CONSTITUTION

1st Amendment

Freedom of Speech

§ 18.2-423.2 – Anti-Noose Statute

*** Turner v. Commonwealth, NOV16, VaApp No. 2039-15-3: (1) The right to free speech does not protect "true threats." (2) "True threats" (a) encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, (b) even where the speaker does not actually intend to carry out the threat. (3) The public display of a noose (a) evokes a long and pernicious history as a signal of impending violence and therefore (b) the Commonwealth may regulate its use as speech. (4) Unlike the cross-burning statute, there is no prima facie assumption under the anti-noose statute and the Commonwealth must prove a true threat. (5) Addressing the statute's limitation to a "public place": The use of offensive language by use of a symbol on one's own premises constitutes a violation of the law when that symbol is used as a means to communicate it to the public, and thus disturbs persons who are within the viewpoint of the communication, display, or message.

4th Amendment

Search & Seizure

The Attenuation Doctrine

** Utah v. Strieff, JUN16, USSC No. 14–1373: (1) Evidence is admissible when the connection between unconstitutional police conduct and the evidence (a) is remote or (b) has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. (2) There are three factors in determining whether the attenuation doctrine applies: (a) the temporal proximity between the unconstitutional conduct and the discovery of evidence, and (b) the presence of intervening circumstances, and (c) ***particularly significant***, the purpose and flagrancy of the official misconduct. (3) Temporal proximity does not favor attenuation unless substantial time elapses between an unlawful act and when the evidence is obtained. (4) When an officer

unconstitutionally seizes an individual for questioning and an ID check indicates there is an arrest warrant the subsequent search subsequent to arrest is constitutionally valid.

DUI Blood Draws & Implied Consent

* Birchfield v. North Dakota, JUN16 USSC No. 14-1468: (1) Breath tests do not implicate significant privacy concerns. (a) No privacy interest in air. (b) Reveals only one bit of information (BAC). (c) Does not significantly add to the embarrassment of an arrest. (2) Blood draws are significant bodily intrusions. (a) Significantly more intrusive than blowing into a tube. (b) Puts in law enforcement's hands something that can be preserved and analyzed for multiple pieces of information [DNA etc.]. (3) Reasons the Blood Test is not allowed without a warrant: (a) The availability of the breath test. (b) "Nothing prevents the police from seeking a warrant for a blood test (i) when there is sufficient time to do so in the particular circumstances or (ii) from relying on the exigent circumstances exception to the warrant requirement when there is not." (4) Criminally punishing a refused blood test are unconstitutional, although civil punishment is allowed.

Hotel / Motel Room

*** Salahuddin v. Commonwealth, Jan17, VaApp No. 1874-15-2: (1) When (a) the hotel reserves the right to exclude a resident for illegal activity and (b) the manager discovers contraband during an inspection of the room, (c) the act of calling the police is a lawful exclusion of the resident from the room and (d) the resident no longer has a reasonable expectation of privacy, (e) even if he has not been notified. (2) The manager allowing police access to the room thereafter is a constitutionally valid entry.

Carroll Doctrine and Vehicles in Driveways

** Collins v. Commonwealth, SEP16, VaSC No. 151277: (1) If (a) a vehicle is readily mobile, and (b) probable cause exists to believe it contains contraband, (c)the Fourth Amendment permits police to search the vehicle without a search warrant. (2) If an officer has probable cause that the vehicle itself is contraband and the vehicle is in plain sight from the street an officer can further inspect the vehicle to make a determination. (3) A vehicle's inherent mobility - not the probability that it might actually be set in motion - is the foundation of the automobile exception's mobility rationale. (4) The search remains constitutionally valid even if the possibilities of the vehicle's being removed or evidence in it destroyed are remote, if not nonexistent. (5) There is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view. (6) A vehicle in plain sight, but on a private driveway can be searched. (7) Rejected VaApp's exigent circumstances rationale in favor of the Carroll Doctrine.

Anticipatory Search Warrant

*** Taylor v. Commonwealth, SEP16, VaApp No. 1330-15-3 & 1340-15-3: (1) There are two conditions necessary for an anticipatory search warrant: (a) the triggering condition of the warrant is likely to occur, and (b) contraband or evidence of crime will likely be found on or in the premises after the occurrence of the triggering condition. (2) Overrules its prior "sure course" analysis: a sufficient nexus between a package containing contraband and a specified location may be established even when the package is not on a "sure course" to that destination.

Staleness of Facts Used to Support a Warrant

* Taylor v. Commonwealth, SEP16, VaApp No. 1330-15-3 & 1340-15-3: (1) Staleness is tested by considering whether the facts alleged in the warrant provided probable cause to believe, at the time the search actually was conducted, that the search conducted pursuant to the warrant would lead to the discovery of evidence of criminal activity. (2) The factors to be considered include (a) the nature of the unlawful activity alleged, (b) the length of the activity, and (c) the nature of the property to be seized.

Terry & the Collective Knowledge Doctrine

** Edmond v. Commonwealth, AUG16, VaApp No. 0557-15-2: (1) An officer without direct observation of something supporting reasonable articulable suspicion is justified in acting upon an instruction (warrant, BOLO, etc.) from another officer if the instructing officer had sufficient information to justify taking such action himself. (2) The mere fact that a second officer has knowledge that supports reasonable articulable suspicion is not enough.

Franks Hearing Motion (Hearing to Prove an Officer Lied on an Affidavit)

** U.S. v. Desmond, AUG16, 4Cir No. 15-4059: (1) A defendant challenging the validity of a search warrant is entitled to a Franks hearing if he makes a preliminary showing that: (a) the warrant affidavit contains a (i) deliberate falsehood or (ii) statement made with reckless disregard for the truth and (b) without the allegedly false statement, the warrant affidavit is not sufficient to support a finding of probable cause. (2) The defendant's preliminary showing (a) must be more than conclusory and (b) should include affidavits or other evidence to overcome the presumption of the warrant's validity. (3) Omission from affidavit: To satisfy the Franks' intentional or reckless falsity requirement for an omission, the defendant must show that facts were omitted (a) with the intent to make, or (b) in reckless disregard of whether they thereby made the affidavit misleading.

Terry Stop

* U.S. v. Bryant, JUL16, 4Cir No. 15-4618: (1) To rely on an anonymous tip, the information given (a) must be predictive (b) instead of descriptive. (2) Predictive information shows a caller's access to inside information. (3) Information available by observing a person or getting information from the internet about him [sex offender website for date of birth] is not sufficient to support a Terry detention. (4) Nervousness at the approach of an officer is normal and does not support a Terry detention / pat down.

Terry Pat Down

** Bland Jr. v. Commonwealth, JUN16, VaApp No. 0864-15-2: (1) Whether the totality of the circumstances, viewed objectively, justified a brief investigatory stop is dependent upon both (a) the content of information possessed by police and (b) its degree of reliability. (2) The reliability of an anonymous tip may be supported through the provision of predictive information to bolster the tipster's basis of knowledge or credibility. (3) An anonymous tip need not include predictive information when an informant reports readily observable criminal actions. (4) An anonymous report (a) to 911 (b) of a criminal act involving a firearm (c) by an identifiable person (d) at a particular location (e) which is responded to quickly by LEO's and (f) includes the suspect patting his pocket as an officer approaches justifies a Terry pat down.

Consent to Search / Seizure

** White v. Commonwealth, MAY16, VaApp No. 0767-15-1: (1) The Commonwealth must prove voluntariness of a consented to search (a) by a preponderance of the evidence (b) based on the totality of all the circumstances. (2) A consensual contact becomes a seizure only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. (3) The factors relevant to applying the totality-of-the-circumstances test for assessing whether a seizure occurred overlap significantly with those to be considered in determining whether a consent to search was voluntary and include (a) the number of officers present, (b) whether any of the officers (i) a weapon, (ii) engaged in physical contact with the person, (iii) used specific language or tone of voice compelling compliance, or (iv) retained the person's identification or other documents or property, (c) the characteristics of the person, and (d) the person's ability to leave or refuse. (4) Voluntariness is not equated with the absolute absence of intimidation. (5) Officers are not required to inform a person that they can refuse. (6) An officer may search a suspect and seize evidence from his person even without consent if the officer has probable cause to believe that the suspect possesses contraband. (7) Consent search changed to non-consent when officer discovered something in socks [from outside] that was obviously drugs and suspect started to physically resist.

