Constitutional Criminal Law

4th Amendment:

Search & Seizure

** Arizona v. Gant, APR09, USSC No. 07-542: An officer may not search a car once the person arrested from the car has been secured unless it is reasonable to believe that there is evidence of the offense of arrest.

US v. Kelly, JAN10, 4Cir No. 08-4982:(1) If police have probable cause to believe contraband is in a car they can search the car. (2) The search the police can perform is as thorough as though they have an actual search warrant. (3) The fact that the police have the driver detained or the car immobilized does not invalidate their right to search the car. (Caroll Doctrine)

** Whitehead v. Commonwealth, SEP09, VaSC No. 082458: A dog indicating that drugs are present in a vehicle which people are in does not provide the probable cause necessary to search the people who were in the car.

** TERRY & POLICE DATABASE: Smith v. Commonwealth, OCT09, VaApp No. 0892-08-2: (1) A police database containing the statement that someone is "probably armed" is not sufficient for an officer to pull him out of a car and search him. (2) A police officer must have reasonable suspicion to conduct a Terry pat down. (3) Reasonable suspicion is dependant on totality of the circumstances and the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the pat down. (4) An officer must have reasonable suspicion that a person is presently armed and dangerous. (5) "Circumstances relevant in this analysis include the characteristics of the area surrounding the stop, the time of the stop, the specific conduct of the suspect individual, whether a bulge in his clothing suggests the presence of a weapon, the character of the offense under suspicion, the suspect's criminal history, if known, and the unique perspective of a police officer trained and experienced in the detection of crime." (6) An officer must have contemporaneous facts which cause a reasonable suspicion that a person is armed and information entered into a database months earlier does not provide that.

** LYING TO SUSPECT: Duncan v. Commonwealth, NOV09, VaApp No. 2397-08-3: (1) An officer who informs a person caught driving suspended that he is going to have the person's car towed, after the person has refused to allow the officer to search his car, has not violated the constitution when the defendant then admits to the presence of contraband because he is allowed to lie to a suspect. (2) An officer who searches a vehicle after the suspect has admitted to the presence of contraband therein and been secured in a police vehicle is not violating Gant because the officer has probable cause that he will find evidence of a crime. (Carroll doctrine)

** Testa v. Commonwealth, DEC09, VaApp No. 2438-08-4: (1) Entering a house with the owner's permission is not a search under the 4th Amendment. (2) A "live-in guest" cannot invalidate permission to enter the common areas of a property given to officers by the actual owner. (3) If a person engages in new illegal activities in the presence of the police while the police are doing an unconstitutional search or seizure the evidence of the new illegal act is admissible.

ANTICIPATORY WARRANTS**:** Ford v. Commonwealth, JAN10, VaApp No. 1047 – 08 - 2: (1) An anticipatory warrant is issued upon a showing of probable cause that evidence of a crime will be at a certain location in the future. (2) Most anticipatory warrants are conditioned upon a triggering event. (3) If there is a triggering condition there must be probable cause that he triggering condition will occur and probable cause that evidence of a crime will be found after the triggering condition has occurred. (4) If the triggering condition does not occur the anticipatory warrant is void.

GOVERNMENT AGENT: US v. Day, JAN10, 4Cir No. 08-5231:(1) The 4th and 5th Amendments use the same test to determine whether a private individual acted as a governmental agent. (2) The defendant bears the burden of proving that an agency relationship exists between a private individual and the government. (3) The two primary factors to be considered are (a) whether the Government knew of and acquiesced in the private individual's challenged conduct; and (b) whether the private individual intended to assist law enforcement or had some other independent motivation. (4) The fact that Virginia regulates private security officers and gives them the power to arrest for crimes committed in their presence does not mean that Virginia knew of and acquiesced in their actions. (5) Government knowledge and acquiescence is shown if a private individual would expect some benefit or detriment from the government when he took the action. (6) Under the "public function" test, a private security officer given the plenary powers of a governmental law enforcement officer is an agent of the government. (7) Because Virginia only gives private security officers the power to arrest for crimes committed in their presence, all private security officers have is the power to effect a citizen's arrest not the plenary arrest powers of a governmental law enforcement officer.

AFFIDAVIT: Barnes v. Commonwealth, JAN10, VaSC No. 090339: (1) There is a strong presumption of validity with respect to an affidavit supporting a search warrant. (2) In order to obtain an evidentiary hearing on and affidavit's integrity, the defendant must first make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit. (3) If the allegedly false material is set aside and there is still enough evidence in the affidavit to support probable cause, no hearing is required. (4) This also applies if the defendant alleges that material facts were purposefully or recklessly omitted from the affidavit, thus making it misleading. (5) In order to ascertain whether probable cause exists, courts will focus in on what the totality of the circumstances meant to police officers trained in analyzing the observed conduct or purposes of crime control.

EMERGENCY AID EXCEPTION: Michigan v. Fisher, DEC09, USSC No. 09–91: (1) When there are objectively reasonable circumstances which indicate someone may be hurt or violence may be taking place, officers may enter a residence without a warrant. (2) Arriving at a house where neighbors are complaining, a truck is wrecked out front, droplets of blood are in the truck, and a man is inside yelling and throwing objects, police can enter under this exception.

PLAIN VIEW: Cauls v. Commonwealth, OCT09, VaApp No. 1977 - 08 - 02: (1) If a second person is found in a residence during a constitutionally valid search, a person is not seized when an officer hands in the clothes he has asked for in order to leave. (2) The test for the plain view doctrine is (a) the officer has not violated the fourth amendment to get where the evidence could be viewed, and (b) the incriminating character of the evidence is immediately apparent, and (c) the officer has a lawful right to access the object. (3) The plain view doctrine cannot be applied when the item in question can be used for legitimate purposes even if the officer's experience tells him that the item is often used toward illegal purposes. (4) Because plastic bags are also used for legitimate purposes, the frayed ends of a plastic bag hanging out of a pocket is not enough to justify a seizure.

BACK YARD (**VACATED** by VaSC No. 2564-07-3) - Vaughn v. Commonwealth, MAR09, VaApp No 2564-07-3: (1) A resident of a dwelling impliedly consents to a police officer entering the curtilage to contact the dwelling's residents. (2) The officer is not restricted to the most direct route to the front door. (3) The test of whether officer's entry into the back yard is constitutional is whether, considering a totality of the circumstances, it was reasonable. In this case, no answer at the front door, a lack of "no trespassing" signs, no fence, and items indicating that defendant ran a business in his back yard made entering the back yard reasonable.

Thompson v. Commonwealth, APR09, VaApp No. 2408-07-1: (1) Loitering in a known drug sale area, failing to answer an officer's question (3 times) as to whether he had a weapon, and being nervous is not sufficient to justify a *Terry* pat down. (2) A citizen has no obligation to answer an officer's question as to whether he is armed. (3) Motion which could have been interpreted as reaching for a weapon or indications of a weapons presence in the clothing could have justified the *Terry* pat down.

Midkiff v. Commonwealth, MAY09, VaApp No. 2393-07-3: (1) The *Leon* exception to the requirement that a search warrant must be valid precludes the exclusion of evidence obtained when an officer operates in good faith belief that the warrant is valid. (2) A magistrate who looks at a warrant affidavit for less than two minutes has not abandoned his judicial role because it doesn't take long for a well trained magistrate to read and comprehend an affidavit. (3) In a child porn case an officer's reliance on a search warrant based upon information from 16 months earlier is valid because those who view child porn tend to collect and keep it. (4) Establishing that a IP address is assigned to a person and physical address currently without establishing that it was at the time of the offense establishes at least a slight nexus and therefore an officer's reliance on the warrant is valid.

West v. Commonwealth, JUL09, VaApp No. 1486-08-1: (1) Probable cause exists when a victim identifies a person as the potential offender, the potential offender has wounds consistent with those the victim described inflicting, the potential offender lives near the victim, and the potential offnder tries to close the door in the face of the investigating officers. (2) Exigent circumstances exist to do a warrantless entry and search shortly after a sexual/physical attack because DNA and other physical evidence from the victim could be present on the person and clothing of the potential offender and could be destroyed through cleaning.

Perry v. Commonwealth, NOV09, VaApp No. 0945-08-4: (1) If there is probable cause an officer can conduct a search of an individual prior to arrest. (2) If a person is in a car which smells of marijuana, he appears intoxicated, and another individual in the car is found to have drugs there is probable cause against the person.

Montague v. Commonwealth, NOV09, VaSC No. 090337: (1) Any seizure, no matter how brief, must have an objective justification related to law enforcement. (2) A person is seized under the 4th Amendment when police use force or a show of authority to restrain a person's freedom of movement. (3) A voluntary encounter between an officer and a citizen is not a seizure. (4) Police may walk up to anyone and request ID without implicating the 4th Amendment. (5) A person giving requested information to the police does not get 4th Amendment protections. (6) As long as police do not convey by words or deeds that compliance is mandatory they don't need objective or particularized suspicion. (7) People may feel compelled to answer an officer's questions, but this alone does not change the nature of the encounter from consensual to a seizure. (8) An encounter

between an officer and a citizen becomes a seizure only if a "reasonable person" would believe he could not leave. (8) If a person could objectively ignore the officer and walk away there is no seizure. (Factors indicating a seizure are (a) the presence of several threatening officers, (b) display of weapons, (c) physical touching of the person being questioned, and (d) use of language indicating that compliance is required. (9) Not telling a person he can leave is not dispositive as to whether an encounter was a 4th Amendment seizure. (10) Officers approached a person leaving an apartment complex and asked his identity. They did nothing to keep him from leaving while they called dispatch for a warrant check and checked the no trespassing list. Therefore, no 4th Amendment seizure.

Whitaker v. Commonwealth, JAN10, VaSC No. 090175: (1) A suspect's presence in a high crime area, standing alone, is not enough to support a reasonable particularized suspicion; however, it is a factor to be considered. (2) Headlong flight is not necessarily indicative of wrongdoing; however, is a factor to be considered. (3) A person in a high crime area who flees from the police, abandoning his personal property, running in an evasive manner, holding on to the pocket of his jacket, and who admits to the police that he has a firearm in his pocket after they have him on the ground but before they have him handcuffed as provided the police with reasonable particularized suspicion making the removal of the firearm from his pocket constitutional.

Jones v. Commonwealth, FEB10, VaSC No. 090979: (1) When a citizen is stopped by two armed officers, in uniform & displaying their badges, and asked to accompany them to an office to fill out paperwork barring him from an apartment complex the citizen was not seized when he went with the officers to the office. (2) The officer's subjective intent to place the citizen in custody if he did not voluntarily accompany him is not relevant in a 4th Amendment analysis.

5th Amendment:

Double Jeopardy:

** Yeager v, United States, JUN09, USSC No. 08-67: If a jury acquits on some charges, but hangs on others the hung charges are a "non-event." "To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide." Thus, if there is an issue of ultimate fact in all of the charges against a defendant, a jury acquittal that necessarily decided that issue in his favor protects him from retrial for any hung charge for which it is an essential element.

Armstead v. Commonwealth, DEC09, VaApp No. 1132-08-2: (1) Double jeopardy applies when (a) the two offenses involved are identical, (b) the former offense is a lesser included of the later offense, or (c) the later offense is a lesser included of the former offense. (2) It is the identity of the offense, and not the act, which is referred to in the constitutional guaranty against double jeopardy. (3) If there are separate elements in the offenses charged there is no double jeopardy violation. (4) Because assault must have the intent to harm or cause apprehension of the possibility of bodily harm and firing at an occupied vehicle only requires an intent to shoot at an occupied vehicle (no intent to harm people in it), assault is not a lesser included offense of firing at an occupied vehicle.

Bobby v. Bies, JUN09, USSC No. 08-598: (1) There is no double jeopardy without an acquital. If a mitigating factor was previously considered (mental retardation), reconsidering it does not implicate double jeopardy. (2) Issue Preclusion does not apply "[i]f a judgment does not depend on a given determination." In this case, a mitigating factor is not depended upon in imposing a death penalty. (3) Issue Preclusion can be overridden if there is an intervening change in the law (ie: mentally retarded cannot be executed).

Payne v. Commonwealth, APR09, VaSC No. 081258: Felony Murder and Aggravated Involuntary Manslaughter each have one element different from the other and thus the conviction for both is valid for the killing of one person. Felony murder requires an unintentional killing during a felony. Aggravated Involuntary Manslaughter (in this case) required the defendant to be driving under the influence in a manner showing a reckless disregard for life.

Fullwood v. Commonwealth, FEB10, VaSC No. 091015: Selling two different drugs to two different individuals is not a single transaction under 18.2-255.2, even though they were sold from the same container and at the same location, so double jeopardy does not apply.

Gheorghiu v. Commonwealth, AUG09, VaApp No. 0801-07-4: Identity theft and credit card fraud are separate crimes and neither punishes a lesser included offense of the other.

Therefore, prosecution for both does not violate double jeopardy.

Right to Remain Silent:

**EXPIRATION OF ASSERTED RIGHT: Maryland v. Shatzer, FEB10, USSC No.08–680: (1) Once a suspect asserts his right to not speak or have an attorney present and he is released from "Miranda custody" the police cannot ask the suspect to waive his Miranda rights for 14 days. (2) Being in prison after a conviction does not count as "Miranda custody." (3) The decision hints that being in jail awaiting trial is "Miranda custody."

