CONSTITUTION

Separation of Powers

Johnson v. Commonwealth, MAY10, VaApp. No. 2919-08-3: (1) It is does not violate the separation of powers between the General Assembly and the Judiciary if the General Assembly mandates a specific sentence (18.2-308.2: five years out of five years possible).

4th Amendment

Search & Seizure

** Young v. Commonwealth, MAR11, VaApp No. 2216-09-2
Opinion: Haley, Trial Judge: Alderman, CAROLINE (Affirmed)
(1) Virginia's statutes requiring or allowing a citizen to be released on a summons are “catch and release” statutes in which a citizen is first arrested and then released from arrest. (2) To establish an arrest (a) the officer must declare the arrest and (b) (i) the officer must place hands on the citizen or (ii) the citizen must acquiesce to the arrest. (3) When a citizen signs a summons that is an acknowledgement of the citizen's acquiescence to the arrest.

** Joyce v. Commonwealth, AUG10, VaApp No. 1397-09-1: If there is probable cause to arrest someone a search of that individual is constitutional whether it takes place before or after the arrest.

** EXCLUSION - Fitchett v. Commonwealth, AUG10, VaApp No.1744-09-1: (1) Exclusion is to be used only when the evidence is obtained (a) as a direct result of or (b) during an unconstitutional search. (2) Evidence is not fruit of the poisonous tree just because it would never have come to light “but for” the unconstitutional search or seizure. (3) When the original seizure or search was unconstitutional the subsequently discovered evidence shall not be excluded if it is found “by means sufficiently distinguishable to be purged of the primary taint.” (4) If an officer starts an unconstitutional search of an individual and the individual flees, accidentally dropping a firearm the officer had yet to find in the unconstitutional search, the accidental dropping of the firearm in flight is sufficiently attenuated from the unconstitutional search and will not be excluded.

** Search Warrant: “All Other Persons Present”

Felton v. Commonwealth, MAR10, VaApp No. 2605-08-1: (1) When probable cause is challenged for staleness, the issue is whether a delay has vitiated the probable cause in existence when the warrant was issued. (2) In cases of drug dealing at a private residence the test is whether the activity is continuing in nature. (3) “All other persons present” language is based on a finding of probable cause that those present at a private residence will be engaged in criminal activity. (4) The individuals to be searched are identified by their nexus with the location of the criminal activity. (5) If probable cause continues at the location, probable cause continues to search “all other persons present.”

** U.S. v. Allen, JAN11, 4Cir No. 10-4012
Opinion: King – Trial Judge: Motz, USMd (Affirmed)
(1) To get a hearing as to whether the officer lied to get a warrant (Franks Hearing) the accused must make a substantial preliminary showing (a) that false statements were either knowingly or recklessly included in an affidavit supporting a search warrant and (b) that, without those false statements, the affidavit cannot support a probable cause finding. (2) If an officer makes an unconstitutional search the items found may not be excluded if the officer was later able to get a search warrant without relying on any information found in the original search (inevitable discovery).

** Byrd v. Commonwealth, FEB11, VaApp No. 2197-08-1
En Banc Opinion: McClanahan, VaApp Judge: Humphreys (overruled), Trial Judge: O'Brien, 2VaCir (Affirmed)
(1) A totality-of-the-circumstances test is used to determine if an informant is reliable. (2) The test for probable cause, for arrest or search, depends upon whether the informant's information would be understood by a reasonably objective police officer to constitute probable cause. (3) Basis of knowledge and reliability are important factors to be considered, but they are not separate and independent requirements to be rigidly exacted in every case. (4) Police corroboration of details of the informant's tip is a way of showing its credibility. (5) Reliability of an informant is not established by the number of convictions proceeding from his information. (6) Reliability of a defendant is established by the finding of contraband where the informant said it would be. (7) The exact number of correct tips and amount of time that an informant has been informing is not relevant as long as reliability is shown.

** Officers Posing as Home Buyers

Redmond v. Commonwealth, NOV10, VaApp No. 2443-09-4: (1) If a house is for sale, officers can pretend to be potential buyers in order to get the realtor to show them the house. (2) Officers may not exceed the behavior permitted a

potential buyer in their viewing of the house.

** U.S. v. Mason, DEC10, 4Cir No. 07-4900: If an officer develops reasonable articulable suspicion of the presence of contraband during a traffic stop he can extend the traffic stop in order for a dog to be brought to sniff the car.

