. The Court first ruled that the defendant was not in custody at the time that the officer spoke with him. Thus, the Court found that the officer did not need to read the defendant *Miranda* warnings during whatever detention that was incidental to the officer's investigation. The Court then rejected the defendant's argument § 19.2-266.2 entitled him to have both his suppression motion and trial heard on the same day. Lastly, the Court found that the defendant acquiesced in the continuance granted on the day of trial and therefore waived speedy trial. The Court also repeated that the defendant's lack of personal acquiescence in his counsel's motion to continue was immaterial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0304171.pdf

Young v. Commonwealth: March 20, 2018
Loudoun: Defendant appeals his conviction for Robbery on Speedy Trial grounds.

Facts: The defendant robbed a juvenile of property, including a phone. Police recovered the phone. When defense counsel asked for evidence regarding the phone in discovery, the Commonwealth informed the defendant that the phone could not be analyzed and that therefore law enforcement had returned it to the victim. However, two weeks before trial, the Commonwealth discovered that law enforcement had obtained a fingerprint analysis on the phone that was "inconclusive" about whether the defendant's fingerprints were on the phone. The Commonwealth had also recently produced approximately 1,000 phone calls by the defendant from the jail and a recorded proffer session with a co-defendant that contained inconsistent statements.

The defendant moved to dismiss the indictments, arguing that he was "forced . . . to choose between his right to a speedy trial and his right to the effective assistance of counsel" due to the Commonwealth's discovery failures. The Commonwealth offered to release the defendant on bond and offered to stipulate to the admissibility of the certificate of analysis. The trial court found that the Commonwealth did not act in bad faith. The trial court denied the motion to dismiss but sanctioned the Commonwealth for its discovery violations by ordering that the Commonwealth was prohibited from using the jail calls for any purpose and ordering that it was bound by its stipulation offer regarding the certificate of analysis. The trial court continued the trial over the defendant's objection.

Held: Affirmed. The Court agreed that the continuance was court-ordered and that the defendant sufficiently noted his objection to it. However, the Court also pointed out that the defendant stated that he would not be prepared to proceed to trial due to the discovery problems. The Court ruled that: "even though the Commonwealth's discovery failures necessitated the court-ordered continuance, because the trial court ruled that the Commonwealth did not act in bad faith, we cannot impute the continuance to the Commonwealth." The Court explained that "when a trial court conclusively finds that the Commonwealth did not act in bad faith even if the Commonwealth may have been party to creating a Hobson's choice," there is no speedy trial violation.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0265174.pdf

TRIAL ISSUES

U.S. Supreme Court

Weaver v. Massachusetts: June 22, 2017
582 U.S. ___ (2017)
Certiorari to the Supreme Court of Massachusetts: Defendant claims ineffective assistance of counsel due to the lack of a public trial.

Facts: The defendant shot and killed a young boy. During jury selection for the defendant's murder trial, there were so many potential jurors that the courtroom could not accommodate them. At

the time, it was not uncommon for Massachusetts's courts to close courtrooms to the public during jury selection, in particular during murder trials. As a result, court staff excluded from the courtroom any member of the public who was not a potential juror. Thus, although the defendant's mother and her minister had come to the courtroom to observe jury selection, court personnel turned them away for the two days of jury selection. Defense counsel did not object.

Four years later, the U.S. Supreme Court ruled in *Presley v. Georgia* that the right to a public trial extends to jury selection. After the *Presley* ruling, the defendant filed a *Habeas* petition, arguing that his attorney had provided ineffective assistance by failing to object to the courtroom closure. The Massachusetts courts held, however, that the defendant failed to demonstrate any prejudice due to trial counsel's alleged error and denied the *Habeas* petition.

Held: Affirmed. In a 7-2 ruling, the Court ruled that the defendant failed to meet the second prong of the *Strickland* test by failing to demonstrate prejudice. The Court reaffirmed that denial of a public trial is a "structural error". The Court then addressed whether a defendant must demonstrate prejudice when the structural error is the closure of a trial during jury selection and is neither preserved nor raised on direct review, but is raised later via a claim alleging ineffective assistance of counsel.

The Court distinguished this error from other errors that would require automatic reversal on *Habeas*, such as a failure to give a reasonable-doubt instruction, exclusion of grand jurors on the basis of race, or a biased judge. The Court agreed that, in the case of a structural error, where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual effect on the outcome.

However, the Court explained that when a defendant raises a public-trial violation via an ineffective assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. The Court explained that courtroom closure is to be avoided, but that there are some circumstances when it is justified. Thus, the Court ruled that not every public-trial violation results in fundamental unfairness. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

In this case, the Court agreed that the defendant had failed to show a reasonable probability that the jury would not have convicted him if his attorney had objected to the closure. The Court also found that there was no evidence that the brief closure led to a fundamentally unfair trial.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/16-240_dc8e.pdf

Virginia Court of Appeals
Published

McGinnis v. Commonwealth: December 12, 2017
68 Va. App. 262, 808 S.E.2d 200 (2017)
Lynchburg: Defendant appeals his conviction for Worthless Check on sufficiency of the evidence.

Facts: The defendant passed several bad checks. The trial court convicted him of those offenses at trial, where counsel represented the defendant. After trial, the defendant raised a new argument in a "motion to set aside verdict and for a new trial." The defendant personally signed the motion; his counsel did not sign the motion. The trial court denied the motion. The defendant appealed based on the arguments raised in the motion.

Held: Affirmed. The Court held that the motion was invalid. The Court pointed out that the defendant was represented by counsel, yet his trial counsel did not sign the motion, which is the only place that the defendant preserved the assignment of error for appeal. The Court reaffirmed that a pleading or motion that is personally signed by a litigant but not signed by a Virginia attorney who is representing the litigant fails to comport with the statute and the rules and is without legal effect.

The Court also repeated that there is no right to "hybrid representation", where a defendant is simultaneously represented by counsel and also acts *pro se*. Therefore, a court must strike a pleading that is signed only by the defendant and not counsel, unless the defect can be cured.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0117173.pdf

Virginia Court of Appeals –
Unpublished

Reyes v. Commonwealth: January 9, 2018
Fairfax: Defendant appeals his conviction for Robbery on denial of a continuance.

Facts: The defendant robbed a woman in her home at gunpoint. The trial court found that the victim was indigent and appointed counsel. The defendant pled guilty to the offense. At the initial sentencing hearing, the defendant asked for a continuance to explore a "youthful offender" program. The Commonwealth objected, noting that the victim was present, but the trial court granted the continuance.

The day before the new sentencing date, however, the defendant filed a motion to continue. A new attorney represented that his client had a change in circumstances and that the defendant was able to retain counsel. The defendant also informed the court that the defendant "may" want to withdraw his guilty plea, although he provided no reasoning or support for this possible action.

The trial court denied the continuance. The trial court told the new attorney that he could join with the previous attorney to represent the defendant at the sentencing, or handle it himself, but the new attorney declined. The trial court sentenced the defendant. Later, the defendant filed a motion to reconsider and to withdraw his plea, but the trial court denied the motions.

Held: Affirmed. The Court first pointed out that, because the defendant filed his motion at the last minute, the defendant was required to show exceptional circumstances to warrant the continuance.

However, the Court found that the defendant failed to present any exceptional circumstances. The Court explained that the defendant's changed financial circumstances alone were insufficient to require the court to grant the continuance.

The Court also noted that, at the sentencing, "The Commonwealth's witness, the victim, was yet again present and ready to testify, which forced her to once again relive the trauma of the events that victimized her, and both the Commonwealth and appellant's appointed counsel were prepared to proceed."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2108164.pdf

Smith v. Commonwealth: January 16, 2018
Spotsylvania: Defendant appeals her conviction for Voluntary Manslaughter on sufficiency of the evidence, refusal to grant a mistrial, and refusal to grant a continuance.

Facts: The defendant shot and killed a man. The defendant claimed that she did so accidentally, while emptying the firearm for storage, but the evidence demonstrated that she had been arguing with the victim just before shooting him and the physical evidence did not corroborate her statement.

At trial, the defendant asked to be excused during the presentation of some of the evidence. The trial court agreed after the defendant stated that it would not impede her ability to assist her attorneys. The defendant later made the same request again and when she did, her attorney indicated that it appeared that the defendant was suffering from PTSD. The defendant's attorney asked for a recess until the next day so that the defendant could consult with her psychiatrist. The trial court denied that motion. After asking the defendant extensive questions, the trial court found that the defendant was competent and knowingly waived her right to be present and to testify at trial.

The defendant's attorney made a motion for a mistrial, arguing that the defendant's mental state at trial made her temporarily incompetent, but the trial court denied the motion. The parties instructed the jury on the various grades of homicide, from first-degree murder to involuntary manslaughter. The jury found the defendant guilty of voluntary manslaughter. After the trial, the defendant argued that the Commonwealth failed to prove "sudden heat of sudden passion."

Held: Affirmed. Regarding the conviction for voluntary manslaughter, the Court repeated the rule under *Blankenship* that: "if the evidence demands or warrants a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal or, if there is, it is not sufficient to warrant or require acquittal, or is disbelieved by the jury, the defendant is not entitled to a reversal or a new trial on the ground that the court instructed on the lower degree of homicide, as to which there was no evidence, the theory being that he is not prejudiced thereby and cannot complain." In this case, the Court found that the facts could have proven second-degree murder, and thus a voluntary manslaughter conviction was appropriate.

In an interesting concurrence, Justice Humphreys argued that "heat of passion" is a mitigating circumstance, rather than an element that the Commonwealth must prove beyond a reasonable doubt.

The majority expressed some interest in this theory, but ultimately decided that *Blankenship* controlled in this case. The majority declined to accept or reject Justice Humphreys' argument.

Regarding the defendant's absence from trial and claim of PTSD, the Court noted that the trial court went to significant lengths to give the defendant breaks to compose herself, went to considerable effort to make sure the defendant understood what rights she was waiving, and made sure that the defendant could communicate intelligently with her counsel and the trial court. The Court found no error in the trial court's decisions to permit the defendant to leave the trial, to deny the continuance, and to deny a mistrial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1058162.pdf

Hughes v. Commonwealth: January 30, 2018
Fauquier: Defendant appeals his convictions for Robbery, Use of a Firearm, and related charges on refusal to hear his Motion in Limine and on sufficiency of the evidence.

Facts: The defendant and his confederates broke into the victims' home and robbed them at gunpoint. Police searched the defendant's home and found some of the victim's stolen property as well as a firearm. The day before trial, the defendant filed a motion in limine to exclude the firearm on the grounds that its admission was more prejudicial than probative. The trial court refused to hear the motion on the grounds that the defendant should have filed it seven days before trial under Rule 3A:9(b)(2).

At trial, the trial court admitted a photo of the gun at the defendant's home. He did not object. At the conclusion of the Commonwealth's evidence, the defendant stated: "Your Honor, at this time I would move to strike. I believe that the Commonwealth's evidence has fallen . . . in the insufficiency category, and I don't believe that they have proven their case beyond a reasonable doubt . . . ." The defendant provided no specific reasoning as to why the evidence was insufficient. The defendant made a similar motion at the conclusion of all of the evidence.

Held: Affirmed. The Court declined to address whether the defendant's motion in limine was a motion under Rule 3A:9 subsection (b)(1), and therefore had to be filed seven days in advance, or under (b)(2). However, the Court did explain that in (b)(2), the use of the word "may" does not require that such motions be heard before trial. Rather, the Court reasoned that Rule 3A:9(b)(2) is permissive, and motions properly considered under this subparagraph are timely so long as they are made before a finding of guilt. Nevertheless, the Court ruled that any possible error that could be attributed to the trial court's not initially hearing and ruling on the motion at the beginning of the trial was moot, because the trial court later admitted the evidence that was the subject of the earlier motion without objection.

Regarding sufficiency, the Court found that the defendant's motion to strike lacked the minimal degree of specificity that Rule 5A:18 requires and refused to consider the issue.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1818164.pdf

Mears v. Commonwealth: February 6, 2018
Fairfax: Defendant appeals his sentencing on the crimes of Burglary, Grand larceny and related offenses on denial of a continuance.

Facts: The defendant was involved in the theft of jewelry from his wife and a neighbor and in the theft of tools from a nearby shed. The defendant pled guilty to the offenses. The defendant then requested a continuance from the scheduled sentencing hearing because he was scheduled to finish a drug program and wanted to submit to a substance abuse evaluation. The trial court denied the continuance and sentenced the defendant.

The defendant later filed a motion to reconsider, alleging that a prior conviction that was used in his sentencing had been overturned and attaching a previous substance abuse assessment performed in another jurisdiction pursuant to Code § 18.2-254. The trial court granted the motion and reduced the defendant's sentence.

Held: Affirmed. The Court ruled that, in light of the defendant's submission of the substance abuse assessment with his motion to reconsider and his references to it in his argument to the court, the defendant failed to demonstrate that he was prejudiced by the denial of his original motion for a continuance in order to obtain a substance abuse assessment. The Court declined to address whether the defendant was entitled to a substance abuse assessment in the first place.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1131164.pdf

VENUE

Virginia Supreme Court

Tarsha Gerald v. Commonwealth: May 31, 2018
Patricia Gerald v. Commonwealth: May 31, 2018
Aff'd Court of Appeals Ruling of December 27, 2016
Albemarle: Defendants appeal their convictions for Perjury and Driving Suspended on sufficiency of the evidence and venue grounds.

Facts: Defendants, a mother and daughter, were driving in a car that struck another car at a stoplight. The victim could see that the mother was driving the vehicle, but the daughter exited the passenger's side, identified herself as the driver, and gave the victim her contact information. The daughter did not give him a driver's license. When the victim asked to see the mother's driver's license, the daughter got into the driver's seat and both women fled the scene.

A police officer located the mother and daughter, who both confessed their licenses were suspended. The mother confessed to driving the car before the crash. Another officer telephoned both

women, who identified themselves on the phone. The mother confessed she had been driving, but claimed that she had a driver's license.

However, at trial in General District Court, both defendants testified under oath that they had not been driving and denied speaking to the police and confessing to the offenses. A police officer took copious notes regarding their testimony at that trial. The General District Court convicted both defendants of driving on suspended and appealed their convictions. The Commonwealth also indicted the defendants for perjury.

At trial in Circuit Court for the perjury offenses and the original offenses of driving suspended, the defendants objected to venue for perjury on the basis that the Albemarle County General District Court is located in the City of Charlottesville, not Albemarle County, and thus Albemarle County was an improper venue for the perjury trial. The City of Charlottesville charter, enacted by the General Assembly, provides "[t]he property now belonging to the county of Albemarle within the limits of the city of Charlottesville, shall be within and subject to the joint jurisdiction of the county and city authorities and officers," and expressly included the courthouse in that description. The defendants argued that this provision meant that the City and County had to "jointly" prosecute the defendants.

Held: Affirmed. The Court first found that the evidence sufficiently demonstrated Perjury. The Court rejected the argument that the Commonwealth did not prove the exact questions asked of the defendant during the general district court trial because the Commonwealth could not prove the precise wording of each of the questions at the original district court trial. The Court found that it would be unreasonable to conclude that the defendant's denials of driving were in response to ambiguous questioning or an inquiry into their driving at a time or place other than what the Commonwealth actually sought to prove.

Regarding the venue issue, the Court ruled that, venue for prosecution of crimes committed in the Albemarle County Courthouse is proper in either Albemarle County or the City of Charlottesville. Like the Court of Appeals, the Court examined the City charter, first enacted in 1888 by the General Assembly, and subsequently re-enacted on a number of occasions as the City claimed land from the County. The Court found that the charter created an exception to 19.2-244's general provisions regarding venue. The Court reasoned that, the due to the city charter's grant of territorial jurisdiction to the county and city courts, crimes committed in the Albemarle County Courthouse are treated as having been committed "within" either the jurisdiction of the county or the city and, therefore, are subject to the "joint jurisdiction" of the county and city courts.

In a footnote, the Court distinguished this case from the 1896 *Fitch* case, where a defendant perjured herself in the City of Staunton while inside the Augusta County Courthouse, noting that although the facts are analogous, in *Fitch* there was no statutory authority or other legal provision granting Augusta County shared jurisdiction over crimes committed on county property located within Staunton city limits.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161844.pdf

Virginia Court of Appeals –
Published

Edwards v. Commonwealth: December 19, 2017
68 Va. App. 284, 808 S.E.2d 211 (2017)
Chesterfield: The defendant appeals his conviction for Murder on venue and sufficiency grounds.

Facts: The defendant murdered his ex-girlfriend. The victim had terminated her relationship with the defendant after he repeatedly threatened and then choked her. After that incident, the defendant continued to contact and threaten the victim, stating "one day I'm gonna get you. Somehow, some way, when you least expect it, I'm gonna get you." The victim's personal journal contained various statements exhibiting the victim's fear of the defendant. On the last day she was seen alive, the victim had a friend at her house in Chesterfield County. After the friend left, no one ever saw the victim again.

Cell phone tower evidence showed that the defendant was around the victim's house for several hours between the night of her disappearance and the next morning. The victim's neighbors noticed the defendant's car parked outside the house. One neighbor noticed an individual fitting the defendant's description in the victim's front yard in the early morning of her disappearance. Another neighbor heard noises sounding like screams come from the direction of the victim's house shortly thereafter. In the afternoon, both the victim's and the defendant's cell phones pinged from towers located away from the house.

Police later found the victim's phones discarded on the side of Interstate 95. Police found no sign of forced entry into the victim's home; the defendant had access to the home. Inside the victim's house, police found all of her personal belongings, including her luggage, passport, glasses, purse, car and keys; even her cats were still there. When police searched the defendant's car, a canine alerted police to the presence of human remains, they found blood stains in the trunk, and they found a blanket that had a hair on it matching the victim's hair color. The blanket appeared to come from the victim's house. Although police recovered no blood or hair evidence from inside the house, the defendant had a bucket and cleaning supplies in his car.

Police interviewed the defendant, who initially lied about being near the victim's house, but ultimately admitted that he had been outside her home the night she disappeared. The defendant's cell phone records showed that in the days leading up to the victim's disappearance, the defendant attempted to contact the victim almost every day, but stopped immediately after she disappeared.

At trial, the defendant argued that the Commonwealth had failed to demonstrate that Chesterfield was the appropriate venue and also argued that the evidence did not demonstrate that the victim was actually deceased. The defendant theorized that the victim may merely have "elected to live life in absentia."

Held: Affirmed. The Court first rejected the defendant's argument regarding venue. Although the Commonwealth had relied on § 19.2-244, the Court pointed out that under § 19.2-248, venue would be established if any violence leading to the victim's death occurred within the home, no matter how minor. In this case, the Court found that the Commonwealth established a strong inference that the

defendant went into the victim's house in Chesterfield County for several hours and either mortally wounded or murdered her there.

Regarding sufficiency, the Court first repeated that no law exists in Virginia requiring the Commonwealth to produce a victim's dead body to obtain a conviction for murder. The Court reviewed the evidence in detail and found that it demonstrated that the defendant displayed express malice in killing the victim. The Court also rejected the hypothesis that the victim had simply fled to start a new life, given that she had abandoned all of her identifications, phones, and even pets suddenly and without warning.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0902162.pdf

McGuire v. Commonwealth: May 22, 2018
Loudoun: Defendant appeals her conviction for False Report to Law Enforcement on Venue grounds.

Facts: Using email and a phone call, the defendant falsely reported to Loudoun County Police that a man, who lived in Loudoun, had sexually abused a child in Loudoun County whom he was holding against her will in his home. An officer investigated and found no such child in the man's home. The officer learned that the defendant made the claims falsely. At trial in Loudoun County, the Commonwealth did not establish the location from where the defendant made the reports.

Held: Affirmed. The Court observed that, because the law enforcement officials who received the false report were located in Loudoun County, an act constituting a part of the violation of Code § 18.2-461 occurred in that jurisdiction. The Court also noted the harm resulting from the offense occurred exclusively in Loudoun County. For example, the police spent time and resources investigating the report and the victim, a resident of Loudoun County, was both inconvenienced and humiliated by the false report. Therefore, the Court ruled that Loudoun County was an appropriate venue for the prosecution of the offense.

The Court further explained that, in cases where a false report is given across jurisdictions, venue is appropriate in both the jurisdiction where the report is made and the jurisdiction where the report is received pursuant to the general venue provision contained in Code § 19.2-244.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0395174.pdf

Virginia Court of Appeals - Unpublished

Dillon v. Commonwealth: October 10, 2017
Roanoke: Defendant appeals his conviction for Uttering on Venue grounds.

Facts: The defendant uttered a forged record at the Roanoke County Circuit Court clerk's office, which is physically located in the City of Salem. The prosecution took place in Roanoke County. The defendant objected on venue grounds.

Held: Affirmed. The Court agreed that, typically, under Code § 19.2-244, Salem would be the proper venue for the uttering prosecution, but for the "special venue" statute passed in 1968, § 17-126.2. That code section states:

> "[T]he . . . courts of Roanoke County shall have, concurrently with the courts . . . of the City of Salem, jurisdiction over criminal offenses committed in or upon the premises . . . located in the City of Salem which are owned or occupied by Roanoke County or any . . .department of the county."

The statute also provides for concurrent jurisdiction between cities and counties of various other municipalities throughout the Commonwealth.

The defendant argued that the General Assembly had repealed § 17-126.2, but the Court rejected that argument. The Court agreed that, at the time of the defendant's uttering offense, § 17-126.2 was no longer expressly "set out" in the Code, but noted that it remained part of the Acts of Assembly. The Court reiterated that, while "general and permanent statutes" are printed in the Code of Virginia, the statutes of more limited scope and purpose, often found only in the Acts of Assembly, are nonetheless valid and enforceable. The Court explained that, in 1988, the Code Commission decided that certain provisions of Title 17, including Code § 17-126.2, would no longer be "set out" in the Code, and replaced them with the designation "not set out."

However, the Court found that the General Assembly, when it replaced Title 17 with Title 17.1 expressly declined to repeal § 17-126.2. Thus, even though the General Assembly did not relocate that section to Title 17.1, the special venue provision remained in effect as part of the Acts of Assembly.

[*Note: Effective April 4, 2017, the Code Commission resumed "setting out" the relevant jurisdictional provision, now in § 17.1-515.2 – EJC].*

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1375163.pdf

WITHDRAWAL OF GUILTY PLEA

U.S. Supreme Court

Kernan v. Cuero: November 6, 2017
483 U.S. ___ (2017)
Writ of Certiorari to the Ninth Circuit Court of Appeals: Defendant appeals the refusal to enforce his plea agreement.

Facts: The defendant committed a series of felonies, including DUI maiming and carrying a firearm as a felon. The defendant pled guilty under a plea agreement for a maximum sentence of 14 years and 4 months. However, prior to sentencing, the state discovered that the defendant had more prior felony convictions than they had first discovered and that the defendant's offense called for a minimum of at least 25 years in the penitentiary. The trial court granted the state's motion to amend the allegations in the complaint, over the defendant's objection.

The trial court permitted the defendant to withdraw his original guilty plea. The defendant pled guilty to the amended complaint and the trial court sentenced the defendant to a term of 25 years to life. On appeal, the Ninth Circuit reversed, determining that the defendant was entitled to specific performance of his original plea agreement.

Held: Affirmed. The Court reversed the ruling of the Ninth Circuit, finding that there was no clearly established Constitutional rule that required the state court to impose the lower sentence that the defendant originally expected. While the Court assumed, without deciding, that the state violated the Constitution by amending the indictment after the defendant's guilty plea, the Court repeated the finding in *Santobello* that the relief to which the defendant is entitled must be left to the discretion of the state court. In this case, the Court ruled that it was sufficient for the trial court to merely permit the defendant to withdraw his guilty plea.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/16-1468_1a72.pdf

Virginia Court of Appeals
Published

Spencer v. Commonwealth: November 14, 2017
68 Va. App. 183, 806 S.E.2d 410 (2017)
Wythe: Defendant appeals his convictions for Child Pornography offenses on refusal to permit withdrawal of his *nolo contendere* plea.

Facts: Defendant procured and possessed pornographic images of a child using his phone. Law enforcement obtained evidence using a search warrant. The defendant entered a plea of *nolo contendere* to several felony offenses. However, prior to sentencing, the defendant obtained new counsel and moved to withdraw his plea. The defendant contended that the officers obtained the evidence from the search warrant in violation of the Fourth Amendment.

At the motion to withdraw the plea, defense counsel stated: "I think [the defendant] was not advised" about the potential motion to suppress prior to entering his pleas. He contended that evidence from the search warrant should have been suppressed because the phone number listed on the warrant was "for a different phone[,] not [the defendant's]." At the hearing, the defendant offered no evidence or testimony. The trial court denied the motion.

Held: Affirmed. The Court re-emphasized that, in a pre-sentencing motion to withdraw a guilty plea, the defendant has the burden of establishing that his motion is made in good faith and must proffer evidence of a reasonable basis for contesting guilt. The Court distinguished the *Hernandez* case, pointing out that in this case, no one testified that the defendant was unaware of a potential motion to suppress.

The Court ruled that the defendant's unsubstantiated contention that the search warrant was "for a different phone" did not constitute sufficient *prima facie* evidence to permit withdrawal of his plea. The Court noted that the defendant failed to introduce the search warrant, phone records, direct testimony, or an affidavit reflecting his phone number. The Court found that his bare assertion that the search warrant was defective was insufficient to satisfy his burden.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0525173.pdf

Virginia Court of Appeals -
Unpublished

Goodman v. Commonwealth: June 27, 2017
King George: Defendant appeals his convictions for Robbery and Use of a Firearm on refusal to permit him to withdraw his guilty pleas

Facts: Defendant pled guilty to Robbery and Use of a Firearm. The plea agreement specifically stated that the defendant "knowingly, intelligently and voluntarily waive[d] all rights to withdraw his pleas of guilty and to appeal these convictions." At the Commonwealth's request, the trial court specifically reviewed the express waiver provision during the plea colloquy, and the defendant stated that he agreed to it. Later, the defendant moved to withdraw the guilty plea, but the trial court denied the motion.

Held: Affirmed. The Court repeated that, as per *Griffin*, a defendant can expressly waive his or her right to withdraw a guilty plea before a sentence is imposed. The Court noted that the trial court specifically went over the terms of the agreement in a plea colloquy, and specifically addressed the express waiver provisions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1037162.pdf

Cuff v. Commonwealth: August 15, 2017

Alexandria: Defendant appeals his convictions for Sexual Assault, Use of a Firearm, and other offenses on refusal to permit him to withdraw a guilty plea.

Facts: The defendant and another man forced their way into a hotel room, threatened a woman with an apparent firearm, demanded money, beat her and her companion, and sexually assaulted them. The hotel alerted police, who responded and captured the defendants as they tried to flee.

The police found the two victims inside the hotel room, naked, emotional, distraught, and physically injured. The condition of the hotel room was consistent with the victims' descriptions of the attacks. Police located DNA evidence linking the defendants to the offense in the hotel room. The police also found what appeared to be a gun in the hotel room. Later, the defendant made admissions to a fellow inmate that he and his confederate went to the hotel with a plan to rob a prostitute and that he had sexual contact with at least one of the women in the room.

The defendant hired an attorney, Peter Greenspun. The Commonwealth offered the defendant a plea agreement, which the defendant accepted. However, after his guilty plea hearing, the defendant's family intervened and hired another attorney. Thereafter, the defendant moved to withdraw his guilty plea, claiming that his attorney had coerced him into the plea. The parties held a hearing on the motion to withdraw the plea.

At the hearing, the defendant's original attorney, Mr. Greenspun, testified. He explained that he had discussed the strengths and weaknesses of the Commonwealth's evidence with the defendant. They also discussed potential defenses to the charges. Nonetheless, the defendant had accepted the plea agreement after these discussions and with full disclosure of the ramifications of the decision. The defendant's original attorney had written the defendant a letter advising him of the terms of the offer, the likelihood of success at trial, and the possible consequences that the defendant faced if he went to trial. In the letter, the attorney told the defendant that accepting the plea was in the defendant's best interests.

At the hearing on the motion, the Commonwealth also introduced several telephone recordings of the defendant's conversations at the jail. In a telephone call to his father after the guilty plea hearing, the defendant affirmed his belief that he understood and agreed with the plea bargain that his attorney had negotiated.

Held: Affirmed. The Court found that the defendant had failed to demonstrate that his motion was made in "good faith," as required by *Parris*. The Court reviewed the overwhelming evidence in the case. The Court noted that, until the family retained the defendant another attorney, the defendant had made no allegation of coercion. In light of the facts, the Court found that the defendant's claim of coercion merely tends to indicate appellant "took a look at what the consequences might be after he pled guilty and had buyer's remorse," not that he was acting in good faith in seeking to withdraw his pleas.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1300164.pdf

Brown v. Commonwealth: March 27, 2018
Portsmouth: The defendant appeals her conviction for Petit Larceny, 2nd offense, on refusal to permit her withdrawal of a guilty plea.

Facts: The defendant stole items from a store after having a previous conviction for larceny. The defendant entered into a written plea agreement acknowledging that she understood her rights, wished to waive them, and was pleading guilty freely and voluntarily. The trial court confirmed that the defendant understood the charges against her and was prepared to plead guilty. The trial court accepted the plea agreement, which included an agreed-upon sentence.

However, two days later, the defendant moved to withdraw her plea, claiming that she "didn't know what the circumstances would be," and that pleading guilty would make her lose her house and her job. She also argued that she had "evidence to fight against" the case. The trial court denied the motion.

Held: Affirmed. The Court distinguished *Parris* and its progeny, noting that the statute provides a different standard for a motion to withdraw a guilty plea made after sentencing. In this case, §19.2-296 provides that a plea may be withdrawn after sentencing only "to correct manifest injustice." The Court explained that a defendant's ignorance of the collateral consequences resulting from a guilty plea is not a basis for withdrawing it after sentencing, because it does not constitute manifest injustice. The Court also noted that the defendant's alleged defense to the charge was irrelevant to her motion to withdraw her guilty pleas filed after sentencing.

Tags: Guilty Pleas –Withdrawal of Plea – Post-Sentencing

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0269171.pdf

II. CRIMES & OFFENSES

ABDUCTION

Virginia Court of Appeals
Unpublished

Billow v. Commonwealth: August 22, 2017
Roanoke: Defendant appeals his conviction for Abduction with Intent to Defile on sufficiency of the evidence.

Facts: The defendant grabbed a jogger off a sidewalk, slammed into her and wrapped his arms around her, preventing her movement while also trying to pull her off the path. The victim struggled, but the defendant was able to put his hand under her shirt and grope her breast. Finally, as a cyclist approached, the defendant fled and the victim broke free.

Held: Affirmed. The Court held that the defendant's actions proved that the defendant used force to deprive the victim of her personal liberty. The Court also held that the defendant, by groping the victim's breast, proved that he intended to defile her.

The Court rejected the defendant's "incidental detention" argument, finding that the defendant's use of force and restraint was separate from, yet interrelated with, the sexual assault. In a footnote, the Court also pointed out that, under *Brown*, the incidental detention doctrine only applies when a defendant is convicted of two or more crimes arising out of the same factual episode. Thus, the Court noted that the incidental detention doctrine was by definition inapplicable in this case because the defendant was only charged with and convicted of one offense, abduction with intent to defile.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1199163.pdf

ASSAULT

Virginia Supreme Court

Lewis v. Commonwealth: May 31, 2018

Williamsburg/James City County: Defendant appeals his conviction for Domestic Battery, 3rd Offense, on admission of a prior conviction.

Facts: In October 2015, the defendant struck his live-in girlfriend in the mouth during an argument. In December 2015, he slapped her. Prior to those events, he already had one conviction for domestic battery from 2011. The Commonwealth indicted him for two offenses of Domestic Battery, 3rd offense. On the day of trial, the Commonwealth first tried the defendant for the October offense. The trial court convicted the defendant of misdemeanor domestic battery. The trial court ordered a presentence report and continued the matter for sentencing.

Immediately after the first trial, the Commonwealth tried the defendant for the December offense, offering the 2011 prior conviction and the prior conviction from earlier in the day regarding the October 2015 offense. Over the defendant's objection, the trial court took judicial notice of its own conviction and convicted the defendant of Domestic Battery, 3rd offense.

Held: Affirmed. The Court ruled that the plain language of § 18.2-57.2(B) does not require that a defendant have two predicate convictions at the time he or she commits the offense ultimately charged as a felony. The Court found that the trial court's oral act of finding the defendant guilty constituted the rendition of judgment; the lack of a written order was irrelevant. The Court repeated that the entry or recording of the instrument memorializing the judgment "does not constitute an integral part of, and should not be confused with, the judgment itself." The Court pointed out that, although courts prefer

written orders memorializing judgments in other cases for their evidentiary value, they are not required when the judgment can be established by other proof.

The Court also rejected the argument that the mere finding of guilt was not a predicate conviction within the meaning of Code § 18.2-57.2(B) because the court did not complete the final phase of adjudication by imposing a sentence. The Court distinguished the *Starrs*, *Hernandez,* and *Moreau* cases by pointing out that, in this case, the Court explicitly found the defendant guilty on the record. The Court reasoned that the imposition of sentence cannot be part of the rendition of a judgment of conviction, because the rendition of the judgment is what determines the range within which the court must sentence the defendant when it imposes one.

The Court also ruled that the statute requires that the warrant, petition, information, or indictment charging the defendant with a felony offense must allege that he or she "has been previously convicted of two" of the listed predicate offenses on different dates within twenty years. Thus, because the Commonwealth must present sufficient evidence of them to enable a grand jury to find probable cause, the two predicate convictions must exist at the time of the indictment. The Court questioned how the Commonwealth obtained an indictment in this case, but ultimately overlooked that issue because the defendant did not raise it.

In a footnote, the Court observed that, although the common law required the indictment to specify the dates and places of the predicate convictions, Code § 19.2-220 superseded that requirement. The Court pointed out, however, that nothing prevents a defendant from moving for a bill of particulars to compel the Commonwealth to specify the dates and places of the prior convictions.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170518.pdf

ASSAULT ON LAW ENFORCEMENT

Virginia Court of Appeals -
Unpublished

Moore v. Commonwealth: May 1, 2018
King William: Defendant appeals her convictions for Assault on Law Enforcement on sufficiency of the evidence.

Facts: Officers arrested the defendant for public intoxication. The defendant was belligerent and violent, cursed and directed racial slurs at the officers, kicked inside their patrol car with sufficient force to rock the vehicle, and threatened to punch one of the officers in the face. The defendant also kicked and head-butted a door in the sheriff's office and continued using obscenities. While being transferred, the defendant turned her head and spat in the direction of two deputies; one officer was so concerned that he had been spat upon that he checked his uniform and a nearby wall for traces of spittle.

Held: Affirmed. The Court reviewed the two forms of assault. The Court found this assault to fall under the first form, which is where an individual "engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm" (i.e. an attempted battery). The Court distinguished that form of assault from the other type of assault, which is where an individual engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim. The Court emphasized that the instigation of fear is not required to support an assault conviction if, as here, it is the first type.

The Court also agreed that the defendant intended to inflict bodily harm when she spit at the deputies.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0721172.pdf

BURGLARY

Virginia Court of Appeals
Published

Lee v. Commonwealth: December 19, 2017
68 Va. App. 313, 808 S.E.2d 224 (2017)
Fairfax: Defendant appeals his conviction for Burglary with a Deadly Weapon on sufficiency of the evidence.

Facts: The defendant broke into a house using a screwdriver. Once inside, he used the screwdriver to threaten and cut the resident, sexually assaulting and robbing her. During an interview with the police, the defendant admitted that he committed the offense and carried the screwdriver to threaten the victim. At trial, the defendant argued that the screwdriver was not a "deadly weapon" at the time that he used it to enter the home.

Held: Affirmed. The Court agreed that, under *Pritchett,* the Commonwealth's burden is to prove that the screwdriver was deadly at the time of commission of the burglary. The Court held that an item, even if it is not *per se* a deadly weapon, may still be defined as a deadly weapon based upon its possessor's intent and its subsequent use as a deadly weapon. In this case, the Court pointed out that the defendant must have known that someone was home, as there was a car in the driveway, the defendant concealed his identity by covering his face with a towel after entering the dwelling, and the defendant continued to carry the screwdriver in his hand after entering the home. The defendant's statement also demonstrated his guilt.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1897164.pdf

Virginia Court of Appeals -
Unpublished

Lane v. Commonwealth: April 10, 2018
Portsmouth: Defendant appeals his conviction for Armed Burglary on sufficiency of the evidence

Facts: The defendant and his confederate entered a man's home, shot and killed him, and fled. They gained entry by enlisting a stranger to open the door for them. The victim let the stranger, an unknown woman, into the home, but she declared that she had to go outside to "grab her phone charger." She opened the door to the house, allowing the defendant and his confederate to charge in and attack the victim. A witness described these events and an inmate testified that the defendant described his scheme at the jail.

At trial, the defendant argued that no breaking occurred because the evidence lacked proof of force or deception of the victim to gain entry.

Held: Affirmed. The Court found that the evidence demonstrated "constructive breaking," which is "fraud, threats, trickery, conspiracy, or some other nefarious conduct designed to . . . let the burglar inside." In this case, whether the unknown woman merely ensured the door was unlocked or opened it herself was unknown, but the Court reasoned that either scenario constitutes a breaking.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0972161.pdf

Chambers v. Commonwealth: May 22, 2018
Cumberland: Defendant appeals his convictions for Burglary and Grand Larceny on sufficiency of the evidence.

Facts: The defendant broke into a storage building and stole thousands of dollars in equipment. When the victim discovered the theft, he found that, although the items were gone, the doors were locked and undamaged. A trail camera nearby captured the defendant at the property.