** Zektaw v. Commonwealth, JUN09, VaSC No. 081738: (1) "I'd really like to talk to a lawyer" is language that a reasonable officer would realize is an invocation of the *Miranda* right to remain silent without counsel. (2) The invocation of the right to counsel must be clear, unambiguous, and unequivocal. (3) The invocation does not pass this test if the defendant is asking police to clarify his rights, being unclear in whom he is asking to be present, stating he might want an attorney, or expressing reservations about continuing without an attorney.

** Commonwealth v. Ferguson Jr

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ground as an officer moves to arrest him, the officer can ask safety related questions about the firearm.

Florida v. Powell, FEB10, USSC No. 08–1175: "You have the right to talk to a lawyer before answering any of our questions. . . You have the right to use any of these rights at any time you want during this interview" told the suspect that he could demand his lawyer before answering any particular question – not just before any questions were asked.

Herron v. Commonwealth, FEB10, VaApp No.1759-08-2: A person in possession of drugs who is being taken to jail retains his right to remain silent about his possession of the drugs, but is not absolved of possession in a jail when he is searched in the jail. He is pressured to reveal the possession because of consequences which may follow. However, pressure is not denial.

GOVERNMENT AGENT: US v. Day, JAN10, 4Cir No. 08-5231:(1) The 4th and 5th Amendments use the same test to determine whether a private individual acted as a governmental agent. (2) The defendant bears the burden of proving that an agency relationship exists between a private individual and the government. (3) The two primary factors to be considered are (a) whether the Government knew of and acquiesced in the private individual's challenged conduct; and (b) whether the private individual intended to assist law enforcement or had some other independent motivation. (4) The fact that Virginia regulates private security officers and gives them the power to arrest for crimes committed in their presence does not mean that Virginia knew of and acquiesced in their actions. (5) Government knowledge and acquiescence is shown if a private individual would expect some benefit or detriment from the government when he took the action. (6) Under the "public function" test, a private security officer given the plenary powers of a governmental law enforcement officer is an agent of the government. (7) Because Virginia only gives private security officers the power to arrest for crimes committed in their presence, all private security officers have is the power to effect a citizen's arrest not the plenary arrest powers of a governmental law enforcement officer.

Due Process:

** IDENTIFYING THE DEFENDANT: Settle v. Commonwealth, NOV09, VaApp No. 1173-08-4: (1) Proving the identity of the offender is a necessary part of prosecuting an offense and (2) the Commonwealth must prove it beyond a reasonable doubt. (3) If (a) the defendant does not challenge that he is properly the person on trial and (b) the trial judge finds that witnesses looked at defendant and in other ways indicated knowledge of him (nodding toward him), then there is no specific requirement that a witness specifically point out the defendant or that the Commonwealth ask the judge to let the record reflect that the defendant is the person the witnesses are talking about.

** Caperton v. Massey Coal, JUN09, USSC No. 08-22: (1) Whether a judge should recuse himself is not based upon actual bias, but "whether, under a realistic appraisal of psychological tendencies and human weakness, a judge's interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." (2) A judge cannot sit in a case for someone who has made a large contribution to his obtaining his place on the bench (ie $3 million toward an election).

EXPERT WITNESS FOR INDIGENT: Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: (1) The defendant does not have an absolute right to an expert paid for by the Commonwealth. (2) The fact that a particular service might be helpful to the defendant does not mean the service is constitutionally required. Mere hope or suspicion that favorable evidence might be developed is not enough. (3) In order to get an expert a defendant must demonstrate particularized need by establishing that an expert's services would materially assist in preparing the defense and the lack of an expert would result in a fundamentally unfair trial.

EXPERT WITNESS FOR INDIGENT: Dowdy v. Commonwealth, NOV09, VaSC No. 082143: (1) When an indigent defendant has demonstrated that the subject that requires expert assistance is likely to be a significant factor in his defense a trial court must determine, based on the facts of the particular case, the probable value of providing the requested assistance and the risk of error in the criminal proceeding if such is not provided. (2) A defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. (3) An indigent defendant must demonstrate a particularized need for expert assistance. (4) Demonstration of particularized need requires more than mere hope or suspicion or conclusory assertions that favorable evidence may be turned up. (5) The fact that defense counsel does not have investigative resources or lacks the time or training to perform criminal investigations does not show a particularized need for an investigator.

EXCULPATORY EVIDENCE: Bly v. Commonwealth, SEP09, VaApp No. 2948-07-3: (1) Failure to disclose evidence material to guilt or punishment violates due process even if there is no bad faith. (2) There are three elements to a Brady violation: (a) the evidence must be exculpatory or impeaching, and (b) the evidence must have been withheld by the Commonwealth whether purposefully or not, and (c) prejudice must have occurred. (3) Prejudice is when there is a reasonable probability that the outcome of the proceeding would have been different if the evidence had been disclosed. (4) The burden is on the appellant to prove the trial court erred in refusing an exculpatory evidence claim. (5) When a judge is sitting as both decider of fact and law and he finds that a late disclosure of Brady evidence is of no consequence then an earlier disclosure would not have altered the case. (6) No factual finding of no prejudice should be set aside unless patently unreasonable.

BRADY: Teleguz v. Warden Sussex I, JAN10, VaSC No. 080760: In order to establish that a Brady violation has occurred a petitioner must (1) establish that the alleged withheld evidence actually exists, and (2) (a) show that the alleged evidence contained exculpatory information, or (b) show that the alleged evidence would have been valuable for impeachment purposes.

EXCULPATORY EVIDENCE: Coley v. Virginia, FEB10, VaApp No. 0275-09-2: (1) A Brady violation occurs even if the evidence was known only to the officers, but not to the prosecutor. (2) The test as to whether non-disclosed evidence was prejudicial does not require a preponderance of proof that the undisclosed evidence would have led to an acquittal. (3) The non-disclosed evidence is prejudicial and requires a conviction be overturned if the non-disclosed evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. (4) Evidence not disclosed, but which comes to light during the trial so that the defendant has the ability to cross examine witnesses with the information is not prejudicial. (5) In the face of overwhelming evidence, the failure to turn over one piece of exculpatory evidence is not prejudicial.

Rivera v. Illinois, MAR09, USSC No. 07-9995: If a judge errs in refusing to allow a peremptory strike it does not violate the defendant's due process right, unless it can be shown that the juror was unqualified or biased.

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: If potentially exculpatory evidence is lost prior to the identification of a suspect there is no due process violation unless bad faith is shown on the part of the Commonwealth.

6th Amendment:

Speedy Trial:

** Vermont v. Brillon, MAR09, USSC No. 08–88: Delays which are caused by multiple court appointed counsel are not attributable to the State for speedy trial purposes, unless there is a breakdown in the public defender system.

Public Trial:

** VOIR DIRE: Presley v. Georgia, JAN10, USSC No. 09-5270: (1) Because the 6th Amendment guarantees the defendant a public trial, the trial court cannot exclude the spectators from voir dire proceedings. (2) Under the 1st Amendment the public has a right to be present during voir dire even if neither party has asserted the right. (3) These rights may give way in circumstances such as the need to guarantee the defendant a fair trial or the government's interest in keeping sensitive information from being disclosed. (4) Even if the court finds adequate grounds for closure, the trial court is required to consider alternatives to closure, even if there are none offered by the parties, and select the narrowest alternative.

Jury:

** Chibikom v. Commonwealth, AUG09, VaApp No. 1699-08-4: (1) Only a judge or Commonwealth can decide the level of culpability between reckless driving and improper driving; a jury is not allowed to decide this element. (2) Seems to violate Apprendi et al (jury must decide all elements of an offense) from the USSC.

Rivera v. Illinois, MAR09, USSC No. 07-9995: If a judge errs in refusing to allow a peremptory strike it does not violate the defendant's due process right, unless it can be shown that the juror was unqualified or biased.

** BATSON: Thaler v. Haynes, FEB10, USSC No. 09–273: In deciding a Batson motion, a judge does not need to have observed the behavior proffered as the reason for the strike.

BATSON: Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) There are three phases to a Batson challenge: (a) The challenger must make a prima facie showing that peremptory strikes were made on racial grounds. (b) The striking party must produce race neutral reasons for the strikes. (c) The challenger then may provide reasons why the

explanations offered were pretextual. (2) If a judge finds that there were facially neutral reasons for striking a juror the burden of showing the Batson violation switches back to the challenger.

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: A jury must unanimously find a single aggravating factor for the death penalty to be imposed.

Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: (1) Excluding potential jurors who will not vote to impose death does not violate the defendant's right to a jury which is a fair cross-section of the community. (2) Death qualifying a jury serves the government legitimate interest in having a jury which can apply the law in both the guilt and sentencing phases of the trial.

Notification of the Offense:

No Cases

Right to Confront Accuser:

** Melendez-Diaz v. Massachusetts, JUN09, USSC No. 07-591: A certificate of analysis is testimonial and may not be introduced at trial unless the defendant has waived the presence of the person who did the test. (Led to current 28/14 statutes)

** Harper v. Commonwealth, APR09, VaApp No. 2441-07-2: *Crawford v. Washington* and its progeny do not extend the right to confront to sentencing hearings.

** FORFEITURE BY WRONGDOING: Crawford v. Commonwealth, DEC09, VaApp No. 1194-07-2: (1) If a defendant has engaged in conduct designed to keep a witness from testifying he forfeits his right to confront a witness. (2) Unconfronted testimony is not allowed unless evidence shows that the defendant intended to keep the witness from testifying. (3) Continuing domestic abuse can support a finding that a defendant intended to keep a witness from testifying (dissent states this is *dictum*). (4) The simple fact, without more, that the defendant killed the victim is not enough to prove intent to keep her from testifying.

** AFFIDAVIT / PRIMARY PURPOSE TEST: Crawford v. Commonwealth, DEC09, VaApp No. 1194-07-2: (1) The Confrontation Clause only applies to testimonial hearsay. (2) In order to be testimonial, the primary purpose of police questioning must be to establish or prove past events potentially relevant to later criminal prosecution. (3) Knowledge that answers might be used in a prosecution do not mean that they are testimonial. (4) An affidavit made for a primary reason other than is not testimonial. (5) An affidavit made in order to get a protective order does not have the primary purpose of

prosecution.

** 911 CALL / PRIMARY PURPOSE TEST: Wilder v. Commonwealth, JAN10, VaApp No. 2785 - 08 - 1: (1) The present sense exception to hearsay requires that the declaration (a) is contemporaneous with the act, and (b) explains the act, and (c) is spontaneous. (2) A 911 call is non-testimonial, and thus admissible without confrontation, if its primary purpose is to enable police assistance in an ongoing emergency. (3) There is a four part test as to whether there is an ongoing emergency: (a) Was the declarant speaking about current events as they were actually happening, requiring police assistance rather than describing past events? (b) Would a reasonable listener conclude that the declarant was facing an ongoing emergency that called for immediate help? (c) Was the nature of what was asked and answered during the course of a 911 call such that, viewed objectively, the elicited statements were necessary to be able to resolve the present emergency rather than simply to learn what had happened in the past? (d) What was the level of formality of the interview? Was the caller frantic, in an environment that was neither tranquil nor safe? (3) An ongoing felony does not per se constitute an emergency. (4) In considering whether evidence was sufficient to sustain a conviction – before remanding the case on other grounds – the appellate court considers all admitted evidence, including illegally admitted evidence.

OVERRULED - Harris v. Commonwealth, MAR09, VaApp No. 3046-07-2 : An affidavit from the Virginia State Police that a person had not registered as a sexual offender can be admitted without violating right to confront. (Overruled by Meledez-Diaz and statute altered by General Assembly to new 28/14 notice format)

OUTDATED – Grant v. Commonwealth, SEP09, VaApp No. 0877-08-4: Under the previous statutory scheme, if the defendant notified the Commonwealth that he wanted the analyst to be summoned by the Commonwealth for trial the Commonwealth could not introduce the certificate if it did not arrange for the analyst to be in court. (Statute altered by General Assembly to new 28/14 format)

Farmer v. Commonwealth, JAN10, VaApp No. 1694-08-3: Relies upon Magruder which required defendant under previous statutory scheme to subpoena the forensic analyst or request the court or Commonwealth to do so if the defendant did not want to allow the certificate of analysis to stand unchallenged. **OVERRULED**: 13 days after this opinion was published the USSC overruled the VaSC's holding in Magruder and, by implication, this decision as well in Briscoe v. Virginia.

Process to Obtain Witnesses:

No Cases

Right to Counsel:

** Montejo v. Louisiana, MAY09, USSC No.1529: "[T]he Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings." However, applying the exclusionary remedy to Sixth Amendment violations "was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule." The defendant henceforth only has exclusionary remedy if the 5th Amendment right to remain silent is violated.

** Kansas v. Ventris, APR09, USSC No. 07-1356: Violation of the right to counsel, in this case by planting an informant in a cell with a defendant after an attorney has been appointed for him, excludes statements made from the case in chief, but not rebuttal. (possibly overruled as to exclusion from case in chief by Montejo v. Louisiana)

** STANDBY COUNSEL-DEATH PENALTY: Porter v. McCollum, NOV09, USSC No. 08–10537: If an attorney is appointed standby counsel 30 days before trial, forbidden to talk to the defendant's family, and becomes the attorney actual after the defendant had presided through the pretrial phase and beginning of the trial, the attorney is fully responsible for investigation of mitigating evidence and presenting it during sentencing.