** Abandonment of Vehicle

Watts v. Commonwealth, NOV10, VaApp No. 2644-09-1: When an officer initiates a consensual encounter after a defendant has parked a vehicle with temporary dealer tags at an apartment building and exited the car, the facts that the suspect fled and residents cannot identify the car does not give the officer the right to treat the car as abandoned. There is no proof that the suspect is not a resident and therefore has no permission to park a car he may have just purchased at his apartment.

§ 19.2-56.

Hicks v. Commonwealth, MAR11, VaSC No. 100727
Opinion: Lemons, VaApp Judge: (Affirmed), Trial Judge: , RICHMOND CITY (Affirmed)
(1) When activity at a drug house is such that drug sales are occurring on the first date, a search warrant is granted and the officer waits 13 days before serving the search warrant, on a second date when activity indicates drugs are being sold on the second date, it does not violate either 19.2-56's requirement that the warrant be served within 15 days or the requirement that the warrant be served forthwith.

Jones v. Commonwealth, APR10, VASC No. 091539: (1) A wallet is neither a weapon nor contraband and therefore it is unconstitutional to seize it during a Terry pat down. (2) If the driver of a car states that he does not have a physical ID, but the name and information he gives match those of a valid driver, the police are not required to stop their investigation of the individual's identity and therefore are not required to stop their seizure of the suspect.

Exigent Circumstances – Smith v. Commonwealth, AUG10, VaApp No. 1534-09-1: (1) When there is an anonymous call describing the occupants of a residence and stating that a drug deal is taking place and police at the scene see someone in the house running from the front room with something white in his hands exigent circumstances allow the officer to enter the residence in order to preserve potential evidence. (2) The combination of the occupants of the residence matching the description of the anonymous call and the act of one of the residents fleeing with a white object in his hand provides probable cause for the drug deal reported by the anonymous call.

Atkins v. Commonwealth, AUG10, VaApp No. 1864-09-1: (1) When a passenger in a car does not assert a possessory interest in the car or the contraband found he cannot challenge the constitutionality of the search of the car. (2) Whether a passenger can assert a 4th Amendment objection to a search is a totality of the circumstance test including at least 5 factors: (a) showing a possessory interest, (b) showing he had a right to exclude others from the vehicle, (c) showing that he had exhibited a subjective expectation that the vehicle would remain free of government invasion, (d) showing he exercised control over a vehicle, or (e) showing he took precautions to maintain his privacy. (3) A passenger of a car may challenge the constitutionality of a stop because he is seized during the stop. (4) When a traffic stop has changed into an investigation of whether another person in the car has pending warrants, there is no constitutional violation in detaining other persons in the car even though their identities had already been checked and their ID's returned, even if there is no reason to suspect the other persons of criminal activity.

(to be reheard en banc) GPS DEVICE ATTACHED TO CAR: Foltz v. Commonwealth, SEP10, VaApp No. 0521-09-4: A INSTALLATION: (1) Installation of a GPS tracking device on the underside of a vehicle does not implicate 4th Amendment privacy concerns when the placement merely has the potential to invade privacy, but does relay any private information to the police. (2) The installation of a GPS tracking device does not violate a suspect's privacy rights when (a) the suspect has done nothing tho prevent others from inspecting the part of the vehicle where the tracker is placed, and (b) the police did not have to open a lock, cover or latch to place the GPS. (3) Parking on a street rather than private property shows a lack of intent to assert privacy rights under the 4th Amendment. (4) There is no societal interest in protecting the privacy of those activities that might occur in a bumper. (5) Placing a GPS tracking device on a vehicle which the defendant uses at the behest of his employer is not a seizure of the defendant's property. (6) Installation of a GPS tracker which does not (a) deprive the owner of dominion and control of the vehicle, (b) affect the vehicle's driving quality, (c) damage the car, (d) take up room that could have been used for passengers or packages or (e) did not alter the car's appearance is not a seizure. B. ACTIVATION: (7) Tracking a defendant via GPS as he drove down public streets is not an unconstitutional search. (8) The fact that the defendant engaged in behavior supportive of an illegal act while he was driving on a road may show a subjective desire for privacy, but it does not render activities on a public road private. (9) The GPS tracker telling the police that the defendant drove his employer's van into his employer's warehouse does not allow the defendant to rely on the 4th Amendment, especially when the police did not use any information from the trips into the warehouse in determining they should pursue the defendant on a different date.

Baker v. Commonwealth, OCT10, VaApp No. 0865-09-1: A potentially dangerous location, time of interaction, and nervousness on the part of a suspect are not sufficient circumstances to justify a Terry patdown.