When police confronted him, the defendant claimed that went there to purchase the items from a woman who purported to be a lawful seller. The defendant admitted that the door was locked when he got to the building and that he went inside the storage building to remove items from inside it. When police asked for the woman's phone number, the defendant claimed he did not have it. However, law enforcement could not locate the woman, she was not pictured in the trail camera photographs, and her alleged phone number did not appear until trial.

Held: Affirmed. The Court ruled that the jury could accept that the building was shut and secured when the defendant first approached it and that a key or some other form of breaking was necessary to enter. The Court distinguished the *Finney* case, where the evidence indicated that the building was already open when the defendant arrived.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1214172.pdf

CHILD ABUSE & NEGLECT

Virginia Court of Appeals
Published

Hannon v. Commonwealth: August 22, 2017
68 Va. App. 87, 803 S.E.2d 355 (2017)

Henry: Defendant appeals her conviction for Felony Child Neglect on sufficiency of the evidence.

Facts: The defendant left her five and four year-old children alone in an unlocked car in the parking lot of a convenience store for approximately fifteen minutes. An officer responded and found the children, noting that numerous vehicles were entering and leaving the parking lot. The trial court convicted the defendant of felony child neglect under 18.2-371.1(B).

Held: Reversed. The Court found that the Commonwealth had failed to prove that the children were likely to suffer injury as a result of the defendant's conduct. As it had in *Thompson* the week before, the Court explained that a conviction for 18.2-371.1(B) requires the Commonwealth to prove that the defendant's act or omission is "willful", which means that an objectively reasonable person would understand that injury to the child is likely to result. The Court wrote: "There was no evidence to suggest that the children were at greater risk of injury in the parking lot than they would have been if left unsupervised for fifteen minutes at their home, on their front porch, or in their front yard."

Although the trial court had compared this case to the *Miller* case, where a defendant had left her children in the car while shopping, the Court noted that *Miller* concerned a misdemeanor conviction for 18.2-371, not a felony conviction for 18.2-371.1(B). The Court contrasted cases like *Kelly,* where the defendant abandoned children in a hot car for seven hours, and noted that the Commonwealth had not noted any extenuating dangers, such as heat, crime in the area, or an unusual amount of vehicular traffic.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1374163.pdf

White v. Commonwealth: September 19, 2017
68 Va. App. 111, 804 S.E.2d 317 (2017)
Pulaski: Defendant appeals her conviction for Abuse & Neglect on sufficiency of the evidence.

Facts: One morning, the defendant ingested prescription Suboxone and fell asleep for several hours, leaving her five-year-old son unsupervised in the home. At some point, her son left the home and fell into the family's septic tank, which had an unsecured lid. When she awoke and could not find her son, the defendant summoned police, who discovered the child's body at the bottom of the septic tank.

The evidence at trial demonstrated that the septic tank cover had, at some point, become loose and easily dislodged. The evidence also showed that the defendant knew that her son might go outside to play without her knowledge while she was sleeping, as he had on several occasions. The Commonwealth also presented evidence that the child had dropped toys into the septic tank in the past and that days prior to her son's death, the defendant saw him standing on the lid of the septic tank and yelled at him for playing on it.

The trial court convicted the defendant of two counts of child abuse and neglect in violation of Code § 18.2-371.1(B) and one count of child abuse and neglect in violation of Code § 18.2-371.1(A). The defendant challenged only the latter conviction on appeal.

Held: Reversed. The Court explained that, to convict the defendant under Code § 18.2-371.1(A), the Commonwealth was required to show that the defendant left her son unsupervised with "reckless disregard" for his safety and with the "knowledge and consciousness" that the lack of supervision would "likely result in injury." However, the Court cautioned that the mere presence of potential hazards in the yard, such as a swimming pool, pond, or septic tank, is not sufficient to find that the defendant was advertent to the likelihood that lack of supervision would result in serious injury. Instead, the Court emphasized that the Commonwealth must show that the defendant knew of a heightened risk in the yard such that the son would likely be injured if he played there unsupervised.

In this case, the Court reviewed the evidence and found no evidence from which the trial court could infer that the defendant was aware, prior to her son's death, of the heightened danger posed by the unsecured lid or that her son had a propensity for opening the unsecured lid and dropping toys into the tank while playing in his backyard. The Court also contended that, having yelled at her child for playing on the lid to the tank, the defendant had no reason to suspect that her son would not obey her.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1322163.pdf

Camp v. Commonwealth: May 8, 2018
Fredericksburg: The defendant appeals her conviction for Child Neglect on sufficiency of the evidence.

Facts: The defendant drove her vehicle while intoxicated with her two young children in the car. An officer noticed her driving after she nearly struck his vehicle with her car. The officer followed her and observed that two of her tires were flat. When she stopped, he pointed out the flat tires; she explained that she had struck a median. She admitted to drinking earlier in the evening.

The defendant failed her field sobriety tests. A blood test revealed that her BAC was .25. At trial, a forensic toxicologist testified that the defendant's BAC would adversely affect the defendant's driving and cause tunnel vision. The trial court convicted her of a felony violation of § 18.2-371.1(B)(1).

Held: Affirmed. The Court focused on whether the defendant committed a "willful act or omission in the care of such child [that] was so gross, wanton, and culpable as to show a reckless disregard for human life." Under *Hannon*, the Court noted that the defendant's act or omission must have been such that "an objectively reasonable person would understand that injury to the child is likely to result" from the act or omission.

Just as in *Stevens* and *Wood*, the Court held that driving with a BAC far above the legal standard for driving while intoxicated can be sufficient to allow a rational factfinder to conclude that the risk of injury is probable. In this case, the Court found that the defendant's blood alcohol content and the forensic toxicologist's testimony regarding the effects of such level of intoxication constituted sufficient evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0483172.pdf

Virginia Court of Appeals –
Unpublished

Thompson v. Commonwealth: August 15, 2017
Chesterfield: Defendant appeals her conviction for Felony Child Neglect on sufficiency of the evidence.

Facts: The defendant's two-year-old child suffered an accidental but severe burn to his feet. The child's mother and father lived separately, and the father had just dropped off the child to the mother a couple of days before the accident. Ten days after the injury, the child's father discovered that the defendant had never sought medical attention for the child. He brought the child to the hospital. There, a nurse examined the child and saw no evidence that the child had received any treatment at all.

At trial, a nurse testified that the child's burns could have developed into an infection, although the burns on the child's feet had not become infected. The nurse testified that the child's vital signs appeared normal and that the burns "were in the process of healing" when he was admitted into the hospital. The nurse explained that she had to remove dead skin from the child's feet in order to permit the child's feet to start to heal. The child remained at the hospital for two nights.

The trial court convicted the defendant of Felony Child Neglect in violation of § 18.2-371.1(A).

Held: Reversed. The Court found that there was no evidence at trial that the defendant's failure to take her child to see a medical provider actually ended up causing or permitting any additional serious injuries to her child's health, as required by § 18.2-371.1(A). The Court noted that § 18.2-371.1(A) requires a finding that the defendant's willful acts, omissions, or her failure to provide the child with necessary care caused or permitted serious injury to the child. The Court contrasted subsection A from subsection B, which covers all reckless acts and omissions. The Court explained that subsection A does not criminalize conduct that simply creates the potential for serious injury to occur.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0842162.pdf

Russell v. Commonwealth: August 22, 2017
Newport News: Defendant appeals his conviction for Child Cruelty on sufficiency of the evidence.

Facts: The defendant dropped his girlfriend's three-year-old child off after babysitting him. The mother noticed that the child had injuries on his face that had not been there before. The injuries didn't appear serious, but she summoned the child's father, who brought the child to the hospital. There, a doctor found that the injuries to the child's face were caused by "non-accidental trauma." At trial, a nurse also testified that she observed injuries on the child's arm that looked like the child had been grabbed with force. She also testified that she found blood in the child's mouth. She testified that the child stated that the defendant hit him. The defendant had been the only person with the child.

The trial court convicted the defendant of child cruelty under § 40.1-103(A).

Held: Affirmed. The Court agreed that the evidence established that the defendant struck the child multiple times, which constituted willful and reckless behavior that was reasonably calculated to produce injury and therefore constituted criminal negligence under § 40.1-103(A). The Court pointed out that the child was hit on his head – a delicate place to be injured, especially for a three-year-old child – and that the evidence established that the child was hit on both sides of his face with enough force to draw blood.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1361161.pdf

Wilmer v. Commonwealth: August 29, 2017
Salem: Defendant appeals his conviction for Felony Child Neglect on sufficiency of the evidence.

Facts: A maintenance worker alerted police that the defendant had left his two toddlers alone in a urine-soaked apartment with their unconscious mother, 19 cats, a ferret, and a "very angry" dog. Police responded and found both children wearing soiled diapers. The apartment was bare and had almost no clothing or items for the children. The defendant returned and admitted that he had gone out knowing the situation in the home. The trial court convicted the defendant of felony child neglect under 18.2-371.

Held: Reversed. As it had with *Thompson* and *Hannon* the week before, the Court examined the elements of 18.2-371. The Court focused on whether the defendant acted "willfully", which the Court equated with criminal negligence.

The Court held that the evidence failed to show that the defendant created or inflicted a physical or mental injury upon the children and also failed to show that he caused the children to be without care by an unreasonable absence. The Court refused to hold the defendant responsible for the children's lack of care, pointing out that the defendant had left another person responsible for the children's care, the mother, at the residence, and neither child suffered harm. The Court repeated that the mere fact that the children could have been harmed does not meet the evidentiary threshold necessary to prove child abuse and neglect under Code § 18.2-371. The Court also noted that the evidence did not prove an intent, circumstantially or otherwise, to injure the children.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0654163.pdf

Gibbs v. Commonwealth: April 3, 2018
Chesterfield: Defendant appeals his conviction for Felony Child Neglect on sufficiency of the evidence.

Facts: The defendant left his five-year-old child alone, at home, and went to the child's school for a pre-scheduled conference with the child's kindergarten teachers about the child's recent suspensions and continuous behavior problems. The defendant knew that, a month before, his child had left their apartment after the defendant had left him at home with his older teenage brother; staff later found the child wandering around the complex's pool by himself.

Around 4:00 p.m., maintenance staff again discovered the child wandering around the parking lot of the apartment. Although it was February and very cold, the child was wearing only a t-shirt, pants, and shoes without socks. The staff attempted to speak to the child, but the child fled across a busy road into a busy Costco gas station parking lot. The staff was able to convince the child to return with them. The child claimed that he was thirteen and that his father had told him to go to the hospital to meet him. The police responded and attempted to locate the defendant. The defendant did not arrive until just before 5:00 p.m., did not appear concerned or surprised, and did not ask where they had found his child.

Held: Affirmed. The Court ruled that the defendant knew or should have known that his five-year-old child was insufficiently mature to be left alone in their apartment for the better part of an hour, while the defendant attended a prescheduled meeting, and that leaving him showed "a reckless disregard" for the child's life and safety and created circumstances that would "probably result in an injury." While the Court agreed that a parent has a right to decide, within reason, when and for how long, a child is sufficiently mature to be left alone at home, in this case, the defendant was aware of his child's significant "history of unruly or undisciplined behavior," his immaturity, and his impulsiveness as evidenced by the child's actions at school.

Even though this case concerned a violation of § 18.2-371.1(B)(1), the Court applied the six factors it had articulated in *Barnes*, explaining that, although *Barnes* concerned a violation of § 40.1-103(A), it was persuasive. Those factors were:

1. The gravity and character of the possible risks of harm

2. The degree of accessibility of the parent
3. The length of time of the abandonment
4. The age and maturity of the children
5. The protective measures, if any, taken by the parent; and
6. Any other circumstance that would inform the fact finder on the question whether the defendant's conduct was criminally negligent.

In applying the *Barnes* factors, the Court noted that the child had a propensity to leave the apartment – which was surrounded by a pool, a pond, and a street that bordered commercial businesses, including a Costco store and gas station – when not properly supervised. Unlike § 18.2-371.1(A), the fact that the child was not actually injured was, as the Court explained, irrelevant under § 18.2-371.1(B)(1).

The Court wrote: "Despite having this knowledge of all of the circumstances, appellant chose to make himself completely inaccessible to his child by leaving J.G. alone in their apartment (apparently without even telling J.G. where he was going) in order to attend a prescheduled meeting. Moreover, appellant's apparent lack of concern that J.G. had left the home, traveled across a road, and was not dressed for the weather indicates appellant's "reckless disregard" for J.G.'s life and safety, and appellant's actions here created circumstances that would "probably result in an injury" to him."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1020172.pdf

CHILD PORNOGRAPHY & SOLICITATION

Fourth Circuit Court of Appeals

Toghill v. Clarke: December 15, 2017
Louisa: Defendant appeals his convictions for Internet Solicitation of a Minor on the Constitutionality of the Sodomy statute.

Facts: Defendant used the Internet to solicit an undercover officer, who had been posing as a minor, for oral sex. After his conviction, the Fourth Circuit ruled that the Virginia prohibition on sodomy in 18.2-361(A) was unconstitutional in *MacDonald v. Moose*. [The GA has since amended the code section – *EJC*]. The trial court convicted the defendant of violations of 18.2-374.3(C)(3).

The Court of Appeals affirmed the conviction, as did the Virginia Supreme Court, writing that: "18.2-361(A) cannot criminalize private, noncommercial sodomy between consenting adults, but it can continue to regulate other forms of sodomy, such as sodomy involving children, forcible sodomy, prostitution involving sodomy and sodomy in public. The easy to articulate remedy [in light of *MacDonald*] is that Code § 18.2-361(A) is invalid to the extent its provisions apply to private, noncommercial and consensual sodomy involving only adults."

The defendant sought *habeas* relief, but the district court denied his petition.

Held: Affirmed. The Court pointed out that, in *MacDonald*, it had agreed that Virginia's existing sodomy statute had constitutional applications, and that there was nothing in *Lawrence v. Texas* that would prohibit a state from enacting a statute criminalizing sodomy between an adult and a minor. The Court then ruled that the Virginia Supreme Court had properly narrowed Virginia's sodomy statute to authoritatively remedy any constitutional infirmity and prohibit convictions that might run afoul of the Due Process Clause.

In a footnote, the Court also agreed that the Virginia Supreme Court was not bound by the Fourth Circuit's ruling in *MacDonald*. However, the Court pointed out that, had the Virginia Supreme Court ignored the Fourth Circuit, the Court would then have routinely granted *habeas* petitions from Virginia prisoners whose convictions violated *MacDonald.*

Full Case At:
http://www.ca4.uscourts.gov/opinions/166452.P.pdf

Virginia Supreme Court

Dietz v. Commonwealth: September 7, 2017
294 Va. 123, 804 S.E.2d 309 (2017)
Hampton: Defendant appeals her conviction for Internet Solicitation of a Child on sufficiency of the evidence.

Facts: Defendant, a school teacher, sent sexually suggestive texts to an 11-year-old boy in her class. The child's father turned the phone over to police, who posed as the child. While police posed as the child, the defendant sent pictures of herself in the bathtub, including a photo of the upper portion of her breasts, asking the child if he had ever seen a woman's "boobs" before. She also sent a picture of her lips while formed in a kiss. The defendant asked the child to delete the photos and hide her contact information from his parents. She inquired as to where she could be alone with the child in order that she could kiss him, but cautioned that if they were alone, she would do "so many dirty things" with the child.

Held: Affirmed. Like the Court of Appeals, the Court first rejected the argument that the Commonwealth must prove that a third party, other than the defendant and the child, was involved or the target of the communications. The Court found that, under the plain language of the statute, a defendant would be guilty of the offense for merely plotting to induce the minor to be the victim of an activity proscribed under Code §18.2-370 (an activity that would constitute taking indecent liberties with a child), whether at the moment or in the future.

The Court also agreed with the Court of Appeals that a defendant need not have actually committed the crime of taking indecent liberties with a child under Code § 18.2-370 to have committed the crime of engaging in improper communications involving a child under Code § 18.2-374.3(B). To establish the latter offense, the Court explained, it is sufficient to show that the defendant's communication was "for the purpose of moving forward with a scheme of taking indecent liberties with

a child". Rather than focusing on whether the defendant's breast was a "sexual part", as the Court of Appeals did, the Court examined the defendant's conversations with the child and found that the defendant was clearly acting with lascivious intent towards the victim as an object of her "sexual desire and appetite."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160857.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0861151.pdf

Virginia Court of Appeals –
Published

Hillman v. Commonwealth: April 3, 2018
Lynchburg: Defendant appeals his conviction for Computer Solicitation of a Minor on sufficiency of the evidence.

Facts: The defendant, a 22-year-old youth pastor, exchanged sexually explicit photos and videos over the Internet with a 14-year-old child. To participate in the church's youth group, the child completed a medical release form setting forth her age and birthday and provided that form to the church. The defendant used "Snapchat," an application that allows a user to send a photograph to another user in a message that, after viewing, deletes itself within a matter of seconds. After sending her nude photos of him, the defendant would follow up with her by text message and confirm that she received the photographs.

Police interviewed the defendant, who admitted sending the child naked photographs and videos, and also admitted to asking the child for naked photographs and videos. Police asked the defendant how old the child was and he responded "fifteen I believe . . . fourteen, fifteen."

At trial, the defendant made two arguments. First, the defendant argued that, under § 18.2-370, he did not "expose" himself to the child because exposure under the statute must occur (1) in the physical presence of the victim, and (2) contemporaneous with this physical presence. He also argued that the evidence did not prove that he knew the child was fourteen.

Held: Affirmed. The Court first rejected argument that the word "expose" requires that the exposure occur in the physical presence of the victim. Instead, the Court held that "expose" under Code § 18.2-370 requires exposure (1) "in the actual presence and sight of others," or (2) "in such a place or under such circumstances that the exhibition is liable to be seen by others." In this case, the Court noted that the defendant used the victim's "Snapchat" address and followed up to confirm that she had received the messages.

The Court then ruled that, although the defendant did not share the images "live," his exposure was sufficiently "contemporaneous" to fall within § 18.2-370.

Finally, the Court found that the defendant's statement, along with the child's medical release form, sufficiently demonstrated the defendant's knowledge that the child was fourteen years old.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0287173.pdf

Virginia Court of Appeals -
Unpublished

Christy v. Commonwealth: April 10, 2018
Augusta: Defendant appeals his conviction for Possession of Child Pornography on Sufficiency of the Evidence.

Facts: The defendant downloaded and stored child pornography on his computer at his home. Police detected the pornography while examining data on a file sharing service called "Shareaza," noting that the defendant's software used a unique identifying "GUID" number and IP address to share the pornography on the network. Officers executed a search warrant at the defendant's residence. When law enforcement officers searched the defendant's home, "Shareaza" was running on his laptop and the defendant was the only person in the home. The defendant admitted that the computer belonged to him, only he had access to it, that he had installed the "Shareaza" software, and that he secured the computer with a username and password.

At trial, a forensic expert testified that he found child pornography on the computer in a section protected by the defendant's username and password. He explained that the "Shareaza" software could only be operated manually and did not install pictures or data automatically. He also explained that he found that someone had used the defendant's account to search for child pornography. He also discovered that, in the month prior to the search warrant, someone had started "Shareaza" twenty times.

The forensic expert also testified that he found "orphan" images of child pornography in a part of the computer that retained deleted data. He explained that the computer's user would not have been able to access or recover those images from unallocated space without using special software. However, the orphan images did retain associated dates and times indicating when they were first stored on the computer; the dates were within a few weeks of date alleged in the indictment.

Held: Affirmed. The Court rejected the defendant's analogy to the *Kobman* case, distinguishing this case on its facts. In *Kobman,* the Court noted, the only evidence supporting the defendant's convictions for possession of images stored in his computers' unallocated space was the presence of undated images in the part of the computer reserved for deleted images. [The trial court had excluded the full EnCase report – *EJC*]. However, the Court found here that the "orphan" images were subject to the defendant's dominion and control from their download dates until he acted to delete them.

Although that evidence did not show the defendant's knowing and intentional possession on the date alleged in the indictment, the Court pointed out that the Commonwealth was not required to

prove the exact date that the defendant possessed the images, because time is not a material element of the offense. Thus, even if there was reasonable doubt as to the exact date or range of dates on which the defendant possessed the images at issue, the evidence was sufficient to prove he possessed child pornography as charged in the indictments.

Tags: Child Pornography – Possession – Sufficiency

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0169173.pdf

CONCEALING A DEAD BODY

Virginia Court of Appeals –
Unpublished

Dellis v. Commowealth: April 24, 2018
Franklin: Defendant appeals her conviction for Concealing a Dead Body on sufficiency of the evidence.

Facts: The defendant suffered a placental abruption that resulted in the death of her unborn child. She birthed the deceased fetus in her home and placed it inside a trash bag, Her father, unaware of the bag's contents, disposed of the trash bag in a public dumpster. After finding the fetus, police submitted it to the Medical Examiner, who concluded that the fetus died "less than several days" before the defendant gave birth. He found the gestational age of the fetus was between thirty to thirty-two weeks and testified that the child was considered a viable human fetus.

At trial, the defendant argued that a fetus that died in the womb does not fall within the definition of "dead body" as contemplated by § 18.2-323.02 and that the fetus was never alive and therefore could not be dead.

Held: Affirmed. The Court examined § 32.1-249(1), which defines "dead body" as "a human body or such parts of such human body from the condition of which it reasonably may be concluded that death recently occurred." The Court concluded that this definition is not ambiguous and that the plain language includes a stillborn fetus.

The Court pointed out that the medical examiner performed an autopsy on the fetus and was able to determine that it was, in fact, a human fetus and that it had recently died, albeit in the womb. Further, the Court reasoned that, even though the statutes identify both terms in the sections that apply simultaneously to a "dead body" or "fetus," the requirements and procedures are largely the same when applied to each one, signaling that the legislature intended both to receive the same treatment. The Court explained that to conclude otherwise would frustrate the larger purposes of the criminal statute.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0341173.pdf

CREDIT CARD OFFENSES

Virginia Court of Appeals
Published

White v. Commonwealth: December 5, 2017
68 Va. App. 241, 807 S.E.2d 242 (2017)
Richmond: Defendant appeals her convictions for Financial Exploitation and Credit Card Fraud on sufficiency of the evidence.

Facts: The defendant was a caregiver for the victim, who suffered a serious brain injury due to West Nile virus and encephalitis. The victim was chronically forgetful, often became confused, and could not process basic information such as the date, time, or season. She was unable to take care of herself. The defendant's job required her to use the victim's debit card while taking her shopping because the victim often could not remember her PIN number and often dropped or forgot to put her debit card back in her purse. The defendant's job required her to assist the victim with making purchases using the card, but she had to put the card back into the victim's purse immediately upon the conclusion of each transaction.

ATM video surveillance revealed that the defendant used the victim's card to make two cash withdrawals for $300 each without the victim being present. When her employer confronted her, the defendant claimed that one of her co-workers had dressed up like her and "was trying to get her in trouble." At trial, the defendant argued that the Commonwealth failed to show that the victim was "mentally incapacitated" and failed to prove that the defendant used the card without the victim's consent.

Held: Affirmed. Regarding the financial exploitation offense, 18.2-178.1 defines "mental incapacity" as a "condition of a person existing at the time of the offense described in subsection A that prevents [her] from understanding the nature or consequences of the transaction or disposition of money or other thing of value involved in such offense." The Court ruled that the evidence was sufficient to prove that the victim's condition at the time of the offense precluded her from understanding the nature and consequences of the defendant's withdrawals of cash at ATMs from her account.

Regarding the credit card fraud offense, the Court ruled that it was reasonable to conclude that the victim did not consent to the defendant's possession of her debit card when the defendant withdrew funds from the bank account. The Court noted the defendant's sole possession of the card was not authorized as part of her employment and that the defendant immediately attempted to shift the blame when confronted. The Court pointed out that no evidence in the record supported the defendant's hypothesis of innocence that the victim consented to her possession and use of the card at the ATMs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1991162.pdf

DRIVING SUSPENDED OR REVOKED

Virginia Court of Appeals
Unpublished

Grasty v. Commonwealth: December 5, 2017
Newport News: Defendant appeals his conviction for Driving Suspended on sufficiency of the evidence.

Facts: The defendant drove after DMV suspended his privilege to operate a motor vehicle. The defendant was a commercial fisherman transporting a recent catch to market within fifty miles from the place the fish were caught. At trial, the defendant argued that he qualified for the exemption to the driver's license requirements provided for commercial fishermen through Code §§ 46.2-300, 46.2-303, and 46.2-674.

Held: Affirmed. The Court agreed that Code § 46.2-300 and § 46.2-674(3) exempt commercial fishermen from having to obtain a driver's license in a case such as this. However, as in the *Triplett* case, the Court ruled that Code § 46.2-301(B) prohibits anyone whose license has been suspended or revoked from driving on the highways of the Commonwealth while a suspension or revocation is in effect, unless they obtain a restricted license. Thus, the Court ruled that, while the defendant would not have normally needed a license in this case, the fact that DMV suspended his privilege to operate a motor vehicle prohibited him from driving.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0281171.pdf

DRUGS

Virginia Supreme Court

Cole v. Commonwealth: November 16, 2017
294 Va. 342, 806 S.E.2d 387 (2017)
Alexandria: Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment and sufficiency grounds.

Facts: The defendant carried cocaine, for sale, in his anus. An officer arrested him on an outstanding warrant and discovered that the defendant possessed marijuana, but did not discover the cocaine. The officer brought the defendant to the jail and advised the jail that he had arrested the defendant for a drug offense. The jail's policy was to strip search only those new detainees charged with offenses involving drugs, weapons, or violence, and only with approval from a supervisor. The jail, pursuant to their procedures, conducted a strip search of the defendant.

During the search, the defendant would not comply with the instruction to "turn around and squat." The officer noticed a white plastic baggy hanging out of the defendant's anus, and told the defendant to put his hands up. The defendant began to struggle with the officers, took the bag out of his anus, and put it in his mouth. However, the officers recovered the bag and found that it contained 14 bag-corners of cocaine, weighing over 5 grams, packaged for sale.

The trial court granted a motion to suppress the evidence, on the grounds that a "higher standard" applies to the strip search of a detainee prior to him or her being taken before a magistrate, and that "without any particularized suspicion as to whether or not [the defendant] was hiding drugs on his person," the search was be a violation of his Fourth Amendment rights. However, the Court of Appeals reversed that ruling in an interlocutory appeal.

At trial, a police expert testified that the "possession of approximately 5 plus grams of crack cocaine broken into individually wrapped baggies held by a defendant in his buttocks," as well as $600 in cash and no smoking device, was inconsistent with personal use.

The defendant appealed again to the Court of Appeals, who refused to reconsider its original ruling and affirmed the defendant's conviction.

Held: Affirmed. The Court first held that the Court of Appeals was incorrect to have refused to re-hear the Fourth Amendment issue on direct appeal. However, the Court then agreed with the Court of Appeals original ruling that the evidence was admissible.

The Court reviewed the U.S. Supreme Court's ruling in *Florence* and noted the legitimate concerns that a jail has in its booking area, such as the dangers of disease, gang-based violence, and the disruption of jail safety due to an underground economy trading in contraband. The Court noted those concerns are heightened when, as here, prisoners are generally kept in group cells, are not handcuffed, and are able to move around the waiting area with some degree of freedom, such as going to the restroom unescorted.

The Court ruled that, in the absence of "substantial evidence demonstrating that the Jail's response to the situation is exaggerated," the jail's policy was reasonable and the trial court should have deferred to the policy. The Court pointed out that, during argument, the defendant had contended that the evidence was not subject to inevitable discovery, thereby admitting that he would have had the opportunity to surreptitiously dispose of his cocaine in the jail if officers had not located it.

The Court also agreed that the evidence was sufficient to demonstrate the defendant's intent to distribute his cocaine.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161113.pdf

Virginia Court of Appeals
Published

Hall v. Commonwealth: January 9, 2018
68 Va. App. 391, 808 S.E.2d 844 (2018)

Lynchburg: Defendant appeals his sentences for Drug Distribution on imposition of mandatory minimum sentences.

Facts: The defendant committed and was found guilty of several offenses of 2nd Offense Distribution of Illegal Narcotics. Two days prior to sentencing, in an effort to take advantage of the "safety valve" provided by § 18.2-248(C) and eliminate the mandatory sentences, the defendant delivered a letter to the prosecutor stating:

"I'm sorry I don't have any information as far as the supplier goes. The only knowledge I had of the man was a phone number. We did not really associate on a personal level[;] the relationship was purely business. I only called and placed an order and I'd meet him, that was the extent of our relationship. He would only be recognizable to me by sight."

The Court refused to apply the "safety valve," finding that the defendant did not comply with the code, and imposed the mandatory sentences.

Held: Affirmed. As it had in *Sandidge*, the Court of Appeals examined section (e) of § 18.2-248(C) and rejected the defendant's argument that providing that information at any time before the commencement of the sentencing hearing is *per se* timely. The Court wrote: "Although we recognize the utility a brighter line would provide, we cannot prospectively declare that providing information a certain number of hours or days before the start of a sentencing hearing will or will not be timely." In this case, the Court found that the defendant's information failed to afford the Commonwealth the opportunity "to test [the] statement for veracity and completeness," as required by *Sandidge*.

In a footnote, the Court also pointed out that the defendant was uncooperative when asked by the probation officer about his level of drug involvement in the community and denied affiliation with any gang, despite, according to Virginia Department of Corrections records, being a confirmed member of the "Crips" gang. The Court noted that these facts bore on the issues of veracity and completeness

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0481173.pdf

Virginia Court of Appeals
Unpublished

Ames v. Commonwealth: November 7, 2017
Virginia Beach: Defendant appeals his convictions for Possession of a Concealed Weapon, Possession of a Firearm by a Convicted Felon, and Possession of Marijuana, on admission of his assertion of Fourth Amendment rights and sufficiency of the evidence.

Facts: The defendant, a felon, sat in a car with marijuana and a concealed handgun. Officers noticed the car and began to approach, noting the strong odor of unburned marijuana. The officers saw that he had his hands inside the center console. When the officers confronted him, the defendant removed his hands from the console, got out of the vehicle, abruptly closed the door, appeared "very

nervous," and tried to walk away. The officers asked him about the smell of marijuana and the defendant then tried to run. As the officers detained him and began to search the car, the defendant asked why he was being arrested and yelled, "You can't do that. You can't search my car."

Officers searched the car and found marijuana in a front center compartment of the car and a firearm just beneath the closed lid of the console. The vehicle was registered to another person and someone else's identification card was in the car. Officers also charged the defendant with resisting arrest, but the trial court dismissed that charge at the motion to strike.

At trial, the defendant argued that the trial court should not admit his question to the officers why he was being "arrested" and his statement that they could not search his car, arguing that doing so would be an impermissible "penalty for asserting a constitutional privilege" and that admitting the statements was more prejudicial than probative.

Held: Affirmed. The Court first rejected the concept of a *per se* bar on admitting a defendant's alleged assertion of Fourth Amendment rights. The Court also found that the statements were not prejudicial, as they did not tend to "inflame irrational emotions" or give rise to "impermissible inferences," particularly in the context of a bench trial. Instead, the Court found the statements to be probative. The Court found that the defendant's question why he was "arrested" was relevant to the charge of resisting arrest. The Court also found his declaration that the officers could not search "his" car was probative of his connection to the vehicle and consequently relevant to the charges relating to possession of the contraband inside it.

Regarding sufficiency, the Court found that the odor of marijuana and the defendant's behavior sufficiently demonstrated his possession of marijuana. The Court also determined that, for an appreciable length of time, the firearm was both hidden from common view and about the defendant's person, accessible for his use, and therefore he was guilty of violating Code § 18.2-308 and possessing the firearm as a felon.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0526161.pdf

Roberts v. Commonwealth: November 7, 2017
Spotsylvania: Defendant appeals his convictions for Manufacturing Methamphetamine and Conspiracy to Manufacture Methamphetamine on hearsay grounds.

Facts: The defendant manufactured methamphetamine in his home. At trial, the Commonwealth presented evidence that the defendant was seen walking in the yard of the residence while shaking a plastic bottle, a known process for manufacturing methamphetamine by the "one-pot" or "shake-and-bake" method. During the execution of a search warrant, officers found numerous items used in making methamphetamine in the yard of the residence and in the defendant's bedroom.

At trial, one of the defendant's housemates testified that he purchased pseudoephedrine for the defendant and that the defendant was the only person in the house who knew how to make methamphetamine, which was present in the house "everywhere and all the time." The Commonwealth

also introduced jail recordings where the defendant discussed purchasing methamphetamine precursors and manufacturing methamphetamine.

At trial, over the defendant's objection, the court admitted records from the National Precursor Log Exchange (NPLEx) that showed the defendant's purchases and attempted purchases of pseudoephedrine, as well as the records regarding four other people who lived in the same house.

The NPLEx, which Virginia implemented in §§ 18.2-265.6 – 18.2-2-265.18, concerns the sale of ephedrine or related compounds and is based on the Federal Combat Methamphetamine Epidemic Act of 2005. Code § 18.2-265.8 requires the Virginia State Police to enter "a memorandum of understanding with an appropriate entity to establish the Commonwealth's participation in a real-time electronic record keeping and monitoring system for the sale of ephedrine or related compounds."

The statute provides that the system be approved by the State Police and directs the State Police to draft regulations for implementation of the statute. Regulation 19 VAC 30-220-10 states that the "Virginia Methamphetamine Precursor Information System is a web-accessed database" that is available to pharmacies and retailers and can be viewed by law enforcement officers, but neither the statute nor the regulation expressly refer to NPLEx, which is a privately managed entity used by many states to track purchases of regulated substances.

In this case, the Commonwealth admitted the records through a detective, who presented the records in court. The trial court admitted the records as business records over the defendant's objection.

Held: Affirmed. The Court dodged the question of the records' admissibility, finding that any error was harmless in light of the overwhelming evidence of guilt.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1535162.pdf

Stone v. Commonwealth: March 27, 2018
Pittsylvania: Defendant appeals his sentences for Distribution of Cocaine on refusal to apply the statutory "Safety Valve."

Facts: On five occasions, the defendant sold cocaine to a police informant from his home. Police executed a search warrant and found a rifle in the home. The defendant's wife stated that the defendant had obtained the rifle prior to the drug deals and kept it in the house for protection.

The defendant already had a previous conviction for distribution, so he faced a mandatory sentence of five years on each count. At sentencing, the defendant asked the trial court to waive the mandatory minimum sentences pursuant to Code § 18.2-248(C), but the trial court refused, finding that the defendant possessed a firearm in connection with each of the offenses.

Held: Affirmed. The Court agreed that the evidence demonstrated that the defendant exercised dominion and control over the premises where the firearm was found during the offenses. The Court also agreed that the defendant knew of the presence, nature, and character of the firearm. The Court particularly focused on the defendant's drug-dealing activities, finding that they were a factor that,

along with his wife's statement, provided sufficient evidence of his knowledge of the presence, nature, and character of the firearm found in his residence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0347173.pdf
Denson v. Commonwealth: March 28, 2018
Montgomery: Defendant appeals her conviction for Manufacturing Methamphetamine on sufficiency of the evidence.

Facts: Police stopped the defendant's rented car, in which she was riding as a passenger. Police arrested the driver and found a container of "one-pot"-style methamphetamine in the back seat of the car, along with other methamphetamine paraphernalia. The defendant admitted that she had just gone camping with the driver and used methamphetamine while camping just two days before. She told police that, shortly before going camping, she bought the driver pseudoephedrine to use in the manufacture of methamphetamine. She explained that the driver used that pseudoephedrine to make the methamphetamine, some of which they used while camping, and that the remaining methamphetamine was in the "one-pot" bottle that police found in the back of the car.

At trial, the defendant claimed that, although she uses methamphetamine, she does not know how to make the drug. However, she admitted that she knew that pseudoephedrine is its main ingredient.

Held: Affirmed. The Court noted that the Commonwealth proceeded under the theory that the defendant acted as an accessory before the fact, purchasing pseudoephedrine for the driver to use in manufacturing methamphetamine. The Court agreed that the evidence demonstrated that the defendant aided and abetted the driver's manufacture of the methamphetamine in the "one-pot" bottle by buying him pseudoephedrine for that purpose.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1971163.pdf

DUI & REFUSAL

Virginia Supreme Court

Commonwealth v. Leonard: October 19, 2017
294 Va. 233, 805 S.E.2d 245 (2017)
Rev'd Court of Appeals Ruling of April 26, 2016
Virginia Beach: Defendant appeals his conviction for DUI 3rd Offense on Collateral Estoppel and sufficiency grounds.

Facts: Defendant drove while intoxicated, hit a mailbox, and then went home. The defendant had two prior convictions for DUI. One conviction, in 2010, was from the General District Court, where

the trial judge had failed to check the box noting that the guilty plea was voluntary and intelligent. The second conviction, in 2010, was in Circuit Court. In the 2012 case, the General District Court reduced the offense from DUI 2nd to DUI 1st offense, after which the defendant appealed to Circuit Court, where the Circuit Court convicted him of DUI, 1st offense. The 2012 record did not reflect the reason for the reduction. However, during the trial in this case, the Commonwealth Attorney stated:

> "I'll stipulate. I – it's my understanding that that was the reason for why Judge Hutchens reduced the charges to a DUI first. I don't think there's any evidence before the court. I will make it evidence now as part of that stipulation that [the general district court judge] reduced that because she did not find that first prior to be [valid for purposes of sentence enhancement under Code § 18.2-270].

At trial, the defendant argued that the evidence was insufficient, that he could not be convicted of DUI 3rd offense without first being convicted of DUI 2nd, and lastly that the 2012 ruling expressly found that the 2010 order was invalid. The Court of Appeals ruled that Collateral Estoppel barred the Commonwealth from re-litigating the issue decided in 2012, to wit: the inherent validity of the 2010 order.

Held: Affirmed, Court of Appeals ruling reversed. The Court focused on a crucial distinction in the concept of collateral estoppel: Collateral estoppel, as applied in criminal proceedings, becomes applicable only when the defendant's prior acquittal necessarily resolved a factual issue that the Commonwealth seeks to litigate again in a subsequent proceeding.