** LATE CHANGE OF COUNSEL: Brailey v. Commonwealth, DEC09, VaApp No. 2353-08-2 : (1) If a person has the ability to hire counsel he has the right to counsel of his choice. (2) The right to choice of attorney is limited by the government's interest in going forward with prosecutions in an orderly and expeditious manner. (3) Continuance because of a last minute change of counsel is only justified if extraordinary circumstance exist. (4) An erroneous denial of the right to choice of counsel requires no further showing of prejudice to make the constitutional violation complete. (5) Absent a showing of exceptional circumstances, a trial court denying a continuance request made at the last second because of new counsel has not denied the defendant his counsel of choice.

** INEFFECTIVE ASSISTANCE OF COUNSEL – PRACTICE GUIDELINES: Bobby v. Van Hook, DEC09, USSC No. 09–144: (1) Effective assistance of counsel is representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms. (2) Restatement of professional standards (a) are evidence of the standard (b) if they were published at the time of trial, (c) but they are not dispositive of the definition of "objectively reasonable" (the Court strongly implies that the ABA's guidelines for capital defense are far beyond objectively reasonable).

** INFORM ABOUT APPEAL: Bostick v. Stevenson, DEC09. 4Cir No. 08-6331: Failure of defense counsel to discuss an appeal with his client is both ineffective assistance of counsel and prejudicial.

Gheorghiu v. Commonwealth, AUG09, VaApp No. 0801-07-4: Violation of the right to counsel, in this case by seizing documents from the defendant's cell meant for an entirely different case, only warrants dismissal of charges if the violation is egregious or it causes a continuing prejudice to the defendant's case.

US v. Chapman, JAN10, 4Cir No. 08-7976: An attorney who does not obey his client's order to take a mistrial without prejudice offered by the judge has not been ineffective because the decision is a tactical one and therefore the choice of the attorney instead of the defendant.

8th Amendment:

Excessive Bail:

No Cases

Excessive Fines:

No Cases

Cruel and Unusual Punishment:

Wilkins v. Gaddy, FEB10, USSC No. 08–10914: (1) The amount of harm done to a prisoner does not determine whether a beating by guards was cruel and unusual. (2) The amount of harm is relevant evidence as to whether the claimed beating is plausible.

14th Amendment:

Equal Protection:

Dowdy v. Commonwealth, NOV09, VaSC No. 082143: Without showing that the Public Defender's office would actually have used their investigator in this case, the indigent defendant cannot claim an equal protection violation because his court appointed attorney was not able to procure an investigator from the judge.

Criminal Procedure

Indictment:

Gheorghiu v. Commonwealth, AUG09, VaApp No. 0801-07-4: An indictment can contain any number of counts dealing with the same offense so that the various possible manners that an offense can be proven are all covered.

IDENTITY THEFT: Gheorghiu v. Commonwealth, AUG09, VaApp No. 0801-07-4: All the acts described in the subsections of 18.2-186.3(A) stem from the same act of identity theft and therefore the Commonwealth is not required to specify which subsection it is proceeding under.

AMENDING: Pulliam v. Commonwealth, FEB10, VaApp No. 2427-08-2: (1) An amendment may not change the nature or character of an offense. (2) To determine "nature or character" the conduct proscribed is examined, (3) not the elements of the offenses. (4) Indecent Liberties and Aggravated Sexual Battery have underlying conduct which is basically the same and allows amendment from Indecent Liberties to Aggravated Sexual Battery.

Jurisdiction:

** Cases *nolle prosequi* in District Court: Kolesnikff v. Commonwealth, JUL09, VaApp No. 3202-06-4: (1) Circuit Court has no subject matter jurisdiction to review a *nolle prosequi* by either a general district court or a juvenile and domestic relations court. (2) A defendant does not have the remedy of having his case remanded to the lower court for a preliminary hearing or having the case dismissed by the circuit court.

** Wilson v. Commonwealth, AUG09, VaApp No. 1775-08-2: (1) Post conviction, a trial court maintains jurisdiction to lessen sentences under 19.2-303 as long as the defendant has not been sent to the Department of Corrections. (2) Even if it is not compatible with the public interest to lessen the sentence or there are no circumstances mitigating the sentence these are not jurisdictional questions, but questions as to whether relief should be granted.

In re: Commonwealth, JUN09, VaSC No. 080282 & 080283: When an appellate court remands a case to the trial court, the trial court has the authority and subject matter jurisdiction to decide other issues relating to the case outside the issue the appellate court directed.

Simmons v. Commonwealth, AUG09, VaApp No. 0542-08-2: Arraignment is not necessary for the trial court to have subject matter jurisdiction.

Venue:

** IDENTITY THEFT: Gheorghiu v. Commonwealth, AUG09, VaApp No. 0801-07-4: (1) For most crimes, the proper venue is where all the elements of the crime are completed. (2)Per 18.2-186.3(D), venue can be (a) where the victim resides, or (b) where a single element of the crime has been undertaken (c) even if the defendant has never been in the locality. (3) The Commonwealth must establish a strong presumption that an element occurred in the locality. (4) Because identity fraud is not completed where the information was stolen, venue lies wherever the thief takes the information.

** CREDIT CARD FRAUD: Gheorghiu v. Commonwealth, AUG09, VaApp No. 0801-07-4: (1) Venue lies where any act in furtherance of the credit card fraud occurred, not only where the card was used. (2) An act in furtherance need not be unlawful itself. (3) Possessing credit card information in one locality before entering another to use the card vests venue in the first locality.

Pretrial Motions:

** CONTINUANCE-NEW COUNSEL: Brailey v. Commonwealth, DEC09, VaApp No. 2353-08-2 : (1) Continuance because of a last minute change of counsel is only justified if extraordinary circumstances exist. (2) Absent a showing of exceptional circumstances, a trial court denying a continuance request made at the last second because of new counsel has not denied the defendant his 6th Amendment right to counsel of choice.

** SPEEDY TRIAL: Howard v. Commonwealth, DEC09, VaApp No. 0413-09-3: (1) Although the statute only states that the defendant must object to continuances asked for by the Commonwealth, if the defendant does not object to a continuance undertaken solely by the judge the speedy trial statute is tolled.. (2) If there is an unobjected to continuance within the 5 or 9 months that does not extend the case beyond the original speedy trial date, the length of that continuance still does not count against the government's requirement to have a speedy trial. (3) In this case a judge continued a case on his own motion from one date within the speedy trial term to another date within the speedy trial term. After the term had run, that time was added back in that time as tolled by the failure to object.

INVESTIGATOR: Thomas v. Commonwealth, JAN10, VaSC No. 090518: (1) To have a private investigator appointed for an indigent defendant, the defense must show a particularized need by establishing that (a) the services of an expert would materially assist him in the preparation of his defense and (b) the denial of such services would result in a fundamentally unfair trial. (2) A particularized need must be more than a hope that favorable evidence will be found.

COMPETENCY: Grattan v. Commonwealth, NOV09, VaSC No. 082547: (1) The party asserting incompetency has the burden of proving it by a preponderance of the evidence. (2) Proof of incompetency is a showing that the defendant either (a) lacks the capacity to understand the criminal proceedings against him, or (b) lacks the ability to assist in his defense. (3) Nothing in the statutory competency standard requires a defendant to actually assist himself or counsel in his defense – it merely requires that a defendant have the ability to do so.

EXCLUSION OF INSANITY DEFENSE: Grattan v. Commonwealth, NOV09, VaSC No. 082547: (1) Once a judge has found a defendant competent to stand trial , it is not abuse of discretion to exclude the insanity defense if the defendant refuses to cooperate with the Commonwealth's expert. (2) The Commonwealth is entitled to have its experts personally examine the defendant. (3) The Commonwealth is entitled to a fair rebuttal of mental health evidence presented by the defendant. (4) A trial judge does not abuse his discretion when he refuses to apply the lesser sanction of admitting evidence that the defendant refused to cooperate with the Commonwealth's mental health evaluators because it could perpetuate rather than limit the prejudice to the Commonwealth and harm the adversary process. (5) The trial court is not required to make a finding that the defendant's refusal to cooperate with the Commonwealth's experts was for strategic reasons or to obstruct justice before excluding the insanity defense.

Constitutional Issues: Arrington v. Commonwealth, MAR09, VaApp No 3072-07-1: Per 19.2-266.2 if a 4th Amendment suppression motion is not filed in a written motion 7 days prior to trial it is waived.

CONTINUANCES: Cooper v. Commonwealth, AUG09, VaApp No. 1392-08-3: (1) Continuances are in the sound discretion of the trial court. (2) An appellate court will only reverse if the trial court abused its discretion and the defendant was prejudiced. (3) Prejudice may not be presumed; the record must prove it.

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: Determination of retardation may not be done pretrial.

Thomas v. Commonwealth, JAN10, VaSC No. 090518: If a defense attorney seeks juvenile records he must identify bias or motivation to receive them.

MURDER LANGUAGE: Thomas v. Commonwealth, JAN10, VaSC No. 090518: It is not error for a trial judge to allow the word “murder” to be used in a murder trial.

Arraignment:

Simmons v. Commonwealth, AUG09, VaApp No. 0542-08-2: (1) Arraignment is not necessary for the trial court to have subject matter jurisdiction. (2) A defendant can waive his arraignment by proceeding through the case in a manner indicating he understands the nature of his charge.

Plea:

Carroll v. Commonwealth, SEP09, VaApp No. 1860-08-4: (1) An Alford plea operates exactly as a guilty plea and is to be accepted by the judge if the plea is voluntary and intelligent choice and the judge finds an adequate factual basis for the conviction. (2) There is no difference between entering an Alford plea and pleading *nole contendere* or no contest.

Jury Selection:

PUNISHMENT: Thomas v. Commonwealth, JAN10, VaSC No. 090518: Neither the prosecution nor the defense is allowed to ask questions in voir dire about the range of punishment which may be imposed if the defendant is convicted.

VOIR DIRE: Thomas v. Commonwealth, JAN10, VaSC No. 090518: (1) Allowable voir dire questions necessarily disclose or clearly lead to disclosure of (a) relationship, (b) interest, (c) opinion, or (d) prejudice. (2) Voir dire questions which would generate answers which are speculative or irrelevant are too ambiguous and a trial judge does not have to allow them.

Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: (1) A relationship to a particular type of person does not automatically keep a potential juror from being fair and impartial. (2) A trial court must determine whether the relationship will prevent the juror from being fair and impartial.

DEATH PENALTY: Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: A person should be stricken for cause if the potential juror's views of the death penalty would substantially impair or prevent the juror from performing her duties or following the judge's instructions.

Opening Argument:

No Cases

Motion to Strike:

** Murillo - Rodríguez v. Commonwealth, JAN10, VaSC No. 090510: (1) If a defendant introduces evidence after having made a motion to strike at the conclusion of the Commonwealth's evidence, the introduction of evidence waives the defendant's claim that the prosecution's evidence alone is insufficient. (2) If a defendant introduces evidence he must make a motion to strike after all evidence has been introduced or a motion to set aside the verdict in order to preserve his argument that the evidence is insufficient. [**Note:** approving long-standing VaApp precedent]

Arrington v. Commonwealth, MAR09, VaApp No 3072-07-1: A defendant cannot first raise whether evidence was unconstitutionally obtained during the motion to strike. The motion is limited to sufficiency of the evidence.

STANDARD: Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) At a motion to strike the judge should resolve any reasonable doubt as to sufficiency of the evidence in the Commonwealth's favor. (2) A motion to strike the evidence should only be granted when (a) it is conclusively apparent that the Commonwealth has proven no cause of action against the defendant or (b) it plainly appears that the trial court would be compelled to set aside any verdict found for the Commonwealth as being without evidence to support it.

HEAT OF PASSION: Avent v. Commonwealth, JAN10, VaSC No. 090537: Whether a killing was done in the heat of passion upon reasonable provocation is a jury question.

Jury Instructions:

** FLIGHT: Thomas v. Commonwealth, JAN10, VaSC No. 090518: (1) Although guilt may be inferred from flight, the phrase “if a person leaves the place where a crime was committed” is overly broad and including it in a jury instruction is a misstatement of the law.

ACCESSORY AFTER THE FACT: Thomas v. Commonwealth, JAN10, VaSC No. 090518: Unless there is a specific indicted charge of accessory after the fact neither the prosecution or the defense is entitled to an accessory after the fact instruction because it is not a lesser included offense.

Lacey v. Commonwealth, APR09, VaApp No. 1407-08-1: An objection to an error in a jury instruction must be made contemporaneously, prior to the jury retiring.

Chibikom v. Commonwealth, AUG09, VaApp No. 1699-08-4: A person being tried for reckless driving by speed is not entitled to an instruction allowing the jury to reduce the charge to improper driving.

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: (1) In capital cases a jury verdict form which does not give the jury the option to give life in prison even after it has found an aggravating factor is defective. (2) The fact that an instruction is based on a statutory instruction does not keep it from being defective. (3) Separate instructions which instruct the jury that the defendant could get a life sentence despite finding an aggravating factor do not salvage the defective verdict form. (4) 19.2-264.4 does not require the circuit court to abdicate its authority in tailoring jury instructions and verdict forms so that a jury is clearly instructed on the issues relevant to the particular case the jury is considering. (5) In capital murder cases jury verdict forms must require the jury to state which aggravating factor they have found unanimously.

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: If the Commonwealth loses evidence that was potentially exculpatory the defendant is not entitled to an adverse inference instruction when there is no finding of bad faith against the Commonwealth.

Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: (1) A jury instruction which tells the jury that it can "infer that every person intends the natural and probable consequences of his acts" does not shift the burden of proof. (2) This instruction only informs the jury of a permissive inference, not a presumption.