Search of Items

*** White v. Commonwealth, MAY16, VaApp No. 0767-15-1: (1) The fact the defendant did not have a reasonable expectation of privacy in a room does not preclude him from having a reasonable expectation of privacy of times in the room (bags, backpacks, suit cases). (2) The expectation of privacy is a two part test: (a) whether the individual, by his conduct has exhibited an actual, subjective expectation of privacy, and (b) whether the expectation is objectively reasonable. (3) The defendant may prove such an expectation by reference to either: (a) concepts of real or personal property law or (b) understandings that are recognized and permitted by society. (4) Objective reasonability is determined by totality of circumstances including (a) whether the defendant has a possessory interest, (b) the right to exclude others, (c) has exhibited a subjective expectation that it would remain free from governmental invasion, (d) took normal precautions to maintain his privacy, and (e) was legitimately on the premises. (5) A bag which (a) is obviously not the property of the person consenting to the search or (b) is identified as belonging to someone other than the consentor, cannot be searched.

§ 46.2-1054 – Objects Hanging from the Rear View Mirror

* Mason v. Commonwealth, MAY16, VaSC No. 150372: (1) In determining the constitutionality of a car stop, (a) the test is not what the officer thought, but rather (b) whether the facts and circumstances apparent to him at the time of the stop were such as to create in the mind of a reasonable officer in the same position a suspicion that a violation of the law was occurring or was about to occur. (2) A military parking card hanging from a car's rear view mirror provides reasonable articulable suspicion that a view could be blocked while driving.

Terry Pat Down

* U.S. v. Foster, MAY16, 4Cir No. 15-4319: If (1) responding to an anonymous call of shots fired, the police find (2) one man in the area who was (3) in an alley in a high crime area, (4) refused eye contact or communication, and (5) reached for his right pocket when asked if he was armed, there is enough suspicion for a Terry pat down.

Franks Test: Leaving Information Off the Affidavit

** U.S. v. Lull, MAY16, 4Cir No. 15-4216: (1) Franks test: (a) The defendant must show that a false statement (i) knowingly and intentionally, or (ii) with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and (b) the defendant must show that with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause. (2) The Franks test also applies when an agent omits relevant facts from the affidavit. (3) If (a) an informant does something to harm his credibility [steal some of they buy money supplied by the LEO's] and (b) this is not included in the affidavit (c) it prevents a neutral magistrate from being able to accurately assess the reliability and the veracity, and thus the significance, of the informant's statements and (d) only the parts of the affidavit not based on the CI's statements are constitutionally valid.

Arrest of a Probationer

* Jones v. Chandrasuwan, APR16, 4Cir No. 15-1110: (1) In order for a probation officer to arrest a probationer there must be reasonable suspicion. (2) Reasonable suspicion in the arrest context is present when there is a sufficiently high probability that a probationer has violated the terms of his probation to make the intrusion on the individual's privacy interest reasonable.

5th Amendment

Double Jeopardy

Issue Preclusion – Retrial After Inconsistent Verdicts

** Bravo-Fernandez v. U.S., NOV16, USSC No. 15–537: (1) 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. (2) When a jury returns conflicting verdicts on two charges which require a determination of the same factual issue both verdicts stand and the jury's verdicts have no preclusive effect. (3) When (a) a jury returns a verdict of not guilty (b) and hangs on a second charge (c) and both charges require a determination of the same factual issue (d) preclusion applies and the hung charge cannot be retried. (4) When (a) a jury returns conflicting verdicts on two charges which require a determination of the same factual issue (b) and the defendant gets the conviction overturned by an appellate court, (c) preclusion does not forbid the retrial of the overturned verdicts.

§ 19.2-128 - Failures to Appear Based upon One Date

** Johnson Jr. v. Commonwealth, DEC16, VaSC No. 151200: (1) In the single-trial setting, 'the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. (2) When considering multiple punishments for a single transaction, the controlling factor is legislative intent. (3) Although multiple offenses may be the "same," an accused may be subjected to legislatively authorized cumulative punishments. (4) If a defendant misses a single court date with multiple felonies he can be charged under 19.2-128 for each felony.

De Novo Appeal from General District Court

** Leonard v. Commonwealth, APR16, VaApp No. 0135-15-1: (1) If a general district court reduces and offense to a lesser offense and convicts upon appeal to circuit court it would be double jeopardy to convict the defendant of the original larger charge.

Collateral Estoppel

*** Leonard v. Commonwealth, APR16, VaApp No. 0135-15-1: (1) General Rules: (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. (2) ERRONEOUS DECISION: If appellant can satisfy the elements for the application of the doctrine of collateral estoppel, it does not matter that the underlying decision was erroneous. The prior court decision is still entitled to preclusive effect. (3) WARRANTS: The lack of factual findings or the court's rationale on the face of a warrant is generally fatal to a claim of collateral estoppel. (4) Stipulated facts can support a finding of collateral estoppel.

Right to Remain Silent

Voir Dire by Judge When Defendant Chooses Not to Testify

* Vay v. Commonwealth, JAN17, VaApp No. 0053-16-2: There is no requirement that a judge question a defendant who chooses not to testify about the choice not to.

Compelled Speech in Post Trial Psychiatric Treatment

** Zebbs v. Commonwealth, MAY16, VaApp No. 0933-15-1: (1) There is a three part test to see if the 5th Amendment is involved in compelled speech: (a) The admission sought from an individual must carry a risk of incriminating that individual in a future criminal proceeding. (b) The state must use compulsion in its attempt to obtain the admission. (c) There must be a substantial penalty imposed if an individual chooses to exercise his Fifth Amendment right not to give incriminating testimony against himself. (2) If a sex offender treatment program requires a probationer to admit to crimes he has been convicted of then there is no 5th Amendment protection. (3) An Alford plea of guilty does not affect a probationer's obligation to comply with a treatment requirement that he admit his guilt.

Due Process

* Lynch v. Arizona, MAY16, USSC No. 15–8366: (1) Where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole the Due Process Clause entitles the defendant to inform the jury of parole ineligibility, either by a jury instruction or in arguments by counsel. (2) The possibility that the legislature may change the law to allow parole in the future does not forgive the refusal to give the no parole instruction. (3) The availability of executive clemency does not forgive the refusal to give the parole instruction.

Destruction of Evidence

** US v. Braxton, SEP16, 4Cir No. 15-4458 & 15-4686: (1) Absent a showing of bad faith, destruction of evidence is not a denial of due process. (2) A showing of bad faith requires proof the evidence was withheld to deprive the defendant use of it at trial. (3) There is no bad faith if evidence is destroyed after officials believe the case is concluded.

Preservation of Evidence – Bad Faith

** US v. Moler, MAY16, 4Cir No. 15-4392: (1) The Government's duty to preserve evidence is triggered when (a) evidence possesses an exculpatory value (b) that was apparent before the evidence was destroyed, and (c) is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (2) When the government fails to preserve evidence which only might have proven exculpatory there is no due process violation unless there is bad faith. (3) Bad faith requires that the government have intentionally withheld the evidence for the purpose of depriving the defendant of the use of that evidence during his criminal trial. To show bad faith, the defendant must prove (a) official animus or a (b) conscious effort to suppress

exculpatory evidence.

