CONSTITUTION

Article I, Section 9: Ex Post Facto

Recategorization of a Prior Conviction

Martin v. Commonwealth, APR15, VaApp No. 0719-14-1: (1) When a person's status is recharacterized because a prior conviction is added to a statutory list that would enhance punishment on a future conviction there is no ex post facto violation because there is no additional punishment of the prior offense – only additional punishment on a subsequent conviction.

4th Amendment

Search & Seizure

Grady v. North Carolina, MAR15, USSC No. 14-593: (1) Requiring a person to wear a personal monitoring system (ankle bracelet) is a search. (2) Case involved required wearing by a convicted sex offender after a civil hearing.

Rodriguez v. U.S., APR15, USSC No. 13-9972: (1) A traffic stop must last no longer than needed to complete the business of the traffic stop. (2) Absent reasonable suspicion, an unrelated investigation cannot extend a traffic stop. (3) As part of the stop, an officer can (a) check the driver's license, (b) check if the driver has warrants, (c) check for insurance, and (d) check for registration. (4) A dog sniff is not an ordinary incident of a traffic stop. (5) A drug sniff cannot extend the time of the stop whether it is done before or after the ticket is issued.

Sanders v. Commonwealth, MAY15, VaApp No. 1386-14-1: (1) Two pronged test whether an action is a 4th Amendment search: (a) Defendant must show an expectation of privacy in the place searched, and (b) Defendant must show the expectation is objectively reasonable based on a source outside the 4th Amendment. (2) Objective reasonableness is established either through (a) concepts of real or chattel property law, or (b) understandings that are recognized and permitted by society. (3) Warrantless entry into a motel room is like entry into a residence and therefore presumptively unconstitutional. (4) The walkways outside a motel room are not curtilage and not entitled to 4th Amendment protection under either a trespass theory or a reasonable expectation of privacy theory. (5) Factors in determining whether an area is curtilage for 4th Amendment: (a) The proximity to the home, (b) whether the area

is included within an enclosure surrounding the home, (c) the nature of the uses to which the area is put, and (d) the steps taken by the resident to protect the area from observation by people passing by. (6) Factors to be used in determining objectively reasonable expectation of privacy in a particular location: Did the defendant (a) own the property, have a possessory interest in it, or was he legitimately on the premises; (b) have the right to exclude others from it; (c) demonstrate a subjective expectation of privacy that it would remain free from governmental intrusion, and (d) take normal precautions to maintain his privacy.

Possible Rejection of the "As Applied" Test's Primacy
Administrative Searches Without Warrants

Los Angeles v. Patel, MAR15, USSC No. 13-1175: (1) Facial challenges under the Fourth Amendment are not categorically barred or especially disfavored. (2) For a facial challenge to succeed (a) a statute must be unconstitutional in all its applications, but (b) only those things which the statute allows or forbids will be considered. (3) Search regimes that don't require a warrant may be reasonable when (a) special needs make a warrant and probable cause requirement impracticable, and (b) the primary purpose of the search is distinguishable from the general interest in crime control. (4) For an administrative search to be constitutional the subject of the search must have the opportunity to obtain precompliance review by a neutral arbiter. (5) Only four industries have no reasonable expectation of privacy and do not fall under this: (a) liquor sales, (b) firearms dealing, (c) mining, and (d) running an automobile junkyard. (6) If an industry is pervasively regulated a statute must fulfill three criteria to be reasonable under the 4th Amendment: (a) There must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (b) the warrantless inspections must be necessary to further the regulatory scheme; and (c) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

Inventory of an Impounded Vehicle

Cantrell v. Commonwealth, JUL15, VaApp No. 1805-14-3: (1) An inventory of an impounded vehicle is constitutional when done (a)to protect the owner's property while in police custody, (b) to protect police against claims of lost or stolen property, and (c) to protect the public or police from danger. (2) The inventory is only valid if (a) the vehicle is lawfully impounded, (b) the impoundment and inventory are conducted pursuant to standard police procedures, and (c) the inventory is not a pretext for an unconstitutional search. (3) The existence of standardized criteria may be proven by (a) reference to either rules and regulations or (b) testimony regarding standard practices. (4) The standardized criteria must sufficiently limit a searching officer's discretion to prevent his search from becoming a purposeful and general means of discovering evidence of crime. (5) When a department has a policy for when a vehicle will be

impounded, but no policy as to how it will be inventoried, and inventory is an unconstitutional search. (6) If the officer is specifically searching for contraband during the inventory it is an unconstitutional search. (7) A reasonable delay in the inventory does not make it unconstitutional. (8) Not listing various items of trash in the vehicle does not make the inventory unconstitutional.

Exigent Circumstances

Collins v. Commonwealth, JUL15, VaApp No. 1096-14-2: (1) When an officer, from the road, can identify a vehicle by what is showing from under a tarp as being consistent with unique features seen on a vehicle previously engaged in a crime, the officer has pictures of that vehicle previously having been there (from facebook), and the owner has just denied having that vehicle, the officer has probable cause that the vehicle has been part of a crime and concern the owner might hide it and therefore can enter the curtilage and remove the tarp to confirm its identification. (2) Reasoning fairly solid except where it relies on a 1977 case which is constitutionally suspect.

Cell Phone Location via Towers

US v. Graham, AUG15, 4Cir No. 12-4659 & 12-4825: (1) A person has a reasonable expectation of privacy in phone company records of where his cell phone has connected to towers. (2) The government conducts a search under the 4th Amendment when it (a) obtains information of where a cell phone has connected to towers (b) for an extended period of time. (3) Tracking the location of an individual and her property inside a private space constitutes a Fourth Amendment search. (4) Locational tracking of an individual and her property continuously over an extended period of time constitutes a search.

Consent Search

Hawkins v. Commonwealth, AUG15, VaApp No/ 1270-14-1: (1) A search authorized by consent requires no search warrant. (2) Consent to a search must be (a) unequivocal, (b) specific and (c) intelligently given, and (d) it is not lightly to be inferred. (2) Consent (a) may be evidence by conduct alone, but (b) mere acquiescence is inadequate to establish voluntary consent. (3) The prosecution bears a heavier burden where the alleged consent is based on an implication. (4) When 5 officers approach a suspect, but do not position themselves to keep the suspect from leaving and one of the officers asks the suspect to raise his coat because of a bulge, when the suspect raises his arms and holds them up the suspect is consenting to a search.

Created Exigent Circumstances

Evans v. Commonwealth, SEP15, VaSC No. 141206: (1) When police have identified themselves to the occupants of a residence/motel room an officer can

reasonably assume that residents would destroy evidence before he can return with a search warrant. (2) The test is (a) what an officer could reasonably believe and (b) the prosecution does not have to produce concrete evidence that those inside were about to destroy evidence. (3) An exigent circumstance exists justifying entry where the law enforcement officers have probable cause to believe t is necessary to prevent destruction of evidence. (4) If the defendant himself has the power to destroy the evidence, the courts assume that he is likely to avail himself of the opportunity. (5) The fact that the officers' knock on the door created the exigent circumstances does not invalidate them.

19.2-56.2 – GPS Search Warrant

Turner v. Commonwealth, OCT15, VaApp No. 1309-14-4: (1) Removal of a GPS tracking device within the allowed period of use does not require the police to get another GPS warrant before resecuring the GPS to the vehicle in the same period. (2) A GPS warrant can only be extended (a) with good cause shown (b) if probable cause still exists.

Detention

US v. Slocumb, OCT15, 4Cir No. 14-4733: (1) To justify a stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. (2) The must provide reasonable and articulable suspicion that the person seized is engaged in criminal activity. (3) The totality of the circumstances is used in determining whether the officer had reasonable suspicion of criminal activity. (4) Factors to be positive consideration in support of reasonable articulable suspicion (but not enough alone): (a) High crime location, (b) Time of day, & (c) Business owning the parking lot is closed. (5) General nervousness and mumbled answers while talking to a police officer does not provide reasonable articulable suspicion. (5) Flight does support reasonable articulable suspicion. (6) Extreme nervousness (heavy breathing, heavy sweating, shaking hands) does support reasonable articulable suspicion.

Franks Hearing – False Statement in Search Warrant Affidavit

Davis v. Commonwealth, NOV15, VaApp No. 0693-14-1: (1) To challenge a facially valid search warrant a defendant must make motion in which he makes a substantial preliminary showing that a false statement was (a) knowingly and intentionally included in the warrant affidavit or (b) included with reckless disregard for the truth, and (c) those allegations must be accompanied by an offer of proof. (2) To show the falsity, the defendant has to (a) point out the deficiency with specificity, (b) include a statement of supporting reasons, and (c) prepare affidavits or sworn (or otherwise reliable) statements of witnesses. (3) If there is (a) a substantial preliminary showing, the circuit court must then determine (b) whether the allegedly false statement is necessary to the finding of

probable cause; if it is the court must have a hearing. (4) If the issues which would be addressed in a Franks hearing have been previously addressed in a prior hearing not specified as a Franks hearing the trial court is not required to hear them again.