Sidney v. Commonwealth, NOV10, VaSC No. 092313: If a police officer responds to an anonymous call that a person with outstanding warrants is at a particular location and checks with dispatch to confirm the warrants exist, there is reasonable articulable suspicion for a stop when the suspect resembles the description dispatch provides and is driving a car owned by someone related to the person with outstanding warrants.

Pretext Stops

Thomas v. Commonwealth, NOV10, VaApp No. 1288-09-3: (1) The fact that the seizure of a person is pretextual (car stop) does not factor into the question as to whether the seizure was constitutional. (2) The question of the constitutionality of a seizure is not dependent on the officer's state of mind, what the officer says, or evidence of the officer's subjective rationale. (3) An objective assessment of the officer's actions in light of the facts and circumstances at the time of seizure will determine whether the seizure was constitutionally valid. (4) When a seizure is valid (traffic violation) the officer does not violate the 4th Amendment when he briefly extends the seizure to ask questions not related to the objectively valid reason for the seizure. (5) It is not unreasonable to extend the time of the seizure of one person in a car in order to run a warrant check on another person in the car. (6) During a traffic stop the officer has the authority to (a) obtain registration of the vehicle; and (b) get the identities of all persons in the car; and (c) seek radio dispatch confirmation of the information gotten from those in the car; and (d) detain the persons in the car, other than the driver, for the duration of the stop; and (e) ask questions unrelated to the stop; and (f) order anyone in the vehicle to exit it; and (g) walk a drug sniffing dog around the vehicle; and (h) seize weapons the moment they are seen.

Terry Pat Downs

United States v. Hernandez Mendez, NOV10, 4Cir No. 09-4511: (1) The subjective intent and motivation of the officer when he does a Terry pat down is irrelevant in determining if the pat down is constitutional. (2) If the facts are sufficient to warrant a protective pat down the subjective intent of the officer is of no concern.

Observing a Drug Deal

Powell v. Commonwealth, NOV10, VaApp No. 1708-09-3: (1) The exchange of an unknown item for money is not enough alone to provide probable cause for a

drug arrest. (2) Additional circumstances may provide probable cause if they are indicative of a drug deal. (3) When an experienced drug enforcement officer sees a car leave a known drug dealing location, go to a site, meet with another car, hand money and an object from one car to another, leave the site within 30 seconds, and the driver rubs his finger as though wiping off crack cocaine, there is probable cause for a drug arrest.

Exigent Circumstances

United States v. Taylor, NOV10, 4Cir No. 10-4234: When an officer finds a young child wandering the street alone he is justified in entering the house the child says she came from to see if a guardian is home (after someone has yelled in and gotten no answer) and is justified in verifying that the person found in the residence is actually the child's guardian. When that person is angry at the child, gives a false name and has ammunition in the room the officer found him can make a safety sweep of the room to check for a weapon.

U.S. v. Hampton, DEC10, 4Cir No. 09-4455: Arizona v. Gant did not limit the ability of officers to order passengers out of cars for officer safety.

CIVIL: Bellotte v. Edwards, JAN11, 4Cir No. 10-1123
Opinion: Wilkinson - Trial Judge: (Affirmed)
(1) The fact that a suspect may have child pornography does not justify a no-knock, dynamic entry into a residence at night. (2) The fact that husband and wife living in a residence both have concealed carry permits does not justify a no-knock, dynamic entry into a residence at night.

5th Amendment

Double Jeopardy

** Andrews v. Commonwealth, SEP10, VaSC No. 100374: (1) When the act violates 2 or more statutes, before applying the Blockburger test the court should determine whether the legislature intended the violation to be separate crimes. (2) The prosecution may put forth different, non-compatible indictments based upon the same act to cover the different evidential possibilities. (3) If the defendant is convicted of two incompatible indictments the commonwealth must elect which one he will proceed with during the punishment phase. (4) Convicting a defendant under a capital offense of both 18.2-31(7), multiple murders in same act or transaction, and 18.2-31(8), multiple murders within 3 year, violates double jeopardy.

King Jr. v. Commonwealth, APR10, VaApp No. 0451-09-4: (1) Neither Child Abuse - § 18.2-371.1(A) - nor Child Endangerment - § 40.1-103(A) - are lesser included offenses of the other. (2) Child abuse requires serious physical harm and child endangerment does not. (3) Child endangerment requires that a child's life, health, or morality be put at risk, but child abuse has nothing to do with moral endangerment.

