CONSTITUTION

Article I Section 10 – Ex Post Facto Laws

Baugh v. Commonwealth, JAN18, VaApp no. 0152–17–2: (1) The ex post facto prohibition forbids the Congress and the States to enact any law which (a) imposes a punishment for an act which was not punishable at the time it was committed; or (b) imposes additional punishment to that then prescribed. (2) The constitutional prohibition against an ex post facto law applies to criminal proceedings and not to civil proceedings. (3) In determining whether a post conviction statute is civil there are two tests: (a) Was the intention to impose punishment? (b) If the intent was to make a civil law, whether the law is so punitive either in purpose or effect as to negate that intent. (4) Test for whether the civil law is too punitive: Whether, in its necessary operation, the regulatory scheme: (a) has been regarded in our history and traditions as a punishment; (b) imposes an affirmative disability or restraint; (c) promotes the traditional aims of punishment; (d) has a rational connection to a nonpunitive purpose; or (e) is excessive with respect to this purpose.

1st Amendment

Packingham v. North Carolina, JUN17, USSC no. 15-1194: The government may not forbid sex offenders contact with all social media cites which children might participate in because it would suppress constitutional behavior in order to forbid criminal behavior (overly broad statute).

4th Amendment

Search & Seizure

Suppression: Judge Exceeds Authority in Approving a Warrant

U.S. v. McLamb, JAN18, 4 Cir. no. 17-4299: (1) If a search warrant is issued by a judge who does not have the authority to do so suppression is not the remedy. (2) Suppression is a remedy against the unconstitutional acts of officers, not the judiciary.

Unconstitutional Conditions Doctrine

Shin v. Commonwealth, DEC17, VaSC no. 170128: (1) A State can not grant a privilege subject to the agreement that the grantee will surrender a constitutional right, even in those cases where the State has the unqualified power to withhold the grant altogether. (2) Where such a condition is imposed upon the grantee, he may ignore or enjoin the enforcement of the condition without thereby losing the grant.

Exigent Circumstances

Commonwealth v. Campbell, DEC17, VaSC no. 161676: (1) The fact that § 19.2-54 (requirements for magistrate filing affidavit etc. to clerk's office) has not been complied with does not exclude the results of the search if it also qualifies under exigent circumstances. (2) The procurement of a defective warrant does not require suppression if the search is justifiable under other grounds. (3) Any defect in the validity of the warrant under state law does not, of itself, invalidate the warrant under the United States Constitution. fn. 4. (4) List of some factors that may indicate exigency: (a) the degree of urgency involved and the time required to get a warrant; (b) the officers' reasonable belief that contraband is about to be removed or destroyed; (c) the possibility of danger to others, including police officers left to guard the site; (d) information that the possessors of the contraband are aware that the police may be on their trail; (e) whether the offense is serious, or involves violence; (f) whether officers reasonably believe the suspects are armed; (g) whether there is, at the time of entry, a clear showing of probable cause; (h) whether the officers have strong reason to believe the suspects are actually present in the premises; (i) the likelihood of escape if the suspects are not swiftly apprehended; and (j) the suspects' recent entry into the premises after hot pursuit.

Internet Peer to Peer

Stickle v. Commonwealth, DEC17, VaApp no. 0660-16-1: (1) By simply installing file-sharing software onto his computer, a person has failed to demonstrate an expectation of privacy that society is prepared to accept as reasonable. (2) When a person puts a file in shared folder of a peer to peer program it is an implicit invitation to others to reach into his computer and take it and therefore no unconstitutional trespass occurs in the taking. (3) When the government's peer to peer program is only "slightly modified" so that it takes the file specifically from the defendant's computer and identifies the defendant's computer (things not normally a function of the program) it is not sufficiently sophisticated to not be a "general public use" item and therefore not constitutionally prohibited without a search warrant as per Kyllo. (4) The government's peer to peer program does not allow the government to explore details of the home that would previously have been unknowable without physical intrusion and therefore does not run afoul of Kyllo.

Strip Search of Initial Detainee (Not General Population)

Cole v. Commonwealth, NOV17, VaSC no. 161113: In determining whether a strip search at a jail was constitutional, unless there is substantial evidence demonstrating the jail's response to the situation was exaggerated deference must be given to the officials in charge of the jail.

Exigent Circumstances – Blood Draw

Aponte v. Commonwealth, OCT17, VaApp no. 0052-17-3: (1) 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. (Contradicts McNeely). (2) Special facts can delay the warrant-seeking process sufficiently to contribute to exigent circumstances. (3) The facts that an officer investigating an accident scene does not initially realize alcohol is involved, the defendant hid evidence, the defendant claimed to have drank the night before, and officer had to spend time processing the scene and driving to the hospital all combine to provide exigency.

Hairston v. Commonwealth, APR17, VaApp No. 0714-16-3: (1) There is no constitutional violation if an officer arrests someone for a minor offense done in

the officer's presence. (2) Probable cause is an objective standard and (a) if the record shows it then (b) the fact (i) the officer could not articulate it or (ii) did not subjectively rely on it is not relevant. (3) It is irrelevant whether the defendant is charged or prosecuted on the charge which provided probable cause. (4) The passage of time between the establishment of probable cause and arrest does not affect the existence of probable cause. (5) Probable cause (a) for a search warrant can go stale, but probable cause (b) for an arrest warrant does not (i)unless the information was discredited before the arrest.

EXIGENT CIRCUMSTANCES

US v. Graham, APR17, 4Cir no. 16-4105: (1) A police officer must have reasonable, articulable suspicion that there is a threat to officer safety or to destroy evidence in order to get the exigent circumstances exception. (2) To uphold an officer's actions, the court must find that the facts available to the officer at the moment of the seizure or the search would warrant a man of reasonable caution in the belief that the action taken was appropriate.