Consent

McLaughlin v. Commonwealth, NOV15, VaApp No. 1187-14-1: (1) Consent may be obtained either from (a) the individual whose property is being searched or from (b) a third party with common authority over the premises. (2) When there is mutual use of the property each person assumes the risk that common areas will be searched. (3) Apparent authority (not actual) may be sufficient if the facts surrounding the situation would have led a reasonable officer to conclude that the person providing consent had the requisite authority. (4) Ownership is not dispositive as to authority to consent to a search.

Scope of Traffic Stop – Unconstitutional But Not Suppressable

Matthews v. Commonwealth, NOV15, VaApp No. 1654-14-4: (1) A police officer (a) may conduct certain unrelated checks during an otherwise lawful traffic stop, but (b) may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. (2) A detention without reasonable suspicion is unconstitutional even if it is de minimus. (3) When a court reviews whether an officer had reasonable suspicion to temporarily detain a person, it must view the totality of the circumstances and view those facts objectively through the eyes of a reasonable police officer with the knowledge, training, and experience of the investigating officer. (4) If police operate under the the constitution as it is currently interpreted the fruits of the search will not be suppressed even if the interpretation is overruled before the conclusion of the trial/direct appeal.

Unconstitutional but Not Suppressable

Rivera v. Commonwealth, NOV15, VaApp No. 1931-14-1: (1) A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final. (2) The fact that the new rule applies does not determine the remedy for its violation. (3) Exclusion (a) is not a personal constitutional right; (b) it is not designed to redress the injury occasioned by an unconstitutional search; (c) its purpose is to deter future Fourth Amendment violations. (4) If an officer (a) has an objectively reasonable good-faith belief that his conduct is lawful and (b) does not violate a suspect's Fourth Amendment rights (i) deliberately, (ii) recklessly, or (iii) with gross negligence then (c) suppression is not an appropriate remedy. (5) No binding precedent argument countered by list of non-binding precedents which provide the objectively reasonable good faith belief.

Item Hanging from Rear View Window

Freeman v. Commonwealth, NOV15, VaApp No. 2302-14-4: (1) Multiple air fresheners hanging from the rearview mirror, which are wider than the mirror, provide reasonable articulable suspicion. (2) A statute is presumed to be constitutional and an officer acting in accordance with the statute has not violated the 4th Amendment (even if statute not constitutional).

Good Faith Exception

US v. Rush, DEC15, 4Cir No. 14–4695: (1) The good-faith exception applies (a) in cases of isolated negligence, and (b) when the police act with an objectively reasonable good-faith belief that their conduct is lawful. (2) Lying to a resident - "We have a search warrant" - after receiving permission from another resident to search the residence denies the lied to resident his right to object to the search and is not in good faith (lie was to protect other resident).

Not Submitting to Seizure

US v. Stover, DEC15, 4Cir No. 14–4283: (1) When an officer attempts to seize a suspect, but the suspect does not submit to the officer, any contraband which appears before the suspect finally submits is not subject to the 4th Amendment.

5th Amendment

Double Jeopardy

Collateral Estoppel

Commonwealth v. Davis, OCT15, VaSC No. 141674: (1) When a defendant seeks to invoke collateral estoppel, he bears the burden of proving that the precise issue or question he seeks to preclude was raised and determined in the first action. (2) When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. (3) In order to determine which specific issues are barred from relitigation the court must (a) examine the record of the prior proceeding and (b) conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. (4) Criminal collateral estoppel bars the Commonwealth from introducing evidence in order to relitigate an issue already resolved in a defendant's favor in a prior trial. (5) If an element necessary to prove a felony is specifically given as a reason that a misdemeanor arising from the same event is

aqcuitted then any felony arising from the same event is bound by that finding. (6) The cases cited and this case all concentrate on identity. (7) Collateral estoppel does not rise from a district court's refusal to certify a felony. (8) When (a) grounds for a dismissal are (i) not assigned and (ii) do not otherwise appear of record (b) a court must examine the record of the prior proceeding, taking into account the (i) pleadings, (ii) evidence, (iii) charge, and (iv) other relevant matter, to determine the precise fact on which the acquittal stood.

Probation Violation

Green v. Commonwealth, DEC15, VaApp No. 0174-15-3: (1) A probation violation is a continuation of the same case and therefore double jeopardy protections do not apply between one violation and another. (2) 19.2-306(D) does provide a statutory bar to subsequent probation violations proceeding from the same event.

Collateral Estoppel

Currier v. Commonwealth, DEC15, VaApp No. 1428-14-2: (1) The Double Jeopardy Clause bars a certain multiple prosecution, where prosecutorial overreaching is present. (2) The clause does not bar a second trial for a defendant who has succeeded in getting his first conviction set aside. (3) If the defendant pleads guilty to lesser charges over the objection of the prosecution, the prosecution is not barred from trying the more serious charges. (4) When a charge is severed for the defendant's benefit and the defendant is acquitted on the other charges there is no bar to the prosecution going forward on the severed charge. (5) The severance of felon in possession of firearm charges is required by Hackney v. Commonwealth, 28 Va. App. 288 (1998) to prevent the jury from being informed of prior convictions and the defendant can be tried on the possession of firearms charge even if the other charges are acquitted.

Right to Remain Silent

Grueninger v. Director, DOC, FEB16, 4Cir No. 14–7072: (1) “I need an attorney” is an unambiguous invocation of the right. (2) “Do you think I need an attorney here?” and “Maybe I should stop talking and get a lawyer” are not. (3) A defendant saying, mid-questioning, “I need a lawyer” and then immediately continuing to answer questions is not.

Miranda Warnings

Smith v. Commonwealth, OCT15, VaApp No. 0427-14-4: (1) Asking if a detained suspect is willing to come to the station to talk and thereafter answering the suspect's question as to why is not an interrogation and any statement

volunteered thereafter is admissible. (2) The functional equivalent of an interrogation is any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Defendant Reinitiating Conversation after Assertion

Overbey v. Commonwealth, DEC15, VaApp No. 1470-14-2: (1) If the suspect has asserted the right, the suspect must (a) reinitiate communication, and (b) knowingly and intentionally waive the right to counsel. (2) If a defendant makes a statement that evinces a willingness and a desire for a generalized discussion about the investigation then she has reinitiated communication. (3) Asking why the police are getting a search warrant reinitiates conversation.

Due Process

Chianelli v. Commonwealth, APR15, VaApp No. 0452-14-1: (1) A vagueness challenge is made under the requirement of fair notice embodied in the Due Process Clause. (2) A statute is unconstitutionally vague if (a) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (b) it authorizes or even encourages arbitrary and discriminatory enforcement. (3) Vagueness challenges to statutes (a) not threatening First Amendment interests (b) are judged on an as the statute is applied in this case basis. (4) An as applied challenge must be passed before a facially unconstitutional challenge can be mounted.

Trial in Jail Clothes

Wilkins v. Commonwealth, MAY15, VaApp No. 0682-14-1: (1) A defendant tried in her jail clothes violates the presumption of innocence and serves no essential state interest. (2) If jail officials reject the clothing as (a) delivered too early, or (b) having taped up hems, and (c) the judge grants a recess so that the defense can seek civilian clothing, there is no violation of this rule. (3) If the jail uniform is not clearly identifiable as such there is no violation of this rule. (4) If the trial judge finds that the failure to have civilian clothes is because of the defendant's bad faith there is no violation of this rule.

Disclosure of Impeachment Evidence

United States v. Parker, JUN15, 4Cir No. 13–4989 & 13–4990: (1) To establish a Brady violation, a defendant must show (a) that the undisclosed information was favorable, either because it was exculpatory or because it was impeaching; (b) that the information was material; and (c) that the prosecution knew about the evidence and failed to disclose it. (2) Evidence is material if its disclosure would have resulted a likelihood of a different result great enough to undermine

confidence in the outcome of a trial. (3) Impeachment evidence (a) may be material when the witness in question supplies the only evidence of an essential element of the offense, (b) especially if the undisclosed evidence was the only significant impeachment material. (4) Impeachment evidence is not material if it is cumulative of evidence of bias or partiality already presented and thus would have provided only marginal additional support for the defense. (5) When exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine

Forced Medication to Restore Competency

US v. Watson, JUL15, 4Cir No. 14-4388: (1) The forcible administration of antipsychotic medication "constitutes a deprivation of liberty. (2) When a defendant (a) is a danger to himself and others involuntary medication is allowed (b) if it is in his medical interest. (3) If the defendant is NOT a threat to himself or others the government must prove by clear and convincing evidence four factors: (a) an important governmental interest is at stake and special circumstances do not sufficiently mitigate that interest; (b) medication is substantially likely to render the defendant competent for trial and substantially unlikely to have side effects which will significantly interfere with the ability to assist counsel at trial; (c) involuntary medication must be necessary to further the government's interest and less intrusive means must be unlikely to achieve substantially the same results; and (d) the administration of drugs is medically appropriate and in the patient's best medical interest. (4) The government (a) must not only show that a treatment plan is likely to work in general, but (b) that it is likely to work on this specific defendant.