Brady Disclosures

** Mercer v. Commonwealth, MAR16, VaApp No. 1897-14-2: (1) The suppression by the prosecution of evidence (a) favorable to an accused (b) upon request violates due process (c) where the evidence is material either to (i) guilt or to (ii) punishment, (d) irrespective of the good faith or bad faith of the prosecution. (2) The prosecution must disclose both (a) exculpatory, and (b) impeachment evidence. (3) A Brady violation occurs when (a) there is evidence favorable to the accused, (b) the evidence is not turned over by the prosecution with or without intent to suppress it, and (c) prejudice ensues. (4) The defendant must prove the three elements in order to prevail. (5) Prejudice occurs when there is a reasonable probability that the outcome would have been different had the evidence been disclosed to the defense. (6) If the date at which possible Brady information comes to light is post trial but presentencing the prosecution has not committed a Brady violation for not turning it over pretrial (letter of firing of lab analyst occurred post trial). (7) The firing of a lab analyst for failing to identify drugs in samples examined is not impeachment evidence because it is not based on false positives.

6th Amendment

Speedy Trial

Post Conviction – Presentence

** Betterman v. Montana, MAY16, USSC No. 14-1457: (1) The 6th Amendment guarantee of speedy trial protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.

Jury

Juror Bias During Deliberation

*** Pena-Rodriguez v. Colorado, MAR17, USSC No. 15-606: (1) Where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the no-impeachment rule [Lord Mansfield's Rule] gives way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. (2) For an inquiry to proceed: (a) there must be a showing that one or more jurors made statements exhibiting overt racial bias (b) that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. (3) The statement must tend to show that racial animus was a significant

motivating factor in the juror's vote to convict. (4) This does not trump normal procedural and ethics rules, but allows a defendant who obeys those rules or who has jurors volunteer information to proceed.

Notification of Offense

Right to Confront Accuser

Witness Death after Prelim

*** Massey v. Commonwealth, DEC16, VaApp no. 1421-15-4: (1) Although it is preferable for the fact finder to observe the demeanor of every witness when making credibility determinations, it simply is not a constitutional requirement. (2) If there was confrontation during the prelim it satisfies the constitutional requirement. (3) If the facts establishing a different offense are testified to during a prelim, the new charges can be indicted and the transcript read into the record as testimony.

Presence During Sentencing - Harmless Error Analysis

*** Nunez v. Commonwealth, Mar16, VaApp No. 0221-15-4: (1) A defendant is entitled to be present during sentencing both under the 6th Amendment and § 19.2-259. (2) Not being present at sentencing is subject to harmless error analysis (not a structural error). (3) Error in a constitutional analysis must be harmless beyond a reasonable doubt. (4) When (a) the defendant is present during the guilt phase, (b) the defendant is present during a sentencing hearing in which the finding is deferred, (c) the defendant does not comply with the conditions of the deferment, and (d) the sentence is very light then any error is harmless.

Process to Obtain Witnesses

Calling Someone who Asserts the Right to Remain Silent (Co-Defendant)

*** Reyes v. Commonwealth, OCT16, VaApp No. 1349-15-4: (1) A defendant has no right to compel his co-defendant to testify if the co-defendant elected to invoke his right against self-incrimination guaranteed by the Fifth Amendment. (2) If the co-defendant has asserted his right to remain silent, the trial court must consider whether (a) a proffered question has an incriminating implication and, if so, (b)

the privilege rests with the witness and its assertion must be honored by the court. (3) The court must determine, question by question, whether a witness may invoke his right against self-incrimination. (4) If a defendant has not yet been sentenced, the possible effect of his answer on his sentence supports a 5th Amendment assertion.

Right to Counsel

Seized Untainted Assets

*** Luis v. U.S., MAR16, USSC No. 14–419: (1) The pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. (2) Tainted assets are subject to a government interest which it can protect by seizing the assets pretrial, but the government does not have the same interest in untainted assets.

Ineffective Assistance – Immigration Law

*** Director, DOC v. Galdamez, JUN16, VaSC No. 151022: (1) If a person has temporary protected status, he forfeits it after a conviction of either one or more felonies or two or more misdemeanors. (2) When defendant tells his attorney his priority is not to be deported and counsel tells him to plead to two misdemeanors rather than try a felony it is ineffective assistance of counsel. (3) When the defendant has been in the US for many years, has his immediate family and extended family all here, and has nothing to return to in his home country he is prejudiced when an attorney advises him to plead to charges that will get him deported.

8th Amendment

Excessive Bail

Excessive Fines

Cruel & Unusual Punishment

Victim Impact Statements

*** Bosse v. Oklahoma, OCT16, USSC No. 15–9173: (1) Victim impact evidence is allowed relating to (a) the personal characteristics of the victim and (b) the emotional impact of the crimes on the victim's family. (2) Victim impact evidence is forbidden expression of (a) opinions about the crime, (b) the defendant, and (c) the appropriate punishment.

Juvenile and Geriatric Parole

*** Johnson v. Commonwealth, DEC16, VaSC No. 141623: The possibility of geriatric parole means that the proscription against sentencing a minor to life in prison has not been violated.

Juveniles & Geriatric Parole

*** LeBlanc v. Warden, NOV16 4Cir No. 15-7151: (1) Juvenile non-homicide offenders sentenced to life imprisonment must have the opportunity to obtain release based on demonstrated maturity and rehabilitation. (2) The opportunity must be meaningful. (3) An early release or parole system must take into account the lesser culpability of juvenile offenders. (4) Virginia's geriatric parole system violates the rights of minors in Virginia sentenced to life in prison.

14th Amendment

Equal Protection

Minor & Life Sentences

*** Jones (II) v. Commonwealth, FEB17, VaSC No. 131385: (1) There is no mandatory life sentence for minors under Virginia law unless the statutes specifically state the life sentence is a mandatory minimum [not applicable in this case] because life sentences can be suspended under 19.2-303. (2) A juvenile defendant (a) has a right to offer mitigation evidence of his youth and attendant characteristics during sentencing (b) unless he waives those rights in a plea agreement.

Batson Challenges

** Foster v. Georgia, MAY16, USSC No. 14–8349: (1) The constitution forbids striking even a single prospective juror for a discriminatory purpose. (2) Three steps of a Batson challenge: (a) a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; (b) the prosecution must offer a race-neutral basis for striking the juror in question; and (c) the trial court must determine whether the defendant has shown purposeful discrimination. (3) If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination. (4) Murder trial with many, many indications in the prosecution file that all black jurors were to be struck violates Batson.

Brady Violation

*** Wearry v. Warden, MAR16, USSC No. 14–10008: (1) The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. (2) This rule applies to evidence undermining witness credibility. (3) Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury. (4) To prevail on a Brady claim does not require a showing that a defendant more likely than not would have been acquitted had the new evidence been admitted. (5) Prevailing on a Brady claim requires only that the new evidence is sufficient to undermine confidence in the verdict. (6) If the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. (7) There must be a cumulative evaluation of all withheld evidence, not an evaluation piece by piece.

Judicial Bias – Former Prosecutor in a Case

** Williams v. Pennsylvania, JUN16, USSC No. 15–5040: (1) The test whether a judge should recuse himself is (a) not whether a judge harbors an actual, subjective bias, but instead (2) whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias. (3) When a judge had a direct, personal role in the defendant's prosecution that judge cannot hear a post trial proceeding as part of an appellate court.

Brady / Giglio

*** Massey v. Commonwealth, DEC16, VaApp no. 1421-15-4: (1) To establish a Brady violation, a defendant must establish that: (a) The evidence not disclosed to the accused must be favorable to the accused, either because it is exculpatory, or because it may be used for impeachment; (b) the evidence not

disclosed must have been withheld by the Commonwealth either willfully or inadvertently; and (c) the accused must have been prejudiced. (2) If evidence that the defense wants to use for impeachment is collateral, then it is not Brady material. (3) To establish the necessary prejudice under Brady, appellant must show that the statements were material. (4) Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (5) This is not a preponderance of proof that the verdict would not have stood. (6) The test is whether the favorable evidence added to the totality of evidence would undermine the confidence in the verdict. (6) If a witness dies after testifying in a prelim and the evidence which the defense claims is impeachment evidence does not pertain to the prelim statements it is collateral and not Brady.