In this case, the Court found that when the general district court ruled in 2012 that the Commonwealth could not use the 2010 conviction to support DUI, second offense, the factual question it decided in the defendant's favor was that the defendant had not been advised of his constitutional rights prior to pleading guilty to the 2010 DUI. That fact, the Court pointed out, has no bearing on the issues in this case.

The Court pointed out that the defendant had no viable legal ground to collaterally attack the 2010 DUI conviction, since only convictions obtained in violation of the Sixth Amendment right to counsel are subject to collateral attack in recidivist proceedings. The Court reasoned that, instead of precluding the Commonwealth from re-litigating a factual finding made in the 2012 proceeding, the defendant was attempting to bind the Commonwealth to an evidentiary ruling made in the 2012 proceeding in connection with sentencing on a different offense. However, to the extent the general district court actually concluded the 2010 conviction was constitutionally invalid for purposes of sentencing enhancement, the Court noted that any such conclusion was a determination of law.

The Court ruled that the 2010 DUI conviction remains a valid and existing conviction and that the general district court's ruling in 2012 did "not operate to 'acquit'" the defendant of the 2010 conviction or change the fact that the prior conviction does still exist.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160952.pdf

Virginia Court of Appeals
Published

Aponte v. Commonwealth: October 10, 2017
68 Va. App. 146, 804 S.E.2d 866 (2017)

Bedford: Defendant appeals her conviction for Involuntary Manslaughter and DUI 2nd Offense on admission of the certificate of analysis.

Facts: The defendant, while driving intoxicated, crashed into another vehicle, crippling the driver and killing her six-year-old child, who had been a passenger in her own car. When an eyewitness told the defendant that she would call 911, the defendant asked her not to, stating "please don't, I've been drinking." The witness called 911 anyway and watched as the defendant discarded beer cans in the woods nearby. A trooper arrived but the scene was hectic; a helicopter transported the child to the hospital and the defendant followed. Only after the defendant left did the trooper discover the role that alcohol may have played in the crash.

The trooper found the defendant at the hospital and learned that the defendant had not consumed any alcohol since the crash. She claimed that she had consumed her last drink approximately 15 hours before. A PBT revealed the defendant's BAC to be .130. Believing the result to be unusually high, the trooper offered another PBT, which returned a result of .109 seven minutes later.

Since more than three hours had passed since the crash, the Trooper asked the defendant if she would consent to a blood draw. He explained that if she did not, he would take the defendant before a magistrate and attempt to obtain a search warrant, and offered that her consent would allow her to stay in the hospital with her son. The defendant consented to the blood draw. The certificate of analysis later demonstrated that the defendant's BAC was .116. At trial, a toxicologist testified that she extrapolated the defendant's BAC to between 0.156 and 0.196 at the time of the crash.

Prior to trial, the defendant moved to suppress the results of the certificate of analysis on the grounds that the trooper coerced her into consenting to the blood draw.

Held: Affirmed. The Court ignored the consent issue and instead concluded that exigent circumstances existed to justify the nonconsensual, warrantless blood draw from the defendant. The Court acknowledged that the general rule under the U.S. Supreme Court ruling in *Missouri v. McNeely* is that most DUI cases do not constitute a exigent circumstances. However, the Court likened this case to the case of *Schmerber v. California*. The Court explained that, as in *Schmerber,* unlike *McNeely*, the blood draw arose from a serious automobile crash with attendant complications, not from a "routine DWI" traffic stop. Also, like the officer in *Schmerber*, the Court noted that the trooper in this case was delayed in pursuing the usual procedures for obtaining a valid blood draw by the need to investigate the crash. The Court also pointed out that the defendant's act of concealing beer cans may have delayed the discovery that alcohol played a role in the crash.

The Court also reasoned that, based on what the trooper learned from the defendant at the hospital, the defendant may have consumed alcohol so long ago that any further delay in obtaining a blood sample would have affected the accuracy, and thus the probative value, of blood alcohol test

results. The Court pointed out that, even under *McNeely,* the detrimental effects of the passage of time upon the reliability of a blood test may alone be sufficient to justify a warrantless, nonconsensual blood draw. Given the potential for the destruction of evidence through dissipation and the other "special facts" specific to this situation, the Court found that exigent circumstances justified the warrantless blood draw.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0052173.pdf

Virginia Court of Appeals -
Unpublished

Patterson v. Commonwealth: July 25, 2017
York: Defendant appeals his conviction for DUI, 3rd or Subsequent Offense on Admission of Prior Convictions.

Facts: Defendant drove his car while intoxicated, after having two prior convictions for that offense in the previous ten years. The defendant argued that one of the convictions, which was from California, was not for an offense that was substantially similar to the Virginia Code. The Court admitted the priors and found the defendant guilty of DUI 3rd offense.

Held: Reversed. While the Court agreed that statutes need not be substantially similar in every respect, in this case the Court ruled that California Vehicle Code § 23152 was not substantially similar to Code § 18.2-266 because the California statute permits a conviction for driving any "vehicle", whereas Virginia Code § 18.2-266 specifically uses the term "motor vehicle." The California Vehicle Code provides different definitions for the terms "vehicle" and "motor vehicle." Thus, for example, a court could convict a defendant under the California DUI statute for driving a moped on private property, where in Virginia that same conduct is not prohibited under Code § 18.2-266.

In a footnote, the Court distinguished the *Honaker* case, in which it had examined a West Virginia prior to determine whether that conduct would be prohibited in Virginia. In that case, the Court noted that, although the West Virginia statute also only used the word "vehicle", the prior contained a description of defendant's conduct and stated that he was guilty of "driving and operating a motor vehicle . . . while under the influence of alcohol." Thus, the Court had affirmed the conviction in that case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0821161.pdf

Hicks v. Commonwealth: August 29, 2017
Washington: Defendant appeals his conviction for DUI 2nd Offense on Admission of a Certificate of Analysis and Sufficiency of the Evidence.

Facts: The defendant crashed into another car while driving intoxicated. An officer responded and noted that the defendant, who admitted to driving, seemed unsteady on his feet, and had glassy eyes and slurred speech. The defendant failed all field sobriety tests. The defendant admitted to the officer that he took Valium, Percocet, and Neurontin before the crash.

At trial, a toxicologist testified that the defendant's blood contained Diazepam, Nordiazepam, Oxazepam, and Temazepam. The toxicologist testified about the side effects of the drugs, including drowsiness, dizziness, poor concentration, slurred speech, and a slow reaction time. The toxicologist admitted that he could not say how the defendant would personally react to the drugs or what unique circumstances might have altered the side effects in his case.

Held: Affirmed. The Court ruled that the evidence, even without the certificate of analysis, was sufficient to prove that the defendant was driving under the influence. The Court pointed out that the officer observed that the defendant exhibited the exact side effects that the toxicologist testified the drugs that the defendant admitted taking would have.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1093163.pdf

Slentz v. Commonwealth: December 12, 2017
Accomack: Defendant appeals his conviction for DUI on Fourth Amendment grounds.

Facts: The defendant drove while intoxicated. An officer watched the defendant's vehicle twice cross the white fog line of the roadway and briefly drive onto the grass shoulder. The officer stopped the defendant and learned he was intoxicated. In a motion to suppress, the defendant argued that he did not leave the travel lane and that there was no basis for the stop.

Held: Affirmed. The Court ruled that it was entirely reasonable for the officer to believe that the defendant violated Code § 46.2-804(2) by weaving over the fog line and onto the shoulder of the road, even if the actions were brief. The Court pointed out that, while the defendant may very well have had an explanation for his actions or could have provided a basis for the officer to conclude that it was not "practicable" to stay within the lane of travel when the vehicle briefly crossed the fog line onto the shoulder, such explanations did not negate objective reasonable suspicion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2102161.pdf

Hedgpeth v. Commonwealth: December 26, 2017
Williamsburg: Defendant appeals his convictions for DUI and Driving Revoked-DUI related on sufficiency of the evidence.

Facts: While driving intoxicated on a license suspended due to his previous DUI conviction, the defendant made an illegal turn in violation of a clearly posted sign. An officer followed the defendant down a narrow alley and approached the defendant after he had parked his vehicle. The officer asked the defendant twice to perform field sobriety tests, but the defendant refused. The officer noticed a strong odor of alcohol from the defendant and that the defendant's speech was slurred. The defendant attempted to light a cigarette but then ran from the scene. The officer located a bottle of whisky and cups of liquor in the car. The keys to the car were no longer in the ignition but instead in the backseat of the car.

Held: Affirmed. The Court found that, while *Jones* found that refusal to perform a field sobriety test, without more, is insufficient to demonstrate a defendant's consciousness of guilt, in this case there was more evidence that demonstrated the defendant's guilt. In this case, for example, the defendant disregarded clearly posted signs and fled from the stop.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0107171.pdf

Aloudah v. Commonwealth: February 13, 2018
Alexandria: Defendant appeals her conviction for DUI on admission of the PBT, admission of the certificate of analysis, and sufficiency of the evidence.

Facts: An officer observed the defendant cut across three lanes of traffic, cross a double-yellow line, and nearly strike a construction barrel. The officer stopped the defendant and detected a "moderate" odor of alcohol. The defendant admitted that he had consumed "one beer" several hours earlier. The officer also noted that the defendant had an open wound on his knee and offered him medical attention. The defendant accepted and the officer summoned an ambulance. The officer then advised the defendant of his right to take a Preliminary Breath Test (PBT) and the defendant agreed. The PBT read .15. The officer arrested the defendant for DUI.

At the hospital, the officer advised the defendant of implied consent and conducted a blood draw. The officer later explained that he did not offer the defendant a breath test using the machine at the jail because "we were going to the hospital in an ambulance, we're not going to stop at jail." The implied consent form that the officer used mentioned that the defendant could face a "conviction" for unreasonable refusal. The blood test resulted in a .164.

At trial, the defendant moved to suppress the arrest, but objected to admission of the PBT on the grounds that there was no foundation for its admission. The defendant also moved to suppress the blood certificate. The trial court denied these motions.

Held: Affirmed. The Court first addressed the PBT, repeating that its result is admissible in pretrial probable cause or suppression hearings. The Court then explained that, under § 18.2-267(A), PBTSs have a lower bar for result admissibility; their results are admissible at a suppression hearing if

the preliminary test was performed by "any police officer in the normal discharge of his duties." The Court rejected the argument that the Commonwealth had an obligation to "establish that the test was administered in compliance with the operational procedures set forth in the instrument's instruction manual, that preventive maintenance and repairs were done, or that the device had been regularly calibrated," as the defendant had argued.

The Court noted that, in this case, the officer testified that he had used a PBT device approved for use by DFS, had learned to operate the PBT device during field training, and had administered the test to the defendant in accordance with his training. The Court ruled that these facts provided a sufficient foundation that the officer performed the PBT in "the normal discharge of his duties" using "the proper method and equipment," as required by § 18.2-267(A) and (B).

Regarding admission of the blood test, the Court held that the two conditions that must be met in order for the statute to support a blood test, that the person must be arrested for DUI within three hours of the alleged offense occurring, and either the breath test must be unavailable or the person must be physically unable to submit to the breath test, were both present in this case. The Court ruled that the facts in this case established probable cause to support the defendant's arrest on suspicion of DUI. The Court also ruled that the officer reasonably determined that he the breath test was not available.

Regarding the implied consent form's use of the word "conviction," the Court refused to find that the officer unlawfully coerced the blood test. The Court pointed out that, in this case, if the defendant had unreasonably refused the blood draw, no criminal sanctions would have applied. The Court quoted the U.S. Supreme Court's warning that the holding in *Birchfield* should not be read to cast doubt on laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.

Lastly, although the Court found that the defendant's BAC was sufficient, alone, to prove his guilt, the Court also ruled that the facts were sufficient to establish the defendant's guilt under an actual-impairment theory, pointing to evidence of the defendant's alcohol-impaired driving and the moderate smell of alcohol on his breath.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0328174.pdf

REFUSAL

Virginia Supreme Court

Shin v. Commonwealth: December 28, 2017
294 Va. 517, 808 S.E.2d 401 (2017)
Fairfax: Defendant appeals his conviction for Unreasonable Refusal on Constitutionality grounds.

Facts: An officer stopped the defendant and learned that the defendant was driving while intoxicated. However, the defendant refused to take a breath test because he "did not believe he was intoxicated and should not have been subjected to such tests." The trial court convicted the defendant of unreasonable refusal.

The defendant argued that the "unreasonable refusal" code section was an unconstitutional condition on the privilege to operate a motor vehicle, that the section is unconstitutionally vague, and that the "implied consent" statute violates the Virginia Constitution because it requires the defendant to give self-incriminating evidence.

Held: Affirmed. The Court refused to consider the question of whether the "unconstitutional conditions" doctrine applies to the portion of the implied consent law that addresses blood samples. While the Court agreed that the Fourth Amendment typically requires a warrant to obtain a blood sample, the Court noted that *Birchfield* also held that the Fourth Amendment permits warrantless breath tests. The Court found it significant that the operation of a motor vehicle within the Commonwealth is not conditioned solely upon the operator's consent to provide a blood sample; it is conditioned upon the operator consenting to providing a blood sample or a breath sample or both a blood and a breath sample.

In this case, the Court reasoned that the officer's actual demand was for a breath sample, and any demand for a blood sample was, at best, conditioned upon the defendant's inability to provide a breath sample or the arresting officer's inability to take a breath sample. Thus, there was no actual demand for a blood sample in this case. In light of that, the Court refused to consider the argument.

The Court also rejected the defendant's argument that the unreasonable refusal statute is unconstitutionally vague. The Court pointed out that, in order to have standing to challenge the constitutionality of the statute, the defendant must first establish that his reason for refusing to take the breath test was objectively reasonable. In this case, his reason was not objectively reasonable.

Lastly, the Court rejected the defendant's self-incrimination argument. The Court clarified that Article I, § 8 of the Virginia Constitution does not protect an individual from having to give incriminatory evidence, but only self-incriminatory evidence. The Court explained that "self-incriminating" evidence is testimonial or communicative of the individual's thoughts, whereas "incriminatory" evidence is not. Because a breath test, like a blood test, is not testimonial, in that it does not communicate anything related to an individual's thoughts or motivations, Article I, § 8 does not apply.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170128.pdf

Aloudah v. Commonwealth: February 13, 2018
Alexandria: Defendant appeals her conviction for DUI on admission of the PBT, admission of the certificate of analysis, and sufficiency of the evidence.

Facts: An officer observed the defendant cut across three lanes of traffic, cross a double-yellow line, and nearly strike a construction barrel. The officer stopped the defendant and detected a

"moderate" odor of alcohol. The defendant admitted that he had consumed "one beer" several hours earlier. The officer also noted that the defendant had an open wound on his knee and offered him medical attention. The defendant accepted and the officer summoned an ambulance. The officer then advised the defendant of his right to take a Preliminary Breath Test (PBT) and the defendant agreed. The PBT read .15. The officer arrested the defendant for DUI.

At the hospital, the officer advised the defendant of implied consent and conducted a blood draw. The officer later explained that he did not offer the defendant a breath test using the machine at the jail because "we were going to the hospital in an ambulance, we're not going to stop at jail." The implied consent form that the officer used mentioned that the defendant could face a "conviction" for unreasonable refusal. The blood test resulted in a .164.

At trial, the defendant moved to suppress the arrest, but objected to admission of the PBT on the grounds that there was no foundation for its admission. The defendant also moved to suppress the blood certificate. The trial court denied these motions.

Held: Affirmed. The Court first addressed the PBT, repeating that its result is admissible in pretrial probable cause or suppression hearings. The Court then explained that, under § 18.2-267(A), PBTSs have a lower bar for result admissibility; their results are admissible at a suppression hearing if the preliminary test was performed by "any police officer in the normal discharge of his duties." The Court rejected the argument that the Commonwealth had an obligation to "establish that the test was administered in compliance with the operational procedures set forth in the instrument's instruction manual, that preventive maintenance and repairs were done, or that the device had been regularly calibrated," as the defendant had argued.

The Court noted that, in this case, the officer testified that he had used a PBT device approved for use by DFS, had learned to operate the PBT device during field training, and had administered the test to the defendant in accordance with his training. The Court ruled that these facts provided a sufficient foundation that the officer performed the PBT in "the normal discharge of his duties" using "the proper method and equipment," as required by § 18.2-267(A) and (B).

Regarding admission of the blood test, the Court held that the two conditions that must be met in order for the statute to support a blood test, that the person must be arrested for DUI within three hours of the alleged offense occurring, and either the breath test must be unavailable or the person must be physically unable to submit to the breath test, were both present in this case. The Court ruled that the facts in this case established probable cause to support the defendant's arrest on suspicion of DUI. The Court also ruled that the officer reasonably determined that he the breath test was not available.

Regarding the implied consent form's use of the word "conviction," the Court refused to find that the officer unlawfully coerced the blood test. The Court pointed out that, in this case, if the defendant had unreasonably refused the blood draw, no criminal sanctions would have applied. The Court quoted the U.S. Supreme Court's warning that the holding in *Birchfield* should not be read to cast doubt on laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.

Lastly, although the Court found that the defendant's BAC was sufficient, alone, to prove his guilt, the Court also ruled that the facts were sufficient to establish the defendant's guilt under an

actual-impairment theory, pointing to evidence of the defendant's alcohol-impaired driving and the moderate smell of alcohol on his breath.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0328174.pdf

EMBEZZLEMENT

Virginia Court of Appeals-
Unpublished

Dickerson v. Commonwealth: May 8, 2018
Greensville: The defendant appeals her conviction for Embezzlement on sufficiency of the evidence.

Facts: The defendant embezzled money from her employer, a grocery store, while working as the store's assistant manager. The defendant was responsible for closing the registers, preparing the bank deposits, and taking the deposits from the store to the bank. While working at the store, the defendant created a series of false returns, some of which were caught on video. Because she did not remove money from the register when she conducted the fraudulent returns, the registers contained more money than the register receipts indicated at the end of the night. However, the paperwork that the defendant completed reflected that the registers balanced at the end of the night.

Instead of removing money from the cash register inside the store, however, the defendant apparently took the money sometime before depositing it at the bank. There was no direct evidence of when or how the defendant took possession of the money. At trial, the defendant testified that he supervisor told her to conduct the false returns and denied taking the money.

Held: Affirmed. The Court explained that the lack of an eyewitness who saw or a video that showed the defendant taking the money did not entitle her to an acquittal. The Court found that the evidence, including the defendant's access to the deposits when she transported them to the bank, was sufficient to prove her guilt.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0821172.pdf

FAILURE TO APPEAR

Virginia Court of Appeals
Unpublished

Cosby v. Commonwealth: November 21, 2017
Richmond: Defendant appeals his conviction for Felony Failure to Appear on exclusion of testimony and sufficiency of the evidence.

Facts: The defendant failed to appear at his jury trial for Possession of a Firearm by Felon. The trial was scheduled for 10 a.m. and the defendant was not in the courthouse at that time. However, a detective saw the defendant arrive at the courthouse at about 10:20 a.m.. Prior to trial, the trial court granted the Commonwealth's motion to exclude that evidence, finding that it was irrelevant and would confuse the jury.

At trial, the defendant's aunt testified that she had planned to drive the defendant to his trial because none of his other family members had a driver's license. However, she became ill in the morning, causing them to leave too late to arrive on time. She testified that she dropped the defendant off at the courthouse and he ran to court. She also acknowledged that there was a bus stop near her home.

Held: Reversed. The Court ruled that the trial court erred by excluding evidence of the defendant's late arrival at the courthouse. The Court found that evidence regarding the time of the defendant's arrival at court and the extent of his tardiness was relevant to whether he made a good faith effort to appear in court at the designated time and date and to whether he "purposely, intentionally, or designedly" failed to appear.

However, the Court noted that the Commonwealth had otherwise presented sufficient evidence of the defendant's guilt, pointing out that proof that a defendant has received timely notice of the date and time of trial and thereafter fails to appear at the designated time is prima facie evidence that a defendant's failure to appear was willful.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1982162.pdf

Winder v. Commonwealth: February 6, 2018
Norfolk: Defendant appeals his convictions for Perjury on Collateral Estoppel and Sufficiency grounds.

Facts: The defendant failed to appear on a felony charge. The Commonwealth indicted the defendant for failure to appear. At a bond hearing, the defendant claimed that he had been hospitalized during his previous court date and produced a medical bill from the hospital. At trial for the failure to appear, the defendant again claimed to have been hospitalized and produced the same bill. However, the Commonwealth introduced testimony from the hospital's risk manager that the bill was not a genuine document and that the defendant had not been a patient on that date. The trial court stated "I think there's enough reasonable doubt on that charge" and dismissed the failure to appear charge.

The Commonwealth then indicted the defendant for perjury, regarding his testimony at the bond hearing and at the trial for failure to appear. During this trial, the Commonwealth introduced testimony from the hospital's custodian of records, who testified that the reference number on the bill

belonged to a patient other than the defendant and that there was no record of the defendant ever being a patient at the hospital. The trial court rejected the defendant's claim of collateral estoppel and convicted the defendant.

Held: Affirmed. The Court first reaffirmed that the acquittal of one charged with a crime is no bar to a prosecution for perjury for testimony given by him at the trial, even though a conviction would necessarily import a contradiction of the verdict in the former case. The Court then noted that § 19.2-128 does not require the Commonwealth to prove where someone was, only where someone was not. Thus, the Court observed that, although a court dismissing a failure to appear charge is free to announce a finding that the defendant was present in a certain location instead of in court, it is not required to make such a finding. In this case, the Court found no clear indication from the record that the trial court in the failure to appear trial used the defendant's claim that he was at another location to arrive at its decision in the failure to appear trial.

In a footnote, the Court also rejected a contention that the parties had raised on appeal that a trial court may find evidence sufficient to prove failure to appear but nevertheless dismiss the charge. The Court wrote that: "courts do not have such latitude in deciding whether to convict a defendant of the crime of failure to appear."

The Court then held that the evidence was sufficient to prove perjury in this case. The Court also ruled that the defendant had failed to preserve his argument that the Commonwealth did not present two corroborating witnesses to prove the perjury charge.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1813161.pdf

FAILURE TO REGISTER AS A SEX OFFENDER

U.S. Supreme Court

Packingham v. North Carolina: June 19, 2017
582 U.S. ___ (2017)
Certiorari to the Supreme Court of North Carolina: Defendant appeals his conviction for using a social media site after having been convicted of child sexual assault.

Facts: In 2002, North Carolina convicted the defendant of Indecent Liberties with a 13-year-old child. His conviction required him to register as a sex offender. In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of social networking websites, including common social media websites like Facebook and Twitter. Two years later, the defendant posted a comment on his Facebook page that celebrated his acquittal on a recent traffic offense. Law enforcement discovered the post. The defendant was convicted of violating the North Carolina ban on sex offenders using social media.

Held: Reversed. The Court ruled that North Carolina "may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture." The Court emphasized that cyberspace and social media are the most important place for the exchange of ideas in current society. The Court then expressed concern that offenders who have completed their sentences and completed probation nevertheless would have no access to social media altogether, preventing the offenders from engaging in the legitimate exercise of First Amendment rights.

The Court wrote: "By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."

The Court also made sure to note that the First Amendment permits the states to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/15-1194_08l1.pdf

Virginia Court of Appeals –
Published

Baugh v. Commonwealth: January 30, 2018
Chesterfield: Defendant appeals his conviction for Failure to Register as a Sex Offender on *Ex Post Facto* grounds.

Facts: The defendant, convicted of carnal knowledge of a minor in 2000, was required to register as a sex offender under the Virginia Sex Offender Registry (VSOR). In 2007, the General Assembly amended the VSOR to add a new provision, Code § 9.1-903(G), requiring an individual to "reregister either in person or electronically with the local law-enforcement agency where his residence is located within 30 minutes following any change of the electronic mail address information, any instant message, chat or other Internet communication name or identity information that the person uses or intends to use."

In 2015, the State Police discovered that the defendant had an email address that he had obtained a year before but had not registered. The defendant argued that the 2007 amendment was an unlawful *ex post facto* law, but the trial court convicted the defendant.

Held: Affirmed. The Court applied the analysis in *Smith v. Doe*, where the U.S. Supreme Court had found that the registration requirements imposed by Alaska were non-punitive and therefore could be applied retroactively without violating the *ex post facto* clause of the Constitution. As in the *Kitze* case, the Court agreed that the VSOR has legitimate non-punitive civil objectives, such as increasing the safety of the public from known violent sex offenders. In this case, the Court found that the defendant

failed to establish that VSOR is so punitive in purpose or effect that it should be deemed a criminal penalty.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0152172.pdf

Virginia Court of Appeals
Unpublished

Turner v. Commonwealth: April 17, 2018
Richmond: Defendant appeals his conviction for Failure to Register as a Violent Sex Offender on sufficiency of the evidence of his prior conviction.

Facts: As a result of his conviction in Idaho for "sexual abuse of a child under the age of 16," Idaho ordered the defendant to "register as a sex offender with the State of Idaho." In 2016, the defendant moved from Idaho to Virginia and registered as a violent sex offender. The defendant signed his re-registration form on August 23, but the registry did not receive his form until September 7, which was one week after the deadline.

At trial for failure to re-register as a violent sex offender, the defendant argued that the Commonwealth failed to prove that his prior conviction was "violent" under § 18.2-472.1(B). The trial court found that Virginia and Idaho's statutes were substantially similar.

Held: Affirmed. The Court found that the plain language of § 9.1-902(F) provides that, if a person is convicted in another jurisdiction of an offense requiring them to register on a "Sex Offender and Crimes Against Minors Registry" registry, Virginia classifies them as a sexually violent offender. Thus, the Court rejected the argument that "substantial similarity" was even an issue in this case. Instead, the Court found that, since the defendant was convicted of an offense in another jurisdiction – in this case, Idaho – that required registry on a Sex Offender and Crimes Against Minors Registry, he was classified as a violent sexual offender in Virginia.

The Court also found that the defendant knowingly failed to re-register as a violent sex offender within the ninety days required.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0826172.pdf

FALSE PRETENSES & FRAUD

Virginia Court of Appeals-
Unpublished

Brooks v. Commonwealth: December 26, 2017
Hampton: Defendant appeals his conviction for Larceny by False Pretense on variance with the indictment.

Facts: The defendant convinced a friend to cash a check for him and give him the money. Although the defendant claimed the check was legitimate, in fact the check had been stolen. After the defendant's friend received the money from the bank and gave it to the defendant, the bank discovered the fraud, reversed the charge and forced the defendant's friend to pay them back. The defendant's friend reported the offense to the police. The Commonwealth indicted the defendant for larceny by false pretense from his friend. At trial, the defendant argued that the larceny was from the bank, not the friend.

Held: Affirmed. The Court reasoned that, unlike in *Gardner*, the money obtained by false pretense was from the friend's own account at the bank, which she subsequently gave to the defendant. When she obtained the money, she had possession of it; it no longer belonged to the bank, and therefore the Court found that the indictment correctly specified that the funds belonged to the defendant's friend.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1228161.pdf

Jefferson v. Commonwealth: March 20, 2018
Pittsylvania: Defendant appeals her conviction for Welfare Fraud on Limitations of Cross-Examination and Sufficiency of the Evidence.

Facts: Over a two-year period, the defendant obtained SNAP and fuel-assistance benefits by filing several applications without disclosing her true employment. At trial, a DSS fraud investigator explained that, the more income the defendant had earned, the fewer benefits she would have been entitled to receive. She testified that the defendant received a total overpayment of approximately $3,500.00. Defense counsel asked the witness if she still would have been entitled to benefits, even if she had reported her true income, but the trial court sustained the Commonwealth's objection, finding that the question was irrelevant.

Held: Affirmed. The Court agreed that any testimony about what the defendant's benefits would have been had she disclosed the income would have been purely hypothetical, and thus irrelevant, since there was no evidence that the defendant did disclose that income. The Court pointed out that the evidence had no tendency to establish the fact in issue, namely, how much the defendant received in benefits overpayment. The Court also found that the evidence was sufficient to find the defendant guilty.

In a footnote, the Court also rejected two other arguments: First, that neither § 63.2-513 nor § 63.2-522 specifies whether the offense identified in § 63.2-522 constitutes petit or grand larceny; and

second, that under § 18.2-186.2, which criminalizes the use of false representations or non-disclosures to obtain housing assistance program benefits, this offense is only a misdemeanor.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0638173.pdf

FALSE REPORT TO LAW ENFORCEMENT

Virginia Court of Appeals
Published

McGuire v. Commonwealth: May 22, 2018
Loudoun: Defendant appeals her conviction for False Report to Law Enforcement on Venue grounds.

Facts: Using email and a phone call, the defendant falsely reported to Loudoun County Police that a man, who lived in Loudoun, had sexually abused a child in Loudoun County whom he was holding against her will in his home. An officer investigated and found no such child in the man's home. The officer learned that the defendant made the claims falsely. At trial in Loudoun County, the Commonwealth did not establish the location from where the defendant made the reports.

Held: Affirmed. The Court observed that, because the law enforcement officials who received the false report were located in Loudoun County, an act constituting a part of the violation of Code § 18.2-461 occurred in that jurisdiction. The Court also noted the harm resulting from the offense occurred exclusively in Loudoun County. For example, the police spent time and resources investigating the report and the victim, a resident of Loudoun County, was both inconvenienced and humiliated by the false report. Therefore, the Court ruled that Loudoun County was an appropriate venue for the prosecution of the offense.

The Court further explained that, in cases where a false report is given across jurisdictions, venue is appropriate in both the jurisdiction where the report is made and the jurisdiction where the report is received pursuant to the general venue provision contained in Code § 19.2-244.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0395174.pdf

FINANCIAL EXPLOITATION

Virginia Court of Appeals
Published

White v. Commonwealth: December 5, 2017
68 Va. App. 241, 807 S.E.2d 242 (2017)

Richmond: Defendant appeals her convictions for Financial Exploitation and Credit Card Fraud on sufficiency of the evidence.

Facts: The defendant was a caregiver for the victim, who suffered a serious brain injury due to West Nile virus and encephalitis. The victim was chronically forgetful, often became confused, and could not process basic information such as the date, time, or season. She was unable to take care of herself. The defendant's job required her to use the victim's debit card while taking her shopping because the victim often could not remember her PIN number and often dropped or forgot to put her debit card back in her purse. The defendant's job required her to assist the victim with making purchases using the card, but she had to put the card back into the victim's purse immediately upon the conclusion of each transaction.

ATM video surveillance revealed that the defendant used the victim's card to make two cash withdrawals for $300 each without the victim being present. When her employer confronted her, the defendant claimed that one of her co-workers had dressed up like her and "was trying to get her in trouble." At trial, the defendant argued that the Commonwealth failed to show that the victim was "mentally incapacitated" and failed to prove that the defendant used the card without the victim's consent.

Held: Affirmed. Regarding the financial exploitation offense, 18.2-178.1 defines "mental incapacity" as a "condition of a person existing at the time of the offense described in subsection A that prevents [her] from understanding the nature or consequences of the transaction or disposition of money or other thing of value involved in such offense." The Court ruled that the evidence was sufficient to prove that the victim's condition at the time of the offense precluded her from understanding the nature and consequences of the defendant's withdrawals of cash at ATMs from her account.

Regarding the credit card fraud offense, the Court ruled that it was reasonable to conclude that the victim did not consent to the defendant's possession of her debit card when the defendant withdrew funds from the bank account. The Court noted the defendant's sole possession of the card was not authorized as part of her employment and that the defendant immediately attempted to shift the blame when confronted. The Court pointed out that no evidence in the record supported the defendant's hypothesis of innocence that the victim consented to her possession and use of the card at the ATMs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1991162.pdf

FIREARMS AND WEAPONS OFFENSES

Virginia Supreme Court

Graves v. Commonwealth: October 12, 2017
294 Va. 196, 805 S.E.2d 226 (2017)
Danville: Defendant appeals his sentence for Use of a Firearm in Commission of a Felony on the length of the sentence imposed.

Facts: In 2007, after convicting the defendant of, among other crimes, using a firearm in the commission of a felony in violation of Code § 18.2-53.1, the trial court sentenced the defendant to five years' imprisonment with two years suspended on that charge.

The defendant filed a civil motion to vacate the sentence in 2016, alleging that the sentence exceeded the statutory maximum sentence. The trial court denied that motion.

Held: Reversed. The Court held, and the Commonwealth conceded, that the trial court's sentence exceeded the statutory maximum and therefore was void. The Court ruled that the Court of Appeals was correct in *Hines* that the three-year "mandatory minimum" sentence in Code § 18.2-53.1 constitutes both the mandatory minimum and the mandatory maximum sentence. The Court reviewed the legislative history in detail and rejected the dissent's textual reading, which had contended that the maximum term for this statute was life in prison. The Court directed the trial court to impose a three-year sentence.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160688.pdf

Gerald v. Commonwealth: October 17, 2017
68 Va. App. 167, 805 S.E.2d 407 (2017)

Virginia Beach: The defendant appeals his convictions for Discharging a Firearm in Public, Brandishing a Firearm, and Possession of a Firearm by a Convicted Felon on sufficiency of the evidence.

Facts: During a dispute, the defendant pointed a gun at the victims and began firing. An officer was driving by at the time, saw the defendant firing the gun, and responded. The defendant fled to his home, and although police captured him, they never found the gun. However, officers did locate bullet fragments and casings at the scene, which a forensic scientist testified came from a single firearm.

At trial, the defendant argued that the Commonwealth failed to prove that he had a "firearm" within the meaning of the statutes.

Held: Affirmed. The Court first noted that the Brandishing charge doesn't even require that the Commonwealth prove that the defendant had a real firearm, although it did in this case. However, the Court then turned to Discharging a Firearm in Public, § 18.2-280, which does not have a definition of the word "firearm." The Court concluded that the definition of firearm provided in § 18.2-282(C); "any weapon that will or is designed to or may readily be converted to expel single or multiple projectiles by the action of an explosion of a combustible material," is the appropriate definition of "firearm" for the purposes of Code § 18.2-280.

Regarding sufficiency generally, the Court found no need to determine make, model, and caliber because the defendant fired multiple projectiles in front of several witnesses.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0731161.pdf

Commonwealth v. Botkin: October 24, 2017
68 Va. App. 177, 805 S.E.2d 412 (2017)
Scott: The Commonwealth appeals the running of two sentences for Possession of a Firearm by Felon concurrently.

Facts: The defendant pled guilty to two counts of possession of a firearm by a convicted nonviolent felon, in violation of Code § 18.2-308.2(A). The trial court ordered the two mandatory sentences of two years to run "concurrent to each other"; the Commonwealth appealed.

Held: Reversed. The Court agreed that the trial court erred in running the sentences for the defendant's two convictions concurrently when, by statute, the trial court was mandated to run the sentences consecutively. The Court repeated that multiple sentences are presumed to be served consecutively. The Court found that, once the trial court found the defendant guilty of two counts of possession of a firearm, the law required it to render a sentence that included two consecutive mandatory minimum terms of two years, as a sentence under Code § 18.2-308.2 must be served separately and apart from any other sentence imposed.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0458173.pdf

Bryant v. Commonwealth: April 5, 2018
Aff'd Court of Appeals Ruling of April 25, 2017
Rockingham: Defendant appeals her conviction for Unlawfully Discharging a Firearm within an Occupied Building on sufficiency of the evidence and denial of a jury instruction.

Facts: While attempting to commit suicide in her hotel room, the defendant fired a handgun. At trial, the defendant claimed that she fired the gun accidentally. However, an officer testified that seven pounds of pressure was required to fire the handgun and that after the defendant fired the gun, officers saw her point it at them. The officer also testified that the defendant stated that she had fired handguns before, although she denied that at trial.

The defendant requested a jury instruction that the Commonwealth was required to prove that the shooting was not accidental, but the trial court denied the instruction. The Court of Appeals affirmed the conviction.

Held: Affirmed. The Court held that proof of accidental or inadvertent discharge is not a defense to a violation of §18.2-279. The Court pointed out that the section designated various levels of

punishment, depending on whether the *mens rea* was "malicious" or merely "unlawful." The Court explained that, while "maliciously" describes a wrongful act done "willfully or purposefully," "unlawfully," describes conduct that merely demonstrates "criminal negligence." The Court wrote that: "the irresponsibility of the proscribed conduct standing alone may be the *mens rea* underlying the offense. No specific intent need be shown." The Court repeated that "handling an instrumentality as inherently dangerous as a loaded firearm in an occupied building, with one's finger on the trigger, is criminally negligent if discharge results in such a manner as to endanger others in the building."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170712.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0922163.pdf

Virginia Court of Appeals
Published

Cartagena v. Commonwealth: November 28, 2017
68 Va. App. 202, 807 S.E.2d 223 (2017)
Virginia Beach: Defendant appeals his convictions for False Statement on a Firearms Form and Possession of a Firearm by Felon on sufficiency of the evidence.

Facts: The defendant, a felon, attempted to purchase a firearm. His felony conviction took place in New York State. On his firearm purchase form, he stated that he did not have a prior felony conviction. The store refused to sell him a firearm, so he purchased a firearm privately. An officer stopped the defendant and seized the firearm.

At trial, the Commonwealth introduced a "Uniform Sentence and Commitment Order" from New York State. The order convicted the defendant of attempted assault and cited the code section, specifically noting that the offense was a felony. Along with the conviction order, the Commonwealth introduced a copy of the statute that was in effect at the time of the conviction, which also stated that the offense was a felony. The code section did not provide the range of punishment for the offense.

The defendant argued that the Commonwealth had failed to prove that the range of punishment in New York was consistent with the range of punishment for a felony in Virginia. He also argued that the evidence did not demonstrate that he knowingly made a false statement on the form.