6th Amendment

Speedy Trial

Stith v. Commonwealth, JUL15, VaApp No. 1548-14-2: (1) Four factors in considering speedy trial delay: (a) length of delay, (b) reason for delay, (c) defendant's assertion of the right, and (d) prejudice to the defendant. (2) When the delay is so protracted as to be presumptively prejudicial, the first factor becomes a triggering mechanism which necessitates inquiry into the other factors that go into the balance. (3) The constitutional speedy trial clock starts at arrest, not the preliminary hearing (as Va Code 19.2-243 does). (4) The prosecution must show (a) what delay was attributable to the defendant and is not to be counted against the Commonwealth and (b) what part of any delay

attributable to the prosecution was justifiable. (5) Defense counsel may request or concur in a continuance without the consent or presence of a defendant and a defendant will be bound by counsel's assent to the delay. (6) A continuance can be granted over a defendant's express objection and still be attributable to him if the delay has been necessitated by circumstances caused or brought about by the defendant. (7) Filing pro se assertions of speedy trial while also filing for new attorneys (5 in total) show that the assertions did not reflect a true desire to have the case tried. (8) Three considerations when assessing if the delay was unconstitutional: (a) oppressive pretrial incarceration, (b) anxiety and concern of the accused, and (c) limiting the possibility the defense will be impaired.

Jury

Notification of Offense

Right to Confront Accuser

Testimony About what a Child Said / Primary Purpose Test

Ohio v. Clark, JUN15, USSC No. 13-1352: (1) Statements are testimonial, and thus require the witness in court to testify, when (a) the circumstances objectively indicate that there is no such ongoing emergency, and (b) that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (2) When the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus is not within the scope of the Confrontation Clause. (3) A factor in determining whether a statement is testimonial is the formality or informality of the situation and the interrogation. (4) In determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant. (5) The question is whether, in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. (6) The Confrontation Clause does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding. (7) Statements by very young children will rarely, if ever, implicate the Confrontation Clause because it is extremely unlikely that a very young child would intend his statements to be a substitute for trial testimony. (8) Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior (not law enforcement) are significantly less likely to be testimonial than statements given to law enforcement officers. (9) When teachers elicit statements from a child about who has beaten the child the purpose is the protection of the child and other children, the questioning was done in a school

(an informal situation), and the questioning was not done by law enforcement and the teacher can testify as to the child's statement in court. (10) Mandatory reporting laws do not change the statements elicited by teachers into testimonial statements.

Primary Purpose Test – Gang Notebook

Holloman v. Commonwealth, AUG15, VaApp No. 1319-14-1: (1) The confrontation clause is not triggered unless the statement's primary purpose was testimonial. (2) Statements are custodial when (a) made during a police interrogation and (b) the primary purpose of the interrogation was to establish or prove events for later prosecution. (3) Statements made to non-officers are much less likely to be testimonial. (4) A “gang notebook” made for the use of the gang is non-testimonial.

Process to Obtain Witnesses

Right to Counsel

Ineffective Assistance of Counsel: Failure to File Motion to Suppress

Grueninger v. Director, DOC, FEB16, 4Cir No. 14–7072: (1) The test has two parts: (a) constitutionally deficient performance, and (b) prejudice which flows from the flawed performance. (2) Prejudice means there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (3) When defense counsel fails to file a motion it is constitutionally deficient performance if there was some substance to the motion. (4) Prejudice from failure to file a motion is established when it is shown that (a) the motion was meritorious and likely would have been granted, and (b) a reasonable probability that granting the motion would have affected the outcome of his trial.

Right to Represent One's Self

Herrington v. Commonwealth, FEB16, VaSC No. 150085: (1) Because the Sixth Amendment guarantee to the assistance of counsel implies a right of self-representation, a defendant may waive his right to counsel and proceed pro se at trial. (2) The defendant should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. (3) When the defendant elects to waive counsel and proceed pro se at trial, his request must be (a) timely, (b) clear, and (c) unequivocal. (4) When a defendant wants to

represent himself so that a trial can go forward that day (attorney withdrew), the court continues the case after appointing counsel, and the defendant does not elect to represent himself thereafter, despite an inquiry by the court, then he has not been denied his right to represent himself.

Self Representation

US v. Ductan, SEP15, 4Cir No. 14-4220: (1) The Sixth Amendment (a) guarantees to a criminal defendant the right to the assistance of counsel before he can be convicted and punished by a term of imprisonment and also (b) protects a defendant's affirmative right to self-representation. (2) Having counsel is the default. (3) Before allowing a defendant to represent himself, a district court must find that the defendant's (a) background, (b) appreciation of the charges against him and (c) their potential penalties, and (d) understanding of the advantages and disadvantages of self-representation support the conclusion that his waiver of counsel is knowing and intelligent. (4) A waiver of counsel through the election of self-representation must be more than knowing and intelligent: it must also be clear and unequivocal. (5) A person may waive the right to counsel and proceed at trial pro se only if the waiver is (a) clear and unequivocal, (b) knowing, intelligent, and voluntary, and (c) timely. (6) A court must insist on appointed counsel against a defendant's wishes (a) in the absence of an unequivocal request to proceed pro se, or (b) when the basis for the defendant's objection to counsel is frivolous.

Maryland v. Kubicki, OCT15, USSC No. No. 14–848 (per curiam): (1) Counsel is unconstitutionally ineffective if his performance is both (a) deficient, meaning his errors are “so serious” that he no longer functions as “counsel,” and (b) prejudicial, meaning his errors deprive the defendant of a fair trial. (2) Counsel's effectiveness is judged by the reasonableness of counsel’s challenged conduct viewed as of the time of counsel’s conduct.

Immigration Consequences

Fuentes v. Clarke, OCT15, VaSC No. 141890: When a defense attorney advises a defendant that deportation after conviction there is a “likelihood of deportation” and the plea agreement says a defendant “may place her at risk for deportation” is constitutionally sufficient because (1) the defense attorney did not affirmatively tell the defendant she would not be deported, and (2) the Attorney General has the discretion to decide whether he will deport any individual.

Ineffective Assistance – Failure to Prosecute an Appeal

Velasquez-Lopez v. Clarke, NOV15, VaSC No. 150303: (1) When an attorney fails to file a direct appeal the test is (a) whether the attorney's representation fell below an objective level of reasonableness, and (b) whether the deficient

performance perjudiced the defendant. (2) When counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal. (3) In these cases prejudice is generally assumed. (4) Two scenarios in which a defendant can raise ineffective assistance of counsel for not filing a direct appeal: (a) the lawyer disregards specific instructions to appeal, or (b) the lawyer fails to consult with the defendant when (i) a rational defendant would want to appeal, or (ii) the defendant has demonstrated an interest in appealing. (5) When instructed to note an appeal, but not to pursue it any further (in deference to claims of new counsel) there is no ineffective assistance if counsel does just that.

Ineffective Assistance: Judicial Invitation

Director, DOC v. Kozich, DEC15, VaSC No. 141788: (1) There is no right to counsel for a motion to reduce a sentence after judgment has been entered and a sentence imposed. (2) A defendant (a) is entitled to representation on his first direct appeal, but (b) not his second appeal to a higher court. (3) A defendant is not entitled to counsel on post-conviction collateral attacks, including state habeas corpus actions. (4) If invited by the judge to do so, (a) counsel has an obligation to file a motion to reduce sentence prior to the entry of the sentencing order or (b) make a attempt to extend the time in which she may do so. (5) If the judge contradicts herself (no program will help – if you find an appropriate program), defense counsel must resolve the contradiction in favor of filing a motion to reduce prior to entry of the final order.

Overbey v. Commonwealth, DEC15, VaApp No. 1470-14-2: (1) The right to counsel adheres at the moment adversarial, judicial proceedings have been initiated. (2) The right to counsel does not attach at time of arrest. (3) If a person asserts his 5th Amendment right to counsel prior to the onset of judicial proceedings that does not trigger his 6th Amendment right. (4) If a person reinitiates communication he waives his 6th Amendment right to counsel.

8th Amendment

Excessive Bail

Excessive Fines

Cruel & Unusual Punishment

Aggregate Sentence for Minors

Vasquez v. Commonwealth, FEB16, VaSC No. 141071 & Valentin v. Commonwealth, FEB16, VaSC No. 150357: (1) There are three sentences which cannot be imposed on someone under 18: (a) No death penalty, (b) No life without parole if no homicide committed, and (c) No mandatory sentences of life without parole. (2) An aggregate terms of years sentence that is effectively life without parole is not cruel and unusual. (3) [IN THE CONCURRENCE] The sentence is legitimate because of Virginia's geriatric parole. (4) Less than 4% of the eligible offenders who applied for geriatric release have received early release.