DUI & Aggravated Involuntary Manslaughter

Davis v. Commonwealth, JAN11 VaApp No. 2581-09-2
Opinion: Frank – Trial Judge: Osborn, 10VaCir (Affirmed)
(1) Since a DUI defendant can be convicted solely on BAC, without being intoxicated and aggravated involuntary manslaughter requires intoxication, but no BAC, DUI is not a lesser included offense and there there is no double jeopardy issue.

Right to Remain Silent

** Angel v. Commonwealth, JAN11, VaSC No. 092341
Opinion: Lacy - VaApp Judge: Unk (Affirmed) - Trial Judge: Unk, 17VaCir (affirmed)
(1) A minor (17 year old) who is read Miranda rights by officers and understands those rights, does not need a guardian present.

** Stevens v. Commonwealth, JAN11, VaApp No. 0266-09-3 (en banc -original unpublished)
Opinion: Petty
Trial Judge: Strauss, 22VaCir (Affirmed)
(1) After being told he can have a lawyer present, the answers “I want , that's what I need. I want to know what’s, you know what I’m saying.” and “That's what I want, a lawyer, man.” is not sufficient to stop police questioning if the defendant has been brought to the courthouse for his initial advisement hearing. (2) The defendant could mean he wants an attorney appointed by the judge and therefore the officers can ask questions to clarify.

Due Process

** INVOLUNTARY ADMINISTRATION OF DRUGS TO RESTORE COMPETENCY: US v. White, SEP10, 4Cir No. 09-7933: (1) Individuals have a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs which may only be overcome by an essential or overriding state interest. (2) Forced return to competency through medication is to be done rarely. (3) There is a four factor test to determine whether a criminal defendant can be forcibly returned to competence: (a) the government must (i) show important governmental interests are at stake and (ii) that special circumstances do not mitigate the interests, (b) the medication must be (i) substantially likely to render the defendant competent and (ii) substantially unlikely to have side effects that interfere significantly interfere with defendant's ability to assist his counsel, (c) less intrusive means must be unlikely to achieve the same results, and (d) the administration of the drugs must (i) be medically appropriate and (ii) in the patient's best medical interests in light of the defendant's medical condition. (4) If an offense carries a punishment with a maximum sentence of 10 years it is serious for involuntary medication purposes. (5) Mitigation circumstances include, but are not limited to, (a) the possibility the defendant might be confined to an institution for the mentally ill and therefore would not be free to commit crimes, (b) the potential for future confinement if the defendant is restored to competency, (c) the fact that the defendant has already been confined for a significant amount of time, and (d) whether the crime is of a violent nature. (6) If a defendant has already been imprisoned for the entirety of her likely sentence that is a significant factor in mitigation of the government's interest . (7) Treatment which is proposed must be shown to work for the particular mental disorder in order to be imposed.

** Grand Jury Testimony

U.S. v. King, JAN11, 4Cir No. 07-4885 & 08-4405
Opinion: Motz – Trial Judge: Faber, EDNC (Overturned in part)
(1) In order to get grand jury testimony a defendant must make a plausible

showing that it is possible that there is exculpatory evidence in the testimony. (2) A plausible showing for grand jury testimony is satisfied when the defendant asks for the testimony of a specific witness. (3) Once a plausible showing has been made the trial judge must review the grand jury testimony of the individual in camera and determine if any of it must be turned over to the defense.

6th Amendment

Speedy Trial

Howard v. Commonwealth, MAR11, VaSC No. 100912
Opinion: Lacy, VaApp Judge: (Affirmed), Trial Judge: ,BOTETOURT (Affirmed)
(1) Four factors are considered in determining whether the constitutional speedy trial right has been violated: (a) length of delay, (b) reason for delay, (c) defendant's assertion of his right, and (d) prejudice to the defendant. (2) There is no requirement that prejudice be established, but the four circumstances are to be balanced to determine whether a constitutional violation has occurred.

Jury

Berghuis v. Smith, MAR10, USSC No. 08–1402: In order to make a prima facie that the venire jury did not have a fair cross section of the community defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.