Held: Affirmed. Regarding the defendant's possession of a firearm, the Court held that the express terms of the statute require nothing more than proof that the defendant had a conviction for an offense that was a felony under the laws of another state. The Court rejected the argument that the other state's range of punishment must be consistent with the range in Virginia.

The Court also found that the evidence demonstrated that the defendant knowingly made a false statement when he denied having a felony conviction. The Court found that, given his New York

felony conviction, the defendant could not have truthfully answered the form's question with anything other than an affirmative response.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2002161.pdf

Jones v. Commonwealth: December 19, 2017
68 Va. App. 304, 808 S.E.2d 220 (2017)
Petersburg: Defendant appeals his conviction for Shooting at an Occupied Vehicle on sufficiency of the evidence.

Facts: The defendant, while inside a vehicle, shot another person who was also inside the vehicle. At trial, the defendant argued that § 18.2-154 did not apply to him because he was also inside the vehicle.

Held: Affirmed. The Court likened this case the *King* case, which addressed § 18.2-279 and held that the shooter's location is irrelevant to the charge of shooting "at or against" a building. The Court held that the prohibition in Code § 18.2-154 against shooting "at" a motor vehicle focuses on the direction of the shot, not the location of the shooter. Consequently, the statute encompasses a shooting when the shooter is also inside the vehicle when he or she shoots at it.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0574162.pdf

Virginia Court of Appeals-
Unpublished

Kinlaw v. Commonwealth: June 20, 2017
York: Defendant appeals his conviction for Use of a Firearm on sufficiency of the evidence.

Facts: The defendant robbed a clerk at a tanning salon. The defendant entered wearing a sweater and jeans and gave the victim a note that said "I have a gun. I don't want to hurt you. Give me the money." The defendant ordered the victim to keep her hands where he could see them. The victim complied. The defendant then ordered the victim to give him her driver's license. He photographed the license, telling her that if she said anything to the police, he would find her.

The victim identified the defendant in a photo array. Police apprehended the defendant several days later. At trial, the victim testified that she was "very scared" during the robbery. A police officer testified that the victim was visibly afraid when she saw the photograph of the defendant in the photo array. The defendant argued that there was no evidence that he actually used or possessed a firearm during the robbery.

Held: Affirmed. The Court ruled that the defendant's explicit assertion that he had a gun, his threatening conduct and other statements during the robbery, the circumstances surrounding his capture, and the reasonable inferences flowing from these facts supported the trial court's finding that the defendant used a firearm in the commission of the robbery.

Just as in *Powell*, the Court reasoned that in light of the evidence, the defendant could have discarded the firearm without being seen. Thus, unlike the traditional *corpus delicti* rule, it was unnecessary to corroborate the defendant's statement that he had a gun. Instead, the Court explained that a fact finder may accept circumstantial evidence involving primarily the assertion of a defendant that he had a gun in order to find that he did, in fact, use a gun in the commission of a felony enumerated in Code § 18.2-53.1.

The Court also repeated that the Commonwealth was not required to present explicit testimony from the victim that she believed that he actually possessed a firearm during the robbery. The Court explained that the question was, instead, whether the totality of the circumstances supported a finding that the defendant possessed and used a firearm to commit the crime

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0761161.pdf

Watson v. Commonwealth: June 27, 2017
Richmond: Defendant appeals his conviction for Possession of a Firearm by Convicted Felon on sufficiency of the evidence.

Facts: During a traffic stop, an officer discovered a firearm in the trunk of the car that the defendant was driving. The car belonged to the defendant and his girlfriend, but the defendant was alone in the car. When the officer found the gun, the defendant did not seem surprised, but immediately started to negotiate with the officer to get out of the charge. While in jail, the defendant called his girlfriend and stated: "They found the gun, I'm going to jail."

Held: Affirmed. The Court found the defendant's statement on the recorded phone call was the most dispositive fact in the case and demonstrated that the defendant knew of the gun's presence in the car.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1214162.pdf

Overton v. Commonwealth: November 21, 2017
Virginia Beach: The defendant appeals the imposition of a suspended sentence on statutory grounds.

Facts: The defendant pled guilty to and was convicted of robbery, abduction, and use of a firearm in the commission of a felony. In addition to sentences for robbery and abduction, the trial court

sentenced the defendant to three years' incarceration and to three years good behavior on the firearm charge.

Held: Reversed. The Court repeated, as in *Graves v. Commonwealth*, that the three-year term of confinement authorized in Code § 18.2-53.1 is both the mandatory minimum and the mandatory maximum sentence. Thus, any part of a sentence exceeding three years is void.

In this case, the Court ruled that, in the absence of a suspended term of post-release supervision, the three-year term of good behavior was unenforceable, and thus a nullity.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0268171.pdf

Coleman v. Commonwealth: November 28, 2017
Hopewell: Defendant appeals his conviction for Possession of a Firearm by Felon and Possession of a Firearm with a Controlled Substance on sufficiency of the evidence.

Facts: The defendant, a felon, carried a gun and drugs in a car that he was driving. An officer stopped the defendant for a traffic violation. The defendant and his passenger immediately got out of the car and walked to the back of the officer's vehicle. The officer told them to get back in the car, but they at first refused. The defendant finally agreed to get back in his car, but before he did, he appeared to kick an object inside the car. A passenger had also been in the back seat of the car; he never moved.

The officer searched the car and found cocaine, baggies and a scale around the driver's seat of the car. The officer found a handgun lying in the back seat of the car. Police searched the contents of the defendant's cellphone and found a photograph of the same handgun in the phone. At trial, a police expert witness testified that many drug dealers carry firearms. In addition to the listed charges, the trial court also convicted the defendant of Possession of Cocaine with Intent to Distribute.

Held: Affirmed. The Court held that the evidence demonstrated that the defendant constructively possessed the firearm in the back seat of his car. The Court found the expert's testimony that drug dealers often carry guns, together with the fact that the defendant was convicted of possession of cocaine with intent to distribute, permitted the inference that the defendant constructively possessed the firearm to protect his illegal activities.

In addition, the Court noted it was irrelevant whether the defendant was near the gun initially in light of him walking toward the officer before the officer could approach, which, the Court reasoned, supported an inference that he wanted to prevent discovery of the gun. The Court also relied on the fact that the defendant had a photo of the gun on his phone.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1712162.pdf

Taylor v. Commonwealth: January 9, 2018
Buckingham: Defendant appeals conviction for Use of a Firearm in Commission of Murder on sufficiency of the evidence.

Facts: The defendant murdered a man by stabbing him to death. The defendant first shot someone else in the back, killing that person, and then fired another shot near the victim that he would later stab. He got into a fight with the victim, losing his gun in the process. The defendant then pulled his knife and stabbed the victim to death.

Held: Affirmed. The Court held that the evidence supported a finding that the defendant used or attempted to use a firearm or displayed one in a threatening manner while committing or attempting to commit first-degree murder of the victim, even though he killed the victim with a knife. The Court pointed out that § 18.2-53.1 does not require evidence that the victim was in fact killed with a firearm; instead, the statute requires only that the defendant used, attempted to use, or displayed a firearm in a threatening manner during the commission or attempted commission of the relevant enumerated felony (in this case, murder).

In this case, the Court found sufficient evidence that the defendant both attempted to use the firearm and also that he displayed the firearm during the offense. The Court ruled that the firearm was part of the ongoing course of conduct through which the victim's murder was ultimately committed.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1390162.pdf

Green v. Commonwealth: February 13, 2018
Norfolk: Defendant appeals his convictions for Discharge of a Firearm in Public and Use of a Firearm in a Felony on jury instructions, refusal to force election of offenses, and sufficiency.

Facts: The defendant got into a dispute at a club with another man. The man had argued with the defendant's girlfriend inside the club and the man had then "yanked" the girlfriend out of the club. The defendant walked out of the club after the man and went to his car, retrieving an item.

Outside the club, the victim, who did not know the defendant, spoke with the man with whom the defendant had been arguing. Suddenly, the man told the victim to "get out the way." Unbeknownst to the victim, the defendant had drawn a gun and was about to open fire on the man. The man drew a gun, and immediately after that, the victim felt a gunshot strike his left hip. He ducked for cover behind a car, from where he heard "a whole lot of shooting." The man firing at the defendant shot the defendant in the chest and then fled the scene.

Police spoke to the defendant a few days later. The defendant claimed that he was unarmed at the time of the shooting, did not fire any shots, and did not know who the shooter was. However, police later examined the surveillance video and determined that the defendant had fired the first shots. The video revealed that the defendant had waited by the other man's car and then opened fire.

At trial, the jury acquitted the defendant of aggravated malicious wounding but convicted him of discharging a firearm in public under §18.2-280 and use of a firearm in the commission or attempted commission of aggravated malicious wounding or malicious wounding under §18.2-53.1.

Held: Affirmed in part, reversed in part. The Court held that the trial court properly instructed the jury and that the evidence was sufficient to convict, but also held that the trial court erred in not requiring the Commonwealth to elect which firearm offense it would prosecute.

The Court examined the defendant's claim of self-defense, describing it as one of justifiable self-defense (that is, self-defense "without fault"), not excusable self-defense. Thus, the Court explained, it was the defendant's burden to show that he fired only after he was shot. However, examining the record, the Court concluded that the evidence did not show he was not the aggressor.

The Court found that the defendant's self-defense claim only invited the jury to speculate as to who fired the first shot. The Court observed: "A scintilla of evidence must be based on facts, which presupposes that some evidence exists." In this case, the Court found no such evidence at all, writing that "a defendant may not claim he had a right to arm himself for self-protection when he armed himself before he had a reasonable belief another person intended to injure or harm him."

Regarding the defendant's conviction for Discharging a Firearm in Public, the Court examined the language of §18.2-280(E), which states: "Nothing in this statute shall preclude the Commonwealth from electing to prosecute under any other applicable provision of law instead of this section." The Court concluded that §18.2-280(E) requires the Commonwealth to choose to prosecute under Code §18.2-280(A), (B), or (C) or choose to prosecute under any other applicable provision of law. However, because the defendant had failed to require the Commonwealth to elect between the offenses at least one week prior trial as required by §19.2-266.2, the Court simply remanded the case for the Commonwealth to elect which of the two convictions should be set aside.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0344171.pdf

Colbert v. Commonwealth: February 20, 2018
Orange: Defendant appeals his conviction for Carrying a Concealed Handgun on sufficiency of the evidence.

Facts: During an investigative stop, officers removed the defendant from his car and then discovered a handgun in a canvas bag located next to where the defendant had been seated. The gun was tucked into some clothes and the grip of the gun was protruding from a holster. The top of the bag was open. The defendant admitted that the gun belonged to him.

At trial, the trial court rejected the defendant's arguments that the officers did not see the bag containing the gun until after they removed him from the vehicle, and that he was no longer sitting next to it at the time the police discovered the gun.

Held: Affirmed. The Court ruled that hat the gun was "readily accessible for prompt and immediate use" and was within the defendant's dominion and control when police first encountered him. The Court explained that it is irrelevant that the defendant was no longer next to the gun when the police found it, as the offense was already complete when they did

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0292172.pdf

Townes v. Commonwealth: March 13, 2018
Richmond: Defendant appeals his conviction for Possession of a Firearm by Felon on denial of a jury trial and sufficiency.

Facts: An officer attempted to stop the defendant for a traffic violation, but the defendant fled in his vehicle. After crashing, the defendant fled on foot while clutching something concealed near his waistband. After capturing the defendant, the officer found a firearm on a pile of leaves, close to where the defendant fell while the officer was pursuing him. The officer noticed that the firearm was warm to the touch and that it was dry and clean, even though it had rained earlier. There were no other people in the area that could have dropped the firearm.

A few months prior to trial, the defendant waived his right to trial by jury. On the day of trial, the defendant asked for a new attorney. When the judge asked the defendant why he wanted a new attorney, the defendant expressed displeasure that his attorney shared a plea offer with him. The defendant stated, "I didn't want no bench. I want a jury. So, I don't want to try to move forward on the bench." The judge asked the defendant if he recalled having given up his right to a jury trial, to which the defendant responded, "I don't know." The trial court found that the defendant had waived his right to trial by jury and asked both sides if they were ready. Both attorneys stated that they were ready. The trial court tried the case.

Held: Affirmed. The Court first ruled that the defendant failed to present the trial court with a motion to withdraw his jury trial waiver, preventing the trial court from having the opportunity to adequately consider and rule on any motion to withdraw his waiver. The Court then found that the circumstantial evidence was sufficient to convict the defendant of possession of the firearm.

Tags: Jury Trial – Waiver, Possession of a Firearm – sufficiency

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0885172.pdf

Williams v. Commonwealth: May 29, 2018
Richmond: Defendant appeals his conviction for Possession of a Firearm by Violent Felon on sufficiency of the evidence.

Facts: The defendant, a felon, possessed a firearm. One of his many felony convictions was a federal conviction for possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1). The trial court ruled that that felony conviction was a "violent" felony for purposes of 18.2-308.2 and imposed the mandatory five-year sentence.

Held: Reversed and Remanded. The Court observed that, under the terms of the federal statute, silencers and mufflers are considered firearms. 18 U.S.C § 921(a). Thus, because a muffler or silencer is defined as a firearm under the federal statute but not for purposes of Code § 18.2-308.2, the offenses were not substantially similar. The Court remanded the case for re-sentencing.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0808172.pdf

HABITUAL OFFENDER

Virginia Court of Appeals - Unpublished

Dawson v. Commonwealth: October 18, 2017
Campbell: Defendant appeals his conviction for Driving while Habitual Offender on sufficiency of the evidence.

Facts: In 1994, the circuit court declared the defendant to be a habitual offender. In 2015, the defendant drove and an officer arrested the defendant. At trial, the defendant argued that that the 1994 adjudication order was void *ab initio* because the face of the order stated he was not present for the hearing and did not state that he had been properly served with a copy of the show cause order, giving him notice of the filing of the information to declare him an habitual offender. He argued that, as a result, the trial court did not have personal jurisdiction over him and the order was accordingly void.

Held: Affirmed. The Court examined the show cause order that was issued by the circuit court directing the defendant to appear and show cause why he should not be declared a habitual offender. That Court pointed out that the order also directed that a copy "shall be served on said Kevin Lee Dawson in the manner prescribed by law…" The Court found that it could presume that the judge presiding over the 1994 adjudication hearing knew the statutory requirements for service of the show cause order and would not have proceeded in adjudicating the defendant an habitual offender if the statutory requirements of Code § 46.2-354 had not been met.

The Court rejected the argument that the silence of the order on the issue of personal jurisdiction established that the trial court did not have personal jurisdiction over him in 1994. The Court reasoned that, although the adjudication order did not expressly state that the show cause order was properly served, neither did it show that it was not properly served.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1106163.pdf

HIT & RUN

Virginia Court of Appeals
Published
Cocke v. Commonwealth: July 11, 2017
68 Va. App. 11, 801 S.E.2d 427 (2017)
Campbell: Defendant appeals his conviction for Felony Hit & Run on sufficiency of the evidence.

Facts: The defendant struck a vehicle at a stoplight and then fled the scene. An insurance adjuster initially assessed the damage at $792. However, when the body shop examined the vehicle more carefully, the repair bill came to $1,484. Half of that bill was for parts, and half for labor. The trial court rejected the defendant's arguments that he should only be responsible for the cost of the parts, not the labor, and also that he should only be responsible for the amount of the victim's insurance deductible.

Held: Affirmed. The Court pointed out that while § 46.2-894 does not provide a method for measuring the damage to a vehicle, the Code defines the amount of loss in a similar statute, § 18.2-137. That offense, Destruction of Property, provides that "the amount of loss caused by the destruction, defacing, damage or removal of such property . . . may be established by proof of the fair market cost of repair or fair market replacement value." The Court extended its analysis from a civil case, *Averett,* and held that where a motor vehicle is capable of being repaired, the total reasonable cost of returning that vehicle to its pre-crash condition constitutes the amount of damage in a prosecution for violation of Code § 46.2-894.

Full case at:
http://www.courts.state.va.us/opinions/opncavwp/1553163.pdf

Virginia Court of Appeals
Unpublished

Fuller v. Commonwealth: April 24, 2018
Chesapeake: Defendant appeals his conviction for Hit & Run on sufficiency of the evidence:

Facts: The defendant struck the victim's car in a parking lot. The defendant refused to speak to the victim. Instead, he gave his information to a man who had intervened after the crash. The man was wearing casual clothes, but both the defendant and victim believed that the man was a police officer because he had a jacket in his car that had an insignia on it that appeared to be a law enforcement

insignia; the trial court later concluded that there was no evidence this person was a law enforcement officer.

The mysterious stranger gave the victim the information that he said the defendant had provided, including a name, phone number, license plate number, and insurance information. The defendant left without ever speaking to the victim. The victim later learned that all of the information she received was false. Instead, her insurance company identified the defendant using a photograph of his license plate that the victim took at the scene.

At trial, the defendant admitted that he relied on the stranger to provide the information, rather than speaking directly to the victim, whom he described as "hysterical." He claimed that he gave the stranger correct information and that he was scared of the victim because of her demeanor.

Held: Affirmed. The Court pointed out that, although nothing prevented the defendant from conveying his information to the victim, the defendant left the scene before directly giving any information to her or ensuring that the information that the victim had was correct. The Court wrote that the defendant "relied all too willingly, and at his own peril, on the mysterious … individual who appellant acknowledged he did not know" and "unreasonably relied on the supposed representations of this mysterious stranger, who emerged from the convenience store in a white tank top, when all he needed to do was to exchange his personal information with [the victim]. By providing his information to the woman whose vehicle he hit, appellant could have easily avoided a felony conviction."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0947171.pdf

HOMICIDE

Virginia Court of Appeals – Published

Edwards v. Commonwealth: December 19, 2017
68 Va. App. 284, 808 S.E.2d 211 (2017)
Chesterfield: The defendant appeals his conviction for Murder on venue and sufficiency grounds.

Facts: The defendant murdered his ex-girlfriend. The victim had terminated her relationship with the defendant after he repeatedly threatened and then choked her. After that incident, the defendant continued to contact and threaten the victim, stating "one day I'm gonna get you. Somehow, some way, when you least expect it, I'm gonna get you." The victim's personal journal contained various statements exhibiting the victim's fear of the defendant. On the last day she was seen alive, the victim had a friend at her house in Chesterfield County. After the friend left, no one ever saw the victim again.

Cell phone tower evidence showed that the defendant was around the victim's house for several hours between the night of her disappearance and the next morning. The victim's neighbors

noticed the defendant's car parked outside the house. One neighbor noticed an individual fitting the defendant's description in the victim's front yard in the early morning of her disappearance. Another neighbor heard noises sounding like screams come from the direction of the victim's house shortly thereafter. In the afternoon, both the victim's and the defendant's cell phones pinged from towers located away from the house.

Police later found the victim's phones discarded on the side of Interstate 95. Police found no sign of forced entry into the victim's home; the defendant had access to the home. Inside the victim's house, police found all of her personal belongings, including her luggage, passport, glasses, purse, car and keys; even her cats were still there. When police searched the defendant's car, a canine alerted police to the presence of human remains, they found blood stains in the trunk, and they found a blanket that had a hair on it matching the victim's hair color. The blanket appeared to come from the victim's house. Although police recovered no blood or hair evidence from inside the house, the defendant had a bucket and cleaning supplies in his car.

Police interviewed the defendant, who initially lied about being near the victim's house, but ultimately admitted that he had been outside her home the night she disappeared. The defendant's cell phone records showed that in the days leading up to the victim's disappearance, the defendant attempted to contact the victim almost every day, but stopped immediately after she disappeared.

At trial, the defendant argued that the Commonwealth had failed to demonstrate that Chesterfield was the appropriate venue and also argued that the evidence did not demonstrate that the victim was actually deceased. The defendant theorized that the victim may merely have "elected to live life in absentia."

Held: Affirmed. The Court first rejected the defendant's argument regarding venue. Although the Commonwealth had relied on § 19.2-244, the Court pointed out that under § 19.2-248, venue would be established if any violence leading to the victim's death occurred within the home, no matter how minor. In this case, the Court found that the Commonwealth established a strong inference that the defendant went into the victim's house in Chesterfield County for several hours and either mortally wounded or murdered her there.

Regarding sufficiency, the Court first repeated that no law exists in Virginia requiring the Commonwealth to produce a victim's dead body to obtain a conviction for murder. The Court reviewed the evidence in detail and found that it demonstrated that the defendant displayed express malice in killing the victim. The Court also rejected the hypothesis that the victim had simply fled to start a new life, given that she had abandoned all of her identifications, phones, and even pets suddenly and without warning.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0902162.pdf

Brown v. Commonwealth: May 22, 2018

Dinwiddie: Defendant appeals his conviction for Capital Murder and related offenses on Denial of Grand Jury Information, Denial of Change of Venue, Jury Selection, Jury Instruction, and Sufficiency issues.

Facts: The defendant murdered a Virginia State Trooper and attempted to kill a second Trooper. The first Trooper pulled over to assist the defendant on the side of the road, but the defendant opened fire and killed the Trooper before he could even put his car in park. The defendant continued to fire on the Trooper's car as it rolled off the road. When a second Trooper arrived, the defendant fired at him and then escaped into the woods, discarding his rifle and clothes. Officers later found him hiding and arrested him. Without any questioning, the defendant gave an extensive statement explaining what he did and why he did it.

Prior to trial, the defendant sought disclosure of all grand juror information for the preceding five years in order to prepare a potential Sixth Amendment fair cross-section challenge to the grand jury selection process. The trial court denied the motion, except for the data from the previous year. The defendant also moved to change venue, but the trial court denied that motion as well.

Jury selection took six days and required a panel of 120 jurors. Almost all the jurors had heard publicity about the case. Though the court struck some jurors due to publicity, it struck more prospective jurors for their views on the death penalty, difficulty understanding the burdens of proof, and other reasons unrelated to prejudice against the defendant.

During jury selection, one juror indicated that she believed "he did it" based on media reports, but added that she would need "to hear the facts would decide my decision once everything is laid out… because that was then; this is now … I can come to a clear conclusion after everything is said and done." Another juror conceded that he had "followed the case pretty heavily when it happened" and that "it would be hard not to form an opinion" about the case based on the media exposure. However, he also affirmed that he would be able to decide the case based solely on the evidence presented in the courtroom and would not let the media reports about the case affect his judgment. The trial court denied the defendant's motion to strike those two jurors.

At trial, the defendant argued that he was not guilty by reason of insanity. He presented evidence from his own expert, Dr. Sara Boyd, and the Commonwealth's expert, Dr. Evan Nelson. Both experts opined that the defendant understood the criminal nature of his acts, but opined that the defendant thought that the nature of his actions was not wrongful because he believed he was acting for God.

On rebuttal, over the defendant's objection, the trial court admitted testimony from a deputy that the defendant stated at his arraignment: "I'm guilty. Go ahead and stick the needle in my arm." The defendant objected that this evidence was not relevant and also objected that the Commonwealth did not disclose this statement in discovery under 3A:11 as a statement to law enforcement.

The trial court also denied the defendant's request for a 2nd Degree Murder instruction.

Held: Affirmed. Regarding the defendant's request for grand jury information, the Court agreed that the trial court properly denied the defendant's request. The Court explained that a criminal defendant in Virginia is not automatically entitled to grand juror lists and that the defendant's expansive request implicated recognized juror privacy concerns. The Court also repeated that a petit jury's verdict of guilt renders harmless beyond a reasonable doubt any claim of defect in the composition of the grand jury, unless a structural error is shown, such as might arise in a claim of intentional discrimination in violation of the Equal Protection Clause under the Fifth or Fourteenth Amendments.

Regarding the defendant's request for a change of venue, the Court ruled that the defendant failed to overcome the presumption that he would receive a fair trial in the jurisdiction in which the crime occurred. The Court rejected the argument that factual reporting of a victim's life and community standing or the defendant's past conduct is inherently inflammatory. The Court also noted that reporting on the offense was generally accurate and largely took place three years before trial.

Regarding the defendant's motion to strike the two specific jurors, the Court ruled that the prospective juror's responses indicated that they had not formed "fixed and decided opinions" about the defendant's sanity, the issue upon which his guilt or innocence turned. Because they were not otherwise disqualified, the Court held that the trial court did not err.

Regarding sufficiency, the Court found sufficient evidence that the defendant acted with the intent to interfere with the officer's performance of his official duties. The Court pointed out that the officer was in uniform when he pulled over his marked police cruiser with lights activated, and the defendant's own words indicate that he knew he attacked and killed a law enforcement officer acting in his official capacity.

The Court also agreed that the trial court properly denied an instruction for 2nd degree murder. Though there is a presumption that all homicides are second-degree murders, in this case the Court observed that no evidence supported a finding that the defendant acted without willfulness, deliberation, or premeditation. The Court pointed out that the defendant was camouflaged, armed with a powerful hunting rifle, and had enough ammunition to kill one Trooper, carry on an extended gunfight with another, and then flee and conceal his gun and clothing.

Regarding the defendant's statement offered in rebuttal, the Court held that the defendant's statement at his arraignment was not subject to discovery disclosure and was relevant to contradict the defendant's argument that he did not know his actions were wrong. Though Rule 3A:11(b)(1) provides for disclosure of a defendant's "oral statements or confessions" he or she makes "to a law enforcement officer," the Court found that the rule contemplates disclosure only of those statements made either in response to police questions or at least volunteered to an officer, but not those an officer merely happens to hear.

Lastly, the Court rejected the argument that the trial court improperly rejected his insanity defense. The Court repeated that, once the Commonwealth has adduced proof that "the accused committed the act, it is not sufficient for the accused to raise a reasonable doubt as to his sanity; he must go one step further and prove to the satisfaction of the jury that he was insane at the time of the commission of the act."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0434172.pdf

Virginia Court of Appeals
Unpublished

Smith v. Commonwealth: December 19, 2017Fredericksburg: The defendant appeals his convictions for Robbery and related offenses on admission of an out-of-court identification and sufficiency of the evidence.

Facts: The defendant and several of his confederates robbed and murdered a man. According to witnesses, the defendant and his confederates pulled up alongside the victim's car. The defendant pulled a gun from his waist as he opened the victim's car door. The defendant told the victim to "get on the floor." The defendant's confederates on the other side of the vehicle ransacked the car while the defendant threatened the victim with a gun. The defendant then said to the victim "I told you don't." A witness heard a gunshot and heard the victim yell. The defendant shot the victim repeatedly. Police found items taken from the car nearby.

After the murder, police confronted a witness but the witness repeatedly lied. Police arrested and charged the witness with obstruction of justice. Afterwards, police showed the witness photo arrays on three separate occasions. In the last set, the defendant's photo was among the photos and the witness identified the defendant, indicating that he was fifty or sixty percent sure that the defendant was involved in the incident. A few weeks later, the Commonwealth requested dismissal of the witness' charge.

Prior to trial, the defendant moved to suppress the witness' out-of-court identification of him. At a hearing on the motion, the defendant argued that the witness' identification in the photo lineup was unduly suggestive because the witness was facing criminal charges.

Held: Affirmed. The Court repeated that an out-of-court identification "will be admitted if either (a) the identification was not unduly suggestive, or (b) the procedure was unduly suggestive, but the identification is nevertheless so reliable that there is no substantial likelihood of misidentification." The Court also emphasized that the burden is on a defendant to establish that the photographic lineup procedure was impermissibly suggestive.

In this case, the Court found that the procedure was not unduly suggestive. The Court pointed out that the witness only stated that he was somewhat certain of his identification, and never definitively pointed to the defendant as the perpetrator in order to relieve himself of the obstruction of justice charge. Moreover, the Court noted that the police interviewed the defendant four times, and showed him photo lineups at three of the interviews. Only at the third photo lineup did the defendant make his identification.

The Court also agreed that the evidence sufficiently demonstrated that the defendant shot the victim while stealing property from him and after forming the intent to rob him.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1938152.pdf

Smith v. Commonwealth: January 16, 2018
Spotsylvania: Defendant appeals her conviction for Voluntary Manslaughter on sufficiency of the evidence, refusal to grant a mistrial, and refusal to grant a continuance.

Facts: The defendant shot and killed a man. The defendant claimed that she did so accidentally, while emptying the firearm for storage, but the evidence demonstrated that she had been arguing with the victim just before shooting him and the physical evidence did not corroborate her statement.

At trial, the defendant asked to be excused during the presentation of some of the evidence. The trial court agreed after the defendant stated that it would not impede her ability to assist her attorneys. The defendant later made the same request again and when she did, her attorney indicated that it appeared that the defendant was suffering from PTSD. The defendant's attorney asked for a recess until the next day so that the defendant could consult with her psychiatrist. The trial court denied that motion. After asking the defendant extensive questions, the trial court found that the defendant was competent and knowingly waived her right to be present and to testify at trial.

The defendant's attorney made a motion for a mistrial, arguing that the defendant's mental state at trial made her temporarily incompetent, but the trial court denied the motion. The parties instructed the jury on the various grades of homicide, from first-degree murder to involuntary manslaughter. The jury found the defendant guilty of voluntary manslaughter. After the trial, the defendant argued that the Commonwealth failed to prove "sudden heat of sudden passion."

Held: Affirmed. Regarding the conviction for voluntary manslaughter, the Court repeated the rule under *Blankenship* that: "if the evidence demands or warrants a conviction of a higher degree of homicide than that found by the verdict, and there is either no evidence in support of acquittal or, if there is, it is not sufficient to warrant or require acquittal, or is disbelieved by the jury, the defendant is not entitled to a reversal or a new trial on the ground that the court instructed on the lower degree of homicide, as to which there was no evidence, the theory being that he is not prejudiced thereby and cannot complain." In this case, the Court found that the facts could have proven second-degree murder, and thus a voluntary manslaughter conviction was appropriate.

In an interesting concurrence, Justice Humphreys argued that "heat of passion" is a mitigating circumstance, rather than an element that the Commonwealth must prove beyond a reasonable doubt. The majority expressed some interest in this theory, but ultimately decided that *Blankenship* controlled in this case. The majority declined to accept or reject Justice Humphreys' argument.

Regarding the defendant's absence from trial and claim of PTSD, the Court noted that the trial court went to significant lengths to give the defendant breaks to compose herself, went to considerable effort to make sure the defendant understood what rights she was waiving, and made sure that the defendant could communicate intelligently with her counsel and the trial court. The Court found no error in the trial court's decisions to permit the defendant to leave the trial, to deny the continuance, and to deny a mistrial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1058162.pdf

Marshall v. Commonwealth: January 30, 2018
Amherst: Defendant appeals his conviction for Murder on refusal to grant a Voluntary Intoxication Jury Instruction.

Facts: The defendant broke into a home and beat an elderly woman to death with a blunt object. He also beat another person, permanently injuring him. The Commonwealth indicted the defendant for first-degree murder. At trial, a witness testified that she observed the defendant consume drugs several times during the night of the murder. The defendant proffered a jury instruction on a voluntary intoxication defense to first-degree murder. The trial court denied the jury instruction.

The jury convicted the defendant of second-degree murder.

Held: Affirmed. The Court pointed out that, although a successful voluntary intoxication defense reduces a defendant's liability for capital murder or first-degree murder to second-degree murder, voluntary intoxication is no defense to the lesser degrees of homicide, or to any other crime. Thus, the Court found that, in returning a guilty verdict for second-degree murder, the defendant received the best result he could have hoped for even had the trial court given his proffered voluntary intoxication instruction. The Court ruled that the trial court's error, if any, in denying the instruction was ultimately harmless because it did not affect the jury's verdict.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1208163.pdf

INVOLUNTARY MANSLAUGHTER

Virginia Supreme Court

Commonwealth v. Gregg: April 5, 2018
Aff'd Court of Appeals Ruling of February 28, 2017
Fauquier: Defendant appeals his convictions for Involuntary Manslaughter on Double Jeopardy grounds.

Facts: The defendant shot at a tow truck that was repossessing his vehicle as it drove away, killing the driver. The trial court convicted the defendant of both common law involuntary manslaughter and of involuntary manslaughter in violation of Code § 18.2-154, "unlawfully shooting at an occupied vehicle wherein death resulted." The Court of Appeals reversed the convictions on Double Jeopardy grounds.

Held: Convictions Reversed. The Court ruled that involuntary manslaughter under Code § 18.2-154 is the "same offense" as common law involuntary manslaughter. The Court reasoned that the General Assembly did not intend to permit simultaneous punishment for both common law involuntary manslaughter and manslaughter under Code § 18.2-154, observing that the General Assembly did not draw a distinction between species of involuntary manslaughter. The Court also pointed out that the defendant's mental state and his acts were the same for both common law involuntary manslaughter and manslaughter under Code § 18.2-154, and there was one victim. The Court found that both

common law involuntary manslaughter and involuntary manslaughter under Code § 18.2-154 constitute the one crime of involuntary manslaughter.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170586.pdf
Original Court of Appeals Ruling at:
http://www.courts.state.va.us/opinions/opncavwp/0047164.pdf

Virginia Court of Appeals
Published

Brown v. Commonwealth: August 1, 2017
(Note case by same name, different defendant, decided the same day)
68 Va. App. 44, 802 S.E.2d 190 (2017)
Richmond: Defendant appeals his conviction for Involuntary Manslaughter on sufficiency of the evidence.

Facts: The defendant, a security guard at VCU Hospital, killed a 64-year-old man at a pharmacy by throwing him to the ground. Surveillance footage captured the attack. The defendant had become annoyed by the victim's complaints to pharmacy staff about a heart medication not being available. The video showed that, after a brief exchange of words, the victim went to a pharmacy window and the defendant came up from just behind the victim and grabbed him with both arms. The defendant then lifted the unsuspecting victim off of the ground in a bear hug and violently hurled the victim to the floor before the victim could break free, defend himself, or brace for the impact. The victim's head struck the ground with such impact that his skull fractured, making a loud "clap" sound that was heard by those who witnessed the incident. The victim died as a result of his injuries.

Held: Affirmed. The Court found that the evidence was sufficient to prove Involuntary Manslaughter. The Court rejected the defendant's argument that criminal negligence requires a finding that "a homicide was not improbable" under the facts and circumstances of each case. The Court noted that the Supreme Court has not used that language since 1967, preferring the language "not improbable that injury will be occasioned."

The Court explained that, under *Noakes*, the Commonwealth did not need to prove that the defendant actually knew or intended that his conduct would cause, or would likely cause, the victim's death; rather, the Commonwealth had the burden to establish that the defendant should have known that his acts created a substantial risk of harm to the victim. In this case, the Court noted that the video footage showed the force with which the defendant threw the victim to the ground and sufficiently demonstrated the defendant acted under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0507162.pdf

Chapman v. Commonwealth: September 26, 2017
68 Va. App. 131, 804 S.E.2d 326 (2017)
Frederick: Defendant appeals his conviction for Felony Reckless Driving Resulting in the Death of a Passenger on sufficiency of the evidence.

Facts: The defendant, while driving on a suspended license, fell asleep and drove off the road while carrying two passengers in his truck. The victim, who was a passenger in the back seat, was not wearing a seat belt and was ejected from the car. He died from his injuries.

The Commonwealth indicted the defendant with Felony Reckless Driving in violation of § 46.2-868(B), which provides for a higher penalty when "as the sole and proximate result of his reckless driving, [a person] caused the death of another." At trial, the defendant argued that the statute required his actions to be the "sole and proximate cause" of the defendant's death under the statute and, because the victim's failure to wear a seatbelt was also a cause of his death, he was not guilty.

Held: Affirmed. The Court held that the victim's failure to wear a seat belt was not a "proximate" cause of his death, leaving the defendant's reckless driving as the "sole and proximate" cause of the accident and resulting death. The Court construed the language of § 46.2-868(B) and defined the concept of "sole cause" as required by the code. The Court ruled that the concept of sole cause recognizes that, even if some act or omission contributes in some way to the occurrence of an event or injury, another act or omission still can be deemed the "sole cause" of the event or injury.

For example, the Court pointed out that during the crash, the embankment also played a significant role in the crash and resulting death. The Court noted that if the place where the car ran off the road had been a flat, open field as opposed to an embankment, it is likely that the vehicle would not have flipped over and most, if not all, of the resulting damage (including the death) would not have occurred. However, the Court reasoned, the presence of the embankment was not, in the legally relevant sense, the result of an act or omission, but rather, was merely an attendant circumstance, and thus, was not a proximate cause of the accident.

In this case, the Court explained that the failure of the victim to wear the seat belt is akin to an "attendant circumstance", in that nothing about the victim's failure to wear a seat belt caused or contributed to the crash. The Court ruled that the sole cause of the crash was the defendant's reckless driving.

The Court also pointed out that it would be "anomalous to the point of absurdity" to conclude that the General Assembly, having determined that the failure to comply with a statutory duty to wear a seat belt cannot be considered a proximate cause of an injury or death in a tort action, intended for the failure of a rear-seat passenger to wear a seat belt when no such statutory duty exists to be considered a proximate cause for purposes of Code § 46.2-868(B).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1948164.pdf

Levenson v. Commonwealth: December 12, 2017
68 Va. App. 255, 808 S.E.2d 196 (2017)
Fairfax: Defendant appeals his conviction for Aggravated Involuntary Manslaughter on sufficiency of the evidence.

Facts: The defendant, intoxicated, crashed his vehicle and severely injured his passenger. At the hospital, doctors discovered that the passenger's leg required surgery and installation of a stent into an artery. The passenger consented to these interventions to preserve his leg, despite the risk of death. However, due to complications partially related to a blood-thinner the hospital administered, the passenger died as a result of bleeding in his brain from an injury undetected by an earlier CAT scan.

At trial, the defendant argued that the victim's medical treatment decision was a superseding act that caused his death and that the defendant was not legally responsible.