EXIGENT CIRCUMSTANCES

US v. Carlson, MAR17, 4Cir no.16-4516: Five factors to be considered: (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the officers' reasonable belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.

5th Amendment

Double Jeopardy

Conspiracy

US v. Jones, JUN17, 4Cir no. 15-4763: (1) The Double Jeopardy Clause prohibits

dividing one overarching conspiracy into two separate counts. (2) The test is totality of the circumstances with five factors (a) time periods in which the alleged activities of the conspiracy occurred; (b) the statutory offenses charged in the indictments; (c) the places where the alleged activities occurred; (d) the persons acting as co-conspirators; and (e) the overt acts or any other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted. (3) In order to support his double jeopardy claim, the defendant must point to substantial overlaps in the two charged conspiracies. (4) Once the defendant has shown his claim to be non-frivolous, the prosecution must prove by a preponderance of the evidence that the indictments refer to two separate criminal agreements. (5) The prosecution cannot split a conspiracy into one larger conspiracy and another smaller conspiracy. (6) It does not matter which indictment is returned first, and the government cannot avoid double jeopardy by splitting one large conspiracy into two.

Collateral Estoppel

Pijor v. Commonwealth, DEC17, VaSC no. 161346: (1) Collateral estoppel is a doctrine of fact preclusion. (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) Requirements of collateral estoppel: (a) the parties to the two proceedings must be the same; (b) the factual issue sought to be litigated must have been actually litigated in the prior proceeding; (c) the factual issue must have been essential to the judgment rendered in the prior proceeding; and (d) the prior proceeding must have resulted in a valid, final judgment against the party to whom the doctrine is sought to be applied. (4) Collateral estoppel does not apply if it appears that the prior judgment could have been grounded upon an issue other than that which the defendant seeks to foreclose from consideration. (5) The defendant bears the burden of proving that the precise issue of fact sought to be precluded was raised and determined in the prior action. (6) A general verdict requires the court to examine the evidence of the prior trial and consider whether a rational fact finder could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Collateral Estoppel

Commonwealth v. Leonard, OCT17, VaSC no. 160952: (1) Collateral Estoppel is

incorporated into double jeopardy. (2) The determination of whether collateral estoppel applies depends on whether the Commonwealth is attempting to litigate in a new case an issue of fact that was resolved in the defendant's favor in a prior acquittal. (3) The defendant bears the burden of proving that the precise issue of fact sought to be precluded was raised and determined in the prior action. (4) The Commonwealth is only bound to prior determinations of fact not prior evidentiary/constitutional/legal rulings. (5) The double jeopardy concerns arising from attempts by the government to relitigate facts underlying a prior acquittal do not apply to the use of a valid and existing conviction for enhanced sentencing.

Right to Remain Silent

OVERBORNE WILL

US v. Giddins, JUN17, 4Cir no. 15-4039: (1) Coercive police activity is a necessary finding for a confession or a Miranda waiver to be considered involuntary. (2) The mere existence of threats, violence, implied promises, improper influence, or other coercive police activity, however, does not automatically render a confession involuntary. (3) The test is (a) whether the defendant's will has been overborne or (b) his capacity for self-determination is critically impaired. (4) The prosecutor must prove toe a preponderance standard that the statement was voluntary. (5) Coercion can be mental as well as physical. (6) Economic coercion that threatens a person's job if they do not forgo their right to remain silent overbears the will of the suspect (claiming the interview is necessary to get suspect's car back which is needed for suspect to get to work). (6) Misleading a suspect or lulling him into a false sense of security without compelling or coercing him to speak are not within Miranda's concerns. (7) There is no duty to tell a suspect the specific offense under investigation. (8) It is affirmative deceit to (a) not tell a suspect that he is the subject of an investigation (b) with the intent to mislead him. (9) When a defendant asks if he is in trouble and police tell him "No. This is just about you getting your car back" it is affirmative deceit.

Article I Section 8 Virginia Constitution

Shin v. Commonwealth, DEC17, VaSC no. 170128: (1) Although the Virginia

Constitution talks about "give evidence against himself" and the US Constitution says "be a witness against himself" the US Supreme Court has expanded the 5th Amendment to cover evidence as per State constitutions. (2) Both only apply to testimonial evidence.

Due Process

Show Up Identification

Scott v. Commonwealth, JAN18, VaApp no. 1900-16-1: (1) Show-up identifications are not per se violative of constitutional rights, and will not be declared invalid unless a review of the totality of the circumstances shows a substantial likelihood of misidentification. (2) A show-up identification by its very nature may be more suggestive than a multi-person lineup or photo array but that does not automatically render its use unconstitutional. (3) Exigent or special
circumstances are not a prerequisite to show-up ID's. (4) The fact that no exigency exists is not determinative of suggestiveness.

Vagueness

Shin v. Commonwealth, DEC17, VaSC no. 170128: (1) Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. (2) Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. (3) A law is unconstitutionally vague if it is so vague and standardless that (a) it leaves the public uncertain as to the conduct it prohibits, or (b) leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. (4) Before a defendant can mount a successful facial challenge to a statute, that defendant must first show that the statute in question is unconstitutional as applied to him. (5) If a statute is constitutional as applied to a defendant, she lacks standing to assert a facial constitutional challenge to it, and the statute is not facially unconstitutional because it has at least one constitutional application. (6) If a defendant's argument is that a statute lacks an objective standard for determining illegal behavior the defendant must first show that his act in violation of the statute was objectively correct in order to

challenge the statute for vagueness. (7) If the statue standing alone may be vague, case law from appellate courts can provide an objective standard through a single example.

Psychiatric Assistance

McWilliams v. Dunn, JUN17, USSC no. 16-5294: (1) When an (a) indigent defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the (b) State must assure the defendant access to a competent psychiatrist who will (i) conduct an appropriate examination and (ii) assist in evaluation, (iii) preparation, and (iv) presentation of the defense. (2) Merely providing an expert for an examination does not satisfy the requirement.