CONSEQUENCES: Thomas v. Commonwealth, JAN10, VaSC No. 090518: "You may infer that every person intends the natural and probable consequences of his acts." is well established and oft upheld jury instruction and does not constitute a presumption.

MALICE: Thomas v. Commonwealth, JAN10, VaSC No. 090518: Jury instructions can tell the jury that they can infer malice from (a) a deliberate, willful and cruel act against another, or (b) the deliberate use of a deadly weapon.

Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) An instruction is proper only if supported by more than a scintilla of evidence. (2) If the instruction is not applicable to the facts and circumstances of the case, it should not be given.

Closing Argument:

Avent v. Commonwealth, JAN10, VaSC No. 090537: A prosecutor's argument must not appeal to the jurors' passions by exciting their personal interests in protecting the safety and security of their own lives and property.

Mistrial:

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: (1) A foreman sending a letter to the judge that "We have been unable to get a unanimous decision. It appears we will be unable to." and an individual juror stating "My decision this time is firm and final and deliberation has crossed the line into peer pressure." is not enough to require a judge to declare a mistrial. (2) It is within the sound discretion of the judge to decide whether to declare a mistrial because the jury was hung. (3) The judge may consider (a) seriousness of the matter to the community, (b) the length of the trial, and (c) the complexity of the trial proceedings when exercising her discretion. (4) A judge has the option of giving an Allen charge.

Jury Sentencing:

** STANDBY COUNSEL-DEATH PENALTY: Porter v. McCollum, NOV09, USSC No. 08–10537: If an attorney is appointed standby counsel 30 days before trial, forbidden to talk to the defendant's family, and becomes the attorney actual after the defendant had presided through the pretrial phase and beginning of the trial, the attorney is fully responsible for investigation of mitigating evidence and presenting it during sentencing.

** MENTAL RETARDATION - Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: (1) There is no statute stating that the issue of mental retardation can be decided separately from other issues in the sentencing phase. (2) 19.2-264.4 mandates that the issue of mental retardation be determined as part of the sentencing phase and (3) it is not to be separated from the issue of punishment.

** Ngomondjami v. Commonwealth, JUN09, VaApp No.0500-08-4: (1) In a traffic case, the introduction of prior traffic offenses is under 46.2-943 not 19.2-295.1. (2) No prior notice of intent to introduce prior traffic convictions during jury sentencing is required under 46.2-943. (3) A DMV transcript is allowed to introduce prior traffic convictions. (this was a DUI case)

** Jones Jr v. Commonwealth, JUL09, VaApp No. 1802-08-1: (1) A defendant may not tell the jury the fact that he had previously been held in jail for this offense, nor the amount of time he was held, before the charge had been previously *nolle prosequi*. (2) Mitigating evidence a defendant may introduce during sentencing is that proving a good previous record, and extenuating circumstances tending to explain, but not excuse, the commission of the crime. (3) A defendant may not present evidence to the jury of (a) the impact of imprisonment on defendant's mental health, (b) a family member's illness and dependency upon the defendant, (c) impact on defendant's job, (d) impact on defendant's family, or (e) a life history of the defendant.

Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: What prison life is like is not relevant mitigating evidence.

Teleguz v. Warden Sussex I, JAN10, VaSC No. 080760: What a person may expect in the penal system is not relevant mitigation evidence.

FUTURE DANGEROUSNESS: Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: (1) Security measures and conditions in prison which reduce the likelihood of future dangerousness of all inmates is not relevant for sentencing. (2) Future dangerous is not whether the defendant could harm others; it is whether he would harm others. (3) To be admissible during sentencing, evidence relating to a prison environment must connect the specific characteristics of the particular defendant to his future adaptability in the prison environment. It must be evidence peculiar to the defendant's character, history, and background in order to be relevant to the future dangerousness inquiry.

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: Introduction of a conviction and pending sentence of death is allowed.

Pending Imposition of Sentence:

J.I.R.C. v. Taylor, NOV09, VaSC No. 090845: When a Juvenile and Domestic Relations judge puts a minor in detention after finding him not innocent, pending a social history and sentencing, the juvenile is entitled to appeal the bond to the Circuit Court.

Judicial Imposition of Sentence:

** ADVISEMENT - Hernandez v. Commonwealth, NOV09, VaApp No. 1892-08-4: (1) A trial judge cannot, on his own authority, dismiss a case without the dismissal being based upon (a) legal merits, (b) factual merits, or (c) a statute allowing dismissal for other reasons. (2) The Court of Appeals specifically did not address whether a trial judge has the authority to dismiss a case for reasons outside the legal and factual merits with the agreement of both the Commonwealth and the defense. (3) A judge may take a case under advisement for a period of time, but at the end of that time must render judgement based upon the legal or factual merits of the case. (4) Once guilt, or facts sufficient, is found the judge must render a sentence within the punishment range set by the General Assembly.

** Brown v. Commonwealth, JAN10, VaSC No. 090201: Because 18.2 - 53.1 (use of firearm in a felony) prescribes a specific penalty for individuals found guilty of use of a firearm in the commission of a felony and 16.1 - 272 only contains general language on sentencing without specific penalties, when a minor is tried as an adult the mandatory minimum sentence under 18.2 - 53.1 must be applied. [**Note:** this would seem to mean that 16.1 - 272 is without effect because all felonies and misdemeanors contain specific

language and to their punishment.]

** INTERSTATE AGREEMENT ON DETAINERS: Carroll v. Commonwealth, NOV09, VaSC No. 082566: (1) When a defendant is brought to Virginia he is still serving time for the State which he came from. (2) The defendant is not entitled to have the time he was in Virginia's temporary custody count toward his sentence.

Post Trial:

19.2-392.2(A)(2): Expungement:

** Brown v. Commonwealth, JUN09, VaSC No. 081417 & 081588: (1) The fact that a defendant obeyed a court condition in order to have a charge dismissed does not establish that the defendant was guilty. (2) If a case is taken under advisement for a period of time without entry of a plea or a finding of guilt or facts sufficient and then dismissed after a period of time the defendant can have the charge expunged. (3) A person who pled guilty cannot have a charge expunged even if the case was dismissed per a first offender statute. (4) A person who pled *nolo contendere* cannot have a charge expunged because he agreed to be treated as though guilty. (5) A defendant who pled not guilty and had a judge find facts sufficient cannot have his charge expunged. (6) Any charge dismissed pursuant to a first offender statute cannot be expunged.

** SEXUAL OFFENDER: Commonwealth v. Doe, SEP09, VaSC No. 081691: (1) A Circuit Court can lift the ban from entering school property per 18.2-370.5(A). (2) However, all this does is allow the school board to determine whether, and under what circumstances, an offender may enter school property. (3) A judge cannot force the school board to let the offender onto the property.

19.2-303: Post Trial Sentence Reduction:

** Wilson v. Commonwealth, AUG09, VaApp No. 1775-08-2: (1) Whether reducing the sentence is compatible with public interest is an issue relevant to whether a reduction should be granted. (2) Whether there are circumstances in mitigation of the offense is an issue relevant to whether relief should be granted. (3) Circumstances in mitigation of an offense does not include evidence proving, or tending to prove, the defendant innocent. (4) Circumstances in mitigation " tend to lessen an accused's moral culpability for the crime committed." (5) Mitigating circumstances include (a) evidence of a good previous record, and (b) extenuating circumstances tending to explain, but not excuse, the commission of the crime.

** Roberson v. Virginia Beach, MAR09, VaApp No 3065-07-1: After 21 days, if an appeal is pending a trial court cannot alter a final order, even to correct clerical errors, without first being granted permission by the appellate court. (interpreting 8.01-428)

** In re: Commonwealth, JUN09, VaSC No. 080282 & 080283: (1) Writs of mandamus or prohibition are extraordinary acts, prospective, and may not be used as a method to appeal the conclusion of a case. (2) Neither mandamus nor prohibition can be used by the Commonwealth to change a final judgment entered by a circuit court upon the conclusion of a criminal proceeding. (3) Cases in which a trial judge has made a pretrial ruling or taken a sentence under advisement are not concluded and could be subject to the writs.

** IMPROPER SENTENCE: Rawls v. Commoonwealth, SEP09, VaSC Nos. 081672 and 082369: (1) A sentence imposed in violation of the statutory range of punishment (higher or lower) is void *ab initio* and the defendant is entitled to a new sentencing hearing. (2) The judge cannot merely change the sentence to make it consistent with the upper limit of the statutory range of punishment.

** MOTION TO VACATE: Rawls v. Commoonwealth, SEP09, VaSC Nos. 081672 and 082369: (1) A motion to vacate a sentence is an appropriate way to challenge (a) a sentence which exceeded the statutory maximum, (b) a void conviction, and (c) want of subject matter jurisdiction. (2) The Circuit Court can always correct a void or unlawful sentence.

** DISMISSAL FROM DRUG COURT: Harris v. Commonwealth, FEB10, VaSC No. 091177: (1) A defendant who goes to drug court in lieu of incarceration, per a plea agreement, has a liberty interest in his participation in drug court. (2) The sentencing court must consider evidence of the reasons for termination from the program when deciding whether to revoke the defendant's liberty and impose the sentence required by the plea.

Lamm v. Commonwealth, FEB10, VaApp No. 0085-09-2: In order for after discovered evidence to require a new trial it must be such that, if believed, it would require an acquittal.

Lacey v. Commonwealth, APR09, VaApp No. 1407-08-1: A mistrial may not be asked for once the jury has retired.

MOTION FOR NEW TRIAL: Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) Motions for new trials based on after-discovered evidence are not looked upon with favor, are considered with special care and caution, and are awarded with great reluctance. (2) The party moving for a new trial must establish four mandatory criteria: (a) new evidence must have been discovered subsequent to the trial; (b) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (c) is not merely cumulative, corroborative or collateral; and (d) is material, and should produce opposite results on the merits at another trial.

Draghia v. Commonwealth, MAY09, VaApp No. 1056-08-4: (1) Rule 1.1 divests the trial

court of jurisdiction after 21 days, even if the defendant claims ineffective assistance of counsel.

JUROR STATEMENTS: Teleguz v. Warden Sussex I, JAN10, VaSC No. 080760: The testimony of jurors should not be received to impeach their verdict.

Burns v. Commonwealth, JAN10, VaSC No. 090863: A remanded hearing to determine whether a defendant is mentally retarded is a criminal proceeding no matter when the original trial occurred. Therefore, a decision may not be rendered if the defendant is not competent.

Evidence

** BEST EVIDENCE: Brown v. Commonwealth, MAY09, VaApp No. 1034-08-2: (1) In Virginia the best evidence rule only applies to writings. (2) It does not violate the best evidence rule for a person to testify as to what he saw on a video.

** BEST EVIDENCE: Midkiff v. Commonwealth, MAY09, VaApp No. 2393-07-3: (1) Copies of digital pictures from a hard drive and copies of digital videos from a hard drive are not within the best evidence rule. (2) A person who can verify the authenticity of the copies can describe them or introduce copies into evidence.

** CERTIFICATE OF ANALYSIS - DUI: Sprouse v. Commonwealth, MAR09, VaApp No. 2515-07-2: Issuing a summons does not put a person under arrest and therefore the person is not required to give a breath or blood sample and a certificate of analysis based on such a test would be inadmissable. (Defendant was at hospital and LEO got blood sample and issued summons)(General Assembly has attempted to overrule this decision by changing Va. Code sec. 268.3(C))

** CERTIFICATE OF ANALYSIS: Roseborough v. Commonwealth, FEB10, VaApp No. 2377-07-4: (1) If a defendant volunteers to provide a sample before the officer mentions the provisions of the implied consent statute to him the officer does not have to rely on the implied consent statute. (2) A suspect cannot legitimately agree to the taking of a sample if (a) he is illegally or untimely arrested, (b) an officer informs him that he must provide the sample under the implied consent statute, and (c) the suspect provides the sample under the incorrect understanding that he can be punished if he does not. (3) The court strongly implies in dicta that if an officer asks a suspect to provide a sample, without telling the suspect about implied consent, any sample the suspect agreed to give would be admissible.

CHAIN OF CUSTODY: Hargrove v. Virginia, MAR09, VaApp No. 2410-07-2: The standard in chain of custody is "only" that "the Commonwealth's evidence affords reasonable assurance that the exhibits at trial are the same and in the same condition as they were when first obtained." If a vital link in the chain is left to conjecture the evidence may not be admitted. However, every witness who handled the evidence need not be at court and, even absent the introduction of proper paperwork, "the Commonwealth establishes, prima facie, that the contraband was received by an authorized agent "if there is no hint that it was received, for example, by some mere non-employee bystander who happened to be loitering on the laboratory's premises."

** CHARACTER OF VICTIM: Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) Where an accused adduces evidence that he acted in self-defense, evidence of specific acts is admissible to show the character of the victim for turbulence and violence, even if the accused is unaware of such character. (2) However, the admissibility of this type of

evidence is qualified in that it must be sufficiently connected in time and circumstances with the claimed self defense as to be likely to characterize the victim's conduct toward the defendant. (3) A single act of bad conduct does not establish one's unfavorable character. While evidence of a series of bad acts may collectively be admissible to establish poor character, the conduct in a single incident is insufficient.

** CONFESSIONS: Waller v. Commonwealth, NOV09, VaSC No. 081920: (1) A confession made outside of court must have corroboration. (2) A confession made during trial corroborates a confession made outside of court. (3) A confession made in court requires no corroboration.