Counsel at Probation Hearings

*** Warden v. Forbes, SEP16, VaSC No. 151848: (1) If there is a right to counsel at a probation hearing it will be under the 14th Amendment, not the 6th. (2) Due process does not always require the presence of counsel at revocation hearings. (3) The presence and participation of counsel will probably be both (a) undesirable and (b) constitutionally unnecessary in most revocation hearing. (3) Counsel should be provided if the probationer makes a timely and colorable claim (a) that he has not committed the violation, (b) or (i) that there are substantial reasons justifying or mitigating the violation, and (ii) the reasons are complex or difficult to develop. (4) A statutory right to counsel in postconviction proceedings does not create (a) a constitutional right to counsel or (b) the concomitant constitutional right to the effective assistance of counsel.

Jury Trial in Jail Clothes

** Wilkins v. Commonwealth, JUN16, VaSC No. 151068: (1) A court compel an accused to stand trial before a jury while dressed in identifiable prison clothes. (2) A defendant must properly object to being compelled to appear before the jury in prison clothes. (3) If a defendant wears jail attire before the jury (a) because of a knowingly made tactical decision or (b) because the defendant is otherwise frustrating the process of justice by his own acts, then there is no state compulsion and no deprivation of rights. (4) The defendant bears the burden of proving that the clothing he or she wore at trial was readily identifiable to the jury as jail attire. (5) Identifying clothing as (a) jail clothes, (b) green scrubs like, (c) black issued tennis shoes, and (d) a bracelet is NOT enough to identify it on the record as identifiable prison garb.

EVIDENCE

Rule 2:803(2) - Excited Utterance

* Synan v. Commonwealth, JAN17, VaApp No. 0795-15-2: (1) The statement must (a) be prompted by a startling event and (b) be made (i) at such time and (ii) under such circumstances as to preclude the presumption that it was made as the result of deliberation. (2) The declarant must have firsthand knowledge of the startling event. (3) the lapse of time between the startling event and a declaration offered in evidence is relevant to a determination whether the declaration was spontaneous and instinctive, or premeditated and deliberative.

Parsing an Email

* Payne v. Commonwealth, DEC16, VaSC No. 151524: (1) A portion of an email that opines on the ultimate issue of fact is inadmissible because it invades the province of the jury. (2) A trial court may exclude part of an email that is is repetitious and cumulative of other presented evidence.

Witness Death After Testifying at a Preliminary

** Massey v. Commonwealth, DEC16, VaApp no. 1421-15-4: (1) The death of a witness after the prelim is treated as any unavailable witness: (a) the witness is unavailable, and (b) testimony was under oath, and (c) the testimony was (i) recorded or (ii) can be provided with clarity and detail by the proposing party, and (d) the opposing party (i) was present, (ii) with counsel, and (iii) had an opportunity to cross examine.

Recent Complaint Evidence (Sexual Charges)

*** Mayberry v. Commonwealth, MAR16, VaApp No. 0225-15-3: (1) § 19.2-268.2 is a (a) codification of the common law rule that recent complaints of rape are admissible at trial, and (b) expands it to include other sexual abuse type charges. (2) Evidence of an out-of-court complaint by a victim is admissible, (a) not as independent evidence of the offense, but (b) as corroboration. (3) Only (a) the fact of the complaint is admissible, (b) not the details of the complaint. (4) A preliminary hearing transcript is not a recent complaint.

Impeachment - Preliminary Hearing Transcript

** Mayberry v. Commonwealth, MAR16, VaApp No. 0225-15-3: (1) If the witness acknowledges an inconsistent statement during a preliminary hearing it is not error to refuse to allow the transcript or statements from it into evidence.

PROCEDURE

Pretrial

Preliminary Hearing

Indictment

*** Commonwealth v. Bass, JUN16, VaSC No. 151163: (1) The requirement that felony prosecutions proceed by indictment or presentment (a) is statutory and therefore (b) errors involving indictments are not constitutional. (2) If, (a) without objection, a defendant (b) is convicted of an offense other than that named on the indictment, but (c) not sentenced to more than he could be under the original indictment (d) there is no ground for reversal.

Order Recording Indictments Not Entered at Time of Trial

* Epps v. Commonwealth, MAY16, VaApp No. 0148-15-3: (1) The fact that the order recording the indictments had not been entered at time of trial does not render the trial invalid. (2) The grand jury procedure is statutory, not constitutional. (3) The use of a grand jury is not jurisdictional. (4) The fact that an order is not signed on the date it is rendered does not render it invalid.

Jurisdiction

Jury Requirement

*** Richardson v. Commonwealth, MAR17, VaApp No. 0051-16-2: (1) If the record does not reflect that the defendant waived his right to a jury, with the concurrence of the Commonwealth and the judge, the trial court had no jurisdiction to try the case. (2) A defendant is not required to demand a jury. (3) A defendant must show some deliberate manifestation of express and intelligent consent to waive a jury. (3) "If the accused plead not guilty, he may . . . waive a jury" only if "his consent" is "entered of record." Va. Const. art. I, § 8. (4) When a defendant refused to answer as to whether he wanted trial by jury [uncooperative defendant] he did not waive his jury trial [however, squirrely language about if court had put in order its notice to defendant that it would consider silence a waiver].

Venue

§ 18.2-386.2(B) – Revenge Porn Statute

** Morehead v. Commonwealth, APR16, VaApp No. 2225-14-1: (1) Under Code § 19.2-244, the Commonwealth (a) need only produce evidence sufficient to give rise to a strong presumption that the offense was committed within the jurisdiction of the court, and (b) this may be accomplished by either (i) direct or (ii) circumstantial evidence. (2) The General Assembly may alter venue requirements for particular offenses. (3) § 18.2-386.2(B) allows venue where the porn was (a) produced, (b) reproduced, (c) found, (d) stored, (e) received, or (f) possessed. (4) If a person "receives" a previously disseminated picture/video by an email from the disseminator wherever that receivor is has venue.

Pretrial Motions

§ 19.2-243: Speedy Trial

*** Harvey v. Commonwealth, FEB17, VaApp No. 1460-15-3: (1) The burden of demonstrating that a delay in commencing trial is excused under the Code lies solely with the Commonwealth. (2) The accused or his counsel may constitute a waiver of the accused's right to invoke the statute's time limitations. (3) A defendant does not waive his right to a speedy trial merely because he remains silent or does not demand that a trial date be set within the prescribed period. (4) If the defendant (a) agrees to a particular date outside of speedy trial or (b) was notified of a trial outside the speedy trial period of and took no steps to register an objection to that date, then speedy trial is waived. (5) If a defense attorney (a) objects to a continuance, but (b) not to the specific date set outside the speedy time period speedy trial is not waived.

Appointment of Expert for an Indigent

** Johnson v. Commonwealth, DEC16, VaSC No. 141623: (1) The indigent defendant who seeks the appointment of an expert must show a particularized need. (2) A particularized need is more than a mere hope that favorable evidence can be obtained through the services of an expert.

§ 19.2-54: Statutory Suppression: Search Warrant Affidavit Not Filed within 30 Days

*** Campbell v. Commonwealth, OCT16, VaApp No. 1404-15-3: (1) A search is invalid and evidence obtained in the search is inadmissible if the search warrant affidavit, including the sworn statements providing probable cause, is not filed with the clerk for a period of thirty days from the issuance or execution of the warrant. (2) Magistrate faxed over only front pages of affidavits supporting search warrants.

Franks Hearing Motion (Hearing to Prove an Officer Lied on an Affidavit)

** U.S. v. Desmond, AUG16, 4Cir No. 15-4059: (1) A defendant challenging the validity of a search warrant is entitled to a Franks hearing if he makes a preliminary showing that: (a) the warrant affidavit contains a (i) deliberate falsehood or (ii) statement made with reckless disregard for the truth and (b) without the allegedly false statement, the warrant affidavit is not sufficient to support a finding of probable cause. (2) The defendant's preliminary showing (a) must be more than conclusory and (b) should include affidavits or other evidence to overcome the presumption of the warrant's validity. (3) Omission from affidavit: To satisfy the Franks' intentional or reckless falsity requirement for an omission, the defendant must show that facts were omitted (a) with the intent to make, or (b) in reckless disregard of whether they thereby made the affidavit misleading.