Undisclosed Brady Evidence

Turner v. U.S., JUN17, USSC no. 15-1503: (1) Evidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. (2) A reasonable probability of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial. (3) Convicts are entitled to a new trial only if they establish the prejudice necessary to satisfy the materiality inquiry. (4) Withheld evidence is judged in the context of the entire record.

SINGLE PHOTO IDENTIFICATION

US v. Weiss, APR17, 4Cir no. 16-4361: (1) Due process concerns arise when law enforcement officers use an identification procedure that is both (a) suggestive and (b) unnecessary. (2) A suggestive procedure (single photograph) does not automatically require suppression. (3) If an identification is reliable it is admissible. (4) Factors considered for reliability: (a) the opportunity of the witness to view the criminal at the time of the crime, (b) the witness' degree of attention, (c) the accuracy of the witness' prior description of the criminal, (d) the level of certainty demonstrated by the witness at the confrontation, and (e) the length of time between the crime and the confrontation. (5) Exigent circumstances can justify the use of a single photo even if it is unduly suggestive.

Judicial Recusal

Rippo v. Barker, MAR17, USSC no. 16-6316: (1) Judicial recusal does not require actual bias. (2) Judicial recusal is required when the probability of actual bias on the part of an average judge in the situation at hand is too high to be constitutionally tolerable. (3) Trial judge asked to recuse himself by defense because he is being investigated for corruption and the prosecutor is involved in the investigation.

6th Amendment

Speedy Trial

Public Trial

Weaver v. Massachusetts, JUN17, USSC no. 16-240: (1) Closing a courtroom during jury selection is structural error. (2) There are three reasons an error is structural: (a) the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest, or (b) the effects of the error are too hard to measure, or (c) the error always results in fundamental unfairness. (3) The structural right to the public's presece can be subject to exceptions, but the judge must make proper factual findings explaining the reason for the exception. (4) Structural error is not subject to harmless error analysis. (5) Closing a courtroom must be objected to and raised on direct appeal or it will be subject to an actual prejudice analysis in a habeas.

Jury

Notification of Offense

Right to Confront Accuser

Campos v. Commonwealth, JUN17, VaApp no. 0617-16-2: (1) If a witness appears in court and is subject to cross examination it does not violate the constitution for the witness' out of court statements to be entered into the record earlier in the trial. (2) The fact that the witness states she does not remember parts of the prior statements does not make their entry into evidence uncosntitutional. (3) The constitution guarantees an opportunity for effective cross examination not actually effective cross examination.

Process to Obtain Witnesses

Right to Counsel

Innefective Assistance: Deportation

Jae Lee v. U.S., JUN17, USSC no. 16-327: (1) When errors occur during a legal proceeding the test for prejudice is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (2) When the error denies the defendant a judicial hearing to which he had a right the test for prejudice is whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. (3) If the failure of the defendant's attorney is such that it affects the prospects of success at trial the defendant must show he would have been better off going to trial to demonstrate prejudice. (4) Misinforming the defendant about deportation consequences does not affect the prospects of success at trial.

INEFFECTIVE ASSISTANCE: IMMIGRATION CONSEQUENCES

US v. Swaby, APR17, 4Cir no. 15-7616 & 15-7621: If the conviction offense requires automatic deportation and the attorney, plea agreement, and judge only inform the defendant that deportation is a possible risk it is ineffective assistance.

8th Amendment

Excessive Bail

Excessive Fines

Cruel & Unusual Punishment

DEATH PENALTY: MENTAL RETARDATION

Moore v. Texas, MAR17, USSC no.15-797: (1) The state may not take the life of an intellectually disabled individual. (2) If the subject scores higher than 70, but the possible range of error puts the score potentially 70 or lower then other evidence must be considered. (3) The courts must apply current medical standards in making the determination.

14th Amendment

Equal Protection

BATSON CHALLENGE

Bethea v. Commonwealth, FEB17, VaApp no. 2014-16-4: (1) There is a three step test for determining whether an impermissible race-based strike has been made: (a) The defendant must make a prima facia showing, (b) the prosecution must offer a reason not based on race for the strike, and (c) the judge must decide if there has been purposeful discrimination. (2) A prosecutor may be both mistaken and genuine. (3) An inaccuracy is relevant to determining the prosecutor's credibility but does not as a matter of law compel the conclusion that the reason given is pretextual.

EVIDENCE

DNA

Burrous v. Commonwealth, DEC17, VaApp no. 0022-17-2: When an item identifiable as being worn at the crime scene and discovered with other discarded items also worn at the crime scene has only one person's DNA on it the finder of fact may infer the person who did the crime is the one who left DNA on the item.

Rule 2:901 - Authentication - Texts, Emails, Social Media

Atkins v. Commonwealth, JUL17, VaApp no. 1542-16-2: (1) To meet the party admission exception to hearsay the identity of the party must be proven to a preponderance standard. (2) Authentication (a) does not set a high barrier to admissibility, and (b) is generally satisfied by any form of proof that supports a finding that it is what it purports to be. (3) Completeness of the identification goes to the weight of the evidence, not admissibility. (4) If the defendant admits the phone is his, knows the passcode, and apps/photos on it point back to the defendant it is sufficient to authenticate communications coming from it as coming from the defendant.