Notification of Offense

Right to Confront Accuser

** Primary Purpose: Michigan v. Bryant, FEB11, USSC No. 09–150:

Opinion: Sotomayor
(1) Statements made when questioned by police are non-testimonial when circumstances objectively indicate that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. (2) The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the objective purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred. (3) That the threat has ended for the victim does not mean the threat has ended for police and others. (4) The medical condition of the victim is important to the primary purpose inquiry (a) to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and (b) on the likelihood that any purpose formed would necessarily be a testimonial one. (5) The victim's medical state provides important context for first responders to

judge the existence and magnitude of a continuing threat to the victim, themselves, and the public. (6) A conversation which is non-testimonial because of an emergency situation can evolve into a testimonial conversation. (7) Trial courts will exclude those portions of statement which are conversational. (8) The statements and actions of both (a) the declarant and (b) interrogators provide objective evidence of the primary purpose of the interrogation. (9) A statement is not testimonial merely because an emergency exists. (10) The primary purpose of an interrogation during an emergency must have been to deal with the emergency in order for the answer to not be testimonial. (11) The Court expressly states that, while it may have hinted that dying declarations are non-testimonial, it does not address that issue in this case. (12) There may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.

** Crawford v. Commonwealth, JAN11, VaSC No. 100202
Opinion: Lemons – VaApp Judge (en banc): (Overturned) – VaApp Judge: (Affirmed) – Trial Judge: (Overturned)
(1) An affidavit is testimonial. (2) It violates the right to confront if an affidavit is introduced into evidence. (3) A statement is nontestimonial if it is made in the context of an ongoing emergency and is given for the purposes of resolving that emergency. (4) A statement is testimonial if (a) it is given while there was no emergency in progress and (b) is made for the purpose of establishing or proving past events (c) potentially relevant to later criminal prosecution. (4) If an affidavit is unconstitutionally introduced it is subject to a harmless error review on appeal. (5) The forfeiture by wrongdoing doctrine requires that the defendant has killed the victim with the intent of keeping her from testifying against him in order for an affidavit of this sort (domestic protection order) to be admitted.

** Satterwhite v. Commonwealth, JUL10, VaApp No. 0849-09-1: (1) Dying declarations do not violate the right to confront because they were a recognized exception prior to the promulgation of the constitution.

** Aguilar v. Commonwealth, SEP10, VaSC No. 082564: (1) As long as the analyst who came to the conclusions and entered them into the certificate is available to testify the certificate is admissible. (2) Failure to call a technician or analyst who worked on the analysis but did not make and enter the final analysis on the certificate goes to the weight of the evidence, not whether the right to confront was violated. (3) Even if other technicians or analysts work on an analysis the certificate is admissible if the testifying witness (a) supervised the work, (b) reviewed the materials, (c) drew his own conclusions, and (d) did not include any statement by the other technician or analyst in the certificate. (4) If the expert has only put the conclusions of others on the certificate, without independently considering the data and coming to his own conclusion, then the

certificate is inadmissible.

** U.S. v. Williams, JAN11, 4Cir No. 09-4049
Opinion: Gregory
(1) If a defendant refuses a stipulation it is a violation of the right to confront when his attorney and the prosecutor agree to the stipulation.

** IMPEACHMENT OBJECTION: Harrison v. Commonwealth, JUN10, VaApp No. 0645-09-1: (1) A defendant who objects to a judges refusal to allow impeachment evidence does not preserve a constitutional error unless he specifically argues a violation of the right to confront. (2) To prove the exclusion of impeachment evidence was unconstitutional the defendant must show that the evidence went to the issue of bias or motive of the witness to fabricate. (3) Cross examination on general credibility (ie prior record) does not involve the constitutional right to confront.

Briscoe v. Commonwealth, SEP10, VaSC No. 070817: (remand from USSC) The prior Virginia statutory scheme for introducing certificates of analysis under former Code § 19.2-187.1 is unconstitutional.

Walker v. Commonwealth, JAN11, VaSC No. 100263
Opinion: Russell – VaApp Judge: Unk (Affirmed) – Trial Judge: Unk, 8VaCir (Affirmed)
(1) The information from an automobile Bluebook is not testimonial.

Process to Obtain Witnesses

Right to Counsel

** Padilla v. Commonwealth, MAR10, USSC No. 08–651: (1) If defense counsel advises an immigrant client that he will not be deported after conviction of a drug offense he has committed clear error. (2) If the type of conviction has unclear consequences for an immigrant defense counsel is only required to tell him that there may be adverse immigration consequences. (3) A defense counsel who does not advise his client about deportation consequences is as guilty of error as one who affirmatively misadvised the defendant.