Held: Affirmed. The Court repeated that medical treatment is not a superseding cause if the need for treatment was put into operation by the defendant's wrongful act or omission. The Court likened this case to the *Jenkins* case, where the victim died from aspiration of his vomit four days after he was shot. The Court further stated that the fact that the passenger consented to the treatment recommended to him by the team of trauma doctors does not relieve the defendant of criminal liability.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1884164.pdf

Virginia Court of Appeals
Unpublished

Miller v. Commonwealth: July 18, 2017
Hanover: Defendant appeals his convictions for Aggravated Involuntary Manslaughter and Hit and Run on sufficiency of the evidence, admission of the victim's toxicology, and jury instruction issues.

Facts: Defendant, while intoxicated, struck and killed a tow truck driver. The tow truck driver had parked his vehicle on the side of the road to assist a motorist. Witnesses saw the defendant driving erratically before the crash, speeding and swerving in and out of traffic. The defendant slammed into the tow truck, briefly got out of his vehicle, and then fled the scene. Witnesses saw the victim standing just before the crash and then saw his body on the road just after the crash. Witnesses also saw the defendant walking unsteadily and making incoherent statements.

Police located the defendant soon after. Three and a half hours after the crash, the defendant's BAC was .181. Police also located the victim's blood and pieces of the victim's truck on the defendant's car. The defendant's vehicle's event data recorder indicated that the defendant did not slow down prior to the crash.

At trial, the trial court did not allow the defendant to introduce the victim's toxicology report, which showed that the victim's blood had .0046 milligrams of THC. However, the defendant asked the toxicologist about the potential effect of that on the victim's behavior and the toxicologist indicated that he could not render an opinion because the level was too low.

The defendant argued at trial that the evidence did not prove that his vehicle struck the victim, arguing that another vehicle could have struck the victim after he crashed into the truck. The defendant also argued that the trial court improperly instructed the jury that his degree of intoxication was relevant to determining whether his conduct was criminally negligent. The instruction that the trial court accepted over the defendant's objection read:

"The degree of intoxication is a circumstance relevant to a determination of the question whether, in light of all other circumstances, the defendant's driving conduct was so gross, wanton and culpable as to show a reckless disregard for human life."

Held: Affirmed. The Court first found that the evidence was sufficient to prove the defendant caused the victim's death. The Court agreed that the evidence demonstrated that the direct and proximate cause of the victim's death was the defendant, who collided with the victim's tow truck and the victim himself with enough force to kill him. However, the Court further observed that it is immaterial whether the defendant's car fatally struck the victim, or whether a subsequent car ran over the victim once he was in the road and killed him. Instead, the Court explained that the Commonwealth was only required to prove that the defendant's vehicle was a proximate cause of the victim's death.

Regarding the trial court's refusal to admit the victim's toxicology report, the Court found any possible error was harmless. The Court noted that, other than the report itself, the defendant had no additional evidence to show that the victim was impaired at the time of the accident; the only expert testimony was from the toxicologist, who could not infer impairment from the level of THC in the victim's blood.

Lastly, regarding the jury instruction, the Court first agreed that the instruction was an accurate statement of the law. The Court then pointed out that, while there was plenty of evidence pointing to the defendant's intoxication in addition to appellant's extremely high BAC, evidence of intoxication alone is sufficient to sustain a conviction for aggravated involuntary manslaughter.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0193162.pdf

Chavis v. Commonwealth: July 18, 2017
Goochland: Defendant appeals his conviction for DUI Manslaughter on admission of expert testimony and sufficiency of the evidence.

Facts: Defendant, intoxicated, rear-ended another vehicle on the highway, sending it off the road and killing two occupants. Police extracted the event data recorder from the defendant's vehicle and downloaded its data. The data indicated that the defendant had been driving at approximately 122

miles an hour just before the crash, but that he suddenly decreased his speed by about 33 miles per hour just as he crashed.

At trial, the defendant objected to the State Police expert's testimony explaining the data recovered from the device, arguing that it invaded the province of the jury. The Court overruled the objection. The expert testified about the data, noting that the size of the defendant's tires could have affected the data and he did not know the size of the tires.

At trial, a toxicologist testified that the defendant's BAC at the time of the crash was .172.

Held: Affirmed. The Court pointed out that the trial court only permitted the expert to testify about the data extracted from the event data recorder in the defendant's vehicle. The Court concluded that the expert did not invade the province of the court as fact finder because the trial court did not permit the expert to draw a conclusion as to the defendant's speed immediately preceding the crash.

However, the Court further noted that the defendant's charges of involuntary manslaughter were based on his driving under the influence of alcohol. Thus, intoxication was the gravamen of the offense, not speed, and the expert's testimony merely provided an indication of impairment, not testimony on the "ultimate issue" of impairment.

The Court also found the evidence was sufficient. The Court ruled that the combination of the defendant's BAC and the sheer force of the crash proved that the defendant's intoxication caused him to operate his vehicle in a manner that resulted in the victims' deaths.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1029162.pdf

Hardin v. Commonwealth: September 5, 2017
Hanover: Defendant appeals his conviction for Involuntary Manslaughter on sufficiency of the evidence.

Facts: The defendant, while driving an eighteen-wheel tractor-trailer, stuck and killed a cyclist on a four-lane roadway at night. The cyclist had been traveling in the same direction as the truck, which clipped her bicycle, knocking her onto the ground and crushing her under the truck. Police responded and spoke with the defendant. He stated that he had first seen the cyclist between 400 and 500 feet away, "wobbling" on the right side of the highway, but that he took no action to avoid her. He acknowledged that, based on the width of his truck, there was "not much clearance;" however, he did not slow down, attempt to move to the adjacent lane, or sound his horn to warn the victim.

Police examined the scene and found that the defendant began to stop after he struck the victim and came to a complete stop 400 feet later. At trial, the defendant claimed that he only saw the victim 2-3 seconds before the crash and that there were vehicles on his left that prevented him from changing lanes; however, a witness contradicted that statement at trial.

Held: Affirmed. The Court agreed that the defendant knew or should have known that his actions created a probability of serious injury and he acted with "reckless or indifferent disregard" to the rights of another when he failed to reduce his speed or take other evasive action. The Court pointed out

that the defendant was able to make a complete stop in 400 feet and therefore, could have avoided hitting the victim after seeing her 400 to 500 feet away.

The Court rejected the argument that the only evidence of the defendant's guilt was his own statement and that the trial court improperly convicted the defendant on an uncorroborated confession. The Court quoted the *Carminade* case, explaining that a "confession" is a statement admitting or acknowledging all facts necessary for conviction of the crime at issue. The Court ruled that the defendant's statement in this case was not a "confession", but an "admission," because the statement did not establish both elements of the corpus delecti for involuntary manslaughter.

The Court also found it was proper to reject the defendant's self-serving statement at trial in favor of his statement at the scene, which had been against his penal interest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1246162.pdf

Novotny v. Commonwealth: October 10, 2017
Montgomery: Defendant appeals his conviction for Involuntary Manslaughter on sufficiency of the evidence.

Facts: The defendant, while driving intoxicated, crashed head-on into an oncoming vehicle, killing the other driver. A witness observed the defendant's vehicle suddenly cross the double solid line and travel into the lane of oncoming traffic. An officer who examined the scene found no evidence that the defendant attempted to stop before the crash. The defendant told an officer that he was traveling between five and fifteen miles per hour above the speed limit and that he had taken prescription Suboxone and Amitriptyline. The defendant later told the magistrate "I did it; was high when I did it." DFS found no drugs or alcohol in the defendant's blood sample.

At trial, a toxicology expert testified about the potential side effects of the prescription drugs appellant admitted to taking regularly, including drowsiness and delayed reaction times. The toxicologist explained that although no drugs or alcohol were found in the defendant's blood sample, the Department of Forensic Science does not test for buprenorphine, an active ingredient in both Subutex and Suboxone. The toxicologist also testified that Amitriptyline can produce side effects similar to those of Subutex and Suboxone, such as "drowsiness, dizziness, [and] difficulty performing divided attention tasks."

Held: Affirmed. The Court rejected the defendant's arguments that he was not aware of the danger posed by his intoxication and that there was no objective test for the level of his intoxication. The Court agreed that, in and of itself, the defendant's speed did not demonstrate "negligence so gross, wanton, and culpable as to show a reckless disregard of human life." However, the Court ruled that the fact that the defendant was aware that he was driving in an impaired state was sufficient to support the conviction for involuntary manslaughter.

The Court rejected the defendant's argument that his dangerous driving only took place briefly and therefore was insufficient, reiterating that the evidence need not go so far as to establish the offender had a prior 'near-miss' before the requisite knowledge may be imputed.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1489163.pdf

LARCENY

Virginia Supreme Court

Commonwealth v. Moseley: June 8, 2017
Rev'd Court of Appeals Ruling of June 7, 2016
293 Va. 455, 799 S.E.2d 683 (2017)
Hampton: Defendant appeals his convictions for Burglary and Grand Larceny on Sufficiency of the Evidence.

Facts: After a burglary, a police officer saw the defendant leaving the house next to the victim home, which she thought was unusual since it was a neighborhood that people seldom visited. She noted that the defendant seemed "startled". Two weeks later, police responded to an attempted burglary nearby and found the defendant, who matched the description of someone leaving the scene, walking near the victim residence. The defendant had thick freezer-gloves in his pocket, even though it was a warm summer day. Police learned that someone had also burglarized another nearby residence.

Meanwhile, later that night, very close to the recent offenses, a tow truck driver towed an abandoned vehicle. The windows of the vehicle were down and the keys were inside. Police searched the vehicle and found property from the burglaries, as well as documents such as the defendant's ID and an electric bill from March. At trial, a witness testified that recently, the defendant had been driving this vehicle on an almost-daily basis, although she could not provide exact dates. The vehicle was registered to someone else.

The Court of Appeals reversed, ruling that the presence of the ID and stolen items together in the same place, although suspicious, did not prove that the defendant stole the items, participated in their theft, saw the items, or was aware that they were stolen.

Held: Conviction Affirmed. The Court rejected the defendant's hypothesis of innocence that he merely "was in the area of the burglaries for a purpose other than committing the crimes and that . . . someone else . . . placed the stolen items in the vehicle and abandoned it in the parking lot."

Instead, the Court found it reasonable to infer that the same person who committed each larceny also committed the related burglary. Second, it was reasonable to infer that the same person committed both burglaries. Taken together, these reasonable inferences allowed the factfinder to infer the defendant's involvement in all the offenses based upon his involvement in one.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161013.pdf

Virginia Court of Appeals-
Unpublished

Jones v. Commonwealth: October 3, 2017
Roanoke: Defendant appeals his conviction for misdemeanor interference with the property rights of another, arguing that the offense is not a lesser-included offense of Grand Larceny.

Facts: The defendant took a number of tools from his friend's property. At trial, the victim explained that the defendant did not have permission, but the defendant claimed that he did. At the conclusion of the trial, the trial court concluded that the Commonwealth had not proven grand larceny, as indicted, but had proven misdemeanor interference with the property rights of another in violation of § 18.2-121. The trial court reduced the offense to a misdemeanor violation of § 18.2-121, reasoning that it was a lesser-included offense of grand larceny.

Held: Reversed. The Court held that § 18.2-121 is not a lesser-included offense of grand larceny under Code § 18.2-95. The Court explained that a violation of § 18.2-121 is an offense against the "land, dwelling, outhouse or any other building of another," its "contents", or "use" of "such property free from interference." While § 18.2-121 focuses on interference, the Court reasoned that § 18.2-95 focuses specifically on goods and chattels over $200; thus, the Court found, both sections include offenses against properties, in general, or types of properties not specified in the other.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0837163.pdf

Cunningham v. Commonwealth: March 20, 2018
Virginia Beach: The defendant appeals his conviction for Concealment on sufficiency of the evidence.

Facts: The defendant entered a Walmart store wearing a large backpack. While looking around, the defendant picked up a box from the shelf, looked left and right, and removed a small item from the box, placing the empty box back on the shelf behind another box containing the same product. The defendant then concealed the item behind a second Walmart item and then walked into the restroom. When the defendant emerged from the restroom, the loss prevention officers watching him could no longer see the item the defendant had concealed. The defendant discarded the second Walmart item as he walked out the door passed all points of sale.

A loss prevention officer identified herself and attempted to stop the defendant, but the defendant ran away. A police officer tried to stop him, but the defendant briefly escaped until officers

found him hiding in a pawnshop bathroom. No one could locate the missing item, even though loss prevention looked throughout the store. The store had not sold the item.

Held: Affirmed. The Court found that the defendant's behavior in the store, his flight from the scene, and the store's inability to find the missing item, all demonstrated his guilt in this case.

In a footnote, the Court noted that the record for this case included the video recording of the incident, but that the Court was not able to watch the video because it required proprietary video software. The Court wrote "we fully expect this issue to arise in future cases due to the inherent tension between proprietary video technology, which is in widespread use, and the requirement of a public record that permits the appellate court and the public at large to view such evidence following its admission at trial."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0240171.pdf

MALICIOUS WOUNDING

Virginia Supreme Court

Commonwealth v. Perkins: April 19, 2018
Reversing Ct. App. Ruling of January 17, 2017
Newport News: The Commonwealth appeals the reversal of a Malicious Wounding conviction on sufficiency of the evidence.

Facts: The defendant and his accomplice robbed another man at gunpoint. The victim had been visiting an old friend at her apartment. However, during the visit, he accidentally revealed to her son, the defendant, that he was carrying a large amount of cash. After becoming aware that the victim had a great deal of cash, the defendant and his confederate began speaking and disappeared into another room together. When the victim left the apartment, the men approached the victim with a gun. The victim turned and walked away, but when he did, the defendant struck him on the head with the gun, and then his confederate struck the victim. After the second blow, the victim fell to the ground, unconscious. The victim suffered a swollen eye, a cut ear, and swollen lips.

Police investigated the offense. During the investigation, they located photographs taken after the offense of the defendant and his accomplice with the stolen money. The Court of Appeals affirmed the convictions for robbery, conspiracy, and use of a firearm, but reversed regarding Malicious Wounding. The Commonwealth appealed the dismissal of the Malicious Wounding conviction.

Held: Conviction affirmed, Court of Appeals reversed. The Court of Appeals had concluded that the trial court could not draw an inference of malice on the part of the defendant, despite the victim's injuries. However, in a *per curiam* ruling, the Supreme Court ruled that violently striking an unsuspecting, defenseless victim, without provocation, in the back of the head with a firearm — with or without the combined violence of another acting in concert of action — supports the reasonable

inference that the attacker had the intent to maliciously wound the victim in cases where, as here, the attack actually injured the victim.

While the Court of Appeals had conspicuously avoided discussing "concert of action," the Supreme Court explicitly acknowledged that the doctrine applied in this case. The Court wrote, in a footnote: "it does not matter whose blow caused which specific injury or, for that matter, which blows, singularly or collectively, caused [the victim] to lose consciousness."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170437.pdf
Previous Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1040151.pdf

Virginia Court of Appeals -
Unpublished

Sledge v. Commonwealth: July 5, 2017
Newport News: Defendant appeals his conviction for Malicious Wounding on sufficiency of the evidence.

Facts: The defendant struck the victim, smashing several of her teeth with a bottle. The defendant had waited for the victim at her residence. The defendant was intoxicated. At first the parties were friendly, but soon the victim and her friend told the defendant to leave repeatedly. The defendant refused to leave. When he finally started to leave, the victim and her friend tried to close the door, but the defendant tried to get back in and began swinging his fists. During the fight, the victim's friend ducked and the defendant struck the victim in the face with a liquor bottle, which he held with a closed fist. The victim fell to the ground; several of her teeth had been badly broken and cracked, and blood was gushing from her mouth.

Held: Affirmed. The Court found that the evidence as a whole was sufficient to prove that the defendant intentionally hit the victim, either directly or accidentally under a theory of transferred intent when the victim's friend moved. The Court also agreed, from the evidence and considering the exhibits showing the condition of the victim's teeth before and after the incident, that the blows were "with such force or violence," that the evidence was sufficient to show the specific intent necessary under the statute.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1338161.pdf

Watford v. Commonwealth: February 27, 2018
Chesapeake: The defendant appeals his conviction for Aggravated Malicious Wounding on jury instruction issues.

Facts: The defendant shot a man, causing the victim scarring from the bullet wound below his upper lip and in his cheek and neck area. The injury caused the victim ongoing nerve issues including pain, numbness, and slurred speech. The trial court instructed the jury that "'Permanent and significant impairment' includes visible scars, scars connected with nerve damage, and scars not visible during ordinary daily activities." The defendant objected that the instruction was unnecessary and prejudicial because it "singled out specific evidence," namely the victim's scars, but the trial court overruled the objection.

Held: Affirmed. The trial court found that, even if the instruction was error, it was harmless, given the overwhelming evidence of permanent and significant impairment in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0165171.pdf

Hunter v. Commonwealth: March 20, 2018
Richmond: The defendant appeals his conviction for Unlawful Wounding on sufficiency of the evidence.

Facts: The defendant became infuriated with the victim after the victim held an elevator door open for an old man. The defendant apparently needed to go to the bathroom and, in the words of the Court, "was nearing the point of involuntary micturition." The defendant followed the victim out of the elevator, faced him, and struck him twice in the face, cutting the victim's face. The victim had been unarmed, had his hands full, and could not fight back. The victim could not tell what the defendant used to cut his face, but at trial the victim's surgeon testified that the victim suffered an "acute fracture of the nasal bone" and that the laceration was "consistent with being cut with a sharp object."

Held: Affirmed. The Court ruled that the defendant's one-sided, surprise attack upon a victim who was unprepared to fight back sufficiently demonstrated the defendant's intent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0479172.pdf

OBSTRUCTION OF JUSTICE

Virginia Court of Appeals – Unpublished

Warren v. Commonwealth: May 29, 2018
Norfolk: Defendant appeals his conviction for Obstruction of Justice on sufficiency of the evidence.

Facts: Officers responded to a call for a person with a weapon and encountered the defendant's girlfriend, who ran to them from the bushes, covered in scratches, crying and reporting that she thought the defendant was trying to kill her. The officers then saw the defendant, who fled from them on sight. As he ran, he reached into his waistband and told the officers that they were "lucky." The officers told the defendant to stop, but he continued running, at one point running directly at one of the officers.

The defendant fled into an apartment building, where he discarded a firearm he had been carrying and announced to the officers that it was a "standoff," he had hostages, and that "you all will have to kill me and bring my girlfriend to me." He disregarded commands to exit the building and get on the ground and instead threatened to shoot the officers, brandishing his cellphone as if it were a gun. Finally, the officers apprehended the defendant.

The Commonwealth charged the defendant for several offenses, including Obstruction of Justice. The Obstruction warrant cited 18.2-460(A), the "passive" obstruction section, rather than section (B), which concerns obstruction by "force or threats of force."

Held: Affirmed. The Court reviewed the cases that construe section (A) of 18.2-460, specifically *Ruckman*, *Atkins*, *Henry*, *Molinet*, and *Thorne.* The Court noted that in this case, the defendant disobeyed the officers' commands, refused to stop, refused to get on the ground, and refused to exit the apartment building. The Court found that his actions demonstrated that he understood or should have reasonably understood that the officers' duties included apprehending him and demonstrated his intention to prevent the officers from performing their duty based on his refusals to comply with the officers' legitimate orders.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0893171.pdf

PERJURY

Virginia Supreme Court

Commonwealth v. Pijor: December 28, 2017
294 Va. 502, 808 S.E.2d 408 (2017)
Rev'd Court of Appeals Ruling of May 26, 2015
Fairfax: The Defendant appeals his conviction for Perjury on Collateral Estoppel grounds.

Facts: Defendant stole his girlfriend's dog. Although no one could find the dog, the Commonwealth charged the defendant with stealing the dog. The offense date alleged in the indictment was the date on which the dog first went missing. At trial, the defendant testified that he had no information regarding the dog's whereabouts and that he had not seen the dog since the theft. A jury acquitted the defendant of stealing the dog.

After the acquittal, witnesses saw the defendant with the dog on several occasions. Finally, five months later, police stopped the defendant in his car and found the dog in the car. The Commonwealth indicted the defendant again for stealing the dog; the offense date charged the date that the police found the dog in the car. The trial court dismissed the indictment on double jeopardy grounds and the Court of Appeals affirmed the dismissal in an unpublished opinion in 2015.

Next, the Commonwealth indicted the defendant for perjury, alleging that he lied at the first trial about knowing where the dog was after the dog went missing. The trial court convicted the defendant, rejecting his argument that Collateral Estoppel precluded the prosecution.

Held: Affirmed. The Court examined the elements of larceny and found that, even if the jury had accepted the defendant's perjured testimony at the original trial as to whether he took the dog, that finding would not support his argument that the jury also decided the precise issue he sought to preclude, that is, whether he had seen the dog since the day of the theft or knew where the dog was.

The Court also found the evidence to be sufficient.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161346.pdf

Tarsha Gerald v. Commonwealth: May 31, 2018
Patricia Gerald v. Commonwealth: May 31, 2018
Aff'd Court of Appeals Ruling of December 27, 2016
Albemarle: Defendants appeal their convictions for Perjury and Driving Suspended on sufficiency of the evidence and venue grounds.

Facts: Defendants, a mother and daughter, were driving in a car that struck another car at a stoplight. The victim could see that the mother was driving the vehicle, but the daughter exited the passenger's side, identified herself as the driver, and gave the victim her contact information. The daughter did not give him a driver's license. When the victim asked to see the mother's driver's license, the daughter got into the driver's seat and both women fled the scene.

A police officer located the mother and daughter, who both confessed their licenses were suspended. The mother confessed to driving the car before the crash. Another officer telephoned both women, who identified themselves on the phone. The mother confessed she had been driving, but claimed that she had a driver's license.

However, at trial in General District Court, both defendants testified under oath that they had not been driving and denied speaking to the police and confessing to the offenses. A police officer took copious notes regarding their testimony at that trial. The General District Court convicted both defendants of driving on suspended and appealed their convictions. The Commonwealth also indicted the defendants for perjury.

At trial in Circuit Court for the perjury offenses and the original offenses of driving suspended, the defendants objected to venue for perjury on the basis that the Albemarle County General District Court is located in the City of Charlottesville, not Albemarle County, and thus Albemarle County was an

improper venue for the perjury trial. The City of Charlottesville charter, enacted by the General Assembly, provides "[t]he property now belonging to the county of Albemarle within the limits of the city of Charlottesville, shall be within and subject to the joint jurisdiction of the county and city authorities and officers," and expressly included the courthouse in that description. The defendants argued that this provision meant that the City and County had to "jointly" prosecute the defendants.

Held: Affirmed. The Court first found that the evidence sufficiently demonstrated Perjury. The Court rejected the argument that the Commonwealth did not prove the exact questions asked of the defendant during the general district court trial because the Commonwealth could not prove the precise wording of each of the questions at the original district court trial. The Court found that it would be unreasonable to conclude that the defendant's denials of driving were in response to ambiguous questioning or an inquiry into their driving at a time or place other than what the Commonwealth actually sought to prove.

Regarding the venue issue, the Court ruled that, venue for prosecution of crimes committed in the Albemarle County Courthouse is proper in either Albemarle County or the City of Charlottesville. Like the Court of Appeals, the Court examined the City charter, first enacted in 1888 by the General Assembly, and subsequently re-enacted on a number of occasions as the City claimed land from the County. The Court found that the charter created an exception to 19.2-244's general provisions regarding venue. The Court reasoned that, the due to the city charter's grant of territorial jurisdiction to the county and city courts, crimes committed in the Albemarle County Courthouse are treated as having been committed "within" either the jurisdiction of the county or the city and, therefore, are subject to the "joint jurisdiction" of the county and city courts.

In a footnote, the Court distinguished this case from the 1896 *Fitch* case, where a defendant perjured herself in the City of Staunton while inside the Augusta County Courthouse, noting that although the facts are analogous, in *Fitch* there was no statutory authority or other legal provision granting Augusta County shared jurisdiction over crimes committed on county property located within Staunton city limits.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161844.pdf

Virginia Court of Appeals –
Unpublished

Winder v. Commonwealth: February 6, 2018
Norfolk: Defendant appeals his convictions for Perjury on Collateral Estoppel and Sufficiency grounds.

Facts: The defendant failed to appear on a felony charge. The Commonwealth indicted the defendant for failure to appear. At a bond hearing, the defendant claimed that he had been hospitalized during his previous court date and produced a medical bill from the hospital. At trial for the failure to appear, the defendant again claimed to have been hospitalized and produced the same bill. However,

the Commonwealth introduced testimony from the hospital's risk manager that the bill was not a genuine document and that the defendant had not been a patient on that date. The trial court stated "I think there's enough reasonable doubt on that charge" and dismissed the failure to appear charge.

The Commonwealth then indicted the defendant for perjury, regarding his testimony at the bond hearing and at the trial for failure to appear. During this trial, the Commonwealth introduced testimony from the hospital's custodian of records, who testified that the reference number on the bill belonged to a patient other than the defendant and that there was no record of the defendant ever being a patient at the hospital. The trial court rejected the defendant's claim of collateral estoppel and convicted the defendant.

Held: Affirmed. The Court first reaffirmed that the acquittal of one charged with a crime is no bar to a prosecution for perjury for testimony given by him at the trial, even though a conviction would necessarily import a contradiction of the verdict in the former case. The Court then noted that § 19.2-128 does not require the Commonwealth to prove where someone was, only where someone was not. Thus, the Court observed that, although a court dismissing a failure to appear charge is free to announce a finding that the defendant was present in a certain location instead of in court, it is not required to make such a finding. In this case, the Court found no clear indication from the record that the trial court in the failure to appear trial used the defendant's claim that he was at another location to arrive at its decision in the failure to appear trial.

In a footnote, the Court also rejected a contention that the parties had raised on appeal that a trial court may find evidence sufficient to prove failure to appear but nevertheless dismiss the charge. The Court wrote that: "courts do not have such latitude in deciding whether to convict a defendant of the crime of failure to appear."

The Court then held that the evidence was sufficient to prove perjury in this case. The Court also ruled that the defendant had failed to preserve his argument that the Commonwealth did not present two corroborating witnesses to prove the perjury charge.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1813161.pdf

PROBATION VIOLATION

Virginia Court of Appeals –
Unpublished

Silvious v. Commonwealth: October 4, 2017
Rockingham: The defendant appeals the extension of his probation on Subject Matter Jurisdiction grounds.

Facts: In 2002, the circuit court sentenced the defendant for three felony offenses of obtaining money by false pretenses. The court sentenced him to twenty years and twelve months of incarceration, with nineteen years and eleven months suspended. The order conditioned the suspension upon supervised probation that included a requirement that the defendant pay approximately $38,000 in restitution. The order did not provide specific terms regarding a payment plan.

In 2012, the defendant violated the terms of his probation. The circuit court revoked one year of the significant previously suspended sentence and extended the defendant's supervised probation for three years, "upon his release … on the same terms and conditions" as in the 2002 order. The court also ordered that the defendant "upon his release shall pay the restitution on a schedule" as set out in the order. The circuit court did not explicitly re-suspend the defendant's remaining sentence.

By 2016, the defendant still had $34,000 in restitution due to the victim that he had not paid. The probation officer requested that the court extend the defendant's probation. Although he questioned the court's jurisdiction to do so, the defendant ultimately agreed and the circuit court extended the defendant's probation indefinitely until restitution is paid.

However, thereafter, the defendant appealed the extension, arguing that the circuit court lacked the subject matter jurisdiction to extend his probation because his probation had terminated in 2012 when the circuit court failed to re-suspend his remaining sentence.

Held: Affirmed. The Court ruled that the circuit court's 2012 revocation order directing that the defendant serve one year of his previously suspended sentences implicitly re-suspended the eighteen years and eleven months remaining on his original sentences. The Court repeated that when a court's revocation order does not expressly re-suspend the balance of a defendant's sentence, it does not implicitly discharge the remaining sentence, but instead implicitly re-suspends it.

Consequently, the Court found that the defendant's suspended sentences remained in effect when the circuit court acted in 2016, giving the court subject matter jurisdiction to do so.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1518163.pdf

Washington v. Commonwealth: November 14, 2017
Hampton: Defendant appeals the revocation of his suspended sentence on Due Process grounds.

Facts: The defendant entered a drug court program after violating probation on his felony drug conviction. However, after five positive drug tests, the drug court program terminated him. After his termination hearing, the circuit court held a sentencing hearing to determine what sentence to impose.

At the revocation hearing, the defendant objected to the revocation on the grounds that the drug court did not give him proper notice and opportunity to object to his termination. At the revocation hearing, the defendant testified and admitted that he had five positive drug tests while in drug court and that he was sanctioned for four of those violations; he also admitted receiving written notice indicating that the Commonwealth sought to revoke his suspended sentence for using drugs.

On appeal, the defendant argued that the trial court violated his due process rights under the Fourteenth Amendment by revoking his suspended sentence without considering evidence of the reasons for his termination from the drug treatment court program.

Held: Affirmed. The Court held that the defendant received his due process rights to notice and a hearing in the circuit court during the revocation proceeding regarding his termination from the drug treatment court program.

The Court pointed out that, when a defendant can no longer participate in such a drug court program, whether due to either willful noncompliance or unforeseen circumstances beyond his control, he necessarily will be subjected to a show cause hearing at which the circuit court has the discretion to revoke all or part of his suspended sentence. The Court made clear, however, that the revocation hearing is not an appeal of the drug court program termination and merely includes consideration of the program termination among "all the circumstances" relevant to the revocation question.

In this case, the Court noted that the defendant's objections in circuit court focused on the drug treatment court termination decision itself. However, the Court reasoned that the drug court's termination did not constitute a revocation of the defendant's liberty interest; the defendant's liberty interest could be revoked only by order of the circuit court. In circuit court, the defendant exercised the opportunity to present evidence and testify in the circuit court revocation hearing.

The Court distinguished the *Harris* case, finding that here, the defendant received notice and an opportunity to be heard regarding his termination from the drug treatment court program in the circuit court, prior to the circuit court's revocation of his suspended sentence. The Court pointed out that the *Harris* case directly addressed the adequacy of due process provided in the circuit court, rather than in the drug court termination hearing.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0710161.pdf

Smith v. Commonwealth: December 12, 2017
Norfolk: Defendant appeals the revocation of his probation alleging improper delegation of probation terms and on hearsay grounds and

Facts: After convicting the defendant of possessing child pornography, the trial court placed the defendant on probation. Among the conditions that the trial court set, the court required the defendant to "comply with all the rules and requirements set by the Probation Officer."

The defendant began to violate the terms of probation. As a result, his probation officer seized the defendant's phone and submitted it to the police for forensic analysis. The search recovered hundreds of pornographic images and others that involved children. The probation officer testified to this evidence at the violation hearing. The trial court overruled the defendant's objection that the probation officer did not personally conduct the forensic analysis.

Held: Affirmed. The Court found that it was reasonable to order the defendant to comply with the conditions set by the probation officer. The Court ruled that the probation conditions were reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances, as required by *Nuckoles.* The Court pointed out that, unlike the issue of restitution, the Code does not expressly mandate that the trial court set the terms of probation or prohibit empowering a probation officer to do so.

The Court also ruled that the trial court did not err in admitting the hearsay evidence. The Court reviewed the two tests for admission of hearsay evidence at a probation violation hearing under *Henderson* and found that the trial court used the "reliability test," although the trial court had not explicitly said so. In this case, the Court pointed out that the probation officer personally took the phone from the defendant, gave it to the police for analysis, watched an officer plug it into the machine that accessed the phone's contents, collected the forensic report, and then personally reviewed the contents of the report.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0038171.pdf

Benjamin v. Commonwealth: December 19, 2017
Richmond: Defendant appeals the revocation of his suspended sentence on admission of hearsay evidence.

Facts: The defendant, while on probation for larceny, stole cellphones from two of his co-workers. The police found a Facebook photo of the defendant and saw that it matched video surveillance from the day of the theft. The police gave one of the victims the records that they had subpoenaed regarding her own cellphone. She saw that the phone dialed a phone number that she did not recognize; the obtained the records for that number and identified the owner of it. The police tried to locate the defendant, but instead located his brother. An officer immediately recognized that the brother was not the person in the photo. The brother identified the unknown phone number as a number belonging to the defendant's wife.

The Commonwealth sought to revoke the defendant's probation based on the new offenses, although it had entered a *nolle prosequi* regarding the charges. The victim and the officers testified to what they had learned during the investigation. The defendant objected to admitting the brother's statements as hearsay, but the trial court overruled the objection.

Held: Affirmed. The Court agreed that, under *Henderson*, the brother's statements were inadmissible unless the record established good cause for not requiring that the defendant be allowed to confront his brother on the witness stand. However, the Court held that good cause existed for not requiring that the defendant be allowed to confront the witness.

The Court explained that the officer testified under oath, providing a far stronger basis for accepting the trustworthiness of the results of his investigation than would be provided by the mere submission of a police report through a probation officer. The Court also noted that the officer had

cellphone records and a photograph to corroborate the statements. Lastly, the Court found that the defendant's failure to offer contradictory evidence was another factor of the "substantial guarantees of trustworthiness."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0920162.pdf

Clark v. Commonwealth: December 26, 2017
Norfolk: Defendant appeals the revocation of his probation, arguing improper delegation to the probation officer.

Facts: The defendant, convicted of child sexual assault, failed to register as a sex offender. The trial court placed the defendant on supervised probation for five years. When the defendant began probation, his probation officer set the DOC-mandated "Sex Offender Special Instructions of Parole / Probation / Post Release Supervision" for the defendant, as required by DOC regulations. The defendant violated those conditions and the trial court revoked his probation. The defendant had argued that the probation officer did not have the authority to set the special probation terms in this case.

Held: Affirmed. As in the *Smith* case from December 12, the Court found that a probation officer may set appropriate probation conditions and supervision as are necessary. The Court examined § 53.1-145 and § 53.1-10(3) and found that the Code grants the Department of Corrections the authority to develop and implement regulations governing its supervision of probationers, in order to accomplish the well-established goals of probation. The Court noted that imposition of the special instructions was not discretionary for the probation officer, since the Department of Corrections requires those special instructions for every sex offender on supervision in Virginia.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1574161.pdf

Edwards v. Commonwealth: April 17, 2018
Roanoke: Defendant appeals the revocation of her probation on the abatement of her probation during incarceration.

Facts: In 2013, the trial court convicted the defendant of Petit Larceny 3rd and sentenced the defendant to three years of incarceration, with all three years suspended, as well as two years of supervised probation from the time of her release from confinement. The order failed to fix a term of suspension.

That conviction resulted in the revocation of a prior sentence. The probation officer requested the trial court to abate (toll) the defendant's probation on her 2013 larceny conviction during her period of active incarceration for earlier conviction. On April 7, 2014, the trial court entered an order to that

effect, stating that the defendant's "supervised probation shall be abated during her current incarceration and shall re-commence upon her release from incarceration."

In 2016, the defendant violated probation. The defendant objected to revocation of her 2013 sentence on the grounds that the trial court's abatement was unlawful, complaining that she had not been given notice of the abatement or an opportunity to be heard.

Held: Affirmed. The Court first pointed out that § 19.2-304 only addresses situations in which a probation term is to be modified, increased, or decreased; it does not apply when the trial court merely "abates", or tolls, a probation term. Thus, the Code does not impose the same notice and hearing requirements in that particular situation.

The Court then found that, because the 2013 sentencing order failed to fix a term of suspension, the sentencing authority of the trial court extended for all five years, the maximum period for which the defendant might originally have been sentenced to imprisonment. Thus, the trial court retained jurisdiction to revoke the defendant's suspended sentence at any time within five years of her May 2013 conviction. The Court ruled that the trial court was well within its jurisdiction to revoke the defendant's suspended sentence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0043173.pdf

Davis v. Commonwealth: May 1, 2018
Southhampton: The defendant appeals the revocation of his probation on refusal to permit him to represent himself.

Facts: The defendant, while on probation, drove to his probation office on a suspended license and lied to, cursed at and threatened his probation officer. At the ensuing probation violation hearing, the defendant expressed a desire to represent himself. However, when the trial court attempted to assess his competency to do so, the defendant stated:

> "I'm not asking to represent myself *pro se* so the [trial court] can hold me to a legal position, I'm asking to represent myself in proper persona in my right as a sovereigner… I'm not asking to represent myself *pro se* because I know if I represent myself *pro se* that I'm going to be held to the standards that lawyers are held to."
>
> The trial court refused the defendant's request to represent himself.

Held: Affirmed. The Court first pointed out that no court has yet concluded that the Fourteenth Amendment contains a right to self-representation at a probation violation hearing. The Court also concluded that the defendant's representations during his colloquy with the trial court were so internally inconsistent that they constituted dilatory tactics that tainted the defendant's effort to waive the assistance of counsel.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0760171.pdf

RAPE & SEXUAL ASSAULT

Virginia Court of Appeals -
Unpublished

Salmeron v. Commonwealth: August 22, 2017
Fairfax: Defendant appeals his convictions for Child Sexual Assault on sufficiency of the evidence.

Facts: The defendant sexually assaulted his daughter's twelve-year-old friend. The defendant pushed her into a bathroom, sexually assaulted her, and warned her not to tell anyone what had happened.

The victim did not report the offense for about one year. When she did, the defendant's wife learned of the allegations and confronted him. The defendant fled Virginia to North Carolina. When police located the defendant in North Carolina, he initially provided them with a false name and false ID card.

At trial, the victim described the attack as lasting over forty minutes. However, the defendant's own children testified that the defendant had never been alone with the victim. The victim also made a number of inconsistent statements over the course of the case about where the defendant had touched her, whether and how he had penetrated her, what various witnesses had stated, whether the defendant removed his pants or only removed his penis from his pants, and where the other children were located in the apartment during the incident.

Held: Affirmed. The Court rejected the argument that the victim's inconsistencies made her "inherently incredible." For example, the Court explained that the significance of the precise location of the touching was not something a young girl would necessarily comprehend. The Court pointed out that although the victim described the attack as lasting over forty minutes, she also had explained that she was not focused on time. The Court also observed that the other inconsistent statements concerned minor details that can be explained by the length of time between the offense and trial, as the trial occurred two years after the abuse.