§ 19.2-270.1:1 and Rule 3A:11 - Discovery: Child Porn Photos

** Nimety v. Commonwealth, JUN16, VaApp No. 1209-15-3: (1) There is no general constitutional right to discovery in a criminal case. (2) A judge's discovery ruling will not be reversed unless it is (a) improvident and (b) affects substantial rights. (2) Under 19.2-270.1:1, in order for the judge to order child porn photos turned over to the defense the judge must (a) find that production of the photos is material to the defense of the accused and not merely it may be material, and (b) the production of copies is necessary to the defense of the accused, not simply that the request is reasonable.

Arraignment

Plea

Trial

Invited Error Presented to Judge by Counsel

*** DuFresne v. Commonwealth, OCT16, VaApp *en banc* No. 0281-15-2: (1) An attorney who has invited error should inform the court of the error and ask for it to be corrected. (2) The trial court must determine if it is appropriate to relieve the litigant of the consequences of the invited error, considering (a) potential prejudice, (b) whether the trial court believes the error was invited intentionally, (c) when in the proceeding the error is brought to the trial court's attention, (d) the amount of time that has passed between the invitation to commit error and the withdrawal of the invitation, (e) the degree to which subsequent proceedings in the trial court were infected by the error, and (f) other factors.

Jury Selection

Women & Gender Studies

*** Vay v. Commonwealth, JAN17, VaApp No. 0053-16-2: There is no *per se* rule that a professor of Women & Gender Studies must be struck from a rape trial.

Opening Argument

Evidence

Motion to Strike

Affirmative Defense

Self Defense

** Bell v. Commonwealth, AUG16, VaApp No. 1479-15-2: (1) Self defense is an affirmative defense. (2) There are two types of self defense: (a) Justifiable (no fault), and (b) excusable (renounced fault). (3) Justifiable homicide in self-defense occurs where a person, (a) without any fault on his part in provoking or bringing on the difficulty, (b) kills another (c) under reasonable apprehension of death or great bodily harm to himself. (4) Excusable self defense occurs where the accused, although (a) in some fault in the first instance in provoking or bringing on the difficulty, when attacked (b) retreats as far as possible, (c) announces his desire for peace and (d) kills his adversary (e) from a reasonably apparent necessity to preserve his own life or save himself from great bodily harm.

Self Defense – Castle Doctrine

*** Hines v. Commonwealth, OCT16, VaSC No. 151066: (1) When a party is assaulted in his own home, that party has the right to use whatever means necessary to repel the aggressor, even to the taking of life. (2) To establish a claim of self-defense, a defendant must show that he reasonably feared death or serious bodily harm at the hands of his victim.(3) Whether the danger is reasonably apparent is judged from the viewpoint of the defendant at the time of the incident. (4) The defendant must show an overt act or other circumstance that affords an immediate threat to safety. (5) An angry, drunk man in the house of the defendant with a firearm who points it at the defendant triggers self defense even if the defendant had to leave the danger zone in order to get his own firearm.

Duress / Necessity (Justification)

** Small v. Commonwealth, JUL16, VaSC No. 150965: (1) The defendant must show three things: (a) a reasonable belief that the action was necessary to avoid an imminent threatened harm; (b) a lack of other adequate means to avoid the threatened harm; and (c) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm. (2) A generalized fear does not support a justification defense. (3) Having a firearm out of fear that another individual may harm you is not an imminent threat.

Duress

** Edmonds v. Commonwealth, JUL16, VaSC No. 151100: (1) In order to show that a threat of harm is imminent, a defendant must demonstrate an immediate, real threat to his safety. (2) Taking a firearm from an apartment to keep a person in that apartment from potentially harming another who is not in the apartment is

not an imminent threat.

Jury Instructions

Concealed Merchandise

* Lindsey v. Commonwealth, JAN17, VaSC No. 151111: (1) The standard jury instruction telling the jury that concealment "is evidence of" intent to steal "unless there is believable evidence to the contrary" allows the jury to infer the element and does not tell it to presume so that burden shifting occurs.

Suspect Identification

*** Payne v. Commonwealth, DEC16, VaSC No. 151524: (1) No separate jury instruction is required as to the witness' ability to ID a suspect because that is already covered when the jury is instructed about an eyewitnesses' "opportunity for knowing the truth and for having observed the things about which they testified", it is informed that it may consider not only (a) whether the eyewitness honestly believes what he or she testifies to on the stand, but also (b) whether he or she had the capacity and opportunity to accurately and reliably form that belief. (2) Focusing the jury's attention on a limited number of factors affecting the reliability of an eyewitness identification and thereby seemingly elevating the importance of those factors vis-à-vis similar factors not included is not appropriate for a jury instruction.

*** Bell v. Commonwealth, AUG16, VaApp No. 1479-15-2: (1) While (a) the jury's ability to reject evidence will support an acquittal, (b) it does not supply the affirmative evidence necessary to support a jury instruction. (2) While both the Commonwealth and the defense are entitled to have the jury instructed as to their theory of the case, jury instructions are properly refused if not supported by more than a scintilla of evidence. (3) If the evidence in conflict tends to support either the prosecution or the defense's theory of the case, the jury must be instructed as to both theories.

** Porter v. Commonwealth, MAY16, VaApp No. 0738-15-3: (1) A defendant is entitled to an instruction upon his theory of the case only when such instruction is supported by some appreciable evidence. (2) More than a scintilla of evidence must be present to support an instruction.

** Mayberry v. Commonwealth, MAR16, VaApp No. 0225-15-3: (1) A defendant is only entitled to instruct the jury on those theories of the case that are supported by evidence. (2) Accidental touching instruction in sexual penetration case is not allowed when defendant's defense is that no touching took place.

Lesser Included Offense

*** Woods v. Commonwealth, MAR16, VaApp No. 0315-15-3: (1) If any credible evidence in the record supports a proffered instruction on a lesser included offense, failure to give the instruction is reversible error. (2) An instruction as to a lesser included offense must be supported by more than a mere scintilla of evidence. (3) When the evidence in a prosecution warrants a conviction of the crime charged, and there is no independent evidence warranting a conviction for a lesser-included offense, an instruction on the lesser offense should not be given. (4) When (a) the physical evidence is strong and (b) uncontroverted (c) except by the defendant's testimony and (d) the defendant's testimony does not offer a rational alternative explanation for the physical evidence then there is no more than a scintilla of evidence to support a lesser included instruction of voluntary manslaughter over murder. (5) Ten bullet wounds in victim including three fatal ones in the back and victim claimed he shot as he ran away in fear.

Closing Arguments

Mistrial

Sentencing

Jury Sentencing

Pending Imposition of Sentence

§ 19.2- 299(A) – Presentence Report

** Johnson v. Commonwealth, DEC16, VaSC No. 141623: This statute requires the probation officer to explore the history of the person being sentenced. (2) The language "and all other relevant facts" refers to the historical requirement and does not require the appointment of an expert for the defense to consider other factors.

§ 19.2-296 - Motion to Withdraw Guilty – Bad Legal Advice

*** Hernandez v. Commonwealth, DEC16, VaApp No. 1544-15-1: (1) Poor or erroneous advice from counsel, where an attorney overlooked a viable defense, constitutes grounds for withdrawing a guilty plea as being inadvised. (2) In a motion to withdraw a guilty plea, it is not the trial court's role to evaluate credibility of witnesses, nor to determine whether the proffered defense will be successful, but whether the defendant has made a prima facie showing of a reasonable defense. (3) The issue is not whether a court thinks a jury or other fact finder would necessarily accept the defense, but rather whether the proffered defense is one that the law would recognize as such if the fact finder found credible the facts supporting it.