Rule 2:803(4) - Hearsay: Medical Treatment Exception

Campos v. Commonwealth, JUN17, VaApp no. 0617-16-2: (1) A patient's statements regarding past (a) pain, (b) suffering, and (c) subjective symptoms are admissible to show the basis of the physician's opinion [and is not technically a hearsay exception]. (2) A hearsay statement made for the purpose of medical diagnosis or treatment is allowed to be introduced for its truth because patients making such statements recognize that they must provide accurate information to the physician in order to receive effective treatment. (3) Chidren too young and inmates trying to manipulate people have been determined to be too unreliable for the exception. (4) There must be sufficient indicia of the statement's reliability for it to fit in the exception. (5) Three types of statements are admissible: (a) medical history, or (b) past or present sensations, or (c) cause of the condition. (6) A SANE nurse is both investigating for prosecution and for

medical care and therefore her recording of the statement is dual purpose and admissible. (7) Although an adult victim's statements assigning blame in cases of bodily 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.

Proffered Evidence / Cumulative Evidence

Logan v. Commonwealth, JUN17, VaApp no. 0867-16-2: (1) The trial judge must make sure that evidence proffered contains all information necessary in order to (a) allow the trial judge the opportunity to resolve the issue at trial, and (b) provide sufficient record for review. (2) If the judge refuses to allow a proffer of evidence the appellate court must reverse because it has no record to review. (3) A judge can limit cumulative evidence but must allow a proffer of that evidence.

Ragland v. Commonwealth, MAR17, VaApp No. 0294-16-3: (1) Consciousness of Guilt: (a) Immediate act of (i) falsehood or (ii) flight, (b) immediately following commission of a crime, which (c) tend to show knowledge of and participation in the criminal act. (2) A fact finder may consider this as evidence tending to show knowledge and guilt.

Multiple DNA Positives

Jennings v. Commonwealth, MAY17, VaApp no. 1088-16-1: (1) When the only evidence is that the defendant is a major contributor to the multiple DNA's on several items of evidence identified as being at a crime scene it is not enough of an identification for a conviction.

Introduction of "Substantially Similar" Convictions from Another State

Beckham III v. Commonwealth, MAY17, VaApp no. 1146-16-2: (1) Statutes are substantially similar (a) if they have common core characteristics or (b) are largely alike in substance or essentials. (2) The Commonwealth bears the burden of proving the out of state conviction was obtained under laws substantially similar to those of the Commonwealth. (3) If the Commonwealth shows substantial similarity, the burden shifts to the defendant to produce evidence of dissimilarity. (4) Dissimilarity exists if a person may be convicted of

an offense under another jurisdiction's statute for conduct which might not result in a conviction under Virginia's statute.

PROCEDURE

Pretrial

Preliminary Hearing

Indictment

Entry into the Order Book

Epps v. Commonwealth, JUN17, VaSC no. 161002: (1) Per 3A:9(b)&(c), any objection to error in the indictment must be raised at least seven days before the trial or it is waived. (2) The fact that an indictment which has been true billed and presented in open court has not been entered into the order book until after the trial does not invalidate that indictment.

Jurisdiction

Venue

Pretrial Motions

§ 19.2-120(B) - Presumption Against Bond

Commonwealth v. Duse, FEB18, VaSC no. 180173: (1) Applying the presumption of innocence at a pretrial bond hearing is (a) an erroneous legal standard and (b) abuse of discretion by the trial judge. (2) (a) Brutal and (b) calculated circumstances of a crime [murder] are not outweighed by the lack of any (c) specific, or (d) immediate threat to others. (3) The existence or nonexistence of (a) specific or (b) immediate threats to others is not a factor required to be considered under Code § 19.2-120. (4) The circuit court abuses its discretion when it speculates that a defendant is unlikely to abscond because of his age.

§ 19.2-159.1(B) - Continuance Upon Hiring New Counsel

Reyes v. Commonwealth, JAN18, VaApp no. 2108-16-4: (1) The trial judge does not abuse his discretion and deny the accused his right to counsel unless he makes an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay. (2) When a defendant makes a last minute request for a continuance, he must demonstrate that exceptional circumstances exist. (3) When a motion to continue is filed the day before a sentencing hearing the defendant must demonstrate exceptional circumstances to get his continuance. (4) A trial judge does not err when he refuses to continue a case for new counsel when the defendant had previously been granted a last minute continuance, the victim was present to testify, and both the Commonwealth and defense attorney are prepared to proceed.

Rules 3A:10(c) & 3A:6 - Joinder

Stickle v. Commonwealth, DEC17, VaApp no. 0660-16-1: (1) Per Rule 3A:10(c), a defendant can be be tried for more than one offense (a) if justice does not require separate trials and (b)(i) the offenses meet the requirements of Rule 3A:6, or (ii) the accused and the Commonwealth's attorney consent thereto. (2) Rule 3A:6(b) permits joinder of multiple offenses in an indictment if the offenses are based (a) on the same act or transaction, or (b) on two or more acts or transactions that are connected or constitute parts of a (i) common scheme or (ii) plan. (3) Offenses may be considered parts of a common scheme or plan when they are closely connected in (a) time, (b) place, and (c) means of commission. (4) A common scheme is composed of crimes that share features idiosyncratic in character, which permit an inference that each individual offense was committed by the same person or persons as part of a pattern of criminal activity involving certain identified crimes. (5) A common plan consists of crimes that are related to one another for the purpose of accomplishing a particular goal.

Pro Se Motions by Represented Defendants

McGinnis v. Commonwealth, DEC17, VaApp no. 0117-17-3: (1) Virginia does not allow hybrid representation. (2) If a defendant proceeds pro se, he can sign his own motions and pleadings. (3) If a defendant has an attorney, the attorney must sign all motions and pleadings or they are a nullity.

Speedy Trial

Turner v. Commonwealth, AUG17, VaApp no. 1284-16-3: (1) The statute does not state that a misdemeanor certified to the circuit court from GDC is subject to the 5 months speedy trial limitation. (2) After a GDC finds probable cause, the Commonwealth has 152 and a part of a days to try the defendant. (3) The defense waives speedy trial if (a) it moves for a continuance, or (b) does not object to a continuance from the Commonwealth. (4) The time between the preliminary hearing and the initial trial date is not a continuance and does not toll the running of the 5 months. (5) When the defendant files complex or last second motions any continuance proceeding from that motion toll the running of the statute. (6) If a delay in the commencement of the trial is not necessitated by the defendant's motion in limine then the defendant's motion doesn't toll the statue. (7) The continuance order must state its reason so the appellate court can review it.