The Court pointed out that the defendant's threat against the victim explained her delayed report. The Court also found that the defendant's failure to inform law enforcement of his real identity and his possession of a false identification card were also relevant to prove consciousness of guilt.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0475164.pdf

Vigil v. Commonwealth: September 26, 2017
York: Defendant appeals his conviction for Aggravated Sexual Battery on sufficiency of the evidence.

Facts: The defendant sexually assaulted his ten-year-old daughter on three occasions. The victim waited several years before reporting the abuse. At trial, the victim described the attacks in detail, although her details were not entirely consistent with her prior reports. The evidence at trial that corroborated her testimony included testimony by the mother of a family friend, who testified that the victim's mother told her that the defendant had admitted to molesting her daughter and that "he was very sorry." [*Note:* The defendant did not object to that testimony]. Another witness testified that the defendant did not deny his wife's account that he had sexually abused the victim during a telephone conversation with the defendant's wife.

Held: Affirmed. The Court began by ruling that the victim's account, standing alone, was sufficient to prove the offenses, despite any inconsistencies between her testimony about the frequency of the abuse and other evidence. The Court wrote that "a reasonable fact finder with all of the evidence before it could determine that the inconsistencies between [the victim's] testimony and her previous statement to police arose from her youth at the time of the offenses, her fragile memory, the traumatic nature of the offenses, the fact that the assailant was her stepfather, and the family dynamics associated with the years of her childhood spent living in his home." In addition, the Court found that the corroborating evidence also supported the conviction.

The Court also examined the admission of the statement that the defendant's wife made on the telephone while the defendant was present that the trial court admitted as an adoptive admission. However, the Court found that the admission was, if it had been error, harmless.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0805161.pdf

Granados v. Commonwealth: November 14, 2017
Alexandria: Defendant appeals his convictions for Indecent Liberties on sufficiency of the evidence.

Facts: The defendant sexually assaulted a fifteen year-old child. The defendant met the victim in his neighborhood and one day invited the victim to learn to lay carpet with him. The victim declined, but the defendant told him to ask the victim's uncle, with whom the victim was living. The victim's uncle gave permission, but told the defendant to wait until the uncle was home before leaving with the victim. Instead, the defendant left immediately with the victim, ignoring the uncle's request. When the uncle found the victim missing, he contacted them, but the defendant assured the uncle he did not need to be concerned, as they were going to look at the carpet installation job and would return soon. While at the location of the job, the defendant sexually assaulted the child.

At trial, the defendant argued that the Commonwealth failed to establish he maintained a custodial or supervisory relationship with the victim at the time of the offenses

Held: Affirmed. The Court ruled that the evidence established that the defendant had both express and implied power to direct or control the victim's actions and therefore maintained a custodial or supervisory relationship with the child. The Court found that the defendant voluntarily took the

victim in his vehicle away from the victim's home, and thereby, as the "only adult present," became responsible for the child's care.

The Court pointed out that a conviction under Code § 18.2-370.1(A) is not limited to "the specific entrustment of the child to the care of the adult" but also arises "when the supervising adult exercises care and control over the child." The Court detailed numerous cases that held that a person may become "responsible for the care of a child" by a voluntary course of conduct and without explicit parental delegation of supervisory responsibility.

The Court distinguished the *Hutton* case, pointing out that in that case, the nature of the relationship between Hutton and the victim was more of a peer-to-peer friendship, as they talked, watched television, and ate together. Here, however, the Court found that the defendant's attempt to befriend the child by proposing they go out together socially and his offer to teach him a job skill evinced a predatory relationship in which opportunities arose to exploit the victim. The Court noted that the child was unusually vulnerable because he was from Honduras, had recently arrived in the U.S., and spoke limited English.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1241164.pdf

Diggs v. Commonwealth: January 30, 2018
Hampton: Defendant appeals his conviction for Attempted Rape Accomplished through the Use of the Victim's Mental Incapacity or Physical Helplessness on Fifth Amendment and sufficiency grounds.

Facts: The defendant was a patient at a secure mental health treatment facility. The defendant is hydrocephalic, has a 9th-grade education, and suffered from emotional and psychiatric problems; he arrived at the facility after a suicide attempt. While there, he met the victim, who was a frequent patient at the facility. She suffered from tuberous sclerosis and other conditions that affected her physical and cognitive abilities and her emotional state, such that she often could not tell the difference between right and wrong. The victim often suffered from episodes of hallucinations and delusions, mood swings, and agitation and aggression, and functioned at the age level of an eight to ten year old child.

One day, a nurse had to repeatedly tell the defendant and the victim to stop having physical contact in violation of the facility rules. Later that day, she found the victim and defendant alone in a room. The victim was partially unclothed and the defendant was rushing to put his clothes back on. The facility summoned the police. A sexual assault nurse examiner examined the victim and discovered injuries to the victim's vagina that could have been caused by penetration or "any kind of blunt [force] trauma." At trial, the nurse-examiner also noted that the victim did not understand what the nurse was asking her and answered inappropriately.

An officer interviewed the defendant at the facility. The officer did not read *Miranda* warnings. The officer told the defendant that he was not under arrest and made clear that he was free to leave. The interview lasted about a half an hour. During the interview, the defendant confessed that he tried to have sex with the victim.

The defendant moved to suppress his statements, arguing that since he was not free to leave the "locked" facility, the interview was a custodial interrogation. Further, the defendant argued, even if the interview was non-custodial in nature, the circumstances surrounding it—including his emotional and mental disabilities, his commitment following a suicide attempt, and the fact that he was on medication— rendered his statements involuntary.

At trial, a doctor who was familiar with the victim testified. Although he had not evaluated or treated the victim on the date of the offense, he testified that he had reviewed some of her records from her stay and had treated her for the preceding six to seven years. The victim's mother also testified. They explained the victim's condition, including that the victim is unable to live independently and has never been able to hold a job, despite having once earned a special education diploma.

Held: Affirmed. The Court first rejected the defendant's *Miranda* argument. The Court explained that the relevant question is not whether a reasonable person would believe that he was not free to leave a police interview because it occurred in a mental health facility to which he had been civilly committed, but rather, under the totality of the circumstances, whether police subjected him to "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." In this case, the Court ruled that the interview by a single officer in a neutral setting was not a custodial interrogation and therefore did not require *Miranda* warnings.

The Court then rejected the defendant's argument that his statement was involuntary. The Court noted that the trial court had found, based upon the defendant's own testimony, that he was extremely intelligent and acquainted with *Miranda* rights. The Court also found no evidence that any medication impaired the defendant's ability to refuse to answer the officer's questions. Lastly, the Court repeated that, for a suspect's statement to be found involuntary in nature, some level of coercive police activity must occur. The Court found that the record was devoid of evidence of such coercion.

Regarding sufficiency of the evidence, the Court reviewed § 18.2-61(A)(ii). The Court distinguished this case from *Adkins* and instead likened it to *Sanford*. The Court repeated that when a mentally impaired or mentally retarded person has sufficient cognitive and intellectual capacity to comprehend or appreciate that they are engaging in intimate or personal sexual behavior which later may have some effect or residual impact upon them, their partner, or upon others, that person lacks the "mental incapacity" that would make the statute apply.

In this case, however, the Court pointed out that the victim's adaptive skills for daily living, personal independence, self-sufficiency, and communication were markedly impaired on the day of the attempted rape. The Court found that the victim's limited adaptive functioning, together with the evidence of her general mental incapacity, made the evidence sufficient to demonstrate her mental incapacity under the law.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2125161.pdf

Avila v. Commonwealth: February 27, 2018
Chesterfield: The defendant appeals his conviction for Indecent Liberties on sufficiency of the evidence.

Facts: The defendant sexually assaulted a child of the family with whom he was living. During the two months that he stayed at their home, sharing a bedroom with the victim's brother, the defendant had become "like a member of the family". The defendant was often the only adult in the house, alone with the victim about fifty percent of the time. One day, the victim became ill and visited the defendant in his bedroom. There, the defendant sexually assaulted her.

At trial, the defendant argued that he lacked the "supervisory relationship" that would make him guilty of Indecent Liberties.

Held: Affirmed. The Court distinguished the *Hutton* case and ruled that the defendant had engaged in "a voluntary course of conduct" over a period of time that created a supervisory relationship with the victim, without explicit parental delegation of supervisory responsibility. The Court also found sufficient evidence to establish that the defendant had the necessary "responsibility for and control of the victim's well-being" to constitute the supervisory relationship required by Code § 18.2-370.1.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0514172.pdf

RECKLESS DRIVING

Virginia Court of Appeals - Unpublished

Barringer v. Commonwealth: February 27, 2018
Rockbridge: Defendant appeals his conviction for Reckless Driving by Passing Two Vehicles Abreast on sufficiency of the evidence.

Facts: Stuck in traffic on Interstate 81, the defendant drove onto the shoulder to pass the cars ahead of him and get off at the exit that was ahead. The portion of Interstate 81 where that took place has three lanes of travel in each direction. The trial court convicted the defendant of Reckless Driving in violation of § 46.2-856, which provides that a "person shall be guilty of reckless driving who passes or attempts to pass two other vehicles abreast, moving in the same direction, except on highways having separate roadways of three or more lanes for each direction of travel, or on designated one-way streets or highways." The trial court rejected the argument that the exception in the statute, which allows a passing movement if the highway has three or more lanes of travel, applied in this case.

Held: Reversed. The Court ruled that, under the plain language of the statute, the code section does not apply when there are three or more separate lanes of travel in each direction. The Court also

pointed out that the defendant was not attempting to pass two vehicles abreast to proceed further down a highway, but instead was attempting to exit the highway. The Court found that a 2010 AG's opinion was not binding in this case. [The link for that opinion is here: https://www.oag.state.va.us/files/Opinions/2010/10-033_Houck.pdf]

In a footnote, the Court acknowledged that the defendant's conduct is unlawful under § 46.2-841(B), which provides that "[t]he driver of a vehicle may overtake and pass another vehicle on the right only under conditions permitting such movement in safety. Except where driving on paved shoulders is permitted by lawfully placed signs, no such movement shall be made by driving on the shoulder of the highway or off the pavement or main traveled portion of the roadway." However, that section has a lesser punishment than Reckless Driving and was not charged in this case.

Tags: Reckless Driving – Passing Two or More Vehicles

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0235173.pdf

Moore v. Commonwealth: May 1, 2018
Hampton: The defendant appeals her conviction for Unlawful Wounding alleging a violation of § 19.2-294

Facts: The defendant had an argument with the victim, her ex-boyfriend, who left on a bicycle. The defendant followed the victim in her car and, finding him, turned the car around toward the victim. She waited until the victim was in the path of the car and then accelerated in his direction. She struck the victim, sending him to the hospital. While her charge of malicious wounding was pending, the defendant was also found guilty in District Court of improper driving in violation of §46.2-869. Thereafter, she moved to dismiss the Malicious Wounding charge under § 19.2-294, which provides:

> "If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others."

The trial court denied the motion. The defendant later pled guilty to unlawful wounding under a conditional guilty plea.

Held: Affirmed. The Court first repeated that the prohibition of § 19.2-294 only forbids multiple prosecution of offenses springing from the same criminal act; if the statutory violations involve different acts, the prohibition is not applicable. The Court analogized this case to the *Jefferson* and *Davis* cases, finding that the same evidence was not required to sustain defendant's two convictions.

The Court observed that the mere act of driving straight at the victim, standing alone, was sufficient to constitute improper driving § 46.2-869. Thus, while proof of the overall act of driving was common to the prosecution of both offenses, the nature of the specific act peculiar to each prosecution was separate and distinct.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0662171.pdf

ROBBERY & CARJACKING

Virginia Court of Appeals
Unpublished

Jackson v. Commonwealth: August 8, 2017
Henrico: Defendant appeals his convictions for Robbery and Use of a Firearm on sufficiency of the evidence.

Facts: The defendant and several confederates robbed a man at gunpoint. Police responded quickly and saw the defendant and the other men nearby, who fled on sight of the police. However, police located the men, hiding in a culvert. Police recovered a ski mask from the defendant; at least one of the robbers had worn a ski mask. All of the men were wearing dark clothing, as the victim had described. Police also located items that the men had stolen from the victim in the immediate area around the culvert.

Police asked the defendant who the other men were. The defendant denied knowing them. However, police learned that one of the men was his brother. Police asked him about his address, but he stated he could not provide it. Police asked him about the ski mask in his pocket, but he claimed it was only a hat. When they asked if it had holes for his eyes and mouth, he laughed and said he did not know.

Held: Affirmed. The Court found more than adequate support for a finding that the defendant acted "at the very least" as a principal in the second degree.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1457162.pdf

Johnson v. Commonwealth: November 14, 2017
Henrico: Defendant appeals his conviction for Carjacking as a Principal in the Second Degree on sufficiency of the evidence.

Facts: The defendant and his confederate robbed a man at gunpoint, stealing his car. They met the victim under the pretense of selling the victim heroin. However, after they entered the victim's car, the defendant's confederate put a gun to the victim's head and demanded money and the vehicle. At trial, though the victim identified the confederate as the source of the command to get out of the car, he also described the situation inside of the car as chaotic, with both robbers yelling over each other. As

the defendant got into the passenger side and his confederate into the driver's side of the vehicle, the victim fled.

Officers found the vehicle nearby using its internal GPS. When they attempted to stop the vehicle, the defendant was the passenger and his confederate was the driver. The vehicle fled and briefly escaped. Officers soon found it again, crashed and abandoned. Nearby, they found the defendant on the ground, complaining of injuries.

At trial, the defendant's confederate testified that he did not initially plan to take the victim's car and that he demanded the victim's wallet but did not order him out of the car. The defendant contended that the evidence showed his mere presence at the offense, rather than guilt as a principal in the second degree.

Held: Affirmed. The Court found the evidence sufficient to demonstrate that the defendant countenanced, approved, and assisted in his confederate's actions and thereby aided and abetted in the carjacking. The Court distinguished the *Moehring* and *Hampton* cases and likened this case to the *Pugliese* case.

The Court also found that the defendant's injuries were consistent with him having taken over as the driver of the vehicle at some point.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1894162.pdf

Heard v. Commonwealth: January 23, 2018
Hampton: Defendant appeals his convictions for Attempted Carjacking, Conspiracy, and Robbery on sufficiency of the evidence.

Facts: The defendant and his confederates attacked and robbed a man who had been sitting in a car. One of the attackers entered the victim's car, another attempted to take his keys and remove him from the car, and someone struck him in the face. The victim sounded his horn and the three attackers fled together. After the men fled, the victim locked his car and summoned police. When he returned, the victim discovered that his phone was missing. Police responded and saw the defendant and his friends, but the attackers fled on sight of the police.

Police later located the defendant and one of his conspirators, who both told police that they were out "running cars," i.e., stealing items from vehicles. Police also located a third conspirator and recovered the victim's phone from that man.

Held: Affirmed. The Court found that the evidence sufficiently demonstrated that the defendant and his companions shared the criminal intent to rob the victim and steal his car. The Court further found that the defendants attempted to carjack the victim through the use of violence to try to seize control of the car and deprive the victim of his possession or control of it. Lastly, the Court found that the evidence demonstrated that the defendant and his friends stole the victim's cellphone.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1576161.pdf

Johnson v. Commonwealth: May 1, 2018
Richmond: Defendant appeals her conviction for Robbery and Use of a Firearm on refusal of a mistrial and a jury instruction.

Facts: The defendant and an accomplice robbed a taxi driver. After the robbery, the defendant and her accomplice used the victim's credit card. Police found the victim's property in the defendant's hotel room. The defendant had also committed two other robberies, but the trial court denied the Commonwealth's motion to join those offenses.

At trial, the Commonwealth asked an officer "Where was it that you went looking for them?" The officer replied: "There was previous a robbery—." The defendant objected. The trial court instructed the jury to disregard the answer. The defendant then asked for a mistrial, but the trial court denied the motion.

The defendant asked the trial court to give a jury instruction that stated, *inter alia*: "The mere unexplained possession of stolen property by the defendant, without more, is not sufficient evidence to support a conviction of robbery, but is merely one circumstance that may be considered." The trial court refused the instruction.

Held: Affirmed. Regarding the motion for mistrial, the Court pointed out that the officer simply stated that there had been a previous robbery; his answer did not explicitly link the defendant to a prior criminal act. In view of the presumption that the jury followed an explicit cautionary instruction promptly given, unless the record clearly shows that the jury disregarded it, the Court found it proper to deny the motion for mistrial.

Regarding the refused jury instruction, the Court first agreed that it was a correct statement of the law under *Bazemore*. However, the Court repeated that, even if an instruction is a correct statement of the law, it does not follow that it was reversible error to refuse it. Instead, the Court pointed out that the Robbery instruction adequately explained that the Commonwealth must prove that the defendant took property or money and the taking was from the victim or in his presence. The Court observed that, under the Robbery instruction, the jury could not have found the defendant guilty based solely upon the defendant's "unexplained" possession of the victim's stolen credit card.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0699172.pdf

UNLAWFUL ENTRY

Virginia Court of Appeals-
Unpublished

Jones v. Commonwealth: October 3, 2017
Roanoke: Defendant appeals his conviction for misdemeanor interference with the property rights of another, arguing that the offense is not a lesser-included offense of Grand Larceny.

Facts: The defendant took a number of tools from his friend's property. At trial, the victim explained that the defendant did not have permission, but the defendant claimed that he did. At the conclusion of the trial, the trial court concluded that the Commonwealth had not proven grand larceny, as indicted, but had proven misdemeanor interference with the property rights of another in violation of § 18.2-121. The trial court reduced the offense to a misdemeanor violation of § 18.2-121, reasoning that it was a lesser-included offense of grand larceny.

Held: Reversed. The Court held that § 18.2-121 is not a lesser-included offense of grand larceny under Code § 18.2-95. The Court explained that a violation of § 18.2-121 is an offense against the "land, dwelling, outhouse or any other building of another," its "contents", or "use" of "such property free from interference." While § 18.2-121 focuses on interference, the Court reasoned that § 18.2-95 focuses specifically on goods and chattels over $200; thus, the Court found, both sections include offenses against properties, in general, or types of properties not specified in the other.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0837163.pdf

UNLAWFUL FILMING

Virginia Court of Appeals
Unpublished

McCurnin v. Commonwealth: November 21, 2017
Louisa: The defendant appeals his convictions for Intentionally Videotaping Non-Consenting Persons on the judge's refusal to recuse himself and sufficiency of the evidence.

Facts: The defendant videotaped several women in various states of undress using a hidden camera pointed at a guest room shower in his home. The defendant's wife discovered the videos and turned them over to police. The videos were approximately a year old and all came from a camera that had recorded over the course of several months. The files appeared to have been uploaded to the

defendant's work computer separately. At trial, a witness testified that the defendant later told her that one of the videos was "good."

Prior to trial, the defendant filed a motion asking the trial judge to recuse himself from hearing the criminal case because the judge had presided over a prior civil hearing between the defendant and his wife. The trial judge refused the motion, noting that he had only a vague recollection of the facts and would only judge the criminal case on the facts presented in this case.

At trial, the defendant claimed that his game camera accidentally recorded the videos. He claimed that he had plugged the camera into the outlet in the bathroom to charge it and that it had captured the videos without his knowledge. He claimed that he found the videos later and deleted them. However, the witnesses testified that they never saw the camera and, although they used the outlets to charge their phones, never saw anything else plugged into the outlets.

Held: Affirmed. Regarding the recusal issue, the Court noted that the party seeking recusal of a judge "has the burden of proving the judge's bias or prejudice." In this case, the Court found that, while the trial judge made findings regarding the defendant's credibility during the prior civil hearing, that in itself did not automatically disqualify him from hearing the criminal matter. The Court pointed out that the defendant did not provide any proof of bias on the part of the trial judge and that the judge stated during the recusal hearing that he had a limited recollection of the prior civil proceeding.

The Court also found that the evidence was sufficient to prove the defendant guilty.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0309172.pdf

III. DEFENSES

SELF-DEFENSE

Virginia Supreme Court

Carter v. Commonwealth: June 22, 2017
293 Va. 537, 800 S.E.2d 498 (2017)
Aff'd unpublished Court of Appeals ruling of May 31, 2016
Amherst: Defendant appeals his conviction for Murder on refusal to admit evidence regarding Self-Defense.

Facts: The defendant shot and killed his ex-girlfriend during an argument regarding videos the victim claimed she had of the defendant and her mother. After shooting the victim in her bedroom, the defendant walked into the living room, told her young children to call an ambulance, and left, taking the victim's cellphone with him. The defendant then called the victim's mother and told her to go pick up the children because the victim would "be dead, she was shot." The defendant next called his employer

and resigned, telling his boss "that he did something bad" and that it "would be on the news." He then took the victim's computer into the woods and destroyed it.

At trial, the defendant claimed that the victim threatened him with a gun and that when he struck the gun in her hand, it went off. He claimed that when he fled, the victim was still standing, although the medical examiner testified that the bullet severed the victim's spinal cord and paralyzed her immediately.

At trial, the defendant attempted to call the victim's own mother, who apparently would have reported that hours before the shooting occurred, the victim stated to her that she was going to kill the defendant. The defendant claimed that the threat was admissible to show that the victim was the initial aggressor and he was acting in self-defense when he shot her. However, the mother suddenly suffered a medical emergency and went to the hospital. The defendant requested a continuance and the trial court denied the motion. Thereafter, the defendant testified. The defendant did not renew his motion to continue.

During his testimony, the defendant sought to testify about prior acts of violence by the victim. The court allowed the defendant to testify to all acts of violence that the victim committed against him between 2012 and the date of her death, and also permitted him to testify as to acts of violence that he observed the victim commit against another person from 2012 until the victim's death. However, the court excluded evidence that the victim was arrested for stabbing a man ten years earlier and that the victim hit the defendant sometime in 2008 or 2009. The court also excluded evidence that the defendant "knew" that the victim broke her own mother's jaw in 2013.

The defendant called one of the victim's acquaintances to testify at trial and unsuccessfully attempted to have him declared an adverse witness. The witness testified that he did not know whether the victim had a gun. However, while the jury was deliberating, the defendant called the witness to testify again, for purposes of a proffer. At that time, the witness stated that his earlier testimony was untrue and he knew that the victim had a gun.

At the time, the defendant told the court that he was not asking the court to change any previous rulings. However, after the jury returned its verdict, the defendant made a motion to set aside the verdict based on the witness' false testimony. The court denied the motion.

Held: Affirmed. The Court first addressed the mother's testimony about the alleged threat by the victim. Unlike the Court of Appeals, the Supreme Court did not address the merits of the defendant's claim, instead finding that any error would have been harmless in light of the overwhelming evidence at trial.

The Court then addressed the victim's alleged prior acts of violence. The Court agreed that, because the defendant had adduced evidence that he acted in self-defense, evidence of the victim's specific acts was admissible to show the character of the decedent for turbulence and violence, even if the defendant was unaware of such character. However, like the Court of Appeals, the Supreme Court noted that the evidence the trial court excluded was either not relevant to the time and/or circumstances surrounding the victim's death.

In this case, the Court observed that testimony regarding a stabbing that occurred ten years prior and arose out of the victim's attempt to defend her sister was not relevant to the time or circumstances. The defendant also admitted he knew nothing regarding the circumstances of the

victim's alleged 2013 breaking of her mother's jaw. Therefore, he could offer no evidence as to whether the act was "likely to characterize the victim's conduct toward" him and it was proper to exclude the evidence.

Finally, the Court addressed the allegedly perjured testimony. The Court held that the defendant's motion to set aside the verdict based on the witness' alleged false testimony came too late. The Court pointed out that, had the defendant raised the issue of the witness' differing testimony, at the time of the proffer, or earlier in the trial, and made known what action he desired the trial court to take earlier in the trial, the trial judge would have been in a position to address the asserted error prior to the jury returning its verdict.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1160993.pdf

Virginia Court of Appeals -
Unpublished

Murphy v. Commonwealth: August 8, 2017
Virginia Beach: The defendant appeals his conviction for Unlawful Wounding on denial of his Self-Defense Claim.

Facts: The defendant, who had no prior relationship with the victim and his girlfriend, confronted them on the boardwalk in Virginia Beach. They argued, and the victim told the defendant that if he did not apologize, "we are going to handle it right here." The victim tried to walk away, but when he did, the defendant punched him in the face, sending the victim to the ground, unconscious. A witness stated that the victim's girlfriend had struck the defendant before the defendant struck the victim. While the victim was unconscious, however, the defendant stomped the victim on his face, neck and chest four to eight times, and then kicked him in the side of the head repeatedly.

Held: Affirmed. The Court noted that, because the altercation started with the defendant having some fault, the appropriate standard to apply was self-defense "with Fault". Thus, it was the defendant's burden prove that, when attacked, he retreated as far as possible, announced his desire for peace and perpetrated an act of violence upon his adversary from a reasonably apparent necessity to preserve his own life or save himself from great bodily harm. The Court found that the evidence demonstrated that the defendant was not acting in self-defense when he unlawfully kicked the victim and stomped on his face after he was already rendered defenseless.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0601161.pdf

Green v. Commonwealth: February 13, 2018
Norfolk: Defendant appeals his convictions for Discharge of a Firearm in Public and Use of a Firearm in a Felony on jury instructions, refusal to force election of offenses, and sufficiency.

Facts: The defendant got into a dispute at a club with another man. The man had argued with the defendant's girlfriend inside the club and the man had then "yanked" the girlfriend out of the club. The defendant walked out of the club after the man and went to his car, retrieving an item.

Outside the club, the victim, who did not know the defendant, spoke with the man with whom the defendant had been arguing. Suddenly, the man told the victim to "get out the way." Unbeknownst to the victim, the defendant had drawn a gun and was about to open fire on the man. The man drew a gun, and immediately after that, the victim felt a gunshot strike his left hip. He ducked for cover behind a car, from where he heard "a whole lot of shooting." The man firing at the defendant shot the defendant in the chest and then fled the scene.

Police spoke to the defendant a few days later. The defendant claimed that he was unarmed at the time of the shooting, did not fire any shots, and did not know who the shooter was. However, police later examined the surveillance video and determined that the defendant had fired the first shots. The video revealed that the defendant had waited by the other man's car and then opened fire.

At trial, the jury acquitted the defendant of aggravated malicious wounding but convicted him of discharging a firearm in public under §18.2-280 and use of a firearm in the commission or attempted commission of aggravated malicious wounding or malicious wounding under §18.2-53.1.

Held: Affirmed in part, reversed in part. The Court held that the trial court properly instructed the jury and that the evidence was sufficient to convict, but also held that the trial court erred in not requiring the Commonwealth to elect which firearm offense it would prosecute.

The Court examined the defendant's claim of self-defense, describing it as one of justifiable self-defense (that is, self-defense "without fault"), not excusable self-defense. Thus, the Court explained, it was the defendant's burden to show that he fired only after he was shot. However, examining the record, the Court concluded that the evidence did not show he was not the aggressor.

The Court found that the defendant's self-defense claim only invited the jury to speculate as to who fired the first shot. The Court observed: "A scintilla of evidence must be based on facts, which presupposes that some evidence exists." In this case, the Court found no such evidence at all, writing that "a defendant may not claim he had a right to arm himself for self-protection when he armed himself before he had a reasonable belief another person intended to injure or harm him."

Regarding the defendant's conviction for Discharging a Firearm in Public, the Court examined the language of §18.2-280(E), which states: "Nothing in this statute shall preclude the Commonwealth from electing to prosecute under any other applicable provision of law instead of this section." The Court concluded that §18.2-280(E) requires the Commonwealth to choose to prosecute under Code §18.2-280(A), (B), or (C) or choose to prosecute under any other applicable provision of law. However, because the defendant had failed to require the Commonwealth to elect between the offenses at least one week prior trial as required by §19.2-266.2, the Court simply remanded the case for the Commonwealth to elect which of the two convictions should be set aside.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0344171.pdf

IV. EVIDENCE

CERTIFICATES OF ANALYSIS

Virginia Court of Appeals - Unpublished

Madonia v. Commonwealth: October 17, 2017
Virginia Beach: Defendant appeals his conviction for Rape on chain of custody and voir dire issues.

Facts: In 1987, the defendant raped the victim. A nurse collected forensic evidence from the victim and provided the evidence an investigating officer. That officer then provided the evidence to an officer who transported the evidence to DFS. At DFS, a forensic scientist examined the evidence, once in 1987 and then again in 2014. The 2014 examination identified the defendant as the attacker.

Unfortunately, in the intervening years, the officer who transported the evidence to DFS died. In a pretrial motion to determine the admissibility of the forensic analysis, the Commonwealth presented evidence that the forensic scientist received the evidence from the deceased officer in the same sealed condition as the first officer had described. The trial court overruled the defendant's argument that the Commonwealth failed to establish chain of custody.

During voir dire, the defendant sought leave of court to ask potential jurors the following question:

> "If there are two reasonable explanations that can be drawn from the evidence, one consistent with innocence, one consistent with guilt, you are bound by law to accept the explanation consistent with innocence and find the defendant not guilty. Do any of you feel that it would be difficult to apply this principle in a case before you?"

The trial court refused the question, instead permitting counsel to ask whether it would be more difficult to apply the standard of "beyond a reasonable doubt" in this case, rather than a shoplifting case. The Court also explained the presumption of innocence to the jury.

Held: Affirmed. The Court first agreed that the Commonwealth's chain of custody evidence addressed the state of the physical evidence at every stage in the investigation, beginning with the initial collection through the 2014 retesting. The Court rejected the argument that the chain of custody evidence consisted of hearsay, pointing out that under Virginia Rule of Evidence 2:1101(c), trial courts are not required to adhere strictly to the rule against hearsay in pretrial motion hearings. The Court

found that the defendant's mere speculation that contamination or tampering could have occurred went to the evidence's weight, not its admissibility.

Regarding the voir dire issue, the Court found that the trial court adequately permitted the defendant to ascertain whether potential jurors (1) understood that the Commonwealth must exclude every reasonable hypothesis of innocence, and (2) would be biased against appellant because he was on trial for rape as opposed to a less provocative offense. Thus, the form of the question was irrelevant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1716161.pdf

DNA

Virginia Court of Appeals
Published

Burrous v. Commonwealth: December 12, 2017
68 Va.App. 275, 808 S.E.2d 206 (2017)
Fredericksburg: Defendant appeals his convictions for Robbery and Wearing a Mask on sufficiency of the evidence.

Facts: The defendant and an accomplice robbed several people outside of a retail store. A witness noted that one of the robbers was wearing a bandana while the other was wearing a different kind of mask. Police responded and searched the area. A police canine found the bandana by directly tracking it from the scene of the robbery to a nearby area, where they found other items related to the robbery. At trial, two of the victims testified that the bandana was the bandana worn by one of the robbers and that the area where the police found the bandana was the area to which the robbers fled.

The Department of Forensic Science found the defendant's DNA on the bandana. At trial, the defendant argued that DNA alone could not prove that he committed the offense.

Held: Affirmed. The Court found that the circumstances excluded the possibility that the defendant innocently came into contact with the bandana. The Court distinguished the *Jennings* case by pointing out that, unlike in *Jennings*, where DFS identified multiple DNA profiles, the DNA analysis of the bandana here showed that DNA of only one individual – the defendant – was on the bandana, and the certificate of analysis stated that the "probability of selecting an unrelated individual with a DNA profile matching" the one developed was approximately 1 in greater than 7.2 billion. The Court also pointed out that the bandana was not accessible to the general public.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0022172.pdf

Virginia Court of Appeals
Unpublished

Kumar v. Commonwealth: September 5, 2017
Fairfax: Defendant appeals his conviction for Child Sexual Assault on failure to preserve evidence, Fifth Amendment, chain of custody, and jury instruction issues.

Facts: The defendant sexually assaulted a four-year-old child in 1994. The child reported the attack to her mother, who brought the child to the hospital. There, the child underwent an examination while wearing the same underwear she wore during the crime. Nurse Sue Rotolo collected a PERK kit and the victim's underwear, and later collected a suspect PERK kit from the defendant. Police also collected a towel and bedding from the apartment. Police arrested the defendant, who then fled the United States and remained a fugitive until 2014.

The Department of Forensic Science analyzed the evidence and found sperm and DNA matching the defendant from the crotch of the victim's underwear. However, in 2006, mistakenly believing that the perpetrator had been arrested and the appeal period had expired, a police sergeant ordered the destruction of all of the evidence in the property room relating to the defendant's case, including both PERKs, the victim's clothing, and the towel and bedding.

In 2013, a detective learned that the defendant was still a fugitive and that the case was still open. He located the investigating detective's original case file and discovered that the original detective from the case had never put the swab of the victim's clothing or the defendant's blood swabs in the property room. Instead, he had kept them in his personal case file, where they remained. The new detective sent the clothing and swabs back to DFS, where the scientists conducted additional DNA analysis and found results consistent with those in 1995.

Police extradited the defendant back to the United States in 2014. Using an Urdu-Hindi interpreter, police advised the defendant of his *Miranda* rights. During the advisement, the defendant and the interpreter had the following exchange:

Interpreter: Whatever you say may be used against you in the court.

Defendant: Okay.

Interpreter: As evidence. You have the right to talk to your lawyer when we question you. You can say that you cannot answer.

Defendant: I have to talk to the lawyer.

Interpreter: I have to talk to the lawyer. He will talk to you.

Defendant: Okay.

Later, the interpreter and the defendant had this exchange as well:

Interpreter: If you don't want to answer any question, you feel bothered by any question, you can say you want to talk to your attorney.

Defendant: Okay, I will talk to the attorney and then answer.

The defendant then indicated that he was willing to talk to the detective. He told the detective that "I did the mistake and so I left." The defendant then requested an attorney and the police terminated the interview.

Prior to trial, the defendant moved to dismiss the indictment, arguing that the Commonwealth had destroyed potentially exculpatory evidence. The defendant argued that the towel and bedding that the Commonwealth destroyed could have been tested and, if they did not contain the defendant's DNA, that fact would have been exculpatory. The trial court denied the motion.

At trial, the nurse, Sue (Brown) Rotolo testified that she collected blood from the defendant, but could not recall collecting hair samples. However, she identified her initials on the evidence. The detective who received the evidence from Nurse Rotolo also testified and explained that after he received the evidence, he delivered it to the Department of Forensic Science. When DFS returned the evidence, the detective placed it in his case file folder, which he stored in an unlocked filing cabinet. He explained that both his floor and the building were secured by key codes.

Another detective, who pulled the file in 1999, testified that the plastic bags of evidence showed no signs of tampering in 1999. Similarly, the final detective, who pulled the file in 2013, testified that the items were stored in sealed packages, and bore no signs of tampering.

The DFS employees who testified at trial could not independently recall all of their actions at the time they handled the PERK evidence in 1994 and 1995, but they testified that when they examined the evidence again in 2013, they recognized their initials, the case number, and the dates that they handled or tested the evidence. The analysts also testified that, upon examining the exhibits in 2013, they appeared to be in the same condition as they were in 1995.

At trial, the defendant denied sexually assaulting the child. He claimed that he had sexual intercourse with a neighbor that day and that he cleaned himself off with a towel in his room.

The defendant requested an instruction to the jury that stated that the jury could infer that the destroyed evidence was beneficial to the defendant. The trial court denied the instruction.

Held: Affirmed. First, the Court rejected the defendant's motion to dismiss, finding that the defendant failed to show that the destroyed evidence "possessed an apparent exculpatory value" and failed to show that the Commonwealth, in failing to preserve the evidence, acted in bad faith, as required. The Court noted that no one testified that the towel or bedding were even present at the crime scene, and also pointed out that the defendant's own testimony indicated that his DNA would be present on the towel. The Court saw no reason that DNA on the bedding would have been relevant to the case.

Second, the Court rejected the defendant's motion to suppress his statement, finding that a reasonable police officer could have concluded that the defendant was not invoking his right to counsel. The Court found that the evidence indicated that, when he said "I have to talk to the lawyer" and "Okay, I will talk to the attorney and then answer," the defendant was merely repeating the explanation of his rights that the interpreter was providing to him.

The Court also found that, even if admitting the statement was error, it was harmless, noting that the statement could have been interpreted as his "mistake" in leaving the country, rather than his "mistake" in committing the aggravated sexual battery. The Court found that the value of the statement was relatively insignificant in comparison to the evidence identifying him as the perpetrator.

Third, the Court agreed that the evidence concerning chain of custody was sufficient. Regarding the handling of the exhibits before they reached DFS, the Court found that the defendant's "mere speculation that contamination or tampering could have occurred" only went to the weight, and not the

admissibility, of the DNA evidence. The Court acknowledged that there was no evidence regarding how the evidence traveled from the investigator's office to a storage facility, or how it was handled between 1999 and 2013. However, the Court found that such concerns were irrelevant when the witnesses testified that the item was in the same condition as when it had been sealed and there was no indication of tampering or contamination.

The Court also rejected the defendant's complaint that Nurse Rotolo did not remember collecting hair and pubic swabs, noting that she did not deny collecting the evidence and that other evidence at trial indicated that she collected this evidence.

Regarding the defendant's objections to the chain of custody regarding how the exhibits were handled, stored, and transported after DFS employees took custody of the exhibits, the Court found that §19.2-187.01 resolved the issue. The Court noted that once DFS took custody of the exhibits, the certificate of analysis served as prima facie evidence of the chain of custody.

Finally, the Court found it was proper to deny the defendant's proposed jury instructions directing an inference related to the Commonwealth's destruction of evidence, because the proposed instructions were not supported by more than a mere "scintilla of credible evidence." As the Court had noted earlier, there was no reason to believe that the towel and bedding were pertinent or germane to the case at all.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1636154.pdf

CIRCUMSTANTIAL EVIDENCE

Virginia Court of Appeals
Published

Logan v. Commonwealth: June 20, 2017
67 Va. App. 747, 800 S.E.2d 202 (2017)
Chesterfield: Defendant appeals his convictions for Maliciously Shooting at an Occupied Vehicle, Attempted Murder, and Use of a Firearm on sufficiency of the evidence and refusal to permit certain evidence at sentencing.