Motion to Overturn Jury Verdict: Invited Error

*** DuFresne v. Commonwealth, OCT16, VaApp *en banc* No. 0281-15-2: (1) A party may not invite error and then attempt to take advantage of the situation created by his own wrong. (2) When the defense asks the judge to reduce robbery to grand larceny it cannot later argue for reversal on grounds that grand larceny is not a lesser included. (3) Whether prejudice has occurred is not a question to be considered once invited error has taken place.

§ 19.2-296 – Motion to Withdraw Guilty Plea

** Small v. Commonwealth, JUL16, VaSC No. 150965: Prejudice to the Commonwealth is a relevant factor to be considered when a judge decides whether to allow withdrawal of a guilty plea. [2 years 8 months between plea and attempt to withdraw].

Judicial Imposition of Sentence

§ 19.2-305: Determination of Restitution

*** Wilson Jr. v. Commonwealth, NOV16, VaApp No. 1658-15-3: (1) The amount of restitution to be paid by the defendant is within the sole province of the circuit court to determine and that determination may not be delegated to another department of government (probation). (2) This is a voidable error and must be addressed within the 21 days post sentencing.

Length of Probation & Conditions

*** Du v. Commonwealth, SEP16, VaSC No 151058: (1) Sentencing decisions within (a) the lawful boundaries of applicable sentencing statutes and (b) constitutional limitations (c) are vested in the sound discretion of trial judges. (2) The only test of non-imprisonment aspects of a sentence which are statutorily and constitutionally valid is reasonableness. (3) The reasonableness standard takes into account the (a) nature of the offense, (b) the defendant's background, and (c) the surrounding circumstances. (4) Only when reasonable jurists could not differ can we say an abuse of discretion has occurred. (5) Once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end. (6) Imposing lifetime probation for a crime which carries up to life in prison is not a violation of sentencing discretion.

Involuntary Failure to Do Requirements Under Advisement

*** Nunez v. Commonwealth, Mar16, VaApp No. 0221-15-4: (1) There is no requirement that a defendant's failure to complete imposed condition while a case is under advisement be willful. (2) A judge is required to consider reasonable alternatives to imprisonment if a defendant fails to complete conditions without intention.

Post Trial

Within 21 Days

Code § 19.2-296 – Trial Court Jurisdiction

*** Valezquez v. Commonwealth, OCT16, VaSC No. 150849: (1) The filing of an appeal does not divest the trial court of its 21 days of post trial jurisdiction. (2) The fact that the appellate court has gained jurisdiction does not divest the trial court of its 21 day post trial jurisdiction.

Code § 19.2-296 – Manifest Injustice

** Valezquez v. Commonwealth, OCT16, VaSC No. 150849: (1) When a defendant moves to withdraw a guilty plea after the trial court has imposed a sentence, he must show "manifest injustice" in order to succeed on his motion. (2) Evidence of manifest injustice is that which is clear and requires no proof; that which is notorious. (3) Manifest injustice is a direct, obvious, and observable error in a trial court.

Post 21 Days

Rule 1.1 & Nunc Pro Tunc Order

*** Minor v Commonwealth, NOV16, VaApp No. 2047-15-4: (1) If the trial court's original order has a scriviner's error that does not toll the 21 days. (2) The running of the twenty-one-day period may be interrupted only by the entry, within the 21-day period after final judgment, of an order suspending or vacating the final order. (3) Neither the filing of post-trial or post-judgment motions, nor the court's taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment, is sufficient to toll or extend the running of the 21-day period.

During Appeal

SUBSTANTIVE

Violent Crimes

Involuntary Manslaughter – Common Law and Va. Code § 18.2-154

*** Gregg v. Commonwealth, FEB17, VaApp No. 0047-16-4: (1) (a) The prosecutor can charge both common law involuntary manslaughter and involuntary manslaughter by shooting into an occupied vehicle causing death under Code § 18.2-154, but (b) if convicted under both the defendant can only be sentenced under one or the other. (2) Only noted exception to the one homicide sustains one conviction are cases involving aggravated involuntary manslaughter under Code § 18.2-36.1(B) because the statute states "the provisions of this section shall not preclude prosecution under any other homicide statute."

18.2-57 – Assault

** Synan v. Commonwealth, JAN17, VaApp No. 0795-15-2: When an operator swerves into oncoming traffic, intending to hit a random vehicle but only nearly impacting the vehicle, the operator has committed assault on the people in the other vehicle.

18.2-42 – Abduction

* Vay v. Commonwealth, JAN17, VaApp No. 0053-16-2: (1) Factors for determining whether an abduction is incidental to other crimes: (a) the duration of the detention or asportation; (b) whether the detention or asportation occurred during the commission of a separate offense; (c) whether the detention or asportation which occurred is inherent in the separate offense; (d) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense; and (e) whether the detention exceeded the minimum necessary to complete the required elements of the other offense.

Resisting an Illegal Arrest

Doscoli v. Commonwealth, JUN16, VaApp No. 0517-15-3: (1) Under the common law there is a right to defend one's self against an illegal arrest. (2) There is no right to defend one's self against an illegal detention. (3) Close questions as to whether an officer possesses probable cause must be resolved in the courtroom and not fought out on the streets. (4) A determination as to whether an arrest is unlawful is made using facts and circumstances viewed objectively from the officer's perspective. (5) Absence of probable cause to believe a suspect committed the particular crime for which he was arrested does not necessarily invalidate the arrest if the officer possessed sufficient objective

information to support an arrest on a different charge. (6) Person who continues to disturb the peace by cursing officers and flipping them off after warned to stop is not arrested illegally.

Murder and Voluntary Manslaughter

** Woods v. Commonwealth, MAR16, VaApp No. 0315-15-3: (1) Second-degree murder (killing with malice) and voluntary manslaughter (killing under heat of passion) are both lesser-included offenses of first-degree murder. (2) Malice and heat of passion cannot coexist. (3) (a) Whether provocation causes heat of passion is a factual question (b) unless it becomes a matter of law because the evidence is such that minds of reasonable men cannot differ.

Sex Crimes

§ 19.2-270.1:1 and Rule 3A:11 - Discovery: Child Porn Photos

** Nimety v. Commonwealth, JUN16, VaApp No. 1209-15-3: (1) There is no general constitutional right to discovery in a criminal case. (2) A judge's discovery ruling will not be reversed unless it is (a) improvident and (b) affects substantial rights. (2) Under 19.2-270.1:1, in order for the judge to order child porn photos turned over to the defense the judge must (a) find that production of the photos is material to the defense of the accused and not merely it may be material, and (b) the production of copies is necessary to the defense of the accused, not simply that the request is reasonable.

§ 18.2-386.2(B) – Revenge Porn Statute

** Morehead v. Commonwealth, APR16, VaApp No. 2225-14-1: (1) Under Code § 19.2-244, the Commonwealth (a) need only produce evidence sufficient to give rise to a strong presumption that the offense was committed within the jurisdiction of the court, and (b) this may be accomplished by either (i) direct or (ii) circumstantial evidence. (2) The General Assembly may alter venue requirements for particular offenses. (3) § 18.2-386.2(B) allows venue where the porn was (a) produced, (b) reproduced, (c) found, (d) stored, (e) received, or (f) possessed. (4) If a person “receives” a previously disseminated picture/video by an email from the disseminator wherever that receivor is has venue.

Drug Crimes

Va Code § 18.2-251.03 – Drug Reporting Safe Haven

*** Broadous v. Commonwealth, FEB17, VaApp No. 0169-16-1: (1) The statute provides an affirmative defense only to the individual making the emergency report. (2) In order for an individual to get the safe haven she must "seek" or "obtain" aid for her overdose. (3) "Obtain" (a) requires more than the passive receipt of medical aid; "obtain" (b) requires action on the overdosing individual's part.