Lethal Injection Protocol

Glossip v. Gross, JUN15, USSC No 14-7955: (1) The Supreme Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment. (2) Because some risk of pain is inherent in any method of execution, the Constitution does not require the avoidance of all risk of pain. (3) Capital prisoners cannot successfully challenge a method of execution unless they establish the a risk that it is sure or very likely to cause needless suffering. (4) To succeed in a challenge, capital prisoners must identify an alternative that is (a) feasible, (b) readily implemented, and (c) significantly reduces a substantial risk of severe pain. (5) The capital inmate bears the burden of proving there is a substantial risk of severe pain.

Montgomery v. Louisiana, JAN16, USSC No. 14–280: The rule that only irredeemable minors can be given life without chance at parole/probation is a substantive rule and must be applied retroactively by the States.

14th Amendment

Equal Protection

EVIDENCE

Article X: Rules 2:1001 – 1008 - Best Evidence

Dalton v. Commonwealth, MAR15, VaApp No. 2385-13-3: (1) Text messages on a telephone are subject to the Best Evidence Rule under the definition of "writings" in 2:1001. (2) Per 2:1004 the reasons the contents are allowed without the original are: (a) originals lost or destroyed, (b) original not obtainable, (c) original in opponent's possession, (d) the writing is about a collateral matter. (3) The test for unavailability is proof with reasonable certainty. (4) There are a myriad of ways that electronic records may be deleted, lost, or purged as a result of routine electronic records management. (5) Not having the phone any longer, without any evidence of bad faith, is a valid reason to allow verbal testimony as to the content of the texts.

Corpus Delecti

Jones v. Clarke, APR15, 4Cir No. 14-6590: If (1) the defendant has admitted to the crime, and (2) there is evidence the defendant had once recently been to the crime scene, and (3) there is evidence that the crime occurred, there is enough evidence to convict.

Rule 2:404(b) - Admission of Other Crimes into Evidence at Trial (Common Scheme or Common Plan)

Rules 3A:6(b) & 3A10(c) – Joinder of Charges as part of Common Scheme or Plan

Walker v. Commonwealth, APR15, VaSC No. 140747: (1) There is a common plan when constituent offenses occur (a) sequentially or (b) interdependently to advance some (c) common, extrinsic objective. (2) There is a common scheme when the crimes share features (a) idiosyncratic in character, (b) which permit an inference that each individual offense was committed by the same person or persons (c) as part of a pattern of criminal activity involving certain identified crimes.

Proximate Cause

Wagoner v. Commonwealth, APR15, VaSC No. 140890: (1) Outside of medmal cases proximate cause of death is not to be used in conjunction with the loss of a substantial possibility of survival. (2) NOT TO BE USED IN CRIMINAL CASES.

Rule 2:201 - Judicial Notice

Williams v. Commonwealth, APR15, VaSC No. 141046: (1) A trial court may take judicial notice of geographical facts that are (a) matters of common knowledge, or (b) shown by maps in common use. (2) The judge may, by judicial notice, dispense with proof of venue. (3) (a) A judge must indicate on the record that he is taking judicial notice because (b) the parties must have the opportunity to object. (4) It cannot be inferred that the judge took judicial notice just because a party asked him to. (5) Failing to establish where a street is located is a failure to establish venue.

Corpus Delicti

Terlecki v. Commonwealth, JUN16, VaApp No. 1681-14-2: (1) An accused cannot be convicted solely on his uncorroborated extrajudicial admission or confession. (2) Slight corroboration of the confession is required to establish corpus delicti beyond a reasonable doubt. (3) A confession is a statement admitting or acknowledging all facts necessary for conviction of the crime. (4) A mere admission admits of facts tending to prove guilt but falling short of an admission to all essential elements of the crime.

Proving Age of the Defendant

Stith v. Commonwealth, JUL15, VaApp No. 1548-14-2: (1) When the defendant is obviously above a mandated age, the trial court may solely depend on the defendant's appearance to prove age. (2) If the defendant is not obviously above a mandated age, corroborating evidence is needed and appearance alone is not sufficient. (3) It is the trial court's prerogative to decide whether appearance alone is enough to prove age.

Relevance

Payne v. Commonwealth, SEP15, VaApp No. 1044-13-3: (1) Whether evidence is exculpatory and whether evidence is admissible are discrete inquiries. (2) An officer's opinion that a defendant is truthful and innocent is just as inadmissible as an officer's opinion that the defendant is dishonest and guilty. (3) Introducing an officer's opinion on a witness' veracity invades the province of the jury. (4) An officer may describe circumstance, but he cannot testify as to a conclusion.

Rule 2:1002 - Best Evidence

Turner v. Commonwealth, OCT15, VaApp No. 1309-14-4: (1) The best evidence rule does not apply where the issue is merely the (a) existence, (b) execution, or (c) delivery of the document. (2) Even where the contents of a document are in question, if those contents are only collaterally related to the issues, the document need not be produced to warrant the admission of secondary evidence. (3) Envelopes offered as circumstantial evidence because they are near contraband – in order to show a connection with the defendant – are not subject to the best evidence rule. (4) Assuming the name and address on the envelope are content, if (a) an officer saw them and (b) can testify verbally about them (c) the fact in issue is one to which a witness can testify orally from personal observation and any document which recites the same facts, though it may be admissible, is only collateral to the actual fact, and does not have to be produced.

Rule 2:106 – The Completeness Rule

Turner v. Commonwealth, OCT15, VaApp No. 1309-14-4: (1) When part of a writing or statement is introduced the court may require the entire other parts in as a matter of fairness. (2) Documents introduced to establish a collateral fact do not require the entire document to be introduced as a matter of fairness.

Davis v. Commonwealth, NOV15, VaApp No. 0693-14-1: (1) It is not error to allow a witness to refresh her testimony from an inadmissible document – (a) payroll documents or (b) inadmissible certificates of analysis.

§ 19.2-270.1 - Photographs as Evidence of Stolen Items

Hall v. Commonwealth, NOV15, VaApp No. 2141-14-1: (1) There is no requirement that the writing mandated in the statute be done prior to trial. (2) The required information can be written during trial while a qualified witness (policeman or conservator of the peace) testifies.

Admission of Prior Convictions

Hall v. Commonwealth, NOV15, VaApp No. 2141-14-1: (1) The (a) same name carries the presumption of the same person although (b) the strength of the presumption will vary according to circumstances.

Best Evidence Rule

Jennings v. Commonwealth, DEC15, VaApp No. 0063-15-1: (1) The rule applies to price tags. (2) A store employee cannot testify as to value if that testimony comes from reading the price from the tag. (3) Per Rule 2:1004 there are four exceptions to the rule: (a) original lost or destroyed, (b) original not obtainable, (c) original in possession of opponents, and (d) introduced to prove collateral matters.

PROCEDURE

Pretrial

Preliminary Hearing

Indictment

Indicting a Charge Not Certified

Herrington v. Commonwealth, FEB16, VaSC No. 150085: (1) The fact that the district court reduced a charge and certified the lesser charge does not keep the prosecution from presenting the original charge to the grand jury, even without a separate direct indictment.

Jurisdiction

Venue

Pretrial Motions

§ 19.2-243 – Speedy Trial

Herrington v. Commonwealth, FEB16, VaSC No. 150085: (1) If a general district court reduces and certifies a lesser charge, but the prosecution presents the original charge to the grand jury, speedy trial runs from the date of the true bill.

Continuance

Herrington v. Commonwealth, FEB16, VaSC No. 150085: (1) The decision to grant a continuance will be reversed only upon a showing of abuse of discretion and resulting prejudice to the party who claims an abuse of discretion.

19.2-243 – Speedy Trial

Wallace v. Commonwealth, JUL15, VaApp No. 1476-14-1: (1) The 5 month period (while incarcerated pending trial) is 152 and a fraction days. (2) The 5

month period begins the day after a preliminary hearing. (3) The burden is on the prosecution to show delays were not in violation of the statute. (4) If the defense makes a motion, it is granted, and the order states the case is continued to the same date it was already set – the defense effectively joins the prosecution's continuance and is responsible for that period of time, not the prosecution. (5) The exceptions stated in the 19.2-243 are not meant to be all-inclusive, and other exceptions of a similar nature are implied. (6) Judicially recognized exceptions to the time requirement are permissible as long as they are of a similar nature and have the same rationale as the enumerated exceptions. (7) When, due to factors beyond his or her control, an assigned prosecutor is unable to be present for trial in a case such as this, a delay is warranted to ensure a fair trial to both the accused and the Commonwealth. (8) The fact that there are multiple prosecutors in a jurisdiction does not mean they can be substituted, one for another, on the eve of trial without adequate preparation.

Appointment of an Expert

Payne v. Commonwealth, SEP15, VaApp No. 1044-13-3: (1) An indigent defendant who seeks government funds to hire an expert witness must demonstrate that (a) the subject which necessitates the assistance of the expert is likely to be a significant factor in his defense, and (b) he will be prejudiced by the lack of expert assistance. (2) An indigent defendant satisfies this test by (a) showing that the services of an expert would materially assist him in the preparation of his defense and that (b) the denial of such services would result in a fundamentally unfair trial. (3) The hypothetical admissibility (or inadmissibility) of the desired expert's testimony is relevant in determining whether the trial court should appoint an expert. (4) If the testimony sought from an expert is within common knowledge and experience of jurors it is inadmissible and its absence does not cause a fundamentally unfair trial.