JOINDER

Severance v. Commonwealth, MAY17, VaApp no. 0308-16-4: (1) Joinder is at the discretion of the court. (2) Per Rule 3A:10, joinder can occur if (a) the prosecution and defense agree, or (b) (i) justice does not require separate trials, and (ii) they charges (aa) are part of the same act or transaction or (bb) are part of a common scheme or plan. (3) Common Scheme: crimes that share features idiosyncratic in character, which permit an inference that each individual offense was committed by the same person or persons as part of a pattern of criminal activity involving certain identified crimes. (4) Common Plan: crimes that are related to one another for the purpose of accomplishing a particular goal.

Arraignment

Plea

19.2-254: Appealing After Guilty Plea

Brown v. Commonwealth, AUG17, VaApp no. 1998-15-2: If a defendant pleads

guilty, but reserves an appeal, the defendant must specify the issue to be appealed or it is not allowed.

Trial

Jury Selection

BATSON CHALLENGE

Bethea v. Commonwealth, FEB17, VaApp no. 2014-16-4: (1) There is a three step test for determining whether an impermissible race-based strike has been made: (a) The defendant must make a prima facia showing, (b) the prosecution must offer a reason not based on race for the strike, and (c) the judge must decide if there has been purposeful discrimination. (2) A prosecutor may be both mistaken and genuine. (3) An inaccuracy is relevant to determining the prosecutor's credibility but does not as a matter of law compel the conclusion that the reason given is pretextual.

Taylor v. Commonwealth, MAR17, VaApp No. 0543-16-3: (1) A defendant's use of a peremptory strike to remove a juror who is not free from exception is not harmless error because a defendant has a right to an impartial jury drawn from a panel of not less than twenty free from exceptions. (2) The opinion entertained by a juror, which disqualifies him, is an opinion of that fixed character which repels the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already. (3) A potential juror who has knowledge of the case, even if such person has formed an opinion about the case, is entitled to sit on the jury if that opinion can be set aside.

Opening Argument

Motion to Strike

Waiver

Aponte v. Commonwealth, OCT17, VaApp no. 0052-17-3: When a defendant puts on evidence he waives any motion to strike he made after the Commonwealth presented its case in chief.

Affirmative Defense

Self Defense

Carter v., Commonwealth, JUN17, VaSC no. 160993: (1) Self defense has two elements; (a) the defendant must show a reasonable fear of death or serious bodily harm from the victim, and (b) imminent threat of harm. (2) Whether danger is reasonably apparent for the first element is judged from the defendant's viewpoint at time of incident. (3) The second element requires an overt act or circumstances affording an immediate threat. (4) Evidence of a victim's propensity for violence is relevant to determine (a) who was the aggressor, or (b) what was the reasonable apprehension of the defendant for his safety, and (c) such evidence is admissible even when the defendant is unaware of it. (5) Evidence of specific acts is admissible to show the character of the decedent for turbulence and violence, even if the accused is unaware of such character. (6) The trial judge determines whether the specific acts are sufficiently connected in (a) time and (b) circumstances.

Jury Instructions

Howsare v. Commonwealth, JUN17, VaSC no. 160414: (1) A jury instruction that does not mirror the model jury instruction cannot be rejected for that reason. (2) Each party has the right to have presented to the jury its contention upon vital points (a) in language to be chosen by it, (b) provided such language is in keeping with the law.

Closing Arguments

Mistrial

Bethea v. Commonwealth, FEB18, VaApp no. 2014-16-4: (1) There is no requirement that a jury arrive at a verdict without discord. (2) A judge may dismiss a jury (a) if they cannot come to a verdict, or (b) when there is manifest necessity for the discharge. (3) When it appears that the jury cannot reach a fair and just verdict the judge must dismiss it and call another. (4) Prejudicial jury misconduct typically is that which occurs outside the courtroom. (5) When a juror reports that they feel bullied, the judge questions the juror about it, the jury is read an Allen charge, and after the guilty verdict the jury is polled and all claim the verdict as theirs – the trail judge did not err in refusing mistrial motions.

Sentencing

Jury Sentencing

Pending Imposition of Sentence

Motion to Withdraw Nolo Contendere Plea

Spencer v. Commonwealth, NOV17, VaApp no. 0525-17-3: (1) A plea or nolo contendere is treated the same as a plea of guilty when considering whether to allow a plea to be withdrawn. (2) A defendant has the burden of establishing that his motion is made in good faith. (3) The defendant must offer a defense that is (a) substantive and (b) reasonable, (c) not merely dilatory or formal and (d) the court may consider whether the Commonwealth will be prejudiced by the withdrawal. (4) A reasonable defense sufficient to withdraw a guilty plea is (a) based upon a proposition of law or (b) supported by credible testimony, supported by affidavit. (5) The defendant must provide evidence of the proposed defense. (6) Merely stating the defense verbally is not enough.

Judicial Imposition of Sentence

White v. Commonwealth, MAY17, VaApp no. 1150-16-1: (1) Despite the fact that the Virginia Supreme Court has explicitly said that trial judges have the ability to

take cases under advisement and reduce or dismiss charges, Starrs v. Commonwealth, 287 Va. 1 (2014), the Court of Appeals refuses to acknowledge the actual language of the decision. (2) Per VaApp, although a trial court can take things under advisement after a guilty plea or finding of facts sufficient it can only reduce or dismiss if more evidence is provided showing non-guilt.