18.2-248(C) – Exception to Mandatory Minimums

*** Sandidge v. Commonwealth, DEC16, VaApp No. 1851-15-3: (1) The mandatory sentence shall not be applied if the trial judge finds (a) the person has never been convicted of certain violent felony offenses; (b) the offense did not involve violence, threats, or weapons; (c) no one was injured or killed as a result of the offense; (d) the person did not lead others in the offense and the offense was not a continuing criminal enterprise; and (e) not later than the time of the sentencing hearing, (i) the person has truthfully provided to the Commonwealth all information and evidence the person has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, (ii) but if he doesn't have any information the trial judge can still find this element fulfilled. (2) Disclosures to the Commonwealth must occur prior to beginning of the sentencing hearing.

18.2-248 – Accommodation

*** Porter v. Commonwealth, MAY16, VaApp No. 0738-15-3: (1) Accommodation is a sentencing matter to be determined during the sentencing phase. (2) The accommodation defense does not apply to one who was normally engaged in drug trafficking. (3) If (a) the judge has refused an accommodation jury instruction before the sentencing phase and (b) the defense puts on evidence of accommodation during the sentencing phase, (c) the defense must move for the instruction after the evidence has been introduced to preserve any error.

Theft / Property Crimes

18.2-104 – Larceny 3d or Subsequent

*** Pitts v. Commonwealth, NOV16, VaApp No. 1728-15-2: A defendant can be convicted of a 3d or subsequent larceny even if he had not been convicted of the second at the time of his offense as long as the second conviction occurs before the third.

18.2-192 – Credit Card Theft

* Scott v. Commonwealth, AUG16, VaSC No. 150932: (1) The credit card theft statute includes two crime with two different intents. (2) The first crime, stealing a card, only requires a general intent to take the card. (3) The second offense, knowingly receiving a stolen card or number requires the specific intent "to use it or sell it, or to transfer it to a person other than the issuer or the cardholder."

* Beck v. Commonwealth, APR16, VaApp No. 0997-15-1: (1) Joint access to common areas in a multi-unit apartment complex or rooming house does not render it impossible for a resident of that complex or rooming house to burglarize other units within the complex or rooming house. (2) When an apartment is built from part of a house and shares access to a laundry room and garage it is treated as a second residence within the building, not part of on entire residence.

Weapon Crimes

USC §922(g)(9) - Illegal Possession of Firearms

* Voisine v. U.S., JUN16, USSC No. 14–10154: A reckless domestic assault qualifies as a misdemeanor crime of domestic violence, forbidding the convicted from possessing a firearm.

Proving the Felony

*** Girard v. Commonwealth, APR16, VaApp No. 0397-15-2: When an out of state conviction is vague as to whether it is a felony, but the (1) Commonwealth introduces the out of state statute and the (2) defendant made an admission describing the nature of his felony conviction, it is sufficient evidence to prove the prior felony conviction.

Punishment for Possessing a Firearm after Adjudicated Delinquent

** Prekker v. Commonwealth, MAR16, VaApp No. 2175-14-3: (1) The mandatory sentencing provision applies to someone adjudicated delinquent (says "convicted"). (2) Applying the same punishment as applied to felons to those adjudicated delinquent is constitutional because at the time the Constitution was written there was no distinction for age and all were convicted.

Motor Vehicles

§ 18.2-268.5 – Designate DUI Blood Draw

*** Coffman v. Commonwealth, JAN17, VaApp No. 1640-15-3: (1) Not required to be on the circuit court list for valid blood draw: physician, registered nurse, licensed practical nurse, phlebotomist, graduate laboratory technician. (2) Required to be on the circuit court list for a valid blood draw: technician or nurse. (3) The nurse requirement does not apply to registered nurses or licensed practical nurses.

18.2-266 – DUI by Grabbing Steering Wheel

* Synan v. Commonwealth, JAN17, VaApp No. 0795-15-2: When an inebriated passenger grabs the steering wheel and effects the vehicle's operation he has committed DUI.

DUI: Blood Draw

*** Wolfe v. Commonwealth, DEC16, VaApp No. 0058-16-4: (1) Police are not required to get a search warrant every time they do a blood draw. (2) Birchfield v. North Dakota, 136 S. Ct. 2160 (2015), has not implicated the constitutional validity of Virginia's implied consent statute as it relates to civil penalties for refusing a blood alcohol test.

§ 18.2-268.10(B) – Commenting on the Failure to Complete a Breath Test

*** Wolfe v. Commonwealth, DEC16, VaApp No. 0058-16-4: (1) Telling a jury why a blood test was done (defendant couldn't stop burping) is allowed because inability to submit to a breath test was a foundational requirement for a blood test to be performed pursuant to Code § 18.2-268.2. (2) The statute only applies when the defendant has refused a test.

Notice of Suspension/Revocation

** Peters Jr. v. Commonwealth, NOV16, VaApp No. 1577-15-4: Even if the driving transcript only indicates mail delivery notice, if the driver admits he has no license to the officer, the transcript indicates he was in court when previously revoked as part of a prior conviction, and the revocation from the last court is still in effect, he has sufficient notice.

§ 18.2-270 - DUI 3d

* Leonard v. Commonwealth, APR16, VaApp No. 0135-15-1: (1) A felony DUI does not require that one of the prior convictions be specifically labeled "DUI Second."

§ 46.2-865.1 - Felony Racing

** Doggett v. Commonwealth, APR16, VaAppNo. 0548-15-2: (1) A race is a contest of speed between two or more motor vehicles. (2) If the defendant's racing was the proximate cause of injury it is irrelevant who started the race or whether the other driver was negligent.

Other

§ 18.2-60.3 - Stalking

*** Banks v. Commonwealth, FEB17, VaApp No. 2055-15-2: (1) There are three elements to stalking: (a) the defendant directed his conduct toward the victim on at least two occasions, and (b) the defendant (i) intended to cause fear or (ii) knew or should have known that his conduct would cause fear, and (3) the defendant's conduct caused the victim to experience reasonable fear of death, criminal sexual assault, or bodily injury. (4) There is no time limit attached to stalking. (5) The (a) last event is the completion of the stalking and (b) all prior events are part of it (c) even if they occurred outside the year limit of the statute of limitations for a misdemeanor. (6) The appellate court did not address the appellant's argument that the decades prior contacts were a separate offense of stalking and not part of the 2014 offense because the defendant did not preserve it at trial.

Accessory After the Fact

*** Suter v. Commonwealth, FEB17, VaApp No. 1937-15-1: (1) There are three factors to accessory after the fact to a felony: (a) a felony must have occurred, and (b) the defendant must know the felony occurred, and (c) the aid must have been given for the purpose of hindering the felon's apprehension, conviction, or punishment. (2) Three factors as laid out by the VaSC [quoted in case] do not require "purpose of": (a) felony must be complete, and (b) accused must know the felon is guilty, and (c) the accused must receive, relieve, comfort, or assist the felon. (3) The accessory after the fact must have been in circumstances that she (a) knew or (b) should have known that the principal was guilty of committing a felony at the time he provided assistance. (4) The felony must have been completed when aid was rendered. (5) Defendant helped shooter escape, but the victim died two days later and therefore the defendant is not guilty.

§ 18.2-416 – Curse and Abuse

** Doscoli v. Commonwealth, JUN16, VaApp No. 0517-15-3: (1) If a person continues to curse at officers and make obscene gestures after being told to stop there is enough probable cause for an arrest. (2) Even if this statute is unconstitutional an officer can rely on it until there is controlling precedent saying it is unconstitutional.

18.2-460(A) – Obstruct Justice without Force

*** Thorne v. Commonwealth, APR16, VaApp No. 0701-15-1: (1) Actions that make an officer's discharge of his or her duty simply more difficult, but achievable, do not constitute obstruction of justice without force. (2) Causes split with Jordan v. Commonwealth, 286 Va. 153 (2013) – Claims the language in Jordan that states 'making an officer's discharge of his duties more difficult is not impeding' is dicta. (3) Obstruction can be either active or passive. (4) As long as the obstructive behavior clearly indicates an intention on the part of the accused to prevent the officer from performing his duty, the evidence proves the offense. (5) Footnote 5: Distinguishes Jordan by stating that Jordan is limited to subsection C and requires both force and an attempt and therefore (not in the statute) intent while subsection A only requires 'knowingly.' (6) When a suspect refuses to roll down her tinted window so the officer cannot check the tint and see who else is in the car for nine minutes (until another officer arrived) she has prevented the officer from performing his duties and is guilty of obstruction.