Facts: During a dispute with the victim outside a home, the defendant pointed a firearm at the victim and threatened him. The victim was in a vehicle and several other people were present. However, no one else had a firearm. The victim fled in his vehicle and while he did, someone shot at the victim's truck from the vicinity of the residence. Police found a bullet lodged in the passenger-side front windshield window visor, the back windshield glass broken, and bullet casings at the edge of the driveway and just in the road. The bullet narrowly missed the passenger's head. The trial court convicted the defendant.

At sentencing, the defendant called five witnesses. When the defendant was getting ready to call his sixth witness, the trial court cut him off and told him: "Five witnesses at the sentencing on these circumstances is enough." The defendant then asked to proffer the testimony of the last witness, but the trial court declared "Enough is enough" … "I'm not going to allow you to do that."

Held: Affirmed in part and reversed in part. The Court found the that the evidence was sufficient to conclude that the defendant was the person who shot at the victim's truck with malice. The Court distinguished this case from *Smith* and *Hines* and ruled that the factfinder was allowed "to draw reasonable inferences from" the facts in this case to conclude that the defendant was the shooter.

However, the Court found that it was reversible error for the trial court to prevent the defendant from proffering the testimony of his proposed additional sentencing witness. In this case, the Court ruled that the trial court erred when it failed to allow the defendant the opportunity to proffer his evidence so that the Court of Appeals could engage in appellate review of the trial court's decision to exclude the testimony. The Court therefore reversed the trial court's sentencing and remanded the case for re-sentencing.

In a footnote, the Court made sure to clarify that its ruling does not preclude a trial court from exercising its considerable discretion in limiting the number of witnesses at sentencing.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0867162.pdf

Virginia Court of Appeals -
Unpublished

Boykins v. Commonwealth: June 6, 2017
Suffolk: Defendant appeals his convictions for Malicious Wounding, Use of a Firearm, and related offenses on sufficiency of the evidence.

Facts: The defendant ambushed and opened fire at the victim at a shopping center, wounding him. Video surveillance recorded the defendant shooting at the victim and chasing him down the sidewalk. The victim drew his own firearm and returned fire, wounding the defendant. The victim identified the defendant as his assailant to police. Police also located a distinctive shirt that the defendant wore during the attack at the defendant's stepmother's home later that evening.

Police located the defendant at a nearby hospital seeking treatment for a gunshot wound in his arm and found primer residue on his hands. The defendant made statements to a detective at the hospital that linked him to the shooting, telling the detective that everything he needed to know was "probably on a video at the shopping center."

At trial, the victim testified that the defendant was not the person who shot him. The victim admitted that the shooting had caused him some memory loss. The circuit court questioned the victim's motivation for changing his identification, and expressly stated that it did not believe all of the victim's testimony at trial. The defendant testified that he was not involved in the shooting,

Held: Affirmed. The Court agreed that the evidence was sufficient to establish that the defendant attacked the victim at the shopping center and initiated the gunfight that occurred there.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1487161.pdf

CONFESSIONS

Virginia Court of Appeals
Unpublished

Hardin v. Commonwealth: September 5, 2017
Hanover: Defendant appeals his conviction for Involuntary Manslaughter on sufficiency of the evidence.

Facts: The defendant, while driving an eighteen-wheel tractor-trailer, stuck and killed a cyclist on a four-lane roadway at night. The cyclist had been traveling in the same direction as the truck, which clipped her bicycle, knocking her onto the ground and crushing her under the truck. Police responded and spoke with the defendant. He stated that he had first seen the cyclist between 400 and 500 feet away, "wobbling" on the right side of the highway, but that he took no action to avoid her. He acknowledged that, based on the width of his truck, there was "not much clearance;" however, he did not slow down, attempt to move to the adjacent lane, or sound his horn to warn the victim.

Police examined the scene and found that the defendant began to stop after he struck the victim and came to a complete stop 400 feet later. At trial, the defendant claimed that he only saw the victim 2-3 seconds before the crash and that there were vehicles on his left that prevented him from changing lanes; however, a witness contradicted that statement at trial.

Held: Affirmed. The Court agreed that the defendant knew or should have known that his actions created a probability of serious injury and he acted with "reckless or indifferent disregard" to the rights of another when he failed to reduce his speed or take other evasive action. The Court pointed out that the defendant was able to make a complete stop in 400 feet and therefore, could have avoided hitting the victim after seeing her 400 to 500 feet away.

The Court rejected the argument that the only evidence of the defendant's guilt was his own statement and that the trial court improperly convicted the defendant on an uncorroborated confession. The Court quoted the *Carminade* case, explaining that a "confession" is a statement admitting or acknowledging all facts necessary for conviction of the crime at issue. The Court ruled that the defendant's statement in this case was not a "confession", but an "admission," because the statement did not establish both elements of the corpus delecti for involuntary manslaughter.

The Court also found it was proper to reject the defendant's self-serving statement at trial in favor of his statement at the scene, which had been against his penal interest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1246162.pdf

Trent v. Commonwealth: December 19, 2017
Augusta: Defendant appeals his conviction for Carnal Knowledge on sufficiency of the evidence.

Facts: The defendant used drugs to lure children into his home and then sexually assault them. Police investigated and identified several child victims. The defendant admitted to the police that all of the boys visited his house frequently and that he had provided them with oxycodone, methamphetamine, and marijuana. He specifically admitted that he sexually assaulted one of the children. The Commonwealth charged him with several offenses, including sexually assaulting that child.

At trial, a few of the children testified. One of them confirmed that he and the other children had received drugs from the defendant and that he had seen the defendant and the victim engaged in sexual activity. The victim of the offense to which the defendant confessed also testified. While he admitted to receiving drugs from the defendant, he refused to talk about anything else. The only thing he stated was that there was "sex stuff that went on that he did not want to talk about."

Held: Affirmed. The Court began by reviewing the history of the *corpus delicti* rule, beginning with *Perry's Case* in 1660. However, the Court distinguished the *Allen* case and instead likened this case to the *Morning* case, where the victim also corroborated significant details of the offense before becoming visibly upset and denying that the offense took place. The Court also pointed out that witnesses corroborated significant details of the defendant's confession. The Court found that the evidence corroborated the defendant's confession far beyond the mere opportunity for the defendant to have committed the crime.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0350173.pdf

CROSS-EXAMINATION

Virginia Court of Appeals
Unpublished

Jefferson v. Commonwealth: March 20, 2018
Pittsylvania: Defendant appeals her conviction for Welfare Fraud on Limitations of Cross-Examination and Sufficiency of the Evidence.

Facts: Over a two-year period, the defendant obtained SNAP and fuel-assistance benefits by filing several applications without disclosing her true employment. At trial, a DSS fraud investigator

explained that, the more income the defendant had earned, the fewer benefits she would have been entitled to receive. She testified that the defendant received a total overpayment of approximately $3,500.00. Defense counsel asked the witness if she still would have been entitled to benefits, even if she had reported her true income, but the trial court sustained the Commonwealth's objection, finding that the question was irrelevant.

Held: Affirmed. The Court agreed that any testimony about what the defendant's benefits would have been had she disclosed the income would have been purely hypothetical, and thus irrelevant, since there was no evidence that the defendant did disclose that income. The Court pointed out that the evidence had no tendency to establish the fact in issue, namely, how much the defendant received in benefits overpayment. The Court also found that the evidence was sufficient to find the defendant guilty.

In a footnote, the Court also rejected two other arguments: First, that neither § 63.2-513 nor § 63.2-522 specifies whether the offense identified in § 63.2-522 constitutes petit or grand larceny; and second, that under § 18.2-186.2, which criminalizes the use of false representations or non-disclosures to obtain housing assistance program benefits, this offense is only a misdemeanor.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0638173.pdf

ELECTRONIC EVIDENCE

U.S. Supreme Court

United States v. Microsoft: April 17, 2018
584 U.S. ___ (2018)
Second Circuit Court of Appeals: The government appeals the quashing of a Search Warrant on statutory grounds.

Facts: The government obtained a search warrant under 18 U.S.C. §2703 that required Microsoft to disclose all e-mails and other information associated with the account of one of its customers. Microsoft moved to quash the warrant on the grounds that the account's e-mail contents were stored at its datacenter in Dublin, Ireland. A district court denied the motion, but the Second Circuit granted the motion, ruling that the government was seeking an unauthorized extraterritorial application of §2703. The U.S. Supreme Court accepted the case and heard oral argument in 2018.

However, on March 23, the "CLOUD Act" became Federal law. The CLOUD Act amends the Stored Communications Act, 18 U. S. C. §2701 et seq., by adding the following provision:

> "A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control,

regardless of whether such communication, record, or other information is located within or outside of the United States."

In light of the change in law, both parties asked the Court to vacate and dismiss the case and the lower courts' rulings.

Held: Case dismissed as moot. The Court vacated the previous rulings and dismissed the case.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/17-2_1824.pdf

Virginia Court of Appeals
Published

Atkins v. Commonwealth: July 5, 2017
68 Va. App. 1, 800 S.E.2d 827 (2017)
Powhatan: Defendant appeals his convictions for Breaking and Entering on admission of text messages and Internet messages.

Facts: Over a few days, the defendant broke into several business and stole electronics, checks, a car and other property. Police located the defendant near the thefts and searched his vehicle, discovering some of the stolen property as well as the defendants phone. Police seized the phone. The defendant provided his passcode and identified the phone as his.

A forensic analyst located a message that the defendant sent from his "Twitter" application on his phone (a.k.a a "tweet") offering one of the stolen items for sale. Police found that item in the defendant's apartment. The analyst also located text messages sent from the defendant's phone offering another stolen item for sale and referencing the stolen vehicle. At trial, the defendant objected to admission of those communications, arguing that the Commonwealth had not proven the identity of the sender. The trial court admitted the messages and convicted the defendant.

Held: Affirmed. The Court found that the evidence clearly met the baseline foundational requirement of proving by a preponderance that the defendant was the person who sent the text messages and the "tweet" from his cell phone. The Court noted that the defendant admitted that the passcode-protected phone from which the tweet and text messages were sent was his phone and that he knew the passcode. The Court also noted that the "Twitter" app installed on the phone had been created with an email address using the defendant's name and that the photograph of the stolen property contained in the tweet was the same item found in the defendant's bedroom.

In a footnote, the Court also reaffirmed that the photograph that appeared with the "Twitter" message was not hearsay at all.

Full case at:
http://www.courts.state.va.us/opinions/opncavwp/1542162.pdf

Virginia Court of Appeals
Unpublished

Simpson v. Commonwealth: November 21, 2017
Spotsylvania: The defendant appeals his convictions for Armed Burglary, Entering a Home in Violation of a Protective Order, and Battery on admission of text messages.

Facts: The defendant broke into his wife's home and attacked her with a metal pipe in violation of a protective order. Prior to the attack, the victim had cataloged several violent and threatening text messages from the defendant. The defendant moved to exclude the messages prior to trial, arguing that the screenshots were too vague and remote in time to be relevant and would prove more prejudicial than probative. He also argued that there was insufficient evidence that he was the author of the messages, suggesting that screenshots are easily manipulated. The trial court admitted some of the messages but excluded others. For example, the trial court admitted messages that identified the children and made specific threats, albeit several months before the attack.

At trial, the victim testified that she received the messages, and she testified about the means she used to save and preserve them. She also testified about the extensive personal details contained in the text messages, which convinced her that the defendant was their author. The defendant offered no evidence at the motion hearing or at trial that the victim had in any way fabricated or manipulated the screenshots or the underlying text messages.

Held: Affirmed. The Court ruled that the text messages contained in the admitted screenshots were relevant to proving the intent, malice, motive, and identity of the intruder, all of which were at issue in the instant case. The Court wrote: "While appellant correctly points out that some of the messages contained in the screenshots were prejudicial, nothing in the record demonstrates that any prejudice outweighed their probative value."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0311162.pdf

EXPERTS

U.S. Supreme Court

McWilliams v. Dunn: June 19, 2017
582 U.S. __ (2017)
Certiorari to the Eleventh Circuit Court of Appeals: Defendant seeks *Habeas* relief for the denial of a mental health expert.

Facts: The defendant robbed, raped, and murdered a convenience store clerk. Trial took place over 31 years ago. Prior to trial, the defendant requested a psychiatric evaluation for both sanity and mitigation purposes. The trial court ordered the Alabama Department of Corrections to "complete neurological and neuropsychological testing on the Defendant . . . and send all test materials, results and evaluations to the Clerk of the Court." A three-member "lunacy commission" examined the defendant and issued a report finding that he was competent to stand trial and had not been suffering from mental illness at the time of the alleged offense. One of the members noted in the report that the defendant appeared to be malingering. A jury convicted the defendant of Capital Murder.

Prior to sentencing, the trial court granted the defendant's request for a complete neurological and neuropsychological examination. A neuropsychologist with the state examined the defendant and filed a report two days before the sentencing hearing. A day before the hearing, the defendant also received the records from the previous examination of the defendant. The defendant asked for a continuance and the appointment of an expert to assist in reviewing the records and the report, but the trial court denied the requests and sentenced the defendant to death.

On appeal, the Alabama Court of Appeals ruled that the state had complied with *Ake* by providing a state-funded psychiatric evaluation. On post-conviction review, the Federal District Court and Eleventh Circuit Court of Appeals denied *Habeas* review, finding that the state court did not unreasonably apply the standards set forth in *Ake v. Oklahoma*.

Held: Reversed. The Court ruled that *Ake* clearly established that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, a defendant must receive, not just an examination, but also the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense."

In this case, the Court complained that no one helped the defendant evaluate the expert's report or the defendant's extensive medical records and translate these data into a legal strategy. In addition, the Court complained that no expert helped the defendant prepare and present arguments that might, for example, have explained that the defendant's purported malingering was not necessarily inconsistent with mental illness. Lastly, the Court complained that no expert helped the defendant prepare direct or cross-examination of any witnesses, nor did any expert testify at the sentencing hearing.

The four dissenting justices noted that the Court had originally granted review on the question of "whether *Ake* clearly established that an indigent defendant whose mental health will be a significant factor at trial is entitled to the assistance of a psychiatric expert who is a member of the defense team instead of a neutral expert who is available to assist both the prosecution and the defense". The majority explicitly dodged that question and ruled on the narrower issue above.

Full Case At:
https://www.supremecourt.gov/opinions/16pdf/16-5294_h3dj.pdf

Virginia Court of Appeals
Unpublished

Chavis v. Commonwealth: July 18, 2017
Goochland: Defendant appeals his conviction for DUI Manslaughter on admission of expert testimony and sufficiency of the evidence.

Facts: Defendant, intoxicated, rear-ended another vehicle on the highway, sending it off the road and killing two occupants. Police extracted the event data recorder from the defendant's vehicle and downloaded its data. The data indicated that the defendant had been driving at approximately 122 miles an hour just before the crash, but that he suddenly decreased his speed by about 33 miles per hour just as he crashed.

At trial, the defendant objected to the State Police expert's testimony explaining the data recovered from the device, arguing that it invaded the province of the jury. The Court overruled the objection. The expert testified about the data, noting that the size of the defendant's tires could have affected the data and he did not know the size of the tires.

At trial, a toxicologist testified that the defendant's BAC at the time of the crash was .172.

Held: Affirmed. The Court pointed out that the trial court only permitted the expert to testify about the data extracted from the event data recorder in the defendant's vehicle. The Court concluded that the expert did not invade the province of the court as fact finder because the trial court did not permit the expert to draw a conclusion as to the defendant's speed immediately preceding the crash.

However, the Court further noted that the defendant's charges of involuntary manslaughter were based on his driving under the influence of alcohol. Thus, intoxication was the gravamen of the offense, not speed, and the expert's testimony merely provided an indication of impairment, not testimony on the "ultimate issue" of impairment.

The Court also found the evidence was sufficient. The Court ruled that the combination of the defendant's BAC and the sheer force of the crash proved that the defendant's intoxication caused him to operate his vehicle in a manner that resulted in the victims' deaths.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1029162.pdf

Smiley v. Commonwealth: May 1, 2018
Powhatan: The defendant appeals his convictions for Child Sexual Assault on refusal to appoint an expert.

Facts: The defendant repeatedly sexually assaulted a ten-year-old child who lived in the same home that he did. The victim first disclosed the assaults to her guidance counselor, and then a police officer and a SANE nurse. Later, the victim also described the assaults to Ian Danielson, a forensic examiner.

Prior to trial, the defendant requested the trial court to appoint a private forensic interviewer to evaluate the victim and the methodology used by the forensic interviewer, but the trial court denied the motion. At trial, the victim testified, as did the guidance counselor, police officer and SANE nurse.

At trial, Danielson, the forensic interviewer, did not testify about any specific statements that the victim made during the forensic interview. Instead, the trial court recognized him as an expert regarding the forensic interviewing of child victims of sexual abuse. As an expert, Danielson explained that "disclosure is a process, not a one-time event," and that children commonly disclose additional details in subsequent interviews pertaining to their sexual abuse.

Nevertheless, the defendant called Danielson as his own witness and questioned him more extensively regarding his forensic interview of the victim, playing Danielson's video interview of the victim in its entirety. The defendant asked Danielson numerous questions about his use of "close-ended" questions. He also questioned Danielson about his failure to ask follow-up questions regarding certain subjects, including the victim's statements concerning the possibility that she dreamed the sexual abuse at issue.

Held: Affirmed. The Court held that, under *Husske*, the trial court did not err by denying Smiley's pretrial motion for the appointment of an independent forensic interviewer. The Court pointed out that, even if the trial court had granted the defendant's motion, although an appointed forensic interviewer could have challenged the interviewing technique used by Danielson during his interview with the victim and generally impeached his credibility as an expert in the field of forensic interviewing, the interviewer could not have challenged the credibility of the victim's testimony at trial. In addition, the Court pointed out that the victim had already disclosed to three other people before disclosing to Danielson.

The Court then noted that the defendant did not require the assistance of an expert forensic interviewer to identify leading questions or issues that were not fully explored in Danielson's forensic interview. Thus, the Court found that the services offered by the expert at issue would not have significantly assisted the defendant at trial or in the preparation of his defense, and the defendant failed to show prejudice by the denial of the expert assistance at issue because he had the ability to thoroughly examine Danielson regarding his forensic interview of the victim.

[*Note: The Court did not address whether the defendant was entitled to an expert to evaluate the victim – EJC*].

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0054172.pdf

HEARSAY

Virginia Court of Appeals
Published

Campos v. Commonwealth: June 13, 2017
67 Va. App. 690, 800 S.E.2d 174 (2017)

Halifax: Defendant appeals his convictions for Sexual Assault of a child on admission of Hearsay evidence.

Facts: Defendant sexually assaulted his girlfriend's daughter repeatedly over the course of several years. Beginning at 10 years old, the child repeatedly reported the assaults to her mother; after one of her reports, the mother brought the child to the hospital for a forensic examination. However, each time, the mother told the victim that she did not believe her and the child would then recant. Finally, the mother brought the child to the hospital for another forensic examination and the defendant confessed to the offenses.

At trial, the victim testified. On cross-examination, she stated that she did not recall several of her previous statements. The Forensic Nurse Examiner also testified, reciting the victim's entire statement to her describing the assaults in detail. The defendant objected on *Crawford* grounds and to allowing into evidence testimonial statements to a medical provider that were not limited to statements of symptoms or medical history, but the trial court overruled the objections. The Forensic Examiner further testified that the child told her that, on one occasion, the defendant threatened to kill her if she reported the assaults.

Held: Affirmed. The Court first rejected the defendant's *Crawford* argument, repeating that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of her prior testimonial statements. The Court noted that the victim testified at trial; the fact that the victim could not remember every previous statement she had made was not relevant. The Court did not address whether the victim's statements were "testimonial", since her testimony did not implicate *Crawford*.

The Court then agreed that, other than the specific statement about the threat to kill her, the victim's statements to the Forensic Nurse Examiner were statements for purposes of medical treatment under Virginia Rule of Evidence 2:803(4). The Court rejected the argument that it should rely on the caselaw regarding Federal Rule of Evidence 803(4), noting that the Virginia Rules of Evidence are merely meant to re-state existing law in Virginia. Instead, the Court reviewed previous Virginia cases in detail to formulate a full explanation of the rule.

The Court explained that for a hearsay statement to be admissible for its truth under Virginia Rule 2:803(4), the declarant must make it for purposes of medical diagnosis or treatment, it must fit at least one of the three types of admissible statements: those relating to

(1) Medical history

(2) Past or present sensations, or

(3) Inception or general cause of the condition

In addition, the statement must be reasonably pertinent to diagnosis or treatment, and it must be reliable. (The Court distinguished this rule from another rule, which is that a patient's statements regarding past pain, suffering, and subjective symptoms are admissible to show the basis of a physician's opinion, rather than for their truth.)

In this case, the Court concluded that almost all of the victim's statements fell into categories #1 and #3. The Court then pointed out that that the Forensic Nurse's investigative purpose did not preclude

her examination from also having medical diagnostic and treatment purposes. The Court directly addressed whether the child's identification of her abuser served a medical and treatment purpose and wrote that "although an adult victim's statements assigning blame in cases of merely somatic injury may not be reasonably pertinent to diagnosis or treatment, child sexual abuse presents a more nuanced situation in which care providers would reasonably rely on a victim's narrative that identified the abuser in determining appropriate treatment."

Lastly, the Court also adopted the trial court's finding that the child's statement was sufficiently reliable to fall within the medical treatment exception. The Court pointed out that the child had no motive to fabricate in this case and was old enough to understand the importance of telling the truth to a medical professional.

However, the Court then addressed the Forensic Nurse Examiner's testimony that the child told her that the defendant threatened to kill her if she reported the assaults. Regarding that statement, the Court ruled that it did not fall within the Rule 2:803(4) exception for statements made for medical treatment or diagnosis. Nevertheless, the Court ruled that admission of this statement was harmless error.

In a footnote, the Court pointed out that the General Assembly's enactment of Code § 19.2-268.3 demonstrated the importance of children's testimony in sexual assault cases.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0617162.pdf

Cody v. Commonwealth: April 17, 2018
Loudoun: Defendant appeals his convictions for Strangulation, Assault and Battery, and Violation of a Protective Order on the admission of Hearsay evidence.

Facts: The defendant attacked the mother of his children, strangling her until she lost consciousness. When she awoke, the victim called 911, described the attack in detail, and asked for help finding a safe place for her and her children. The dispatcher referred her to the police. The victim described the attack to the police, who referred her to a forensic nurse examiner. The victim then described the attack in detail to a forensic nurse examiner, who reduced the facts and her findings to a "Medical/Legal Report of Examination for Diagnosis and Treatment."

The J/Dr court issued a protective order and held the defendant in custody. However, while in jail, the defendant contacted the victim five times by phone in violation of the order. The jail recorded the conversations. The defendant used another inmate's account to make the calls and used a false name. During the calls, the defendant acknowledged that the protective order prohibited the conversations, but repeatedly begged the victim to not cooperate with the prosecution and drop the charges against him.

After the fifth call, the victim retained an attorney, requested that the Commonwealth drop the charges, and declared that she would assert her Fifth Amendment privilege against self-incrimination if asked to testify. The Commonwealth offered the victim immunity for everything except lying under oath at trial. However, the victim continued to refuse to testify.

At trial, over the defendant's objection, the circuit court applied the doctrine of forfeiture by wrongdoing and admitted the victim's statements on the 911 call, statements to the police, and statements to the forensic nurse examiner as substantive evidence of the attack.

Held: Affirmed. In a case of first impression, the Court agreed that the defendant, by his illegal actions in tampering with a witness, forfeited his right under the Sixth Amendment to confront the victim. The Court held that the doctrine of forfeiture by wrongdoing properly applies where a defendant unlawfully contacts a witness with the successful intent to procure that witness' unavailability, whether such unavailability is the witness' physical absence from the court or through a witness' refusal to testify by invoking the Fifth Amendment right to avoid self-incrimination.

Before applying the doctrine of forfeiture by wrongdoing, however, the Court first examined whether all three statements implicated the Confrontation Clause of the Sixth Amendment.

Regarding the victim's statements to 911, the Court concluded that the victim's statements to the emergency dispatcher were not made "with a primary purpose of creating an out-of-court substitute for trial testimony." The Court made note of the victim's emotional state during the call and pointed out that the emergency dispatcher was simply eliciting identifying and other information to determine the nature and type of emergency from a caller claiming to be a victim of an assault, including, her name and address, the nature of any injuries, and whether or not the victim and her children were in a safe location. Thus, the Court held that the victim's statements to the emergency dispatcher were not testimonial and the Confrontation Clause of the Sixth Amendment did not bar their admission.

Regarding the victim's statements to the forensic nurse examiner, the Court found that the purpose of the victim's out-of-court statements, recorded in the Medical/Legal report, was to obtain a medical diagnosis and treatment for her injuries. Therefore, the Court held, as in the *Campos* case, that the victim's statements to the forensic nurse examiner were admissible because they were non-testimonial and did not implicate the Confrontation Clause.

Regarding the victim's statements to the police, the Court agreed that the statements to the police were made under similar circumstances and were undoubtedly obtained for the purpose of future criminal prosecution; thus, those statements were testimonial and triggered the protections afforded by the Confrontation Clause. However, the Court then applied the doctrine of forfeiture by wrongdoing.

The Court explained that conduct by a defendant that is intended to prevent a witness from testifying and successfully results in a witness being unable or unwilling to do so satisfies the requirements for application of the doctrine of forfeiture by wrongdoing. The Court rejected the argument that forfeiture by wrongdoing includes only physical unavailability, explaining that forfeiture by wrongdoing applies when a defendant causes a witness' unavailability at trial, by a wrongful act, undertaken with the intention of preventing the witness from testifying.

The Court clarified that the doctrine of forfeiture by wrongdoing only applies upon a showing by a preponderance of the evidence that a witness, whose out-of-court statements are at issue, is unavailable to testify at a defendant's criminal trial. In this case, the Court ruled that, since the defendant violated a protective order numerous times to unlawfully contact the victim of his crimes, repeatedly urged her to drop the charges and refuse to appear to testify against him and where, in furtherance of the result the defendant sought, she made herself unavailable for confrontation through

her refusal to testify by invoking her rights under the Fifth Amendment, the common law doctrine of forfeiture by wrongdoing applied in this case and permitted the trial court to admit hearsay.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0599174.pdf

Virginia Court of Appeals -
Unpublished

Parker v. Commonwealth: October 3, 2017
Chesapeake: Defendant appeals her conviction for Driving Suspended on the admission of the DMV Transcript.

Facts: Defendant drove suspended after having several prior convictions for that offense. At trial, the Commonwealth offered the defendant's DMV transcript, but the defendant objected on several grounds:

(1) That the procedure by which the Commonwealth obtained the transcript violated the procedure set forth in Code § 46.2-384, rendering it inadmissible;

(2) That the presence of an inaccurate notation in the transcript, despite being redacted, cast doubt on the record's validity;

(3) That admitting the transcript violated the defendant's Sixth Amendment right to confront witnesses against her; and

(4) That Code § 46.2-384 violated the defendant's right to due process by impermissibly shifting the burden of proof from the Commonwealth to her.

The trial court overruled each of these objections and admitted the transcript.

Held: Affirmed. The Court rejected each argument, in turn.

The Court first rejected the argument that § 46.2-384 conveyed any substantive rights to the defendant and ruled that strict compliance with Code § 46.2-384's procedures is not a prerequisite for transcript admission. The defendant had argued that the statute requires the DMV to provide a transcript directly to the Commonwealth alone, not to any other instrumentality of the criminal justice system. Thus, the defendant argued that the transcript in this case should have been inadmissible because the DMV provided the transcript to the trooper who then provided it to the Commonwealth's attorney.

However, the Court pointed out that the Code has an entirely separate statute that governs the admissibility of DMV transcripts and that statute's only prerequisite for admission of a DMV transcript, whether an original or a reproduction, is that it be authenticated.

Next, the Court rejected the argument that inaccuracies in the DMV transcript made the transcript inadmissible. The Court observed that the transcript was authenticated pursuant to § 46.2-215 and thus served as prima facie evidence of the facts it contained, subject to the defendant's

rebuttal. However, although the Court agreed that the defendant was entitled to present evidence demonstrating that the transcript contained inaccurate information and calling into question the document's reliability, the Court found that "blanket exclusion is not an appropriate remedy for a transcript inaccuracy."

The Court also rejected the defendant's third argument, that the transcript was hearsay in violation of the Sixth Amendment. The Court repeated its finding in *Jasper*, that a DMV transcript constituted a "compilation of records that had been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial," and therefore was not "testimonial" hearsay.

Regarding the defendant's final argument, the Court ruled that Code § 46.2-384's "prima facie" language constitutes a permissive inference that does not violate due process because it does not shift the burden of proof onto the defendant. The Court likened this code section to the many other "permissive" inferences in the Virginia Code. The Court explained that, by presenting the transcript, the Commonwealth satisfied its burden of production and created an inference that the defendant had been convicted of the crimes reported on the transcript. The Commonwealth, while it obligated the defendant to produce some evidence contesting that inference, retained "the ultimate burden of proof beyond a reasonable doubt."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0303161.pdf

Schmidt v. Commonwealth: January 23, 2018
Prince William: Defendant appeals his convictions for Felony Murder and Child Abuse on *Crawford* hearsay and Double Jeopardy grounds.

Facts: The defendant killed his infant child through a "severe catastrophic trauma-type injury" by violently shaking the child, causing the infant's head to whip back and forth so violently that the blood vessels between the brain and skull sheared and caused blood leakage, resulting in the subdural hematoma.

During the medical examiner's investigation, she contacted Dr. Bennet Omalu, an internationally renowned neuropathologist, and asked him to conduct additional analysis on samples taken from the victim's brain. Dr. Omalu prepared stain slides of the samples taken from the victim's brain, which he sent to his lab in California. Dr. Omalu later provided his observations to the medical examiner, which documented various data findings but contained no conclusions about cause of death or the relative age of the brain injuries. The information contained in Dr. Omalu's report consisted of observational data collected during his neuropathological examination of the victim's tissue and organs. Nowhere in the report did Dr. Omalu opine about a probable cause of death, nor did he render any estimation about the age of the victim's injuries. The medical examiner included Dr. Omalu's notes in her final autopsy report.

At trial, the medical examiner testified as an expert for the Commonwealth. The medical examiner testified about her conclusions but did not reference Dr. Omalu's findings. Dr. Omalu did not

testify. The defendant objected on *Crawford* and *Melendez-Diaz* grounds, arguing that the report should not have been admitted unless Dr. Omalu testified, but the trial court overruled the objection.

The defendant also objected to his convictions for both felony child abuse and felony murder on Double Jeopardy grounds, but the trial court rejected that argument.

Held: Affirmed. The Court likened this case to *Aguilar* and *Robertson* and held that the trial court did not err in admitting the autopsy report. The Court found that nothing within Dr. Omalu's report could be considered a "solemn declaration" or an "affirmation" of an element of an offense, as occurred in *Melendez-Diaz*, and *Robertson*. The Court noted out that the defendant confronted the author of the autopsy report at trial and had the opportunity to cross-examine her.

The Court also found that, because the defendant objected to the introduction of evidence that discussed medical information and data but then later sought to re-interpret in his own favor through his experts, the defendant could not raise his Constitutional argument at all under the "approbate-reprobate" rule.

Regarding the Double Jeopardy argument, the Court first found that the language of the two statutes of which the trial court convicted the defendant apply to distinct forms of actions. While the Court noted that that fact alone was sufficient to deny the defendant's Double Jeopardy claim, the Court also found that the offenses were separate under *Blockburger*, given that committing a felonious act is not an element within the offense of felony child abuse.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1104164.pdf

Garcia v. Commonwealth: February 6, 2018
Fairfax: Defendant appeals his conviction for Assault on Law Enforcement on the admission of Hearsay evidence at a motion to suppress.

Facts: The defendant attacked a police officer who had been attempting to detain him. The officer had encountered the defendant a few days before and learned that the defendant had an outstanding warrant for his arrest. During a motion to suppress, the officer testified about how he had learned of the outstanding warrant, but the defendant objected on hearsay grounds. The trial court overruled the objection and denied the motion to suppress based on the officer's testimony.

Held: Affirmed. The Court pointed out that whether there actually was a warrant was not the issue at the suppression hearing. Instead, the issue was why the officers believed they had a sufficient basis to detain the defendant. Because the out-of-court statement regarding the existence of an outstanding warrant was offered solely for the "purpose of explaining or throwing light on the conduct" of the officers, the Court ruled that the officer's statement was not inadmissible hearsay.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0400174.pdf

IMPEACHMENT EVIDENCE

Virginia Court of Appeals –
Unpublished

Williams v. Commonwealth: July 11, 2017
Newport News: Defendant appeals his convictions for Robbery and Use of a Firearm on admission of jail calls.

Facts: The defendant robbed a woman at gunpoint. The victim identified the defendant in a photo array "unequivocally." Police located the victim's stolen phone in a residence that the defendant shared with his wife. At trial, the defendant's wife testified that the defendant had been with her continuously for the week prior and week after the robbery. However, she could not recall exactly where the defendant stayed the night of the robbery.

During cross-examination of the wife, the Commonwealth played two jail recordings of conversations between the defendant and his wife. The defendant objected on the grounds that the Commonwealth could not play the tapes to "show the evil mind of [the defendant] as he was attempting to tell [his wife] what to say." The trial court permitted the Commonwealth to play the recordings.

Held: Affirmed. The Court held that the jury was entitled to hear the recordings in order to determine whether the defendant attempted to influence his wife's testimony to provide him with an alibi and also to assess the witness' credibility.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0445161.pdf

INSANITY

Virginia Court of Appeals
Unpublished

Brown v. Commonwealth: March 6, 2018
Portsmouth: Defendant appeals his conviction for Manslaughter on sufficiency of the evidence.

Facts: The defendant shot and killed a man at a party. At trial for murder, he presented an NGRI defense through Dr. Earl Williams, who testified that the defendant was suffering from schizoaffective disorder at the time of the offense. However, on rebuttal, the Commonwealth presented testimony from a licensed clinical psychologist, who testified, based on the tests he administered, that the defendant was fabricating at least part of his mental illness. He explained that he disagreed with Dr. Williams's conclusion that, at the time of the shooting, the defendant could not distinguish between right and wrong. The jury convicted the defendant of voluntary manslaughter.

Held: Affirmed. Noting that the Commonwealth was not required to present any affirmative evidence that the defendant understood the nature and consequences of his actions, the Court found the evidence sufficient.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0464171.pdf

PRIOR BAD ACTS

Virginia Court of Appeals
Unpublished

Chaconas v. Commonwealth: August 22, 2017
Loudoun: Defendant appeals his convictions for Credit Card offenses on admission of prior bad acts.

Facts: The defendant broke into a car and stole a credit card from a purse inside. He then created a fake hospital ID card in the victim's name and gave it to a woman, whom he sent into a store wearing the fake ID and a hospital uniform. Inside, per his instructions, she purchased a computer with the stolen card and then gave it to the defendant in exchange for cash.

At trial, the Commonwealth filed a motion in limine to admit testimony from a previous conspirator who described how she watched the defendant break into cars, steal credit cards, create fake hospital IDs with the victims' names, and then send people into a store to buy computers with the stolen cards wearing hospital clothing and the fake IDs. The defendant objected, but the trial court granted the motion and admitted the testimony. The trial court repeatedly admonished the jury to consider the conspirator's testimony solely as evidence of the defendant's identity in connection with the charged offenses.

Held: Affirmed. The Court ruled that the previous conspirator's testimony bore "a singular strong resemblance to the pattern of the offenses charged" and was admissible as proof of modus operandi. In a footnote, the Court also noted that it demonstrated identity, i.e. whether the defendant in fact committed the offense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1137164.pdf

Hairston v. Commonwealth: March 10, 2018
Campbell: Defendant appeals his convictions for Forgery and Uttering on admission of other crimes.

Facts: The defendant presented a forged check, payable to himself, at a bank. The teller recognized the forgery and rejected the transaction. However, the defendant successfully passed five

other similar checks at five other locations within two hours of this transaction, including one check after the transaction in this case. The defendant later claimed that he thought the checks were valid and that he gave the proceeds to a confederate, who gave him back a portion of the total.

At trial for the transaction that the teller refused to process, the trial court admitted the evidence of the other transactions over the defendant's objection.

Held: Affirmed. The Court agreed that the evidence of the other transactions provided relevant, material insight into elements of the charged offenses. The Court also agreed that it established a common scheme, design, or plan shared with the instant offenses. Thus, it was admissible as an exception to the prohibition against admission of other crimes evidence. The Court also ruled that the trial court undertook an appropriate review to balance the probative value against the prejudicial effect.

The Court applied *Woodfin* and *Kirkpatrick* and found that the evidence tended to show that the defendant was aware that the checks he was cashing were forged, especially since the transactions were spread out over six events in two hours. The Court noted that the defendant's procedure for each incident was identical: the defendant possessed a check made payable to him, he presented the check for payment using his own identification, and he returned the received money to a confederate who gave the defendant a cut of the proceeds.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0282173.pdf

PRIOR CONVICTIONS

Virginia Supreme Court

Lewis v. Commonwealth: May 31, 2018
Williamsburg/James City County: Defendant appeals his conviction for Domestic Battery, 3rd Offense, on admission of a prior conviction.