Post Trial

Pro Se Motions by Represented Defendants

McGinnis v. Commonwealth, DEC17, VaApp no. 0117-17-3: (1) Virginia does not allow hybrid representation. (2) If a defendant proceeds pro se, he can sign his own motions and pleadings. (3) If a defendant has an attorney, the attorney must sign all motions and pleadings or they are a nullity.

Within 21 Days

Post 21 Days

19.2-392(F) - Expungement: "may cause circumstances which constitute a manifest injustice to the petitioner"

A.R.A. v. Commonwealth, MAR18, VaSC no. 170199: (1) When a criminal charge is amended to a separate and unrelated charge, not a lesser included charge, the petitioner occupies the status of innocent with respect to the original charge. (2) A petitioner is not required to prove her actual innocence of a crime the Commonwealth declined to prosecute. (3) The Commonwealth may not introduce facts to establish the petitioner's guilt of an offense in an expungement hearing. (4) The manifest injustice standard in this instance is forward-looking. (5) While (a) expungement is at the circuit court's discretion, that (b) discretion is hemmed in by the "may cause" language of the statute. (6) Expungement must occur when when a petitioner establishes a reasonable possibility of a manifest injustice. (7) This does not apply (a) if the petitioner has an already lengthy criminal record and expungement would be ineffective or (b) if the petitioner makes unbelievable claims about the possible manifest injustice. (8) The court specifically did not answer whether a person whose case was dismissed after suppression of evidence or for speedy trial violations has the status of innocent with respect to the original charge. [fn. 2]

Hackett v. Commonwealth, JUN17, VaSC no. 160619: After the 21 day period has passed the judge cannot place a defendant on advisement in order to reduce the felony to a misdemeanor.

During Appeal

SUBSTANTIVE

Violent Crimes

Voluntary Manslaughter

Smith v. Commonwealth, JAN18, VaApp no. 1058-16-2: (1) Voluntary manslaughter occurs when there is (a) an intentional homicide committed (b) while in the sudden heat of passion (c) upon reasonable provocation. (2) Words alone are not enough provocation to justify voluntary homicide.

§ 18.2-91 – Possessing a Potentially Deadly Weapon During Burglary

Lee v. Commonwealth, DEC17, VaApp no. 1897-16-4: (1) Unless an item is per se a deadly weapon, (a) the fact finder should determine whether it, and the manner of its use, place it in that category, and (b) the burden of showing these things is upon the Commonwealth. (2) The manner of an object's use inside the dwelling is relevant to prove the material issue of whether the burglar intended to use an object as a weapon and whether it could be deadly.

§ 18.2-36.1 – Involuntary Manslaughter

Levenson v. Commonwealth, DEC17, VaApp no. 1884-16-4: (1) Because an event can have more than one proximate cause, criminal liability can attach to each actor whose conduct is a proximate cause unless the causal chain is broken by a superseding act that becomes the sole cause of the death. (2) An intervening cause of such death that is a probable consequence of the defendant's own conduct will not constitute a superseding cause breaking the chain of proximate causation. (3) An intervening cause is not a superseding cause if it was put into operation by the defendant's wrongful act or omission. (4) Intervening medical treatment, even if a cause of the death, does not exempt the defendant from liability if that event was put into operation by the defendant's initial criminal acts. (5) The fact that the victim consented to recommended medical treatment, which led to his death, does not relieve the defendant of his criminal responsibility.

§ 19.2-248 – Venue for Murder

Edwards v. Commonwealth, DEC17, VaApp no. 0902-16-2: (1) If the violent injury occurs in one municipality, but the death in another then the murder can be prosecuted in either. (2) Venue can be established thru direct or circumstantial evidence. (3) The burden is on the Commonwealth to establish venue.

Involuntary Manslaughter

Brown v. Commonwealth, AUG17, VaApp no. 0507-16-2: (1) Involuntary manslaughter is (a) the killing of one accidentally, (b) contrary to the intention of the parties, (c) (i) in the prosecution of some unlawful, but not felonious, act; (ii) or in the improper performance of a lawful act. (2) Involuntary manslaughter requires proof of recklessness which is conduct evidencing either a willful or wanton disregard for the safety of others. (3) The prosecution is not required to prove that homicide is not improbable. (4) The prosecution must show that the defendant should have known his actions would reasonably, likely, or probably cause injury.

Geriatric Parole

Virginia v. LeBlanc, JUN17, USSC no. 16-1177: The Virginia ruling that gerriatric parole allows sufficient relief that a minor can be sentenced to life is not outside the rulings of the Supreme Court of the U.S.

Sex Crimes

§ 18.2-374.3(B) - Using a Phone etc. to "Procure or Promote" Indecent Liberties with a Minor

Dietz v. Commonwealth, SEP17, VaSC no. 160857: (1) The communication under this statute is not required to be a third party, but can be the victim only. (2) In order to be convicted under this statute it is not necessary that the defendant have actually committed indicent liberties only that the defendant be acting in a manner meant to cause them in the future.

Drug Crimes

§ 18.2-248(C) - Mandatory Minimums / Safety Valve

Hall v. Commonwealth, JAN18, VaApp no. 0481-17-3: (1) Mandatory minimum is not applicable if (a) no prior conviction under 18.2-248(C), and (b) no threats or weapons in the offense, and (c) offense did not cause death or serious bodily injury, and (d) not an organizer, (e) prior to sentencing hearing gives all information about the offense to the Commonwealth (and safety valve if no new info known). (2) The information must be turned over to the Commonwealth long enough before the sentencing hearing to allow the Commonwealth to test its veracity.

Theft / Property Crimes

§ 18.2-178.1 – Financial Exploitation of the Mentally Disabled

White v. Commonwealth, DEC17, VaApp no. 1991-16-2: (1) In order for the person to be shown mentally disabled the victim must be shown to not understand the (a)(i) nature, or (ii) consequence of the (b)(i) transaction, or (ii) disposition of the victim's property. (2) Taking a mentally disabled person's card and getting money from the ATM violates this statute.