COURT RECORDS: Waller v. Commonwealth, NOV09, VaSC No. 081920: (1) Per 8.01-389(A), the records of all judicial proceedings except orders of circuit courts shall be received as prima facie evidence. (2) Circuit court orders shall be received only when authenticated pursuant to Code 17.1-123(A). (3) Per 17.1-123 to validate a circuit court order the Commonwealth must show (a) the order is signed by the judge, or (b) the judge has signed the order book, or (c) an order is recorded in the record book on the last day of each term signed by each judge who sat in that term.

** EXCLUSION OF EVIDENCE: Logan v. Commonwealth, MAR09, VaApp No. 0468-06-3: Even if an item of evidence is excluded from a trial it can be used in a probation violation hearing alleging the same infraction, unless the defendant proves bad faith on the part of the officers.

EXPERT TESTIMONY: Jones v. Commonwealth, MAY09, VaApp No. 2721-07-3: (1) Virginia has not adopted the rule of evidence allowing an expert to testify to and about facts not admitted into evidence in a criminal case (the General Assembly has adopted of this rule in civil cases: 8.01-401.1). (2) An expert witness in a criminal trial may only testify to those facts within his personal knowledge and may not be permitted to base his opinion on facts not in evidence.

** FIELD SOBRIETY TESTS: Jones v. Commonwealth, JAN10, VaSC No. 090727: (1) "Consciousness of guilt" is shown by (a)affirmative acts of (i) falsehood or (ii) flight (b) which tend to show a person's (i) guilty knowledge of or (ii) participation in a criminal act. (2) A defendant's refusal to submit to field sobriety tests is not evidence of consciousness of guilt. (3) A court may consider a defendant's refusal to perform field sobriety tests to determine whether an officer had probable cause when the refusal is accompanied by (a) evidence of the driver's alcohol consumption and (b) its discernible effect on the driver's mental or physical state.

** HEARSAY: Cooper v. Commonwealth, AUG09, VaApp No. 1392-08-3: An NCIC may be entered into evidence to prove a matter relevant to the case under the business record exception because it has a circumstantial guarantee of trustworthiness.

IMPEACHMENT: Thomas v. Commonwealth, JAN10, VaSC No. 090518: (1) Juvenile adjudications cannot be used as impeachment of general credibility. (2) Pending juvenile proceedings which may tend to show bias or motivation of a prosecution witness must be allowed during cross examination.

PICTURES: Thomas v. Commonwealth, JAN10, VaSC No. 090518: (1) Photographs and videos of a crime scene are admissible to show (a) motive, (b) intent, (c) method, (d) malice, (e) premeditation, and (f) the atrociousness of the crime. (2) Accurate photographs of a crime scene are not rendered inadmissible solely because they are gruesome. (3) Photographs must be excluded if their prejudicial effect substantially outweighs their probative value.

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: (1) The Commonwealth does not have a duty to retain all possible evidence in a case. (2) Evidence retained prior to identification of a suspect is only potentially exculpatory until it is checked against an actual suspect (in this case hair).

Substantive Law

Motor Vehicles:

** Improper Driving (46.2-869): Chibikom v. Commonwealth, AUG09, VaApp No. 1699-08-4: (1) Improper driving is not a lesser included offense of reckless driving by speed (by inference all reckless driving). (2) Only a judge or Commonwealth may reduce the reckless to improper driving if (3) the degree of culpability is slight.

** REFUSING FIELD SOBRIETY TESTS: Jones v. Commonwealth, JAN10, VaSC No. 090727: (1) "Consciousness of guilt" is shown by (a)affirmative acts of (i) falsehood or (ii) flight (b) which tend to show a person's (i) guilty knowledge of or (ii) participation in a criminal act. (2) A defendant's refusal to submit to field sobriety tests is not evidence of consciousness of guilt. (3) A court may consider a defendant's refusal to perform field sobriety tests to determine whether an officer had probable cause when the refusal is accompanied by (a) evidence of the driver's alcohol consumption and (b) its discernible effect on the driver's mental or physical state.

Ngomondjami v. Commonwealth, JUN09, VaApp No.0500-08-4: To be convicted of DUI a defendant need only operate the vehicle; conviction does not require that he operate it with the intent of putting it in motion.

PUBLIC HIGHWAY: Seaborn v. Commonwealth, JUL09, VaApp No. 1788-08-1: (1) Parking lots that allow access to commercial establishments are not public highways. (2) Private roads in apartment complexes or mobile home parks are *prima facie* public highways, open to public use, unless proven otherwise.

Theft / Property Crimes:

18.2-91: Statutory Burglary:

** Lacey v. Commonwealth, APR09, VaApp No. 1407-08-1: (1) An attached garage is part of a residence and (2) walking through an open garage door is not a "breaking." (3) Breaking an interior door between the garage and the house does not support a burglary charge because it is not done to enter the residence.

Jones v. Commonwealth, JAN10, VaSC No. 090265: (1) Statutory burglary which occurs at night does not require a "breaking", only an entry. (2) Even a person authorized to enter a dwelling can be guilty of burglary if that person entered with the intent to commit illegal acts forbidden by the statute.

Johns v. Commonwealth, APR09, VaApp No. 2618-07-1: In order to prove that a building is a dwelling house the Commonwealth must show that it is used for habitation, such as sleeping and other usual activities of life, on at least an occasional basis.

Lunsford v. Commonwealth, OCT09, VaApp No. 2383 - 08 - 1: If there is proof of breaking and entering and a larceny as part of the same transaction, exclusive possession of the items stolen shortly thereafter gives rise to the inference that the possessor committed both the breaking and entering and the larceny.

18.2-94: Burglarious Tools:

** Gheorghiu v. Commonwealth, AUG09, VaApp No. 0801-07-4: (1) Possession of burglarious tools requires an intent to commit burglary, robbery, or larceny. (2) Possessing tools to be used in credit card fraud does not sustain a charge under this statute. (3) This decision hints that because credit card theft is a statutory creation which was not included in common law larceny that tools used to steal a credit card would not fall under this statute.

Owens v. Commonwealth, MAY09, VaApp No. 0618-08-1: When a group of individuals conspires to commit a crime involving burglarious tools, all individuals in the conspiracy are guilty of possession of burglarious tools, even if only one individual had physical possession.

18.2-95; 18.2-96; 18.2-103: Larceny

** VALUE: Baylor v. Commonwealth, OCT09, VaApp No. 2074 - 08 - 2: (1) The value of stolen property is measured at time of theft. (2) The Commonwealth may prove value by (a) a layperson's estimate as to fair market value, or (b) the opinion of an expert, or (c) traditional accounting principles starting with original costs and factoring in either appreciation or depreciation. (3) When there is no market value, actual value must be shown. (4) Unless there is evidence linking the fair market value of the item stolen with the replacement cost - i.e. proof the item appreciated, or is so new that replacement cost is equal to the fair market value - mere evidence of the replacement cost does not establish the value of the item stolen. (5) Catalytic converters stolen from used cars and no secondary market in Virginia and therefore the replacement cost does not prove the value of stolen catalytic converters.

Carter v. Commonwealth, SEP09, VaApp No. 0203-08-2: (1) When a person enters a store and participates in taking items from the shelf and giving them to another so the second person can falsely try to return them for money, the first person is guilty of larceny of the items. (2) In the absence of contrary evidence, the wrongful taking of an

item allows inference of intent to steal the item. (3) “An offer to sell the property to its owner is one of the strongest acts of dominion and control over the property.” (4) Intent to return property can negate the evidence of intent to steal, but the intent to return must be without any condition. (5) “The intent to return, conditioned on a future event that may or may not occur and based on a false assertion of ownership, should be disregarded as a matter of law and, as such, cannot negate the inference of intent to steal.” (6) Larceny is committed as soon as the person picks up an item in the store with intent to steal it.

18.2-108: Receiving Stolen Goods:

** Whitehead v. Commonwealth, JUN09, VaSC No. 080775 : A person receiving benefits from the sale of stolen goods by a third party is not sufficient to establish that the person is guilty of receiving stolen goods (boyfriend paying rent with proceeds from sales of stolen items).

18.2-186.3: Identity theft:

** Gheorghiu v. Commonwealth, AUG09, VaApp No. 0801-07-4: Identity theft is a continuing offense and does not end when the information is first taken. It continues as long as the thief retains the information with intent to commit fraud.

Drug Crimes:

18.2-248 & 18.2-248.1 Possession of Drug With Intent to Distribute

Hargrove v. Virginia, MAR09, VaApp No. 2410-07-2: A defendant shall be convicted of the quantity of whatever drug he possesses to distribute, even if he does not know the quantity. (defendant claimed not to know he had over 5 pounds of marijuana)

Williams v. Commonwealth, JUN09, VaSC No. 081577: An unemployed person with significant weight of heroin, cocaine, and 10 pills – one of which was positively tested as methadone – is guilty of possession with intent to distribute methadone.

Scott v. Commonwealth, NOV09, VaApp No. 1482-08-2: (1) Intent to distribute can be proven by (a) quantity found, (b) packaging, (c) presence of equipment used in drug dealing - specifically including (i) pagers and (ii) firearms, (d) and/or the absence of paraphernalia needed for use. (2) If drug weight is consistent with use this does not stop the defendant from being convicted of possession with intent to distribute. (3) A defendant found with small quantities of marijuana, rock cocaine, & powder cocaine; who is in possession of a firearm; who is lacking paraphernalia for use; who has the drugs

in corners; and who admits to using marijuana, but fails to admit using cocaine, is guilty of possession with intent to distribute.

Holloway v. Commonwealth, JAN10, VaApp No. 0828 - 08 - 1: (1) If a person possesses more drugs than is consistent with personal use that fact alone may be sufficient to support a conviction of possession with intent to distribute. (2) However, if a person has a small quantity of drugs the finder of fact may infer they were only for personal use. (3) To overcome an inference when the quantity is consistent with personal use the Commonwealth must provide other circumstances showing an intent to distribute. (4) Even if a substance is packaged for distribution there must be additional evidence proving that wasn't just purchased in that package. (5) Factors which may be considered are (a) how the substance is packaged, (b) the lack of an ingestion device, (c) the presence of firearms, (d) unusual sums of money, and (e) the presence of equipment such as scales or baggies which are used in drug distribution. (6) The fact that the drugs found on a person were imitation does not by itself prove that the defendant intended to distribute them; it equally viable to suppose the possessor had been fooled.

18.2-255.2: Possession with Intent to Distribute Drugs within 1,000 Feet of a School

Fullwood v. Commonwealth, FEB10, VaSC No. 091015: (1) "Property open to public use" in the statute does not mean that the that the public use to be legal. (2) Trespassing people can be publicly using an area.

53.1-203(5): Bringing Drug Into Jail:

Herron v. Commonwealth, FEB10, VaApp No.1759-08-2: (1) This is a strict liability statute. (2) A person can be convicted of possessing a drug in jail even if he did not intend to do so.

Weapon Crimes:

18.2-53.1: Use of Firearm in Felony

** Rose v. Commonwealth, MAR09, VaApp No. 2762-07-3: A firearm used in a felony is still a firearm under the statute even if it is used as a club and the victim never sees it.

** Startin v. Commonwealth, SEP09, VaApp No. 2837-08-4: (1) The purpose of the statute is to discourage criminal conduct that produces fear of physical harm. (2) A replica which looks like a firearm, but does not have the internal parts needed to fire ammunition, is sufficient for conviction.

Paiz v. Commonwealth, AUG09, VaApp No. 2142-07-4: While a member of a mob might be held responsible vicariously (principal in the 2d degree), he is not a principal in the 1st degree and cannot be convicted under that theory for using a firearm in commission of murder or malicious wounding by mob if he did not use the firearm.

18.2-308: Carrying a Concealed Weapon:

** Whitaker v. Commonwealth, JAN10, VaSC No. 090175: When a person states that he has a firearm in his pocket there is probable cause for a charge of carrying a concealed weapon even if the person may have a concealed carry permit.

18.2-308.2: Felon Possessing Firearm:

** JOINT POSSESSION: Smallwood v. Commonwealth, NOV09, VaSC No. 082228: (1) Constructive possession is enough to obtain a conviction. (2) To establish constructive possession the defendant (a) must be aware of the presence and character of the firearm, (b) may be in joint possession of the firearm, and (c) it must be subject to his dominion and control. (3) Mere proximity to the firearm does not prove possession, but it is a factor which may be considered. (4) A firearm which belongs to the passenger of a vehicle, but which is in plain sight and easy reach of the driver is in joint possession of both.

Waller v. Commonwealth, NOV09, VaSC No. 081920: If evidence is insufficient to convict of possession of a firearm after conviction of a violent felony, a person can still be convicted of the lesser offense of possession of a firearm after conviction of a felony under the same indictment.

18.2-308.2(A) & 18.2-308(A): Felon in Possession of a Concealed Bladed Item:

McMillan v. Commonwealth, Dec09, VaApp No. 2074-07-2: (1) There is a 3 part test as to whether a bladed item falls under 18.2-308.2(A): (a) Is the item listed in 18.2-308(A)? (b) Is the bladed item a weapon? (c) Does the item have similar characteristics to the items listed in 18.2-308(A)? (2) Even if the defendant states that he is carrying the bladed item for protection that does not bear upon the determination of whether it is a weapon. (3) The fact that the bladed item could be used harmfully by a person with criminal intent does not have any bearing upon whether it falls under this statute. (4) A scuba knife does not fall under this statute.