Facts: In October 2015, the defendant struck his live-in girlfriend in the mouth during an argument. In December 2015, he slapped her. Prior to those events, he already had one conviction for domestic battery from 2011. The Commonwealth indicted him for two offenses of Domestic Battery, 3rd offense. On the day of trial, the Commonwealth first tried the defendant for the October offense. The trial court convicted the defendant of misdemeanor domestic battery. The trial court ordered a presentence report and continued the matter for sentencing.

Immediately after the first trial, the Commonwealth tried the defendant for the December offense, offering the 2011 prior conviction and the prior conviction from earlier in the day regarding the October 2015 offense. Over the defendant's objection, the trial court took judicial notice of its own conviction and convicted the defendant of Domestic Battery, 3rd offense.

Held: Affirmed. The Court ruled that the plain language of § 18.2-57.2(B) does not require that a defendant have two predicate convictions at the time he or she commits the offense ultimately charged as a felony. The Court found that the trial court's oral act of finding the defendant guilty constituted the rendition of judgment; the lack of a written order was irrelevant. The Court repeated that the entry or recording of the instrument memorializing the judgment "does not constitute an integral part of, and should not be confused with, the judgment itself." The Court pointed out that, although courts prefer written orders memorializing judgments in other cases for their evidentiary value, they are not required when the judgment can be established by other proof.

The Court also rejected the argument that the mere finding of guilt was not a predicate conviction within the meaning of Code § 18.2-57.2(B) because the court did not complete the final phase of adjudication by imposing a sentence. The Court distinguished the *Starrs*, *Hernandez,* and *Moreau* cases by pointing out that, in this case, the Court explicitly found the defendant guilty on the record. The Court reasoned that the imposition of sentence cannot be part of the rendition of a judgment of conviction, because the rendition of the judgment is what determines the range within which the court must sentence the defendant when it imposes one.

The Court also ruled that the statute requires that the warrant, petition, information, or indictment charging the defendant with a felony offense must allege that he or she "has been previously convicted of two" of the listed predicate offenses on different dates within twenty years. Thus, because the Commonwealth must present sufficient evidence of them to enable a grand jury to find probable cause, the two predicate convictions must exist at the time of the indictment. The Court questioned how the Commonwealth obtained an indictment in this case, but ultimately overlooked that issue because the defendant did not raise it.

In a footnote, the Court observed that, although the common law required the indictment to specify the dates and places of the predicate convictions, Code § 19.2-220 superseded that requirement. The Court pointed out, however, that nothing prevents a defendant from moving for a bill of particulars to compel the Commonwealth to specify the dates and places of the prior convictions.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170518.pdf

Virginia Court of Appeals
Unpublished

Kim v. Commonwealth: October 3, 2017
Newport News: Defendant appeals his conviction for Possession of a Firearm by Juvenile Felon on validity of the adjudication order.

Facts: In 2008, the juvenile court adjudicated the defendant delinquent for felony offenses of burglary and grand larceny. Before he turned 29, the defendant possessed two firearms as an adult and when police found him in possession of those firearms, they arrested him. At trial, the Commonwealth

introduced the defendant's juvenile adjudications, but the defendant objected to the document on the grounds that the "Adjudicatory/Disposition Record of Proceedings" form did not indicate the presence of counsel on the date he was convicted.

The document reflected that a number of hearings had taken place, at which both the defendant and his attorney were present. In the adjudication order, the section for the adjudicatory hearing labeled "Present" had boxes marked for "Juvenile/Defendant" and "Mother," but not for "Attorney." The document's header, however, contains the handwritten words "Public Defender" in a section labeled "Attorney A/R/W." The document also recorded that the defendant, his attorney, the guardian ad litem, and a foster parent were all present for the dispositional hearing, during which the juvenile court sentenced the defendant.

Held: Affirmed. The Court first pointed out that the defendant presented no affirmative evidence to rebut the presumption of regularity and instead offered only a bare assertion that the juvenile court conviction was uncounseled. The Court reaffirmed that a mere judicial omission, without more to indicate error, is insufficient to rebut the principle that "every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears."

The Court then noted that the record demonstrated that the defendant, in fact, had counsel during the juvenile proceedings. The Court ultimately held that the defendant's prior convictions were valid because the defendant was represented at the time of his juvenile adjudication.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0116171.pdf

Wadford v. Commonwealth: October 31, 2017
Suffolk: The defendant appeals his conviction for Driving While Intoxicated, 3rd offense on admission of a prior conviction.

Facts: The defendant drove while intoxicated after having 2 previous convictions for that offense. At trial, the Commonwealth introduced two prior Virginia DUI conviction orders from 2007 and 2012. The Commonwealth also introduced evidence that the judge in the 2012 case had granted the defendant's request for court-appointed representation. The defendant objected, arguing that the 2012 conviction was uncounseled because, in a place on the order designated for the name of the defendant's attorney, only "PD" was written. The trial court overruled the objection.

The defendant also challenged the 2012 conviction order because a box on the form indicating he entered his plea voluntarily and intelligently was left unchecked.

Held: Affirmed. The Court first held that, because the defendant failed to introduce any evidence indicating that he was unrepresented by counsel during the 2012 proceedings, and in light of the uncontroverted evidence that he was, in fact, represented by a public defender, he may not collaterally attack that prior conviction.

The Court then addressed the issue of the voluntariness of his 2012 guilty plea. The Court first ruled that the omission on the prior conviction order did not indicate that the defendant was denied counsel. Therefore, it was also an improper collateral attack on the 2012 conviction. Next, the Court also ruled that a mere omission from a prior conviction order, standing alone, does not rebut the presumption of regularity.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1641161.pdf

MISCELLANEOUS EVIDENTIARY ISSUES

Virginia Court of Appeals – Published

Davis v. Commonwealth: May 15, 2018
Fauquier: Defendant appeals his conviction for Possession of a Firearm while Subject to a Protective Order on Due Process grounds.

Facts: The defendant's wife obtained a protective order in J/Dr Court, as well as petitions for custody and support. Ten days later, the defendant and his wife returned and asked for the petitions to be dismissed. The judge agreed and signed an order reflecting that "petitioner wishes to non-suit all petitions" and "all petitions are dismissed." However, their request and his order did not include the case number for the protective order.

A few months later, an officer noticed that the defendant had a rifle and, running his information, learned that the defendant was subject to a protective order. The defendant told the officer that he thought it had been dismissed and that the judge had stated orally that "all matters against [defendant] have been dropped."

At trial, the defendant requested a jury instruction on the affirmative defense of reasonable reliance, but the trial court denied the instruction.

Held: Reversed. The Court reaffirmed that a due process defense is available to a defendant who is on trial "for reasonably and in good faith doing that which he was told he could do." The Court explained that the defendant bears the burden of establishing the affirmative defense, and establishing "as a threshold matter, the legal sufficiency of the content and source of the information received."

In this case, the Court reasoned that judges have a duty to interpret and apply the law and therefore their statements can implicate the reasonable reliance defense. The Court found that the undisputed evidence of an affirmative assurance by the J/Dr Court judge was legally sufficient to support giving an instruction.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0825174.pdf

Virginia Court of Appeals-
Unpublished

Neville v. Commonwealth: February 6, 2018
Richmond: Defendant appeals his conviction for Distribution of Heroin on admission of his nickname

Facts: The defendant sold heroin to a DEA Informant. Police found the informant, murdered, in a vehicle, holding a plastic sandwich bag containing heroin that had a DNA mixture that included the defendant's DNA. The last communication that the victim received was a call from the defendant's cell phone. Police found the defendant's other phone at the scene of the crime.

The Commonwealth indicted the defendant for murder and related offenses, as well as distribution of heroin. During the trial, the Commonwealth introduced evidence that the defendant's nickname was the "Grim Reaper," over the defendant's objection. However, the jury acquitted the defendant of all the charges except the distribution offense.

Held: Affirmed. The Court found that admission of the "Grim Reaper" nickname – evidence that the defendant contended was "inflammatory" because it would be used to show he was a killer, and would unfairly prejudice the jury – could "not have substantially influenced the jury and did not affect the ultimate result" because the jury acquitted the defendant of conspiracy to commit murder, and only convicted him of heroin distribution.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0217172.pdf
and
http://www.courts.state.va.us/opinions/opncavwp/1693162.pdf

V. MISCELLANEOUS

APPEALS

Fourth Circuit Court of Appeals

Blount v. Clarke: May 15, 2018
E.D.Va: Defendant seeks *Habeas* relief for his sentence as a juvenile for Robbery on Eighth Amendment grounds.

Facts: In 2008, the defendant received six consecutive terms of life imprisonment plus 118 years' imprisonment for robberies that he committed when he was 15 years old. After the U.S. Supreme Court's decision in *Graham v. Florida*, the defendant filed for *habeas* relief from his sentence. In

response, the Governor issued the defendant a partial pardon, reducing his sentence to 40 years. DOC asked that the district court dismiss the defendant's petition as moot, but the district court denied the motion.

While the case was on appeal, the Governor granted the defendant a second pardon — a "Conditional and Partial Pardon" — that reduced his 40-year sentence to 14 years. This second pardon was conditioned on the defendant's successful completion of a reentry program, his entry into a three-year period of supervised release, and his compliance "with all other conditions set by the Virginia Parole Board." If the defendant violated the conditions, he would be subject to the original 40-year sentence.

Held: Reversed, petition dismissed as moot. The Court first agreed that the Governor's most recent pardon did not render the issues on appeal moot. The Court pointed out that the recent pardon is conditioned on good behavior and may be revoked by the Parole Board, in which case the defendant's earlier 40-year sentence would again become operational.

However, the Court found that any violation of *Graham* at the defendant's 2008 sentencing was an invalid basis on which to vacate the 40-year sentence fixed by the Governor. The Court ruled that the Governor's valid partial pardon reducing the defendant's sentence to 40 years rendered the habeas application moot. Thus, the court was without jurisdiction to address it and opine on the constitutionality of the defendant's original sentence under *Graham*

Full Case At:
http://www.ca4.uscourts.gov/opinions/176743.P.pdf

Virginia Court of Appeals –
Published

Brown v. Commonwealth: August 1, 2017
(note case by same name, different defendant, decided on the same day)
68 Va. App. 58, 802 S.E.2d 197 (2017)

Albemarle: The defendant appeals his convictions for Distribution of Drugs on Fourth Amendment and Sixth Amendment grounds.

Facts: The defendant sold cocaine over several months to a police informant. Officers observed multiple sales by the defendant and watched him return to his apartment after several of the sales. None of the sales took place at the defendant's apartment. At the end of the investigation, officers arrested the defendant while he was driving from a recent sale and recovered additional cocaine and evidence from the defendant.

Just after the arrest, a detective obtained a search warrant for the defendant's apartment. While that detective obtained a search warrant, other detectives entered the defendant's apartment without a warrant and conducted a "protective sweep" of the apartment, to make sure that no one was

present. Once they determined that no one was inside, they left and guarded the apartment, waiting for the warrant to arrive.

At a motion to suppress, each of the detectives testified that the detective who wrote the affidavit for the search warrant had no communication with the detectives who conducted the protective sweep, between the time the sweep that they conducted the sweep and when he obtained the search warrant. Police did not find any evidence during the protective sweep. All the evidence located by police was located while executing the search warrant.

Over the course of the proceedings, the defendant obtained and then fired four court-appointed attorneys. He fired his first two court-appointed attorneys after complaining that they were not acting in his interests. The defendant continued to complain about his third attorney, so the trial court appointed a fourth attorney to assist the third attorney. The defendant then asked the trial court to remove both lawyers. The Court agreed, but denied his request for a fifth attorney, setting the matter for trial. The defendant objected, but the trial court ruled that he had effectively waived his right to an attorney.

On the day of trial, the defendant entered a conditional *Alford* plea of guilty, *pro se*. In his guilty plea, the defendant signed the guilty plea form stating, "I understand that by pleading guilty I waive all objections to the admissibility of evidence and to the legality of my arrest and any search and seizure of my property, except as to this Court's ruling on December 16, 2014 regarding the legality of the search of my residence." The plea agreement further provided, "I understand that by pleading guilty I waive any right of appeal from the decision of the court, except as noted above."

Held: Affirmed. The Court first held that the protective sweep did not taint the issuance of the search warrant and that the circuit court did not err when it denied the motion to suppress. The Court rejected the argument that the sole reference to the protective sweep in the search warrant affidavit, a statement in the affidavit that "[t]he residence is currently secured by law enforcement officers", was relevant to the magistrate's determination of whether probable cause existed to issue the search warrant.

The Court also examined the search warrant and found that it established probable cause to search the defendant's residence. The Court noted that the affidavit described several drug sales and that the officers saw the defendant coming from and returning to the area where his apartment was located. The affidavit included a confirmation that the defendant actually lived at the apartment. The Court also noted that the affidavit stated that, "based on affiant's training and experience, persons involved in the sale of illegal drugs often keep quantities of drugs in their residence" and the apartment would "likely contain further evidence of the crime of distribution of cocaine." The Court found that these facts supported probable cause for the issuance of the search warrant.

Regarding the defendant's request for an attorney, the Court held that the defendant failed to reserve the right to appeal that issue in his conditional guilty plea and therefore the Court had no statutory authority to review whether the trial court erred in declining to appoint him a fifth attorney. The Court pointed out that Code § 19.2-254 required the defendant to specify in his plea agreement exactly which issues he wished to have reviewed on appeal; otherwise, by pleading guilty, the defendant waived and may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1998152.pdf

Virginia Court of Appeals -
Unpublished

Commonwealth v. Berry: December 26, 2017
Prince George: The Commonwealth appeals the granting of a motion to suppress on Fourth Amendment grounds.

Facts: The trial court granted a motion to suppress on June 8, prior to trial. Although the defendant did not request it, in the order granting the motion the trial court also dismissed the case. On June 14, the Commonwealth filed an interlocutory appeal and also filed a motion asking the trial court to modify or reconsider the dismissal of the case. On July 26, the trial court heard the motion and agreed to vacate the portion of the order dismissing the case. The Court entered a new order on August 3, vacating the dismissal and confirming the suppression of the evidence.

The Commonwealth filed a new appeal, this one regarding the August 9 order. The Commonwealth did not pursue the original appeal from June.

Held: Affirmed, Commonwealth's appeal dismissed. The Court first found that, although the Commonwealth never sought and the circuit court never entered an order suspending the June 8 order to allow the circuit court to consider the Commonwealth's motion to reconsider the dismissal, under § 19.2-400, the Commonwealth's filing of the notice of appeal on June 14 operated as a suspending order that tolled the running of Rule 1:1's 21-day period. Accordingly, the Court found that the circuit court did not lose jurisdiction over the case twenty-one days after entry of the June 8 order and the circuit court had the authority to issue its August 3 order.

Nonetheless, the Court ruled that the appeal statute only permits one appeal of a ruling regarding a particular suppression motion and therefore did not permit the Commonwealth's attempted appeal of the August 3 order in this case. While the circuit court issued two orders that memorialized its ruling regarding suppression of the evidence, the Court explained that it issued only one substantive ruling, which was contained in the June 8 order. From June 8, the appellate deadlines began to run, and the Commonwealth was free to pursue that appeal to its conclusion. However, under the terms of the statute, having abandoned that appeal, the Commonwealth was not entitled to appeal that same ruling again in a later proceeding.

The Court also reaffirmed that the circuit court's erroneous inclusion of language dismissing the charge in its order granting a motion to suppress did not prevent the Commonwealth from appealing the suppression ruling.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1350172.pdf

Truman v. Commonwealth: March 27, 2018
Prince William: Defendant appeals his conviction for Heroin Distribution and related offenses on the granting of a *nolle prosequi*.

Facts: Defendant sold heroin on repeated occasions. The Commonwealth indicted him with a series of offenses related to his crimes. Prior to trial, the defendant fired and obtained several different attorneys. At the last continuance, the defendant's new attorney asked for more time, but the defendant personally objected. The trial court granted the continuance, but the Commonwealth entered a *nolle prosequi* regarding all of the charges but one, due to speedy trial concerns. The defendant objected to the *nolle prosequi*, but the trial court overruled the objection. The Commonwealth then obtained new indictments for the *nolle pros'd* charges.

Held: Affirmed. The Court repeated that it lacks subject matter jurisdiction to hear an appeal of a trial court's *nolle prosequi.* The Court pointed out that the defendant did not challenge the Commonwealth's decision to re-indict him after the *nolle prosequi*. The Court therefore dismissed the appeal.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1703164.pdf

EXPUNGEMENT

Virginia Supreme Court

A.R.A. v. Commonwealth: March 1, 2018
Williamsburg/James City: Defendant appeals the denial of her expungement petition.

Facts: The defendant grabbed a police officer by the groin while she was intoxicated. The defendant was arrested and charged with Assault on Law Enforcement. The Commonwealth reduced the offense to Disorderly Conduct. The defendant pled guilty to the amended offense.

The defendant then moved to expunge the records of the felony arrest, including the arrest record and the portion of the police reports regarding her attack on the officer. She explained that she hoped to work as a volunteer and potentially attend law school and that a felony arrest record would impair those goals. The trial court denied the petition on the grounds that she failed to demonstrate "manifest injustice."

Held: Reversed. The Court first concluded that disorderly conduct is not a lesser-included offense of felony assault and battery of a police officer and therefore concluded that the felony assault charge was "otherwise dismissed" under § 19.2-392.2(A)(2). The Court then ruled that the "manifest injustice" inquiry turns on whether the continued existence of the record will or may cause the

petitioner a manifest injustice in the future, explaining that a reasonable possibility of a hindrance to obtaining employment, an education, or credit can thus serve as a basis for a finding of manifest injustice.

The Court rejected the trial court's reliance on the defendant's actual guilt of the offense. The Court contended that, while a petitioner may not seek to adduce facts at an expungement hearing to prove his innocence, the Commonwealth may not introduce facts to establish the petitioner's guilt of an offense. Instead, the Court emphasized that an applicant's character and fitness are relevant considerations. The Court found that the uncontested facts established a reasonable possibility that a felony arrest record would hinder the defendant's career or her educational opportunities, and have hindered the pursuit of her volunteer interests.

The Court offered guidance for future cases, writing: "trial courts possess limited discretion to deny such petitions. A person with a lengthy unexpungeable criminal record will generally stand on a different footing with respect to showing a possible "manifest injustice." For such a person, even if an isolated arrest record is expunged, the remaining criminal history remains available to prospective employers and others. It makes little sense to compel overburdened law enforcement agencies to devote time to redacting records when the exercise will yield no tangible benefit to the petitioner. In addition, fantastical or exaggerated assertions of a potential adverse impact on career prospects, credit, housing, or social standing will not suffice to show the potential for a manifest injustice."

Justices Kelsey and Goodwin wrote a strong dissent. In response, in a footnote, the Court stated that it was not ruling as to whether a petitioner similarly "occupies the status of innocent" for purposes of expungement following a successful suppression motion or speedy trial dismissal.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170199.pdf

PROSECUTOR LIABILITY

Fourth Circuit Court of Appeals

Safar v. Tingle: June 7, 2017
859 F.3d 241 (2017)
Eastern District of Virginia: Plaintiffs appeal the dismissal of their lawsuit regarding a False Arrest claim.

Facts: Defendants, husband and wife, purchased flooring at a Costco store, then found it at another Costco for a lesser price. Costco staff advised them to buy the flooring at a new price, then return the same flooring using their original receipt to get the benefit of the discount. Unfortunately, Costco loss prevention staff identified this act as a false return and notified the police. Police reviewed the video and the sales receipts from the recent sale, which indicated (at first glance, at least) that a false return had taken place. A police officer obtained arrest warrants for both defendants.

The next day, Costco contacted the officer and notified her of their mistake. However, the officer did not take any further action. Eight months later, Fairfax police arrested the husband during a traffic stop. In court, Costco explained the error to the Assistant Commonwealth's Attorney, who entered a *nolle prosequi* on the charge against the husband. However, neither the officer nor the prosecutor took any further action to withdraw the arrest warrant for the wife.

Approximately a year later, while applying for American citizenship, the wife visited a police department in Maryland. The officers there took her into custody on her outstanding warrant. Virginia extradited her after she had been in custody for three days. The Commonwealth entered a *nolle prosequi* regarding her offense the next day. The plaintiffs filed a lawsuit against the officer and the prosecutor in Virginia state court, claiming deprivation of civil rights under 42 U.S.C. §1983 and gross negligence under Virginia tort law.

The defendants removed the case to U.S. District Court. The District Court dismissed the lawsuit for failure to state a §1983 claim. The District Court also dismissed the gross negligence claim, finding that Virginia does not recognize a cause of action based on negligent investigations or prosecution.

Held: Affirmed in part, reversed and remanded in part. The Court dismissed the Fourth Amendment claims under §1983, but dismissed the negligence claim without prejudice for the state court to determine the gross negligence issue.

Regarding the §1983 claim against the officer, the Court first pointed out that the plaintiffs cannot state a false arrest claim, since the officer took no part in the actual seizure and the arresting officers acted pursuant to a facially valid warrant. The Court then held that the officer had no clearly-established duty to take steps to withdraw a warrant upon learning that the charges were meritless. The Court wrote that, although this case appeared extreme, "courts should not lightly enter the business of micromanaging police investigations and impose a categorical duty on officers governing the termination of allegedly stale arrest warrants. Indeed, if every failure of a police officer to act in some unspecified way on the basis of new information gave rise to liability, we would invite a legion of cases urging us to second-guess an officer's decision about whether to second-guess a magistrate's finding of probable cause."

The Court then dismissed the plaintiffs' §1983 claims against the Assistant Commonwealth's Attorney on grounds of Prosecutorial Immunity. The Court pointed out that prosecutorial activities that are "intimately associated with the judicial phase of the criminal process" are absolutely immune from civil suit. The Court rejected the plaintiff's argument that the decision to withdraw a warrant was a merely ministerial duty, the kind that does not carry absolute immunity. The Court found that, because a prosecutor's decision to file a motion to rescind generally involves the exercise of substantial discretion, the prosecutor was entitled to absolute immunity under *Imbler*.

The Court expressed concern that "If absolute immunity does not insulate prosecutors for their refusal to withdraw an arrest warrant, it would … give rise to an anomalous regime where criminal defendants could mount civil suits against prosecutors for the maintenance of arrest warrants even though those same defendants could not challenge the initial decision to seek a warrant." Although the Court agreed that this case was unusual, the alternative of qualifying a prosecutor's immunity "would disserve the broader public interest" by "prevent[ing] the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."

Lastly, regarding the gross negligence claim, the Court dismissed the state law claims without prejudice to plaintiffs' right to advance their case in Virginia state court. The Court reasoned that the definition of legal duties under the law of tort is best left for the state courts to resolve.

Full Case At:
http://www.ca4.uscourts.gov/Opinions/Published/161420.P.pdf

Nero v. Mosby: May 7, 2018
Baltimore: A prosecutor appeals the refusal to dismiss a lawsuit on Prosecutorial Immunity grounds.

Facts: The plaintiffs, Baltimore police officers, sued the defendant, the State's Attorney for Baltimore City, for malicious prosecution under 42 U.S.C § 1983 for conducting a grand jury investigation into, indicting, and trying the plaintiffs for their actions during the arrest and death of Freddie Gray. They also sued her under Maryland law regarding her statements at a press conference and on other grounds based in Maryland law. The district court held that, although the prosecutor was entitled to absolute immunity for her conduct before the grand jury and for malicious prosecution, she was not entitled to absolute immunity for any of her actions prior to convening the grand jury.

Held: Reversed, lawsuit dismissed. The Court agreed that a prosecutor's absolute immunity extends only to actions intimately associated with the judicial phase of the criminal process. In order to determine whether a prosecutor's actions are immune, the Court explained that it employs a "functional approach," looking to the nature of the function performed, without regard to the identity of the actor who performed it, the harm that the conduct may have caused, or even the question whether it was lawful. The Court repeated that absolute immunity safeguards the process, not the person.

Thus, the Court pointed out that a prosecutor acts as an advocate and is absolutely immune when she professionally evaluates evidence assembled by the police, decides to seek an arrest warrant, prepares and files charging documents, participates in a probable cause hearing, and presents evidence at trial. The Court contrasted those roles with instances where a prosecutor does not act as an advocate, but rather in an investigative or administrative capacity, such as when she gives legal advice to police during an investigation, investigates a case before a probable cause determination, and personally attests to the truth of averments in a statement of probable cause.

However, the Court rejected the argument that providing legal advice to police is never entitled to absolute immunity. Instead, the Court concluded that advice about whether there was probable cause, such as in this case, are "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings"— including "the professional evaluation of the evidence assembled by the police"—and were therefore absolutely immune. In this case, the Court found that the prosecutor's advice that there was probable cause to charge the officers was immune.

The Court also found that, assuming that the prosecutor helped write the affidavit supporting the charges in this case, both her characterization of the facts and her decision to provide some facts while omitting others fell within the scope of her immunity. The Court noted that there was no allegation that the prosecutor's participation in the investigation, standing alone, caused the plaintiffs

any harm. The Court rejected the argument that the prosecutor's participation in the investigation deprived her subsequent acts of absolute immunity.

The Court also found that the prosecutor was entitled to immunity under Maryland law for her actions, including for her statements at a press conference. In his concurrence, Judge Wilkinson wrote separately to emphasize that the prosecutor should be immune for her public statements. He wrote: "Defamation law unbound is inimical to free expression. I thought the principle of *New York Times v. Sullivan* secure. But no. As the saying goes, the censors never sleep. Here they come again."

Full Case At:
http://www.ca4.uscourts.gov/opinions/171166.P.pdf

RECUSAL

Virginia Court of Appeals
Unpublished

McCurnin v. Commonwealth: November 21, 2017
Louisa: The defendant appeals his convictions for Intentionally Videotaping Non-Consenting Persons on the judge's refusal to recuse himself and sufficiency of the evidence.

Facts: The defendant videotaped several women in various states of undress using a hidden camera pointed at a guest room shower in his home. The defendant's wife discovered the videos and turned them over to police. The videos were approximately a year old and all came from a camera that had recorded over the course of several months. The files appeared to have been uploaded to the defendant's work computer separately. At trial, a witness testified that the defendant later told her that one of the videos was "good."

Prior to trial, the defendant filed a motion asking the trial judge to recuse himself from hearing the criminal case because the judge had presided over a prior civil hearing between the defendant and his wife. The trial judge refused the motion, noting that he had only a vague recollection of the facts and would only judge the criminal case on the facts presented in this case.

At trial, the defendant claimed that his game camera accidentally recorded the videos. He claimed that he had plugged the camera into the outlet in the bathroom to charge it and that it had captured the videos without his knowledge. He claimed that he found the videos later and deleted them. However, the witnesses testified that they never saw the camera and, although they used the outlets to charge their phones, never saw anything else plugged into the outlets.

Held: Affirmed. Regarding the recusal issue, the Court noted that the party seeking recusal of a judge "has the burden of proving the judge's bias or prejudice." In this case, the Court found that, while the trial judge made findings regarding the defendant's credibility during the prior civil hearing, that in itself did not automatically disqualify him from hearing the criminal matter. The Court pointed out that

the defendant did not provide any proof of bias on the part of the trial judge and that the judge stated during the recusal hearing that he had a limited recollection of the prior civil proceeding.

The Court also found that the evidence was sufficient to prove the defendant guilty.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0309172.pdf

USE OF FORCE

U.S. Supreme Court
Kisela v. Hughes: April 2, 2018
138 S. Ct. ____ (2018)

Writ of Certiorari to the Ninth Circuit Court of Appeals: Police Officer appeals the denial of immunity in a Use of Force case.

Facts: Officers responded to a 911 call, reporting that a woman was engaging in erratic behavior with a knife and hacking at a tree. The person who had called 911 flagged down the officers, gave them a description of the woman with the knife, and told them the woman had been acting erratically. When officers encountered the woman, she was engaged in a dispute with her roommate, but a chain-link fence separated them from the officers. She failed to acknowledge at least two commands to drop the knife. Officers shot and wounded her. She brought a lawsuit against the officers, claiming unlawful deprivation of Fourth Amendment rights.

The District Court dismissed the lawsuit, but the Ninth Circuit Reversed.

Held: Lawsuit dismissed. The Court did not decide whether the officers violated the Fourth Amendment by using deadly force. Instead, the Court held that, even assuming a Fourth Amendment violation occurred, on these facts the officers were at least entitled to qualified immunity. The Court found that the officers believed, perhaps mistakenly, that the woman posed an immediate threat to others, and therefore it was improper to find that any competent officer would have known that shooting the woman to protect her roommate would violate the Fourth Amendment.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/17-467_bqm1.pdf

Fourth Circuit Court of Appeals

E.W. v. Dolgos: February 12, 2018

884 F.3d 172 (2018)
Baltimore District Court: A juvenile appeals the dismissal of her claim against a law enforcement officer under the Fourth Amendment for excessive force.

Facts: The plaintiff, who was ten years old, attacked and kicked another student on the bus to school. Three days later, the school summoned the school resource officer, a local Sheriff's deputy, and showed a video of the assault to the officer. The officer interviewed the victim as well and confirmed the assault, noticing bruises on the child's leg. The officer then interviewed the plaintiff, who admitted the offense but "did not seem to care." The officer decided to arrest the plaintiff.

The officer placed the plaintiff in handcuffs from behind and reseated her. The officer made sure that the cuffs were not too tight. The officer explained, later, that she was concerned about the physical safety of herself and the school administrators because of both the incident she observed in the video. She was not aware of any of the plaintiff's history, behavioral issues, or police involvement.

After being handcuffed, the plaintiff began to cry and expressed remorse. The officer ultimately changed her mind and released the plaintiff without arresting her. The plaintiff, through her family, sued the officer 42 U.S.C. § 1983 for unreasonable seizure and excessive force. The District Court dismissed the claim on summary judgment.

Held: Affirmed. The Court ruled that the officer's actions amounted to excessive force. However, the Court also found that conclude that the plaintiff's right not to be handcuffed under the circumstances of this case had not been clearly established at the time. As such, the Court found that the officer was entitled to qualified immunity.

Regarding the lawfulness of the handcuffing, the Court applied the factors in *Graham v. Connor*: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." However, the Court added that those factors are not exclusive and chose to also consider also the plaintiff's age and the fact that the incident took place at school. While the Court agreed that a standard procedure such as handcuffing would rarely constitute excessive force where the officers were justified in effecting the underlying arrest, the Court refused to adopt a rule that handcuffing is *per se* reasonable under the Fourth Amendment.

The Court explained: "We are not considering the typical arrest of an adult (or even a teenager) or the arrest of an uncooperative person engaged in or believed to be engaged in criminal activity. Rather, we have a calm, compliant ten-year-old being handcuffed on school grounds because she hit another student during a fight several days prior." The Court specifically found that the school setting— especially an elementary school— weighs against the reasonableness of using handcuffs. The Court ruled that there was there was no need for any physical force in this case.

However, the Court agreed that, until now, it was not obvious that the officer could not handcuff the plaintiff under these facts. The Court acknowledged that existing cases hold that "the use of handcuffs would 'rarely' be considered excessive force when the officer has probable cause for the underlying arrest." The Court concluded, though, by writing: "We emphasize, however, that our excessive force holding is clearly established for any future qualified immunity cases involving similar circumstances."

Justice Shedd wrote a concurrence in which he agreed with the dismissal but chided the majority for opening the door to potentially frivolous lawsuits by adult prisoners under a similar theory.

Full Case At:
http://www.ca4.uscourts.gov/opinions/161608.P.pdf

Virginia Court of Appeals
Unpublished

Rankin v. Commonwealth: April 24, 2018
Portsmouth: Defendant appeals his conviction for Voluntary Manslaughter on refusal to admit expert testimony and juror misconduct.

Facts: The defendant, a police officer, shot and killed a larceny suspect. The officer had attempted to detain the victim, but the victim fought with the officer. The officer used his Taser, but the victim knocked it away. The officer then drew his gun and ordered the defendant to get on the ground. However, the victim made a quick and aggressive gesture towards the officer and the officer shot and killed him.

At trial, the trial court denied the defendant's effort to admit testimony of an expert who would opine that the defendant's conduct was consistent with "well-established and widely-adopted police training and policies concerning use of force" as well as with the police department's use of force policy. Further, he unsuccessfully sought to have the expert testify about certain types of accepted police training.

During trial, a friend of the victim saw a juror entering the courthouse. They knew each other and exchanged greetings. They talked briefly and later testified that they did not discuss the case. A video of their interaction showed them talking briefly but then parting ways. The defendant learned of the interaction and asked the trial court to investigate. The trial court examined the juror and the victim's friend, as well as the deputy from the screening post, and also reviewed the video. The trial court refused the defendant's request to conduct additional investigation and also denied the defendant's motion for a mistrial.

Held: Affirmed. The Court first established the standard by which the trial court had to evaluate the officer's use of force. The Court, for the first time, explained in detail how to judge the use of deadly force by an officer in a case such as this one.

In determining the nature of the officer's acts, the Court explained that a jury must consider whether the officer's killing was first-degree murder, second-degree murder, voluntary manslaughter, or justifiable self-defense. Consequently, a jury has to decide the officer's state of mind: whether it was willful, deliberate, premeditated, malicious, intentional, or in the sudden heat of passion. The Court elucidated that, if the jury determines that the officer acted without malice but in fear of harm, the jury then must decide whether the officer acted in self-defense. The Court noted that this defense requires a finding that the force that the officer used was reasonable in relation to the threatened harm.

The Court agreed that evidence of the officer's actions in the context of his training and his police department policy on use of force was probative of his state of mind in the context of the crimes charged and his defense. The Court noted that the officer and the Assistant Chief testified regarding department training and policy regarding use of force and that the trial court admitted the department's policy manual. Thus, the Court found that the jury was able to consider the defendant's actions in light of his training and his department's policy on the use of force without the expert's testimony.

The Court concluded that the jury could determine intelligently whether the defendant acted in compliance with his department policy and that admitting the expert's opinion testimony on that point would not have assisted the trier of fact in understanding the evidence. The Court reasoned that whether the defendant acted in accordance with national standards on use of force was irrelevant to the considerations before the jury regarding the criminal charges and related defense. The Court pointed out that, even if the defendant followed general police policy, he could have been criminally culpable.

Further, the Court observed that there was no evidence that showed that the defendant was familiar with national policies on use of force, and thus such policies were not relevant. The Court also expressed concern that the rejected evidence posed the risk of distracting the jury from the determinative issue of whether the defendant used reasonable force in relation to the harm threatened by the victim.

Regarding the alleged juror misconduct, the Court embraced the 4th Circuit's test as articulated in the *Cheek* and *Basham* cases. The test first requires the party who is attacking the verdict to introduce competent evidence that the extrajudicial communications or contacts were more than innocuous interventions. For an exchange to qualify as a private communication that is innocuous, it cannot pertain to the matter before the jury. Only if the challenging party meets this initial burden that the burden shifts to the prevailing party, in this case the Commonwealth, to prove that there exists no reasonable possibility that the jury's verdict was influenced by an improper communication.

In this case, the Court ruled that the trial court had sufficient information to make a reasoned decision and did not need to conduct additional scrutiny regarding the juror. The Court concluded that any discrepancies between the juror's and citizen's accounts and the video did not contradict that conclusion.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1671161.pdf

WRITS OF ACTUAL INNOCENCE

In Re Brown: March 22, 2018
Albemarle: Defendant seeks a Writ of Actual Innocence.

Facts: In 1969, the defendant entered a woman's home without permission and demanded she have sex with him. When she refused, he beat her into unconsciousness and stabbed her repeatedly.

When she awoke, she could not move. Her sister found her and her four-year-old-child, stabbed to death in his bed. Rescue workers found the knife blade lodged in the mother's body and her underwear nearby. After treating the mother, the hospital took a vaginal smear slide and preserved it.

The Commonwealth only charged the defendant with the murder of the four-year-old-child. At trial, a witness testified that he saw the defendant go to the victim's house. When he saw the defendant later, the defendant was washing up and told the witness that he "messed up," although the defendant later told police he had never gone to the victim's property at all. The jury convicted the defendant of first-degree murder and imposed a death sentence, although the defendant later received a life sentence on remand after appeal.

During parole interviews over the next decades, the defendant repeatedly took responsibility for the crime and explained what happened in detail. However, in 2016 he filed a writ of actual innocence, arguing that analysis of the vaginal smear slide by an independent lab exonerated him by "clear and convincing evidence" such that "no rational trier of fact would have found proof of guilt beyond a reasonable doubt" pursuant to § 19.2-327.5. The defendant located the slide, now partially damaged, still in the hospital's storage, forty-seven years later.

DFS performed a DNA analysis of the slide and the victim's nightgown to compare them with other DNA developed in this matter. DFS created a DNA profile for the victim from DNA recovered from the nightgown but could not create a DNA profile from the vaginal smear slide. However, the defendant sent the slide to a third-party lab for MiniFiler DNA analysis of the remaining, but highly-degraded, DNA on the slide. The portion they analyzed, however, was not sperm. The third-party lab found little to no DNA, but was able to eliminate the defendant as a contributor to what little DNA they did find on the slide.

Held: Writ dismissed. The Court ruled that it has no authority to go outside the boundaries of the statute to grant a writ of actual innocence based on test results uncertified by DFS. The Court found that it was irrelevant that the Commonwealth agreed to the third-party tested and that the circuit court ordered the testing.

The Court also ruled that the defendant had failed to prove, by clear-and-convincing evidence, that no rational factfinder would find him guilty. The Court emphasized that this case was not a rape case; even if the evidence did prove that the defendant did not rape the victim, the Court found that it failed to prove that he did not stab her and murder her child. The Court also pointed out that the defendant's statements to the Parole Board "undermine his present protestations of innocence." The Court dismissed the DNA tests, noting that the samples were too small to be reliable and had a suspicious chain of custody.

The Court quoted the U.S. Supreme Court's *Osborne* case: "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161422.pdf

Prepared by:

Elliott J. Casey, Staff Attorney
Commonwealth's Attorneys' Services Council
ejcasey@wm.edu
757-585-4370 (office)