§ 18.2-195 - Credit Card Fraud

White v. Commonwealth, DEC17, VaApp no. 1991-16-2: (1) If a denfedant is given control of a card she cannot be convicted of credit card fraud if she uses the card for personal gain because she does not possess it wrongfully. (2) If a person can possess a card at certain times, but has possession of it outside those times, the finder of fact may infer that she has possesses it wrongfully.

§ 18.2-58.1 – Carjacking – Taking Keys

Hilton v. Commonwealth, APR17, VaSC No. 160458: (1) Use of a firearm to take the keys from an individual can be found as taking control of that vehicle from that person.

Weapon Crimes

§ 18.2-91 – Possessing a Potentially Deadly Weapon During Burglary

Lee v. Commonwealth, DEC17, VaApp no. 1897-16-4: (1) Unless an item is per se a deadly weapon, (a) the fact finder should determine whether it, and the manner of its use, place it in that category, and (b) the burden of showing these things is upon the Commonwealth. (2) The manner of an object's use inside the dwelling is relevant to prove the material issue of whether the burglar intended to use an object as a weapon and whether it could be deadly.

§ 18.2-154 - Discharging a Firearm "at" a Vehicle

Jones v. Commonwealth, DEC17, VaApp no. 0574-16-2: (1) The graveman of the offense is where the destination of the bullets go, not where the defendant was when he shot. (2) A defendant does not have to be outside the car to violate this statute.

18.2-308.2 - Felon Possessing Firearm
18.2-308.2:2 – Faise Application to Purchase a Firearm

Cartagena v. Commonwealth, Nov17, VaApp n. 2002-16-1: (1) A felony conviction from another State is a felony if so defined by the other State. (2) Whether the out of state felony would fit under Virgnia's definition of a felony is not relevant.

§ 18.2-53.1 – Use of a Firearm in a Felony - Mandatory Minimum Sentence & Maximum

Graves v. Commonwealth, OCT17, VaSC no. 160688: (1) The only sentence which can be imposed under this statute is both the minimum and the maximum: 3 years first offense & 5 years for every subsequent offense. (2) The fact that the General Assembly did not set a statutory maximum does not mean

this statute has a maximum of life.

§ 18.2-282(A) - Brandishing – Definition of a Firearm

Gerald v. Commonwealth, OCT17, VaApp no. 0731-16-1: Under the brandishing statute the item need only be "similar in appearance" to a firearm.

§ 18.2-280 – Discharging a Firearm in Public – Definition of a Firearm

Gerald v. Commonwealth, OCT17, VaApp no. 0731-16-1: A firearm is 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.

§ 18.2-308.2(A) - Consecutive Mandatory Minimum Sentences

Commonwealth v. Botkin, OCT17, VaApp no. 0458-17-3: (1) Two convictions under this statute must run consecutively.

§ 18.2-279 – Unlawfully Discharging a Firearm in an Occupied Building - Intent

Bryant v. Commonwealth, APR17, VaApp No. 0922-16-3: (1) The use of the word "unlawful" means that a conviction under this statute only requires criminal negligence – "the reckless disregard of the safety of others." (2) The part of the statute which is for "malicious" discharge requires the higher "willfully or purposefully" intent.

Motor Vehicles:

46.2-300 & 301: If Suspended and Not Required to Have a License

Grasty v. Commonwealth, DEC17, VaApp no. 0281-17-1: Even if a person would normally not be required to have a license to drive (exceptions under 46.2-300), if he has previously had his privilege to drive on Virginia roads suspended he violates 46.2-301 if he drives on any Virginia road.

Exigent Circumstances – Blood Draw

Aponte v. Commonwealth, OCT17, VaApp no. 0052-17-3: (1) 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. (Contradicts McNeely). (2) Special facts can delay the warrant-seeking process sufficiently to contribute to exigent circumstances. (3) The facts that an officer investigating an accident scene does not initially realize alcohol is involved, the defendant hid evidence, the defendant claimed to have drank the night before, and officer had to spend time processing the scene and driving to the hospital all combine to provide exigency.

46,2-868(B) - Vehicular Manslaughter - Sole and Proximate Result of Reckless Driving

Chapman v. Commonwealth, SEP17, VaApp no. 1948-16-4: (1) Proximate result is the same as proximate cause. (2) Sole proximate result does not mean only one cause; it means a cause without an intervening, superceding cause. (3) Not wearing a seat belt is not a proximate cause because there is no statute requiring the rear passengers to have it on and the law says there is no responsibility for the front passenger (adopted from tort law).

46.2-894(i) - Hit and Run > $1,000

Cocke v. Commonwealth, JUL17, VaApp no. 1553-16-3: (1) Damage is (a) the value of the car before the accident less its value immediately after the accident, unless (b) the actual cost of repair is less. (2) The cost of repair is not limited to

just the cost of parts and includes labor. (3) Damage is not limited to the amount of money paid by the victim as the insurance deductible.

Florida DUI

Beckham III v. Commonwealth, MAY17, VaApp no. 1146-16-2: (1) Florida's DUI statute is substantially similar to Virginia's and therefore Florida convictions can be used as prior convictions in a felony DUI case.

§ 18.2-371.1(B)(1) - Felony Child Endangerment – DUI

Coomer v. Commonwealth, APR17, VaApp No. 1017-16-3: (1) A person who is DUI of .10, without any other factors, is not criminally negligent and therefore the defendant's conviction is not valid. (2) Has to claim opinions previously issued saying it is are dicta.