18.2-308.4(C) Possession of a Firearm While Possessing Drugs

** NEXUS: Wright v. Commonwealth, NOV09, VaSC No. 090308: (1) When a person arrested for possession of drugs leads police to a location where a firearm and drugs which he admits are his are present, he is constructively in possession of both the firearm and drugs. (2) OVERRULING STANDARD SET BY COURT OF APPEALS: There is no requirement under this statute that there be a nexus between possession of the drug and possession of the firearm. Simply possessing both is sufficient for a conviction.

Violent Crimes:

18.2-31 Capital Murder:

VILENESS: Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: (1) Vileness can be proven by showing the crime involved torture, depravity of mind, or aggravated battery. (2) Only one factor need be proven to show vileness. (3) Depravity of mind is a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. (4) A single gunshot wound, causing instant death, (a) is not aggravated battery, but (b) can involve depravity of mind. (5) (a) Execution style killings where the defendants failed to show remorse or regret or (b) a murder involving an unprovoked killing support a finding of vileness.

FUTURE DANGEROUSNESS: Teleguz v. Warden Sussex I, JAN10, VaSC No. 080760: A determination of future dangerousness revolves around an individual defendant and a specific crime.

MENTAL RETARDATION: Walker v. Kelly, JAN10, 4Cir No. 06-23: (1)To show mental retardation under Virginia law a defendant must show that (a) the disability originated prior to 18 years of age, (b) the defendant displayed intellectual functioning on IQ tests at least two standard deviations below the mean, and (c) the defendant has significant limitations in adaptive behavior. (2) Limitations on adaptive behavior are measured by looking to a person's conceptual, social, and practical adaptive skills. (3) Conceptual adaptive skills are those pertaining to language, reading and writing, money concepts, and self-direction. (4) Social adaptive skills are interpersonal skills and responsibility, self-esteem, gullibility and naivete, and ability to follow rules and obey laws. (5) Practical adaptive skills involve activities relevant to daily living, occupational skills, and maintenance of a safe environment.

18.2-32: 1st Degree Murder:

PROVOCATION: Avent v. Commonwealth, JAN10, VaSC No. 090537: Provocation

cannot be relied upon to reduce murder to manslaughter, unless the provocation so incensed the anger of the attacker to temporarily affect his reason or self control.

SELF DEFENSE: Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) Killing is self defense if it is justifiable or excusable homicide. (2) Justifiable homicide in self defense is when a person, (a) without any fault on himself in provoking or bringing on the problem, kills another (b) under reasonable apprehension of death or great bodily harm to himself. (3) If a defendant is even slightly at fault, the killing is not justifiable homicide.(4) Excusable homicide in self-defense occurs where the accused, (a) although 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 from a reasonably apparent necessity to preserve his own life or save himself from great bodily harm.

INTOXICATION: Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) Mere intoxication does not negate premeditation. (2) To negate premeditation, thus changing murder in the 1st degree to murder in the second degree, a person must have been so intoxicated as to negate deliberation or premeditation.

MALICE: Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) Manslaughter is the unlawful killing of another without malice. (2) Malice may be inferred from the deliberate use of a deadly weapon unless, from all the evidence, there is reasonable doubt as to whether malice existed. (3) A common theme running through the definitions of malice is a requirement that a wrongful act be done wilfully or purposefully. (4) Using as sawed off shotgun allows a jury to infer malice.

INTENT: Avent v. Commonwealth, JAN10, VaSC No. 090537: (1) (a) The intention to kill need not exist for any specified length of time prior to the actual killing; (b) the design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill. (2) In deciding whether there was premeditation and deliberation, the jury may properly consider (a) the brutality of the attack, (b) whether more than one blow was struck, (c) the disparity in size and strength between the defendant and the victim, (d) the concealment of the victim's body, (e) the defendant's lack of remorse and (f) efforts to avoid detection.

18.2-36: Manslaughter:

Noakes v. Commonwealth, AUG09, VaApp No. 0295-08-2: (1) A trial court's decision as to the degree of negligence can only be overturned by an appellate court if reasonable minds could not differ. (2) It is immaterial whether unlawful reckless conduct was inherently unlawful or a lawful act that became unlawful by the way it was performed. (3) When an act would otherwise have been lawful, the Commonwealth must show that its performance was so improper as to constitute negligence so gross and culpable as to

indicate a callous disregard of human life. (4) The fact that the defendant recognized and took precautions for some dangers in the situation does not forgive her the others. (5) The defendant does not have to foresee the specific manner of death, she has need only to be able to reasonably foresee that death or serious injury could occur.

Brown v. Commonwealth, NOV09, VaSC No. 090013: (1) Involuntary manslaughter consists of two elements: (a) the accidental killing of a person, contrary to the intention of the parties; and (b) the death occurs during the defendant's performance of an unlawful but not felonious act, or in the defendant's improper execution of a lawful act. (2) The "improper" execution of a lawful act must amount to an unlawful commission of that lawful act, demonstrating criminal negligence. (3) Involuntary manslaughter involving a motor vehicle operation is an accidental killing that is proximately caused by the defendant's criminal negligence involving conduct so gross, wanton, and culpable as to show a reckless disregard of human life. (4) 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. (5) 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. (6) A fleeing driver puts into operation the pursuit of police officers and is therefore guilty of involuntary manslaughter when the officer hits and kills someone. (7) The reasonableness of police actions in pursuing a fleeing vehicle is not relevant to this analysis. (8) The Court refuses to limit involuntary manslaughter to only cases in which the death is inflicted by the defendant or a third party acting in furtherance of the crime.

18.2-42: Assault or Battery as Part of a Mob

Abdullah v. Commonwealth, APR09, VaApp No. 1166-08-1: Even though the victim could not testify that the defendant struck him, defendant was part of a mob assembled to batter the defendant and took part in encircling the victim so he could not escape. Therefore, he is guilty.

Hamilton v. Commonwealth, JAN10, VaSC No. 090069: (1) A mob must have a specific purpose and a specific intent - to commit assault and battery. (2) The original assemblage of a group need not to assembled with this purpose in mind, but a lawfully assembled group may become a mob without great deliberation. (3) Whether a group becomes a mob depends on circumstances. (4) No particular words or express agreements are required to change the group's purpose or intentions. (4) Every member of a mob is criminally culpable even though he has not actively encouraged, aided, or continenced the act.

18.2-47: Abduction

** Clanton v. Commonwealth, MAR09, VaApp No. 1018-07-2: During an armed house robbery, removing a baby from the room her father is in and placing it in a room with an unrelated female girlfriend, while both are tied up, can be an abduction. It was reasonable for the trial court to conclude (1) the defendant intended to withhold the infant from the person lawfully entitled to her charge and (2) the infant was moved for the purpose of facilitating the accomplishment of the ongoing armed robbery. (3) The force in an abduction does not have to be against the abductee, it can be directed against a third party (the father tied up at gunpoint).

18.2-57: Assault & Battery

ASSAULT: Clark v. Commonwealth, MAY09, VaApp No. 2656-07-2: (1) Virginia has assimilated the tort definition of assault into criminal assault. (2) Assault requires a threat and an act meant to cause fear or apprehension of harm and creates such fear or apprehension in the victim. (3) Standing 5 feet outside a school bus door and yelling threats at the driver so the driver feels she cannot safely leave the bus is assault.

Montague v. Commonwealth, NOV09, VaSC No. 090337: (a) ASSAULT: An assault is an "attempt with force and violence, to do some bodily hurt to another, whether from wantonness or malice, by means calculated to produce the end if carried into execution; it is any act accompanied with circumstances denoting an intention, coupled with a present ability, to use actual violence against another person. (b) BATTERY: Battery is the actual infliction of corporal hurt on another that is done willfully or in anger.

Holloway v. Commonwealth, JAN10, VaApp No. 0828 - 08 - 1: (1) The intent to commit battery may be imputed from the commission of a reckless act. (2) Intent is determined by the acts of defendant and their natural consequences.

Jones v. Commonwealth, JAN10, VaSC No. 090265: (1) An intent to commit assault and battery can be inferred from the facts and circumstances of a case as well as the acts of the defendants.

18.2-57(C): Assault and Battery of a Law Enforcement Officer

** Cline III v. Commonwealth, APR09, VaApp No. 2563-07-3: The statute does not state that ABC officers are law enforcement officers and therefore the defendant cannot be convicted of a felony battery.

18.2-58: Robbery:

** Abdullah v. Commonwealth, APR09, VaApp No. 1166-08-1: Property abandoned while fleeing a mob attack which had as its purpose beating the victim cannot support robbery because the object of the beating was not to obtain the property.

Commonwealth v. Anderson, SEP09, VaSC No. 081720: A manager making eye contact when defendant enters the store, later ceasing to walk toward him when defendant draws a firearm on a cashier (a co-conspirator in a staged robbery), and calling the police is not sufficient evidence to convict the defendant of robbery of the manager.

Williams v. Commonwealth, NOV09, VaSC No. 082477: (1) The intent to commit robbery does not have to have existed for a particular length of time, but can be only momentary. (2) Larceny is a continuing offense and if the owner intervenes to retrieve his property the use of threat of force or violence to retain the property changes it into robbery. (3) Asportation is required in robbery, but need only be enough to sever the owner from his property.

ATTEMPT: Rogers v. Commonwealth, OCT09, VaApp No. 0985 - 08 - 4: (1) In order to prove robbery the Commonwealth must both prove (a) the defendant intended to steal from the victim, and (b) the defendant committed a direct act intended to accomplish the crime - however the act need not have been effective. (2) The act intended to accomplish the crime (a) cannot be merely preparatory, it must be (b) a direct step toward committing the offense. (3) The act must be one which would end in the completion of the offense except for circumstances independent of the defendants will. (4) Merely scanning a location in anticipation of a robbery is not enough for a conviction of attempted robbery. (5) If someone goes to a residence wearing a mask, carrying a firearm, and knocks on the door trying to gain entry he has attempted to commit a robbery.

18.2-58.1: Car Jacking:

Pressley v. Commonwealth, JUL09, VaApp No. 0181-08-4: Quickly approaching a car's driver; demanding money, items and the keys; and wearing a mask throughout this is reasonably calculated to produce fear and is sufficient to convict of carjacking.

Sex Crimes:

9.1-902: Registering as a Sex Offender

Johnson v. Commonwealth, MAR09, VaApp No 2309-07-2: Per 9.1-920 sex registration statutes are to be liberally construed. As registration for a crime committed in another State requires only that the crime be “similar” to a Virginia offense, as opposed to

"substantially similar", the statute in the other State need only have characteristics in common with Virginia statutes to require registration. A North Carolina conviction for aiding and abetting a second degree rape is similar to a principal in the second degree rape in Virginia and thus requires registration.

18.2-67.1(A)(2) & 18.2 67.10(3): **Mental Incapacity:**

Sanford v. Commonwealth, JUL09, VaApp No. 0230-08-4: (1) A low IQ by itself is not enough to prove mental incapacity. (2) Mental incapacity requires that the victim not understand the nature or consequences of the act. (3) If a mentally handicapped person has never had the mechanics of the act explained to her she does not understand the nature of the act. (4) If testing shows that a mentally handicapped person has no "ability to assess cause-effect relationships in social interaction" she does not understand the consequences of the act.

18.2-370.1: Custodial Indecent Liberties:

Kolesnikff v. Commonwealth, JUL09, VaApp No. 3202-06-4: (1) A minor is in a adult's custody if the adult knows the minor is sleeping over at his house with his child. (2) Lascivious means a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of inciting sexual desire and appetite. (3) Unlike in indecent exposure lascivious intent in this kind of case does not require proof of (a) defendant's sexual arousal, (b) that the defendant made gestures toward himself or the victim, or (c) the defendant asking the victim to do something for him.

18.2-386.1(A): Photographing Intimate Areas of the Body

Wilson v. Commonwealth, MAR09, VaApp No. 2783-07-3: This statute allows someone trying to take a photograph up a skirt in a public area to be convicted.

Other

16.1-253.2: Felony Violation of Protective Order:

Nolen v. Commonwealth, MAR09, VaApp No 2422-07-1: Rejecting definitions found in 16.1-283(E) and Code § 18.2-371.1, the appellate court defines (1) "serious bodily injury" in this statute to mean an injury "that can fairly and reasonably be deemed not trifling, grave, giving rise to apprehension, giving rise to considerable care, and attended with danger." (2) As well "[b]odily injury comprehends, it would seem, any bodily hurt whatsoever.."

16.1-279.1: Violation of Protective Order:

Elliot v. Commonwealth, APR09, VaSC No. 081536: (1) Phone Calls: The fact that there is no evidence other than the complaining witness' statement does not require the defendant to be found not guilty. The trial judge is entrusted with the job of determining the truthfulness of witnesses and may choose to believe the complaining witness over the defendant. (2) Visual Contact: Mere visual contact is not enough. Standing in sight next to a car a block from the complaining witness' house is not enough to find guilt beyond a reasonable doubt.

18.2-22: Conspiracy:

James v. Commonwealth, Mar09, VaApp No 2335-06-1: (1) To prove a conspiracy, the Commonwealth must show an agreement between two or more persons by some concerted action to commit an offense. (2) Because conspiracies are seldom formalized, the Commonwealth need not show an explicit agreement and can establish the conspiracy through indirect and circumstantial evidence. To be found guilty, (3) a conspirator does not need to know all the details of the conspiracy, the identity of the other conspirators, the part each member of the conspiracy is to play, or how the spoils of the conspiracy are to be divided. (4) When the conspirators agree to commit an offense they have completed the crime of conspiracy. (5) No overt act is required for a conviction.