Arraignment

Plea

Trial

Jury Selection

Opening Argument

Evidence

Motion to Strike

Affirmative Defense

Hodges v. Commonwealth, MAY15, VaApp No. 1243-14-3: To determine whether something is an element of an offense or an affirmative defense the court should look at the intent of the statute and the abilities of the parties to prove the facts concerning the matter.

Jury Instructions

Standard for Circumstantial Cases

Vasquez v. Commonwealth, FEB16, VaSC No. 141071 & Valentin v. Commonwealth, FEB16, VaSC No. 150357: (1) The statement that circumstantial evidence must exclude every reasonable theory of innocence is simply another way of stating that the Commonwealth has the burden of proof beyond a reasonable doubt. (2) A factfinder (a) cannot "arbitrarily" choose between two equally plausible interpretations of a fact, but (b) the choice is arbitrary only when no rational factfinder could believe the incriminating interpretation of the evidence and disbelieve the exculpatory one. (3) The question is not whether "some evidence" supports the hypothesis of innocence, but whether a rational factfinder could have found that the incriminating evidence renders the hypothesis of innocence unreasonable.

King v. Commonwealth, APR15, VaApp No. 1684-13-4 (en banc): (1) A defendant is entitled to have the jury instructed only on those theories of the case that are supported by more than a scintilla of evidence. (2) Whether there is a scintilla of credible evidence is determined by reviewing each individual case's evidence. (3) If a proffered instruction finds any support in credible evidence, however, its refusal is reversible error. (4) Where the conflicting evidence tends to sustain either the prosecution's or defense's theory of the case, the trial judge must instruct the jury as to both theories. (5) The test is whether there is more than a scintilla of credible evidence when the evidence is viewed in the light most favorable to the proponent of the instruction. (6) Where the evidence warrants, an accused is entitled to an instruction presenting his theory of accident. (7) The trial judge (a) must affirmatively instruct a jury as to a principle of law and a(b) cannot rely on a negative inference from another instruction. (8) With conflicting evidence a judge cannot rely on the intent in the malicious wounding instruction if the defense is accident.

Either Party's Account

Collins v. Commonwealth, JUL15, VaApp No. 1096-14-2: (1) When weighing the evidence, the fact finder is not required to accept entirely either party's account of the facts. (2) The fact finder may reject that which it finds implausible, yet accept other parts which it finds to be believable.

Eyewitness Identification & Weapons Focus

Payne v. Commonwealth, SEP15, VaApp No. 1044-13-3: (1) An instruction which comments upon the evidence is inappropriate. (2) Instructions that are statements of scientific knowledge, rather than of legal principle, constitute an improper comment. (3) Closing argument is the point at which evidence should be commented upon. (4) Jurors, not experts, are the ones who make credibility determinations in relation to witnesses. (5) An instruction which functions as a substitute for expert witness testimony is an impermissible commentary on the facts of the case. (6) The effect of short viewing time, stress, and the display of a weapon is within the lay knowledge of the jurors.

Lesser Included Offense

Edwards v. Commonwealth, DEC15, VaApp No. 0954-14-1: (1) A defendant (a) is entitled to have the jury instructed on his theory of the case, but (b) such an instruction must be supported by some appreciable evidence (more than a scintilla). (2) Whether there is more than a scintilla of evidence is resolved on a case-by-case basis by assessing the evidence in support of a proposition against the other credible evidence that negates it. (3) A defendant is not entitled to a lesser-included offense instruction unless a jury could rationally find the

defendant guilty of the lesser offense, yet acquit him of the greater. (4) A jury's ability to reject evidence (a) will support an acquittal, but (b) does not supply the affirmative evidence necessary to support a jury instruction. (5) If the evidence supports a lesser included offense instruction then either side can request it.

Witherow v. Commonwealth, DEC15, VaApp No. 1827-14-3: (1) A defendant is entitled to have the jury instructed only on those theories of the case that are supported by more than a scintilla of evidence. (2) The weight of the credible evidence that will amount to more than a mere scintilla is a matter to be resolved on a case-by-case basis. (3) The evidence must provide the necessary quantum of independent evidence to support an instruction on the lesser-included offense. (4) The defense is entitled to an instruction which requires conviction of a lesser offense if there is reasonable doubt as to the greater offense and it must include all grades of lesser offenses. (5) A defendant's testimony about his intent may, alone, rise above the quantum of a mere scintilla and be enough to require a trial court to give a proffered instruction on the lesser-included offense.

Closing Arguments

Mistrial

Sentencing

Jury Sentencing

Pending Imposition of Sentence

Withdrawing Plea of Guilt

Smith v. Commonwealth, OCT15, VaApp No. 0427-14-4: (1) A plea can be withdrawn (a) if it was (i) entered by mistake or (ii) under a misconception of the nature of the charge; (iii) through a misunderstanding as to its effect; (iv) through fear, fraud, or official misrepresentation; (v) was made involuntarily for any reason; or (vi) even where it was entered inadvisedly, (b) if any reasonable grounds is offered for going to the jury. (2) A plea entered inadvisedly can be withdrawn (a) when application therefor is duly made in good faith and (b) sustained by proofs, and (c) a proper offer is made to go to trial on a plea of not guilty. (3) A defense (alibi) that if proven and accepted by the jury would support

a defendant's contention that he was not guilty requires the plea withdrawal to occur. (4) Evidence indicating that the defendant did not understand the specific elements of the crime he was charged with shows the plea withdrawal should occur.

Motion to Withdraw Guilty Plea

Ramsey v. Commonwealth, DEC15, VaApp No. 1960-14-1: (1) A defendant who wishes to withdraw his guilty plea (a) must show that his motion is made in good faith and (b) must proffer that he has a reasonable basis for contesting his guilt. (2) A withdrawal is not allowed for a merely dilatory or formal defense. (3) The court can deny the motion if there is any significant prejudice to the Commonwealth including partially or fully fulfilling its obligations in a plea agreement by dismissing or amending charges. (4) A defendant does not establish that his motion to withdraw the guilty plea was made in good faith when he is merely fearful of his possible sentence. (5) A reasonable defense sufficient to withdraw a guilty plea is (a) one based upon a proposition of law or (b) one supported by credible testimony, supported by affidavit. (6) A defense based solely upon a challenge to the credibility of a victim's testimony is not a reasonable defense that would warrant withdrawal of a guilty plea. (7) An alibi witness placing the defendant away from the scene that contradicts a victim's testimony that the defendant did the crime is not enough to withdraw the guilty plea.

Withdraw Guilty Plea

Griffin v. Commonwealth, JAN16, VaApp No. 0499-14-1: (1) A defendant can waive his right to withdraw his guilty plea in a plea agreement. (2) Plea agreements are treated by the courts as binding contracts. (3) A motion to withdraw a guilty plea can be denied when there is significant prejudice to the Commonwealth. (4) Prejudice may exist where the record reflects that the Commonwealth has partially or fully fulfilled its obligations in a plea agreement by dismissing or amending charges.

Judicial Imposition of Sentence

§§ 19.2-303 and 19.2-305(B) and 19.2-305.1(A): Restitution

Shelton v. Commonwealth, FEB16, VaApp No. 0327-15-3: (1) The scope of restitution is limited to payments for damages or losses caused by the offense. (2) Costs that result only indirectly from the offense, that are a step removed from the defendant's conduct, are too remote and are inappropriate for a restitution payment. (3) Restitution is proper only (a) when a victim's financial loss is actually caused by the offense, (b) not when the financial loss is only related to the offense. (4) Costs that result only indirectly from the offense, that are a step

removed from the defendant's conduct, are too remote and are inappropriate for a restitution payment. (5) The court applies a "but for" standard.

§§ 19.2-295.3 & 19.2-299.1 - Victim Testimony

Harvey v. Commonwealth, OCT15, VaApp No. 2037-14-2: (1) The (a) scope of testimony in the sentencing phase is wide, and the (b) standard for exclusion of relevant evidence is whether the prejudicial effect substantially outweighs its probative value. (2) While §§ 19.2-295.3 & 19.2-299.1 limit the scope of victim impact testimony, they do not preclude a trial court from considering testimony from a victim at the sentencing hearing about the underlying facts of the crime if the judge concludes that evidence would help him fashion an appropriate sentence.

Grafmuller v. Commonwealth, NOV15, VaSC No: 150433: (1) Whether a sentence which exceeds the statutory maximum was imposed by the jury or a judge the defendant is entitled to a new sentencing hearing.