§ 46.2-100 – Definition of Highway (and Obverse: Private Road)
§ 18.2-268.3 – Refusal DUI Breath/Blood Test

Kim v. Commonwealth, APR17, VaSC No. 160665: (1) There is no requirement that a highway be owned and maintained by the public. (2) Roads on private property open to unrestricted public use are highways. (3) A prosecutor must show that the vehicle operation took place on a highway and that requires more than showing there was no physical barrier to entry. (4) Evidence a prosecutor might show to prove unrestricted use: (a) named roads, (b) traffic signs, (c) curbs, and (d) sidewalks. (5) Evidence the defense can show to rebut unrestricted use: (a) no trespassing signs at entries to the private road, and (b) the manager (i) has the power to bar people and (ii) has exercised that power [may apply only to business parking lots].

Other

§ 18.2-423.2(B) - Anti-Noose Statute

Turner v. Commonwealth, MAR18, VaSC no. 161804: (1) Whether a noose display is on privately or publicly owned property is not determinative of

whether it is located on a public place. (2) A public place under Virginia law includes private property generally visible by the public from some other location.

19.2-371.1(B)(1) - Child Endangerment

Hannon v. Commonwealth, AUG17, VaApp no. 1374-16-3: (1) Leaving two young children in a car for 14 minutes while in a store does not constitute child endangerment.

PROBATION

APPEALS

Appellee Argument

Appellant Argument

MISTRIAL

Bethea v. Commonwealth, FEB17, VaApp no. 2014-16-4: When the trial judge denies a motion for a mistrial, the appellant carries the burden of establishing a probability of prejudice to the accused.

Pro Se Motions by Represented Defendants

McGinnis v. Commonwealth, DEC17, VaApp no. 0117-17-3: (1) Virginia does not allow hybrid representation. (2) If a defendant proceeds pro se, he can sign his own motions and pleadings. (3) If a defendant has an attorney, the attorney must sign all motions and pleadings or they are a nullity. (4) Appellate courts will not recognize pro se motions by a represented defendant.

19.2-254: Appealing After Guilty Plea

Brown v. Commonwealth, AUG17, VaApp no. 1998-15-2: If a defendant pleads guilty, but reserves an appeal, the defendant must specify the issue to be appealed or it is not allowed.

Writs

ACTUAL INNOCENCE

In re: Roy L. Watford III, MAR18, VaSC no. 161187: (1) The General Assembly has directed courts to examine the probative force of newly presented evidence in connection with the evidence of guilt adduced at trial [language change from

could to would]. (2) Courts are required to look beyond whether the evidence is sufficient to sustain the conviction. (3) Courts must examine the likelihood of a reasonable juror finding the petitioner guilty beyond a reasonable doubt once all of the evidence has been fairly considered. (4) The petitioner must prove, by clear and convincing evidence, that no rational trier of fact would have found proof of guilt beyond a reasonable doubt. (5) For a biological writ, the petitioner must first show new DNA evidence. (6) The court must consider (a) the petition, (b) the response by the Commonwealth, (c) previous records of the case, (d) the record of any hearing held under this chapter [§ 19.2-327.5], and (e) the record of any hearings held pursuant to § 19.2-327.1 [motion for testing of new or untested evidence], and (f) if applicable, any findings certified from the circuit court. (7) A guilty plea without any evidence offered, with a light sentence, and no plea colloquy carries little weight in an analysis under the writ.

Standards of Review

Smith v. Commonwealth, JAN18, VaApp no. 1058-16-2: If a defendant is convicted of a lesser included offense by a jury after receiving a waterfall instruction, the first question is whether a rational jury could have found the defendant guilty of a superior offense and if so, the fact that the lesser included is not proven does not require it to be overturned.

Rule 5:25: Ends of Justice

Williams v. Commonwealth, AUG17, VaSC no. 160257 & 161639: (1) Two questions are considered in the ends of justice exception: (a) whether there is error as contended by the appellant; and (b) whether the failure to apply the ends of justice provision would result in a grave injustice. (2) Conditions under which the ends of justice exception has been allowed: (a) the record established that an element of the crime did not occur, (b) a conviction based on a void sentence, (c) conviction of a non-offense, and (d) a capital murder conviction where the evidence was insufficient to support an instruction. (3) A defendant sentenced to a normal sentence and an NGRI on a separate offense who is competent and sane at time of sentencing does not have access to the ends of justice exception if the judge sentences him to prison first and civil commitment thereafter.

Rule 5A:20(e) - Citing Authority for Arguments

Bartley v. Commonwealth, JUN17, VaApp no. 1336-16-3: (1) A brief must contain (a) the principles of law, (b) the argument, and (c) the authorities relating to each question presented. (2) Unsupported assertions of error do not merit appellate consideration. (3) Where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.

Sufficiency of the Evidence

Commonwealth v. Moseley, JUN17, VaSC no. 161013: (1) The factfinder determines (a) which reasonable inferences should be drawn from the evidence, and (b) whether to reject as unreasonable the hypotheses of innocence advanced by a defendant. (2) The standard of review is whether any rational factfinder, in consideration of the totality of the evidence, could have rejected the theories of innocence and found the defendant guilty.

Va Code 8.01-678 - Harmless Error

Commonwealth v. White, JUN17, VaSC no. 160879: (1) Harmless error analysis is required by statute. (2) Harmless error analysis is strongly favored by appellate courts and is deeply embedded in our jurisprudence.. (3) It is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless. (4) Things considered in determining whether there is harmless error: (a) the importance of the tainted evidence in the prosecutor's case, (b) whether that evidence was cumulative, (c) whether there is evidence that corroborates or contradicts the tainted evidence on material points, and (d) the strength of the prosecution's case as a whole. (5) The ultimate test is if it is clear beyond a reasonable doubt that a rational factfinder would have found the defendant guilty absent the error? (6) Mooted the VaApp's exclusion of a search of a bag girlfriend had in her room and ID'ed as defendant's because case was proven by items on defendant's person.

Remedies

HABEAS