Owens v. Commonwealth, MAY09, VaApp No. 0618-08-1: (1) Every member of a conspiracy is guilty of the crimes of other members of the conspiracy if they are reasonably foreseeable probable consequences of the original criminal design. (2) Neither a conspirator not knowing of his co-conspirator's other illegal act nor not intending the second illegal act forgives the conspirator of guilt of his co-conspirator's act.

Jones v. Commonwealth, JAN10, VaSC No. 090265: (4) A conspiracy is complete under Virginia law when two or more persons agree to commit an offense, regardless of whether they have taken a step in furtherance of the crime. (5) Proof of an explicit agreement is not required and it may be established by circumstantial and indirect evidence, including the overt acts of the parties.

Thomas v. Commonwealth, JAN10, VaSC No. 090518: (1) A principal in the second degree is as culpable as a principal in the first degree. (2) A principal in the second degree need not be present during the actual commission of the crime. (3) A principal in the second degree need only (a) encourage, (b) incite, or (c) aid in the commission of the crime. (4) Presence at the commission of a crime, without disapproving or opposing it, is a factor which jurors may use to help them determine if the defendant was a principal in the second degree. (5) If two people are acting in concert to commit a wrongful act each party is responsible for the acts of the other which were not specifically planned, but

which were the incidental probable consequences of the planned wrongful act. (6) When parties are acting in concert they are guilty of the acts of the others even if they did not intend them or anticipate they would occur.

18.2-46.2: Participation in a Criminal Street Gang:

Hamilton v. Commonwealth, JAN10, VaSC No. 090069: To prove participation in a criminal street gang the Commonwealth must show (1) a person has actively participated in or been a member of a criminal street gang, and (2) the person has knowingly and willfully participated in a criminal act listed in 18.2 - 40 6.1, and (3) the act was committed for the benefit of, at the direction of, or in association with the gang.

18.2-119: Trespassing:

** Baker v. Commonwealth, NOV09, VaSC No. 081715: The Commonwealth must prove that a "No Trespassing" sign was posted by someone authorized by the statute to do so.

18.2-325(1), 326, 328, 329 & 330, and 3.1-796.125: Cockfighting:

** US v. Kingrea, MAY09, 4Cir No. 08-5065: Even if cockfighting is a contest of skill, 18.2-333 only allows the actual skilled participant to obtain the award. It does not allow anyone to bet on the event. (only the cock can benefit from his victory)

18.2-371.1(B)(1): Felony Child Neglect:

Shanklin v. Commonwealth, APR09, VaApp No. 1093-08-1: A babysitter is presented with a lethargic child who has large parts of his body covered with duct tape holding gauze over burns which the parent says have been treated. The babysitter may be negligent, but it is not gross negligence (reversed).

18.2-427: Use of Profane or Threatening Language Over the Phone

** Lofgren v. Commonwealth, NOV09, VaApp No. 1349-08-2: (1) In order for a defendant to be convicted under this statute the language must (a) be obscene and (b) intended to coerce, intimidate, or harass. (2) Calling someone a "fucking cunt" and a "fucking bitch" in anger is invective and therefore not obscene and does not support a conviction.

Contempt:

Scialdone v. Commonwealth, FEB10, VaSC No. 090303 & Taylor v. Commonwealth, FEB10, VaSC No. 090305: (1) Direct contempt (a) occurs in open court, (b) in the presence of the judge, and (c) all the essential elements of the contempt were observed by the judge. (2) Direct contempt may be punished summarily (18.2-456) (3) Indirect contempt requires that (a) defendants be advised of the charges against them, (b) given a reasonable opportunity to meet them, (c) allowed the right to be represented by counsel, and (d) given the chance to testify and call other witnesses. (3) Irregular papers offered into evidence which require questioning and investigation by the judge, including sending people to a law office and bringing other people from that law office to court, cannot be punished summarily.

18.2-456(1): Contempt with Intent to Obstruct or Interrupt Administration of Justice:

** Singleton v. Commonwealth & Zedd v. Commonwealth, NOV09, VaSC Nos. 082270 & 090012: (1) When a defense attorney agrees with a prosecutor prior to the court date that the case will be continued and then (a) does not appear, or (b) tells his client not to appear, he has not acted with intent to obstruct justice. (2) The Supreme Court noted three possible ways that an attorney could be found in contempt under the statute and then went out of its way to say that sections 4 (misbehavior of an officer of the court) & 5 (disobedience to lawful process) had not been noted as grounds for the finding of contempt, thus limiting its consideration to section 1.

18.2-460: Obstruction of Justice:

Testa v. Commonwealth, DEC09, VaApp No. 2438-08-4: If a suspect yells through a door at officers that he is going to shoot them the suspect has "knowingly attempt[ed] to intimidate or impede a law-enforcement officer" and is guilty of obstruction under 18.2-460(B).

Atkins v. Commonwealth, JUL09, VaApp No. 1502-08-2: (1) Running away from an officer is not obstruction of justice. (2) Lying about one's own identity to an officer is not obstruction of justice.

18.2-478: Pre-Trial Escape:

Hall v. Commonwealth, DEC09, VaApp No. 2328-08-3: (1) A person under arrest is in custody for purposes of applying the escape statutes. (2) Simply telling someone he is under arrest is not enough to effect an arrest. (3) The slightest touching of a person by an

officer with the intent to arrest accomplishes the arrest. (4) When an officer tells someone he is under arrest and grabs his wrist, fighting free and running away is an escape.

58.1-348.1: Fraudulent Tax Assistance:

Brailey v. Commonwealth, DEC09, VaApp No. 2353-08-2: (1) The statutes expansive language intended to criminalize all conduct regarding false tax returns. (2) The Commonwealth need not prove that the defendant prepared the returns. (3) The Commonwealth must only prove that the defendant "aided, assisted, counseled, or advised in the preparation."

Probation Violations

** POLYGRAPH: Turner v. Commonwealth, NOV09, VaSC No. 082122: The testimony of a polygraph examiner or anyone holding himself out as a as a polygraph expert is unreliable and inadmissible in a probation revocation hearing.

** EXCLUSION OF EVIDENCE: Logan v. Commonwealth, MAR09, VaApp No. 0468-06-3: Even if an item of evidence is excluded from a trial it can be used in a probation violation hearing alleging the same infraction, unless the defendant proves bad faith on the part of the officers.

** EXCLUSION OF EVIDENCE: Logan v. Commonwealth, JAN10, VaSC No. 090706: (1) The exclusionary rule is not available in probation hearings unless there is a showing of bad faith on the part of the police. (2) Bad faith searches are motivated by (a) bias, (b) personal animus, (c) a desire to harass, (d) a conscious intent to circumvent the law, or (e) a similar improper motive. [NOTE: same case as Logan, MAR09, VaApp]

** ADMITTING SEXUAL OFFENSE: Carroll v. Commonwealth, SEP09, VaApp No. 1860-08-4: A defendant who enters an Alford plea and is ordered into sex offender therapy must confess his crime to the therapist or he is in violation of his probation.

** Scott v. Commonwealth, MAY09, VaApp No. 1557-07-2: (1) No State but Virginia can revoke a probationer's Virginia probation. (2) Should another State purport to put a probationer in jail for violating his Virginia probation, this does not divest Virginia courts of there ability to revoke the probationer's time and have him serve time in Virginia.

Appellate

Consideration of Appellant's Argument:

** Brown v. Commonwealth, JAN10, VaSC No. 090201: Even if a party does not expressly object or take exception to a court's ruling, if a trial court is aware of a litigant's legal position and litigant does not waive that argument the argument is preserved for appeal.

** Rogers v. Commonwealth, OCT09, VaApp No. 0985 - 08 - 4: Even though the appellant's motion to strike used different language than that used on appeal, if the meaning and intention of an argument in the same on appeal and the argument made before the trial court the argument is preserved.

** 5A:18 & PLEADINGS: Dowdy v. Commonwealth, NOV09, VaSC No. 082143: If the defendant raises an issue in memoranda which were before the trial court when it made its decision the defendant has not waived its argument.

** PLEA AGREEMENTS: Carroll v. Commonwealth, SEP09, VaApp No. 1860-08-4: If a defendant does not argue for the benefit of his plea agreement during his probation violation hearing he waives the benefit and cannot argue it on appeal.

PROFFER: Ray v. Commonwealth, FEB10, VaApp No. 0573-09-2: (1) If testimony is rejected by the court before it is presented, the appellate courts are forbidden to consider the evidence unless a proffer is made. (2) A proffer allows appellate courts to consider both the admissibility of the evidence and any prejudice caused by its non-introduction.

NECESSARRY PARTY: Ghameshlouy v. Commonwealth, FEB10, VaSC no. 091120: (1) Most statutory and rule-based procedural prerequisites for the valid exercise of jurisdiction by a court may be waived, even when couched in mandatory terms by the language of the statute. (2) Even though the case was styled against the “Commonwealth” in the appeal, the participation of the proper party (a city) waives any error in not naming the proper party.

NECESSARRY PARTY: Roberson v. Commonwealth, FEB10, VaSC No. 091299: (1) The controlling documents for determining what entity served as the prosecuting authority in a criminal trial are the instrument, that is the summons, warrant, or indictment, under which the charge is brought and the orders of conviction and sentencing that conclude the trial. (2) Any defect in the notice of appeal that does not touch on its timeliness or the identity of the case to be appealed is procedural only and can be waived by the actions of the appellee. (3) If nothing in the notice of appeal informs the court that it is an appeal against a conviction obtained via a locality's ordinance the appellate court has no jurisdiction because the identity of the case has not

been properly shown.

Scialdone v. Commonwealth, FEB10, VaSC No. 090303 & Taylor v. Commonwealth, FEB10, VaSC No. 090305: (1) The purpose of Rule 5:25 and Rule 5A:18 is to (a) protect the trial court from appeals based upon undisclosed grounds, (b) prevent the setting of traps on appeal, (c) enable the trial judge to rule intelligently, and (d) avoid unnecessary reversals and mistrials. (2) In some cases an objection may be waived because a specific relief is not requested (the Court does not state an actual rule for determining this).

Vaughn v. Commonwealth, JAN10, VaSC No. 090856: Appellate courts will not consider a ruling as basis for reversal unless an objection and supporting grounds were made at the time of the ruling.

Arrington v. Commonwealth, MAR09, VaApp No 3072-07-1: If a party has not objected during the trial it has waived the argument on appeal.

ENDS OF JUSTICE: Brittle v. Commonwealth, AUG09, VaApp No. 0824-08-1: (1) If a defendant fails to object any error is waived on appeal unless the appellate court finds (a) that the trial court erred, and (b) that a grave or manifest injustice will occur or the appellant will be denied essential rights (the ends of justice exception). (2) A trial court error is not, in and of itself, a grave or manifest injustice and does not deny the defendant essential rights. (3) In general, the ends of justice exception requires that the appellant prove that he was convicted despite the failure of the Commonwealth to prove an element of the offense. (4) When the defendant has not preserved a sufficiency of the evidence objection, in this case by not stating any grounds for the motion to strike an appellate court "cannot consider the merits of [the] improperly preserved sufficiency of the evidence appeal unless there is some reason beyond mere insufficiency that invokes the ends of justice exception (examples given: insufficiency + improper jury instruction; insufficiency + alleged activity not being a crime).

ENDS OF JUSTICE: Lacey v. Commonwealth, APR09, VaApp No. 1407-08-1: (1) In order to argue a matter before the appellate courts which was not preserved by objection, there must be more than an error. (2) The petitioner must prove that a miscarriage of justice occurred. (3) The mere fact that a grave injustice may have occurred is not enough. (4) Even a constitutional error by the trial court is not sufficient, by itself, to meet this standard.

Roberson v. Virginia Beach, MAR09, VaApp No 3065-07-1: If the defendant was convicted on a locality's ordinance the defendant must appeal against that locality (not the Commonwealth).

Ghameshlouy v. Commonwealth, MAY09, VaApp No. 1882-07-1: (1) A defendant convicted under a local ordinance who files an appeal against the Commonwealth, without appealing against the locality, has not filed a notice of appeal on that charge. (2)

Even if the Commonwealth moves to amend the original petition to include the locality and the locality joins in the Commonwealth's brief there is no valid notice of appeal and their acts cannot cure the petitioner's error.

Rowe v. Commonwealth, APR09, VaSC No. 081173: If the defense asks the trial court to convict of a lesser offense it cannot then appeal on the grounds that the lesser offense was not a lesser included offense of the indicted offense. (attempted capital murder – assault and battery of a police officer)

Draghia v. Commonwealth, MAY09, VaApp No. 1056-08-4: A writ of error *coram vobis* is a civil litigation outside the limited jurisdiction of the Court of Appeals. (per this case *coram vobis* is the same as *coram nobis*: civil writ to the trial court asking it to fix a factual error)

Prieto v. Commonwealth, SEP09, VaSC Nos. 082464 & 082465: (1) Listing an error, but not briefing it, waives the argument. (2) Failing to cite any authority for an argument concerning an assignment of error is a failure to adequately brief and waives that error. (3) Arguments which simply restate the assignment of error waive the error. (4) An error not objected to during trial is waived on appeal.

Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: If a defendant raises an issue and the judge takes it under advisement or continues the matter, or in any way the defendant does not obtain a ruling the defendant has waived the argument on appeal.

EXCESSIVE SENTENCE: Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: The VaSC is required to decide if a death sentence is excessive or disproportionate to similar cases considering both the crime and defendant even if the appellant did not argue it.

STATEMENT OF FACTS: Delaney v. Commonwealth, OCT09, VaApp No. 0692-08-1: If the statement of facts does not include the motions to strike the appellate courts will not consider the sufficiency of the evidence.