Director, DOC v. Kozich, DEC15, VaSC No. 141788: (1) There is a rebuttable presumption that a court speaks through its orders. (2) The subjective intentions of a judge upon entering a written order cannot change its character or legal efficacy. (3) If nothing appears upon the face of the judgment stating that further action in the cause is necessary to give completely the relief contemplated by the court the order is final.

Post Trial

Within 21 Days

Motion to Set Aside Verdict

Wagoner v. Commonwealth, APR15, VaSC No. 140890: (1) In a motion to strike, the trial court must use the same standard as employed by the jury. (2) If a standard is not given in jury instructions a trial judge may not use it.

Post 21 Days

During Appeal

SUBSTANTIVE

Violent Crimes

18.2-51.2 – Aggravated Malicious Wounding

Hawkins v. Commonwealth, APR15, VaApp No. 0908-14-2: (1) A scar from surgery to deal with a bullet wound caused by the defendant is a permanent and significant physical impairment under the statute. (2) Surgery neither (a) relieves a defendant from liability nor (b) breaks the chain of the causal connection between the shooting and the scar because the (c) surgery was a reasonably foreseeable consequence of the shooting. (3) Shooting a victim (a) puts into operation the victim's need for surgery, and (b) is a cause without which the victim's surgery and resulting surgical scar would not have occurred.

§ 18.2-51.6 – Strangulation – Bodily Injury

Ricks v. Commonwealth, NOV15, VaSC No. 141650, & Chilton v. Commonwealth, NOV15, VaSC No. 141820: (1) Bodily injury is any bodily injury whatsoever and includes (a) an act of damage or harm or hurt that relates to the body; is (b) an impairment of a function of a bodily member, organ, or mental faculty; or is (c) an act of impairment of a physical condition. (2) If the Commonwealth presents evidence sufficient to prove that unlawful pressure to the neck was applied to a victim and that such unlawful pressure resulted in unconsciousness, that is sufficient to prove the element of bodily injury.

1st Degree Murder – Lying in Wait & Voluntary Intoxication

Tisdale v. Commonwealth, NOV15, VaApp No. 2138-14-1: (1) Virginia recognizes only one exception to the (a) rule that voluntary intoxication is no defense for a crime: (b) voluntary intoxication can negate the deliberation and premeditation required for first degree murder. (2) Murder by lying in wait does not require premeditation and therefore intoxication cannot be used as a defense. (3) Murder by lying in wait can occur without an intent to kill.

18.2-57(G) – Teacher Exception

Lambert v. Commonwealth, DEC15, VaApp No. 0029-15-3: (1) (a) (i) Incidental, (ii) minor, or (iii) reasonable contact (b) used to maintain control and order (c) by a school employee is not a battery. (2) Due deference shall be given to reasonable judgments that were made by a school employee at the time of the event. (3) The statute represents an express legislative intent to defer to

teachers. (4) Instructions issued by a school board to a teacher are ineffective to modify the standards set by the General Assembly for criminal culpability. (5) A trial court cannot rely on the strictures of a School Board to determine whether a defendant is acting in the course and scope of her official capacity. (6) Even if (a) the trial court believes the defendant was erroneous in her interpretation of the events at the time, (b) the trial court must determine whether the defendant's interpretation was (i) a "reasonable fair or just" or (ii) not arbitrary and capricious understanding of the events at the time.

Malicious and Unlawful Wounding/Injury

Witherow v. Commonwealth, DEC15, VaApp No. 1827-14-3: (1) Purposeful acts may be done without malice if they are done in the heat of passion. (2) Heat of passion (a) is determined by the nature and degree of the provocation and (b) may come from (i) rage, (ii) fear, or (iii) a combination of both. (3) A plea of self-defense and a claim of provoked heat of passion do not conflict with each other.

Malicious Wounding/Injury and Battery

Witherow v. Commonwealth, DEC15, VaApp No. 1827-14-3: (1) Battery is a lesser included offense of malicious wounding/injury with malice but without the intent to maim, disfigure or kill.

Sex Crimes

18.2-374.1:1 – Distributing Child Porn – Peer to Peer Sharing

Kelley v. Commonwealth, APR15, VaSC No. 140837: When a person downloads child porn into a computer notebook labeled "My Shared Files", shows a working knowledge of the peer-to-peer program, the program allows sharing to be disabled, and a remote computer downloaded the files he is guilty of distributing child porn.

Possession of Child Porn

Terlecki v. Commonwealth, JUN16, VaApp No. 1681-14-2: (1) When the prosecution does not have the pictures to present, it can prove them through other competent evidence. (2) When (a) a person is performing fellatio that person's face must be visible and therefore (b) the "recognizable as an actual person" requirement of § 18.2-374.1(A) is met. (3) Possession (a) does not hinge on who downloaded images, but (b) awareness of their (I) presence, and (ii) character, and (c) the exercise of dominion and control over the images. (4)

Images can be possessed by more than one person simultaneously. (5) Destroying a laptop while the defendant knows he is under investigation (a) shows awareness that child porn was on the device, and (b) that the defendant exercised dominion and control over it.

§ 18.2-370.1 – Indecent Liberties With a Child

Le v. Commonwealth, JUL15, VaApp No. 0850-14-4: (1) (a) Corroboration of the victim's statement is not essential and (b) her testimony alone is sufficient to sustain a conviction if (I) it is credible and (ii) the guilt of the accused is believed by the jury beyond a reasonable doubt. (2) Although the other subsections of the statute require force, subsection (a) does not because there is no language in that section indicating force is an element.

18.2-374.1:1 – Possession of Child Pornography

Kobman v. Commonwealth, OCT15, VaApp No. 1451-14-2: (1) Computer pictures which are in unallocated space (have been deleted from trash bin) are not under dominion and control because they cannot be seen or accessed without forensic software. (2) The presence of images in the unallocated space is "a circumstance probative" of the possession of other images on the computer. (3) Pictures in the recycle bin are in possession because they can be reached.

Drug Crimes

18.2-265.3 – Drug Paraphernalia

Chianelli v. Commonwealth, APR15, VaApp No. 0452-14-1: The fact that it is legal for someone to possess or distribute marijuana under 18.2-251.1 (by prescription, for treatment of cancer or glaucoma) does not mean that a merchant can sell marijuana paraphernalia to the general public.

Similarity of 18.2-248(A) and New York Statutes

Mason v. Commonwealth, APR15, VaApp No. 0678-14-3: (1) In order to prove that a statute from another State is substantially similar to 18.2-248(A) for 2d or 3d offense convictions, the Commonwealth must show (a) the act convicted of was the same, and (b) the substance involved was a schedule I or II drug [possibly curable during trial with evidence of substance involved in prior conviction]. (2) NY PL § 220.31 (a) convicts for the same act, but (b) is not substantially similar because it could be a conviction of drugs outside of schedule I or II. (3) NY PL § 220.39(1) is substantially similar because (a) the act is the

same, and (b) it only applies to schedule I and II drugs. (4) The sale of a drug does not require possession.

Walker v. Commonwealth, APR15, VaSC No. 140747: (1) Four drug deals in the same neighborhood in 13 days cannot be tried at the same time because they are not part of a common scheme or plan.

Theft / Property Crimes

§ 55-334.1(A) – Larceny of Trees

Frango v. Commonwealth, FEB16, VaApp No. 1195-15-3: (1) The statute requires no proof of value for conviction. (2) Value would be only used as determining appropriate punishment.

§ 18.2-96 – Petit Larceny

Frango v. Commonwealth, FEB16, VaApp No. 1195-15-3: (1) While some value must be proven for a petit larceny, it is sufficient if it be worth less than the smallest coin known to the law. (2) The fact that a victim filed a complaint is enough to establish the item had value to him. (3) Time and effort expended by a perpetrator can establish the item taken has value. (4) A show that items of the same type have been put to a use previously can establish a value.

§ 18.2-178 - Obtaining Money by False Pretenses: “Loans”

Reid v. Commonwealth, FEB16, VaApp No. 0511-15-1: (1) Larceny by false pretenses, unlike larceny by trick, requires that title or ownership pass to the perpetrator. (2) Larceny by false pretenses does not require that a defendant intend to permanently deprive the victim of the goods. (3) It is sufficient if the fraud of the accused has put the victim in such a position that he may eventually suffer loss. (4) If the victim gives money to a defendant to use on the victim's behalf (agency) and the defendant takes the money for himself it is larceny by trick. (5) If the victim gives money to the defendant for the defendant's use (loan), the defendant's lie to et the money is larceny by false pretense.

§ 18.2-200.1 – Construction Fraud: Demand Letter

Bowman v. Commonwealth, OCT15, VaSC No. 141737: (1) The construction fraud statute is not meant to criminalize contractual default. (2) Fraudulent intent must exist at the time the defendant procure an advance. (3) The contractor

must (a) (i) fail or (ii) refuse to perform the work and (b) (I) fail or (ii) refuse to substantially make good the advance. (4) Even with 2 & 3 supra proven, there must be evidence that the contractor failed to return the advance within 15 days of a request to do so. (5) The request must be an unqualified demand to return all or part of the advance. (6) The letter is not valid if it makes alternative demands. (7) Proof that letters were sent without proof of their contents is not enough to satisfy the statutory requirements.