PROBATION

§ 19.2-306: Probation and Suspension of Time

*** Wilson Jr. v. Commonwealth, NOV16, VaApp No. 1658-15-3: (1) Post incarceration there are two phases: (a) probation, and (b) a period of suspended time beyond probation. (2) Suspension of sentence means either (a) delay in the imposition of a sentence for a crime or (b) the staying of execution of the sentence imposed. (3) A circuit court may revoke a previously suspended sentence for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court. (4) A trial court may extend its jurisdiction over probation only up to 21 days after the probation ends. (5) FROM STATUTE: "If neither a probation period nor a period of suspension was fixed by the court, then the court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned." (6) Even though the probation period has run, the circuit court still has jurisdiction and authority to revoke a suspended sentence for any cause deemed sufficient that occurred at any time within the period of suspension fixed by the circuit court.

Counsel at Probation Hearings

*** Warden v. Forbes, SEP16, VaSC No. 151848: (1) If there is a right to counsel at a probation hearing it will be under the 14th Amendment, not the 6th. (2) Due process does not always require the presence of counsel at revocation hearings. (3) The presence and participation of counsel will probably be both (a) undesirable and (b) constitutionally unnecessary in most revocation hearing. (3) Counsel should be provided if the probationer makes a timely and colorable claim (a) that he has not committed the violation, (b) or (i) that there are substantial reasons justifying or mitigating the violation, and (ii) the reasons are complex or difficult to develop. (4) A statutory right to counsel in postconviction proceedings does not create (a) a constitutional right to counsel or (b) the concomitant constitutional right to the effective assistance of counsel.

APPEALS

Appellee Argument

Notice Not Timely Filed

*** Greer (II) v. Commonwealth, FEB17, VaApp No. 0175-16-1: (1) If the Commonwealth appeals a sentence, the defendant must appeal within the 30 days or file a cross appeal at the same time. (2) If the defendant does not file the appeal at that time the Commonwealth does he forfeits filing an appeal if the Commonwealths appeal succeeds and there is a new sentence.

Appellant Argument

Invited Error

** DuFresne v. Commonwealth, OCT16, VaApp *en banc* No. 0281-15-2: (1) A party may not invite error and then attempt to take advantage of the situation created by his own wrong. (2) When the defense asks the judge to reduce robbery to grand larceny it cannot later argue for reversal on grounds that grand larceny is not a lesser included. (3) The fact that the defense raises its issue before the trial judge does not change this rule. (4) Whether prejudice has occurred is not a question to be considered once invited error has taken place.

Ends of Justice Rules 5A:18 & 5:25

** Wright v. Commonwealth, AUG16, VaSC No. 150181: (1) The ends of justice exception only applies when a defendant fails to contemporaneously object and preserve an issue. (2) The argument of the appellant of a different issue than the one approved by the appellate court does not fall under ends of justice.

Appealing from the Court of Appeals

*** Wright v. Commonwealth, AUG16, VaSC No. 150181: (1) If the Court of Appeals rejects an argument as unpreserved per Rule 5A:18 “ends of justice”, then the appeal to the Supreme Court must be about 5A:18 “ends of justice.” (2) If the issue addressed generally states that the VaApp erred in rejecting the appellant’s trial court issue this is not sufficient to present the case to the Supreme Court.

Rule 5A:18 – Ends of Justice

*** Holt v. Commonwealth, APR16, VaApp No. 1252-14-1(*en banc*): (1) In order to invoke the ends of justice exception, the appellant must demonstrate that (a) he or she was convicted for conduct that was not a criminal offense or (b) the record must affirmatively prove that an element of the offense did not occur. (2) An appellant must do more than show that the Commonwealth failed to prove an element or elements of the offense.

Writs

Standards of Review

Retroactivity of a Supreme Court Decision

*** Oprisko v. Director, DOC, FEB17, VaSC No. 151450: (1) A new constitutional rule of criminal procedure generally will not be applied to a conviction which has become final before the rule is announced. (2) A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. (3) A rule is not compelled by existing precedent if those decisions merely (a) inform or (b) control the analysis of the petitioner's claim. (4) A rule is compelled by existing precedent only if a contrary conclusion would have been objectively unreasonable; the result must be apparent to all reasonable jurists. (5) The new rule principle validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions. (6) In determining whether a ruling is retroactive a court must: (a) determine the date on which the defendant's conviction became final; (b) survey the legal landscape as it existed on that date to determine whether existing constitutional precedent compelled the conclusion which the defendant sought; and (c) decide whether a rule, even though new, falls within one of the two exceptions to the retroactivity principle, which are (i) rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and (ii) watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

Law of the Case Doctrine

** Greer (II) v. Commonwealth, FEB17, VaApp No. 0175-16-1: (1) When there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. (2) Statutory exception: When the Commonwealth wins a pretrial appeal, per § 19.2-409, the defendant is not precluded from raising that issue on direct appeal.

Interpreting a Statute: The Last Antecedent Rule

* Coffman v. Commonwealth, JAN17, VaApp No. 1640-15-3: (1) Absent a contrary intent, (1) a qualifying word or phrase should be read as modifying only the last noun or phrase that immediately precedes it, (2) if such interpretation can be done without impairing the meaning of the sentence.

Interpanel Accord Doctrine

* Vay v. Commonwealth, JAN17, VaApp No. 0053-16-2: (1) A published decision of a prior panel of the Court of Appeals is binding on any subsequent panel unless *en banc*.

Alternative Trial Court Findings

* Commonwealth v. Lambert, DEC16, VaSC No. 160132: (1) A trial court's alternative holding can provide an independent and sufficient basis upon which to support Lambert's conviction. (2) Failure of a party to address an alternative holding of the trial court may necessitate it not being relied upon by the appellate court.

* Minor v Commonwealth, NOV16, VaApp No. 2047-15-4: If the appellant files a motion after the 21 days allowed under Rule 1.1, so that the trial court had no jurisdiction to hear it, the appellate courts have no jurisdiction to hear it.

Rule 5A:8(c) - Filing of Written Statement of Facts

*** Granado v. Commonwealth, SEP16, VaSC No. 150936: (1) The written statement of facts submitted before the deadline fulfills the requirement of filing even if the court requires amendments and/or does not sign until after the due date. (2) The circuit court clerk can add documents to the record submitted to the appellate courts at any time prior to the granting of an appeal. (3) After the granting of an appeal, the appellate court must grant a writ of certiori in order to add documents which the circuit court clerk did not include originally.

Right Result – Wrong Reason

** Collins v. Commonwealth, SEP16, VaSC No. 151277: (1) An appellate court may properly affirm a judgment appealed from where the court from which the appeal was taken reached the correct result but gave a wrong reason for its holding. (2) This doctrine is only applicable where (a) the right reason can be fully supported by the evidence in the record and (b) where the development of additional facts is unnecessary to support it.

Interpanel Accord Doctrine

* Prekker v. Commonwealth, MAR16, VaApp No. 2175-14-3: (1) Published panel opinions of the Court of Appeals bind all other three-judge panels, (2) however, they do not bind the Court sitting *en banc*.

Remedies

HABEAS

Court with Jurisdiction

*** In re: Director Central State, DEC16, VaSC No. 151723: Unless the habeas proceeding is based upon a conviction [§ 8.01-654(B)(1)] or there are unrecorded facts [§ 8.01-657] a habeas hearing can be held in front of any circuit court, not just the trail court. (defendant found not to be competent and held in hospital in a county other than the trial court's locality)