Duncan v. Commonwealth, NOV09, VaApp No. 2397-08-3: If, in the brief and argument before the appellate court the appellant has only offered “general quotations of hornbook law regarding searches”, he “has failed to develop [an] argument based on the case” and the appellate court will not consider the issue on appeal.

CIVIL FORFEITURES / VaApp: Settle v. Commonwealth, NOV09, VaApp No. 1173-08-4: (1) The Court of Appeals is a court of limited jurisdiction and does not have jurisdiction over civil forfeitures, even should they require a criminal act.

INEFFECTIVE ASSISTANCE OF COUNSEL: Dowdy v. Commonwealth, NOV09, VaSC No. 082143: Ineffective assistance of counsel may not be heard on direct appeal.

Consideration of Appellee's Argument:

** Whitehead v. Commonwealth, JUN09, VaSC No. 080775 : (1) When the party seeking affirmance did not make an argument in the trial court he may not make that argument in the appellate courts. (2) Under section IIA of the decision the reason given is that "cases in which the party seeking affirmance failed to present the argument in the trial court, such that the trial court did not have an opportunity to rule on the argument, are not 'proper cases' for the application of the [right result / wrong reason] doctrine." (3) Under section IIB the court found if the Commonwealth tried to prove its case via one method of proof it cannot offer another method of proof in the appeal because the defense attorney had no opportunity to rebut the new method in the trial court.

** Perry v. Commonwealth, NOV09, VaApp No. 0945-08-4: (1) The Whitehead rule does not apply unless the Court of Appeals would have to consider factual findings the trial court never reached. (2) When the Commonwealth argues reasonable suspicion to justify a pat down at trial it puts the parties on notice that the 4th Amendment will be applied in this case and allows the Commonwealth to change its argument on appeal to claim that probable cause existed justifying a search.

Standard of Review:

Constitutional Issues:

4th AMENDMENT: Roberts v. Commonwealth, NOV09, VaApp No. 2486-08-1: Whether facts found by the trial court implicate and infringe upon the 4th Amendment is considered *de novo* by the appellate courts.

4th AMENDMENT: Montague v. Commonwealth, NOV09, VaSC No. 090337: Determining whether someone has been seized under the 4th Amendment is a mixed question of fact and law an is reviewed *de novo* by the appellate courts.

Judge's Discretion

Grattan v. Commonwealth, NOV09, VaSC No. 082547: (1) The appellate court does not substitute its judgment for the trial court's. (2) The appellate court only considers whether the trial record fairly supports the action of the trial judge.

Facts:

Clanton v. Commonwealth, MAR09, VaApp No. 1018-07-2: Appellate courts (1) do not ask whether they believe guilt beyond a reasonable doubt was proven at trial. They (2)

view the evidence in the light most favorable to the prosecution and (3) decide whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This deferential standard of review applies not only to the historical facts themselves, (4) but the inferences from those facts as well.

James v. Commonwealth, MAR09, VaApp No 2335-06-1: Appellate courts are not permitted to reweigh the evidence because we have no authority to preside *de novo* over a second trial

Negligence: Noakes v. Commonwealth, AUG09, VaApp No. 0295-08-2: A trial court's decision as to the degree of negligence can only be overturned by an appellate court if reasonable minds could not differ.

Wilson v. Commonwealth, MAR09, VaApp No. 2783-07-3: The facts determined by a judge, in a bench trial, are to be given the same weight as if they came from a jury.

Cooper v. Commonwealth, AUG09, VaApp No. 1392-08-3: (1) The trial court's findings are to be reviewed "with the highest degree of appellate deference." (2) In reviewing sufficiency, an appellate court is not limited to the facts stated by the parties or as stated by the trial judge. (3) The appellate court must consider all evidence in the record. (4) The appellate court's deferential review applies not only to historical facts, but also to inferences the trial court drew from those facts. (5) Whether a hypothesis of innocence is reasonable is subject to the same deferential review.

Bly v. Commonwealth, SEP09, VaApp No. 2948-07-3: (1) Absent clear evidence to the contrary in the record, the judgment of a trial court comes to the appellate court with a presumption that the law was correctly applied to the facts.

COMPETENCY: Grattan v. Commonwealth, NOV09, VaSC No. 082547: A trial court's determination of a defendant's competency to stand trial is a question of fact and will not be reversed on appeal unless it is plainly wrong or without evidence to support it.

Statutes:

Wilson v. Commonwealth, MAR09, VaApp No. 2783-07-3: A trial judge's decision as to the interpretation of a statute is to be reviewed *de novo* by the appellate courts.

Jury Instructions:

Chibikom v. Commonwealth, AUG09, VaApp No. 1699-08-4: An appellate court reviewing jury instructions is to make sure that "the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises."

Jury Selection

Morva v. Commonwealth, SEP09, VaSC Nos. 090186 & 090187: Appellate courts give deference to the trial judge's ruling as to whether to retain or exclude a prospective juror because the trial judge is in a better position to judge the juror's responses and determine whether seating the juror is proper.

Commonwealth v. Brown, JAN10, VaSC No. 090557: (1) The Court of Appeals may only consider issues properly brought before it by the parties. (2) Even if a party raised an issue in the trial court, the Court of Appeals cannot resurrect it if the party did not brief or argue it to the Court of Appeals. (3) The Court of Appeals cannot broadly recast a party's argument to reach an issue not argued by the party on appeal.

VOIR DIRE: Thomas v. Commonwealth, JAN10, VaSC No. 090518: (12) The standard of review for refusing to allow a voir dire question is abuse of discretion.

STRIKING A JUROR: Thomas v. Commonwealth, JAN10, VaSC No. 090518: (1) The standard of review for reviewing a judge's refusal to strike a juror is abuse of discretion. (2) In reviewing the refusal to strike a juror the appellate court will consider the entirety of questions asked to the juror, not just a single question.

JURY INSTRUCTIONS: Thomas v. Commonwealth, JAN10, VaSC No. 090518: If the judicial instruction proffered by the defense has the same error as the one given the defense cannot claim error in the instruction given.

Avent v. Commonwealth, JAN10, VaSC No. 090537: (22) An appellate court reviewing a refused jury instruction will view the facts in the light most favorable to the defendant.

PEREMPTORY STRIKES: Avent v. Commonwealth, JAN10, VaSC No. 090537: The standard of review as to whether a trial court's findings that peremptory strikes were race neutral is entitled to great deference and will not be overturned unless clearly erroneous.

EXCLUSION OF EVIDENCE: Avent v. Commonwealth, JAN10, VaSC No. 090537: Standard of review for the admission or exclusion of evidence is abuse of discretion.

CLOSING ARGUMENT: Avent v. Commonwealth, JAN10, VaSC No. 090537: The appellate standard of review as to whether a prosecution closing argument was objectionable is to allow a trial court's decision to stand unless it appears probable that the party complaining has been substantially prejudiced by the objectionable remarks or argument.

Harmless Error:

Grant v. Commonwealth, SEP09, VaApp No. 0877-08-4: (1) When a federal constitutional error is involved there must be a reversal unless the error is found beyond a

reasonable doubt to be harmless. (2) If an error might have contributed to a decision it is not harmless beyond a reasonable doubt. (3) The beneficiary of the error must either prove there was no injury or suffer a reversal. (4) The standard for a non-constitutional harmless error analysis is whether it plainly appears from the record and the evidence that there was a fair trial on the merits and substantial justice has been reached.

HARMLESS ERROR: Ray v. Commonwealth, FEB10, VaApp No. 0573-09-2: (1) Errors are subdivided into "trial error" and "structural error." (2) Trial error is subject to harmless error analysis. (3) Structural error is not subject to harmless error analysis. (4) Structural errors are limited to those few which affect the framework within which the trial proceeds. (5) Disallowing testimony of a witness is not structural error.

Remedy

Weeks v. Commonwealth, NOV09, VaApp No. 2645-08-4: When a reversal is for trial error, and not for insufficiency of the evidence, the case is to be remanded for a new trial.

Habeas

** IMMEDIATE RELEASE RULE: Carroll v. Commonwealth, NOV09, VaSC No. 082566: (1) Habeas Corpus jurisdiction is no longer predicated upon the inmates ability to be immediately released from detention. (2) Habeas corpus is only available in cases wherein a ruling in the petitioner's favor will directly impact the duration of the petitioner's confinement. (3) Habeas corpus is not available in cases wherein a ruling in the petitioner's favor will give rise to a possibility of reducing the petitioner's term of imprisonment.

INEFFECTIVE ASSISTANCE – PREJUDICE: Hash v. Director, D.O.C., NOV09, VaSC No. 081837: (1) A defendant must both show that (a) his attorney was ineffective and (b) prejudice to the defense rose from the attorney's errors. (2) Prejudice occurs when a defendant is deprived of a fair and reliable trial. (3) In deciding whether there was prejudice the appellate courts must consider the totality of the circumstances. (4) To show prejudice the petitioner must show a reasonable probability that but for the errors of counsel the result of the trial would have been different. (5) If counsel has impeached a witness during cross examination as to his desire to receive consideration in another case then the fact that there are documents in the court's file in the other case which confirm his desire to receive consideration may be error, but it does not produce prejudice.

PROSECUTORIAL MISCONDUCT: Hash v. Director, D.O.C., NOV09, VaSC No. 081837: (1) A conviction must be reversed if (a) testimony was false, and (b) the government knew it was false, and (c) it may have had an effect on the outcome of the trial. (2) False evidence includes perjured testimony only involving credibility.

Williams v. Warden, Sussex I Prison, NOV09, VaSC No. 090483: Even when mistake by the appellant's attorney leads to the Supreme Court not to address an issue, there is no prejudice if the Supreme Court, during habeas review, finds that it would have ruled against the appellant even had he properly put the issue before the Supreme Court.

Corcoran v. Levenhagen, DEC09, USSC No. 08–10495: If a court grants habeas on one ground without addressing the other grounds claimed by the petitioner, the appellate court cannot reverse the original court's decision and require that court to dismiss on all grounds. The other grounds must be addressed.

Ethics

Barret v. Virginia State Bar, APR09, VaSC No. 081935: An attorney's suspension does not relieve the VSB and courts of supervisory power over him. An attorney representing himself is subject to the supervision of the VSB and courts. Hence, a suspended attorney representing himself is subject to the supervision of the VSB and court.

J.I.R.C. v. Taylor, NOV09, VaSC No. 090845: (1) A judge cannot prevent the appeal of his decisions. (2) A Juvenile & Domestic Relations judge cannot prevent a minor from appealing his bond pending a sentencing hearing by entering an order that the J&DR judge's order of detention is interlocutory and unappealable and instructing the clerk to follow the order.

Statutory Interpretation

Statutory Interpretation

TEST WHETHER CIVIL OR CRIMINAL: Settle v. Commonwealth, NOV09, VaApp No. 1173-08-4: (1) Did the General Assembly intend the statute to be criminal or civil? (2) If the General Assembly intended the statute to be civil, is the statutory scheme so punitive in purpose or effect so as to transform it into a criminal penalty?: (a) Does the statute involve an affirmative disability or restraint? (b) Has it historically been regarded as a punishment? (c) Does it come into play only after a finding of intent? (d) Will it act as punishment or deterrence (the goals of punishment)? (e) Is there an alternative purpose rationally assignable for it? (f) Is it excessive for the other purpose assigned? (3) This test (a) applies to the statute on its face and (b) requires clear proof before the courts will override the General Assembly's intent to make a statute civil.

INTENT: Herron v. Commonwealth, FEB10, VaApp No.1759-08-2: (1) There is no constitutional requirement that a crime have an intent element. (2) If a statute is written without intent included the Commonwealth need not prove intent to convict. (3) Even a strict liability crime requires some affirmative intent to do the bodily action required to complete the crime.

STRICT INTERPRETATION AGAINST COMMONWEALTH: Fullwood v. Commonwealth, FEB10, VaSC No. 091015: Penal laws must be strictly construed against the state and limited in application to cases falling clearly within the language of the statute. We have made it clear that it is a fundamental rule of statutory construction that penal statutes are to be strictly construed against the Commonwealth and in favor of a citizen’s liberty. Such statutes may not be extended by implication; they must be applied to cases clearly described by the language used and the accused is entitled to the benefit of any reasonable doubt about the construction of a penal statute.

Wilson v. Commonwealth, MAR09, VaApp No. 2783-07-3: (1) Search out and follow the true intent of the legislature, (2) adopt a sense of the words which harmonizes best with the context, and (3) promote in the fullest manner the apparent policy and objects of the legislature. (4) Do not read a statute in a manner that will make a portion of it useless or repetitious. (5) Give reasonable effect to every word of a statute and promote the ability of the statute to remedy the harm it was directed against.

Nolen v. Commonwealth, MAR09, VaApp No 2422-07-1: (1) A basic rule of statutory construction is that a word in a statute is to be given its everyday, ordinary meaning unless the word is a word of art. (2) It is not permissible to add to or subtract from the words used in the statute.

Johnson v. Commonwealth, MAR09, VaApp No 2309-07-2: When the language of a statute is clear and unambiguous the court is bound by the plain meaning of the statutory

language.

Cline III v. Commonwealth, APR09, VaApp No. 2563-07-3: When a statute's language is clear a court must follow it disregarding policy or the wisdom of the statute.

Waller v. Commonwealth, NOV09, VaSC No. 081920: If two statutes appear to conflict they should be construed, if reasonably possible, to allow both to be valid.