Weapon Crimes

18.2-308.2:2(K) – Lying in an Attempt to Purchase a Firearm

Parham v. Commonwealth, APR15, VaApp No. 0772-14-1: When a person has been arraigned in Circuit Court and he gives inconsistent statements about how he came to state "no" to the "are you under indictment" question, he can be found guilty of lying to buy a firearm despite his claim that he did not know what an indictment was.

18.2-308(C)(10) – Firearm in closed Center Console

Hodges v. Commonwealth, MAY15, VaApp No. 1243-14-3: It is the Commonwealth's burden to prove that a firearm in a vehicle's center console was not secured. (2) It is not an affirmative defense because when officers find a firearm in a vehicle they will have all the knowledge as to how it was stored that the defendant would.

§ 18.2-56.1 – Reckless Handling of a Firearm

Jones v. Commonwealth, OCT15, VaApp No. 1019-14-2: (1) Because they have a shared legislative intent, "firearm" under 18.2-56.1 carries the same definition as it does under 18.2-308.2. (2) Under these statutes, "firearm" has no element of perception of the appearance of danger by a victim that would warrant applying a broad construction to the term "firearm." (3) These statutes are meant to prevent actual danger, (4) Under these statutes a firearm is an instrument which was designed, made, and intended to expel a projectile by means of an explosion.

Motor Vehicles:

46.2-301 – Driving Suspended

Barden v. Commonwealth, MAY15, VaApp No. 1027-14-4: (1) § 46.2-301(B) criminalizes driving only during the period in which the driver's license is suspended or revoked. (2) A license is revoked for a DUI only for the specific

time mandated by statute. (3) A license suspended for failure to pay fines and costs to a court is only suspended until the fines and costs are paid. (4) If a defendant has not gotten a new license that does not mean she is still revoked or suspended. (5) A person no longer revoked or suspended, but who has not gotten a new license is guilty of 46.2-300, not 46.2-301.

46.2-416(A) – Use of a Driving Transcript

Hodges v. Commonwealth, MAY15, VaApp No. 1243-14-3: A certified driving record can be used to prove a person had notice of her suspended driver's license.

Calibration of Radar Guns

Wells v. Commonwealth, JAN16, VaApp No. 0611-15-1: (1) The accuracy of the radar gun (a) is not an element of the offense, but instead (b) a prerequisite for the admission into evidence of its speed measurement. (2) When the radar reading is offered the court must make a threshold determination as to its accuracy in order to admit it. (3) Calibration must be objected to at the admission of the radar reading, not in the motion to strike.

§ 46.2-817 – Eluding: Instruction on Flight

Graves v. Commonwealth, JAN16, VaApp No. 2344-14-1: (1) Acts to escape, or evade detection or prosecution for criminal conduct (a) may be evidence at a criminal trial and a jury (b) may be instructed that it could consider such acts. (2) Flight (a) is the action of the alleged offender after the commission of the crime, (b) not the crime itself. (3) In an Eluding charge, flight is part of the offense itself and therefor it is not appropriate to give a flight instruction separate from the elements of the charged crime. (4) A separate flight instruction (a) would be confusing, and (b) would inappropriately emphasize part of the evidence.

Other

§ 3.2-6570(F) – Animal Cruelty

Pelloni v. Commonwealth, FEB16, VaApp No. 0586-15-1: (1) “Willfully inflict” imports knowledge and consciousness that injury will result from an act or omission. (2) Willful used in a criminal statute generally means an act done with (a) a bad purpose; (b) without justifiable excuse; (c) stubbornly, (d) obstinately, (e) perversely, or (f) without grounds for believing it is lawful. (3) The issue of the accused’s mental state requires an examination not only (a) of the act that created the risk, but also of (b) the degree to which the accused (I) was or (ii) should have been aware of the danger that resulted from the act. (4) Wilful failure to act requires circumstances that warrant an inference that the failure

to do the act was intentional or by design. (5) Unexplained omissions by themselves are not sufficient to establish willfulness to the exclusion of another equally reasonable explanation. (6) In proving willfulness beyond a reasonable doubt, the Commonwealth is not required to introduce evidence explaining the reason for the defendant's act or omission.

§ 18.2-461(i) – False Report of a Crime to a Police Officer

Dunne v. Commonwealth, FEB16, VaApp No. 0426-15-3: (1) The fact that the supposed perpetrator has a defense does not mean the crime was not alleged. (2) "Any crime" under the statute is not limited to Virginia crimes. (3) Code § 18.2-461 criminalizes the false report of a crime, not the provision of proof beyond a reasonable doubt of each element of such a crime. (4) The fact that the officer initiated the conversation does not keep the statements made to him from being a report. (5) There is no requirement that the defendant (a) contacted the police, or (b) wrote a statement, or (c) alleged a crime with specificity.

§ 18.2-79 - Arson

Wilson v. Commonwealth, FEB16, VaApp No. 0363-15-3: (1) A "warehouse" is (a) a specific type of storage structure (b) used in a commercial setting (c) to hold excess goods prior to (d) retail sale at (e) some other location. (2) A "storehouse", on the other hand, is a general type of structure for storing goods for a number of purposes. (3) A "storehouse" is a class of storage structures that includes both (a) retail stores and (b) structures used for the storage of provisions and goods.

Contempt
Late to Court

Abdo v. Commonwealth, MAR15, VaApp No. 0965-14-4: (1) In a contempt hearing for tardiness, the introduction of prior occurrences of tardiness into evidence is allowed because (a) it shows the person's knowledge that tardiness will disrupt the court, (b) repeated affronts to the court's dignity are relevant in establishing intent, and (c) prior warnings constitute evidence of willfulness when they go unheeded. (2) Willfulness or recklessness satisfies the intent element necessary for a finding of criminal contempt – thus allowing courts to "punish witnesses or attorneys whose chronic laziness or carelessness consistently thwart[s] the administration of justice." (3) Officer 9 minutes late to court and had another officer inform the court he was going to be tardy; contempt $25 fine; court noted 3 prior late appearances in finding the officer in contempt.

Contempt
Filing Garnishment with Company Before Filing at Court

Becker v. Commonwealth, MAR15, VaApp No. 1611-13-4: (1) Contempt is defined as an act in disrespect of (a) the court or (b) its processes, or which (c) obstructs the administration of justice, or (d) tends to bring the court into disrepute. (2) Willfulness or recklessness satisfies the intent element necessary for a finding of criminal contempt.

18.2-371 – Contributing to the Delinquency of a Minor
Willful, Unreasonable Absence of a Parent

Miller v. Commonwealth, MAR15, VaApp No. 0340-14-4: (1) Under the statute, "guardian" means someone with a degree of legal or formal responsibility for a child. (2) A random store employee asked to watch a child is not a guardian. (3) To convict under the statute (a) requires an unreasonable absence, (b) not that the child (I) be injured or (ii) have unmet needs. (4) Whether a parent's absence is unreasonable is a jury question. (5) Willful actions under this standard are those of criminal negligence or recklessness. (6) The test for willfulness (adopting criminal negligence test) is whether the defendant knew or should have known the probable results of her acts. (7) Relevant facts for determining willfulness include (a) the gravity and character of the possible risks of harm; (b) the degree of accessibility of the parent; (c) the length of time of the abandonment; (d) the age and maturity of the child; and (d) the protective measures, if any, taken by the parent.

18.2-168 / 42.1-77: Forging a Public Record – Accord and Satisfaction

Moreno v. Commonwealth, AUG15, VaApp No. 1216-14-4: (1) An accord and satisfaction offered a court is a public record because it is required under 19.2-151 for the dismissal of a case. (2) An accord and satisfaction offered in court is not purely a private transaction because it relies on the prosecutor and judge to act upon it in court. (3) Per 42.1-77 public records are both those received (a) in pursuance of law and (b) those connected with the transaction of public business.

19.2-358: Contempt – Failure to Pay Restitution

Porter v. Commonwealth, NOV15, VaApp No. 1374-14-2: (1) A restitution plan which is imposed as part of a sentencing order can be enforced under 19.2-306 or 19.2-358. (2) 19.2-305.1(A) requires that restitution be part of probation and therefore could not be enforced by 19.2-358. (3) 19.2-305.1(B) only requires restitution to be paid and therefore can be enforced by 19.2-358. (4) If a court's order does not specify which section under 19.2-305.1 restitution is ordered the trial court can interpret the obligation as existing both under probation and

independently. (5) Contempt hearings are not criminal and statutes of limitation do not apply to them. (6) There is no statute of limitations on 19.2-358 (60 days jail and/or $500) because it is not a misdemeanor.

Perjury

Cossitt-Manica v. Commonwealth, NOV15, VaApp No. 1746-14-2: (1) Elements of perjury: (a) wilfully (b) make a false statement under oath (c) about a material matter or thing. (2) A perjury require corroboration. (3) Proving perjury with opposing testimony requires (a) two opposing witnesses, or (b) one opposing witness and strong corroborating circumstances. (4) No evidence is required to corroborate competent, authenticated, real evidence, such as a video recording. (5) An answer that is literally true, even if it is arguably evasive or incomplete, does not constitute perjury. (6) Corroborating evidence (a) must be of a strong character, and (b) not merely corroborative in slight particulars, but (c) it doesn't need to be equal in weight to the testimony of a second witness; (d) it need be enough to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. (7) Corroborative evidence (a) must not emanate from the sole witness' mouth, (b) must not rest wholly upon the sole witness' credibility, and (c) must (i) add to, (ii) strengthen, and (iii) confirm the sole witness' testimony. (8) A witness' judicial confession (guilty plea) in one proceeding cannot corroborate his testimony in a different judicial proceeding (perjury trial).

§ 18.2-152.5(A) – Computer Invasion of Privacy – VCIN

Ramsey v. Commonwealth, DEC15, VaApp No. 0123-15-1: (1) To be convicted under this section the evidence must establish that (a) the offender viewed identifying information of another when he knows or reasonably should know he is without right, agreement, or permission to do so or (b) acting in a manner knowingly exceeding such right, agreement, or permission. (2) The fact that the computer warning says cannot “use” the information for non-criminal justice purposes and the recertification test says the same does not mean the person can access as long as she does not use the information when training otherwise informs the person (state trooper got access to several people's VCIN information without criminal justice purpose).

18.2-460 - Obstruction of Justice

Molinet v. Commonwealth, DEC15, VaApp No. 0279-15-2: (1) “Obstruction” means (a) to obstruct the officer himself (b) not merely to oppose or impede the process with which the officer is armed. (2) Obstruction of justice does not occur (a) when a person fails to cooperate fully with an officer or (b) when the person’s conduct merely renders the officer’s task more difficult. (3) When an officer is maintaining a perimeter around a crime scene and a person curses him, refuses to step back, and moves toward the officer in an aggressive manner those

actions obstruct the officer from fulfilling his duties.

PROBATION

Hearsay

Cox v. Commonwealth, DEC15, VaApp No. 1871-14-3: (1) Hearsay is allowed only when the hearing officer specifically finds good cause for not allowing confrontation. (2) Reliability test: Hearsay is allowed if it possesses substantial guarantees of trustworthiness. (3) Balancing test: The court weighs (a) the interests of the defendant in cross-examining his accusers against (b) the interests of the prosecution in denying confrontation. (4) Either the reliability or balancing test can be used as may be most appropriate in the circumstances. (5) The fact that allowing hearsay in probation hearings is “very customary” is not good cause.

APPEALS

Appellee Argument

Appellant Argument

Invited Error & Approbate and Reprobate

Moreno v. Commonwealth, AUG15, VaApp No. 1216-14-4: (1) Appellate courts will not notice error invited by the party seeking the appeal. (2) An appellant cannot have it both ways, inviting error at trial and taking advantage of the error on appeal.

Cross Racial Identification

Payne v. Commonwealth, SEP15, VaApp No. 1044-13-3: (1) If defense counsel only raises the race of the defendant in voir dire and the opening statement the race of the defendant is not in evidence and the appellate courts will not recognize arguments based upon it. (2) If an instruction is neutral on its face and does not specifically mention cross racial identification no appeal based upon cross racial identification will be recognized by appellate courts. (3) If a defendant wants to raise an issue concerning the race of the jurors (a) he must raise an objection at trial and (b) the jurors' racial composition must be preserved in the record.

Can't Challenge Statute Not Charged Under

Freeman v. Commonwealth, NOV15, VaApp No. 2302-14-4: (1) An appellant cannot challenge the constitutionality of a statute if he is not charged under it – even if it was the statute the officer initially seized him under (traffic stop on obstructed view).

Not a Waiver of Objection

Cox v. Commonwealth, DEC15, VaApp No. 1871-14-3: (1) If an accused (a) unsuccessfully objects to evidence and then on his own behalf (b) introduces evidence of the same character, he waives his objection, and appellate courts cannot reverse for the alleged error. (2) The defendant does not waive his objection by (a) cross-examining or (b) presenting rebuttal evidence.

Writs

Standards of Review

End of Justice – Sentence Beyond Statutory Maximum

Frango v. Commonwealth, FEB16, VaApp No. 1195-15-3: (1) When the judge imposes a sentence greater than the statutory maximum, the sentence is void ab initio and the ends of justice exception applies.

Mussachio v. US, JAN16, USSC No. 14–1095: When a trial court improperly adds an additional element in its instruction to the jurors, due process is satisfied if the review of sufficiency of the evidence is based on the elements of the crime instead of the improper instruction.

8.01-678 – Harmless Error

Dalton v. Commonwealth, MAR15, VaApp No. 2385-13-3: If the error did not influence the jury or had but slight effect the verdict should stand.

Right Result, Wrong Reason - Motion to Set Aside Verdict

Wagoner v. Commonwealth, APR15, VaSC No. 140890: (1) The Supreme Court does "not hesitate, in a proper case, where the correct conclusion has been reached but the wrong reason given, to sustain the result and assign the right ground." (2) Review of a trial court's ruling on a motion to set aside the verdict is particularly ripe for application of the "right result for the wrong reason" doctrine, because an appellate court is necessarily limited to the facts in the record and no additional factual presentation is necessary.

Judicial Notice of Venue in Appellate Courts

Williams v. Commonwealth, APR15, VaSC No. 141046: (1) The failure to clearly prove venue (a) is usually due to inadvertence, flowing naturally from the familiarity of court, counsel, witnesses, and jurors with the locality of the crime; therefore (b) appellate courts will generally and properly lay hold of and accept as sufficient any evidence in the case, direct or otherwise, from which the fact may be reasonably inferred. (2) Venue cannot be inferred (a) by the law enforcement agency involved, or (b) by an allegation in the warrant. (3) Appellate courts may take judicial notice of geographical facts that are so well known that they are matters of common knowledge in the Commonwealth. (4) Failure to establish where a street is located precludes an appellate court from

finding venue.

Ends of Justice

Le v. Commonwealth, JUL15, VaApp No. 0850-14-4: (1) In order to avail himself of the ends of justice exception to the requirement of a contemporaneous objection at trial, the trial record must affirmatively establish that an element of the offense did not occur. (2) If the prosecution did not prove an element this does not prove that it did not occur.

Favoring Narrower Grounds over Constitutional

Commonwealth v. Swann, AUG15, VaSC No. 141387: (1) The doctrine of judicial restraint dictates that (a) appellate courts decide cases on the best and narrowest grounds available, (b) avoiding unnecessary adjudication of a constitutional issue.

Harmless Error

Commonwealth v. Swann, AUG15, VaSC No. 141387: (1) Code § 8.01-678 makes harmless-error review required in all cases. (2) A non-constitutional error in a criminal case is harmless if the error did not influence the jury, or had but slight effect. (3) If the appellate court cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, then the conviction cannot stand.

Harmless Error – Hearsay that does not violate the Confrontation Clause

Holloman v. Commonwealth, AUG15, VaApp No. 1319-14-1: (1) If admission of evidence violates the hearsay rule but not the Confrontation Clause the court must make a harmless error determination. (2) A non-constitutional error is harmless if the error did not influence the jury or had only a slight effect. (3) In order to determine this, the appellate court must decide whther the evidence was merely cumulative.

Joinder of Charges

Holloman v. Commonwealth, AUG15, VaApp No. 1319-14-1: (1) In reviewing a trial court's pretrial ruling allowing joinder of offenses for trial, the appellate court is not confined to the contents of the pretrial proffers and may rely on evidence presented at trial to affirm the joinder decision. (2) An appellate court may not rely on evidence presented at trial to reverse a pretrial joinder ruling unless the

defendant renewed his objection to joinder at the conclusion of trial.

Remedies

Sentence Beyond Maximum

Frango v. Commonwealth, FEB16, VaApp No. 1195-15-3: (1) When the trial judge sentences beyond the statutory maximum, the remedy is a new sentencing hearing.

HABEAS

In Federal Custody – Immigration

Escamilla v. Commonwealth, OCT15, VaSC No. 141121: (1) For a Virginia court to exercise jurisdiction over a habeas corpus petition, the Commonwealth must be the source of both (a) the challenged conviction and (b) the detention. (2) A person is detained for habeas purposes so long as (a) he was sentenced to a term of incarceration and (b) the Commonwealth retains active power over him that could result in immediate physical detention. (3) The petitioner can challenge the lawfulness of his detention as long as an order entered in her favor will impact the duration of the petitioner's confinement. (4) Courts do not have jurisdiction to determine the validity of a sentence under which the petitioner is not detained at the time he files the petition. (5) Exception: A petitioner currently detained under a repeat offender statute may collaterally attack the validity of a fully served sentence that is a basis for the current detention. (6) A person in federal custody for deportation purposes cannot habeas a Virginia conviction for which he is no longer under detention.