** United States v. Nicholson, JUL10, 4Cir No. 08-6347: (1) An attorney has a conflict of interest when he represents one client who claims possession of a firearm as self defense and another client who has threatened to kill the first client, attempted to kill the first client's brother and actually killed the first client's step-father. (2) In order to establish ineffective assistance of counsel when

conflict of interest is claimed the petitioner must show that (a) there was a plausible tactic or strategy the defense did not pursue, and (b) the alternative strategy or tactic (i) was objectively reasonable under the facts as the attorney then knew them and (ii) clearly suggested by the circumstances, and (c) defense counsel's failure to pursue the strategy was linked to the conflict. (3) It does not need to be shown that the tactic or strategy would have worked, only that it was objectively reasonable.

** U.S. v. Cooper, AUG10, 4Cir No. 08-7131: (1) Although it is usually ineffective assistance of counsel not to inform a defendant of his right to appeal it is not a per se rule. (2) There is a two part test to see if an attorney should have consulted with his client: (a) would a rational defendant want to appeal, or (b) did the defendant demonstrate to counsel that he is interested in appealing? (3) The fact that a defendant entered an Alford plea does not give his attorney notice that he wants an appeal. (4) When an attorney explains to a defendant the consequences of pleading guilty, there is no ineffective assistance of counsel when the attorney does not discuss an appeal with the client if (a) the consequences are as explained, (b) the defendant has not expressed an interest in appealing, and (c) the attorney concludes there are no non-frivolous grounds for appeal.

Gray v. Warden Sussex I, MAR11, VaSC No. 080524
Opinion: UNK
(1) It is ineffective assistance of counsel to allow a defendant to be sentenced on both murder of more than one person in three years and murder of more than one person in a single event.

8th Amendment

Excessive Bail

Excessive Fines

Cruel & Unusual Punishment

** Graham v. Florida, MAY10, USSC No. 08–7412: (1) A determination as to whether a sentence is disproportionate is considered under either (a) length of sentence, or (b) categorical restrictions. (2) In determining whether the length of a sentence violates the 8th Amendments courts use a "narrow proportionality principle, that (a) does not require strict proportionality between crime and sentence but rather (b) forbids only extreme sentences that are grossly disproportionate to the crime." (3) Categorical restrictions under the 8th Amendment either (a) the nature of the offense, or (b) the characteristics of the offender. (4) A person under the age of 18 years, who did not commit murder, cannot be sentenced to life in prison without the possibility of parole.

** Angel v. Commonwealth, JAN11, VaSC No. 092341
Opinion: Lacy - VaApp Judge: Unk (Affirmed) - Trial Judge: Unk, 17VaCir (affirmed)
(1) Although it is unconstitutional to sentence a minor to incarceration for life, the fact that Virginia offers geriatric parole allows minors in Virginia to be sentenced to life in prison.

14th Amendment

Equal Protection

** Inconsistent Prosecution Theories

Ali v. Commonwealth, NOV10, VaSC No. 092461: (1) The prosecution may not use mutually exclusive theories to convict the defendant of two crimes proceeding from the exact same act. (2) Robbery requires the element of force and larceny from a person requires there be no violence and therefore a defendant cannot be convicted of both if they come from the exact same acts.

** Impeachment Evidence Suppressed by the Government

Bly v. Commonwealth, NOV10, VaSC No. 092064 **[OVERRULING VaApp No. 2948-07-3]**: (1) If the government has suppressed evidence the standard as to whether the verdict must be overturned is whether the evidence suppressed was material. (2) Evidence is material if its suppression undermines confidence in the outcome of the trial. (3) There are four considerations in determining materiality: (a) a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal; (b) a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict; (c) a harmless error analysis is unnecessary once materiality has been determined; and (d) suppressed evidence must be considered collectively, not item by item. (4) If the suppressed evidence would have (a) impeached the only witness for the government and (b) called into question the government's investigation the conviction must be overturned.

** PROVIDING DEFENSE A TRANSCRIPT OF THE PRELIMINARY HEARING:

Asfaw v. Commonwealth, APR10, VaApp No. 2496-08-4: (1) There are two factors to be considered in deciding whether an indigent defendant is entitled to a state financed transcript of a preliminary hearing: (a) the strategic value the transcript provides to the defense, and (b) the availability of alternative devices that would fulfill the same functions as a transcript. (2) The strategic value of a transcript from a prior hearing can be presumed because of its potential use in impeachment. (3) All an indigent defendant has to assert is a reasonable basis for believing the transcript would (a) serve as a valuable discovery device in preparation for trial or (b) as a tool at trial itself for the impeachment of prosecution witnesses. (4) An indigent defendant's right to a transcript is waived if it is asserted so late that it would disrupt a scheduled trial. (5) When a transcript is requested so that the defense does not have to have a continuance

to get it or cost the State extra money for expedited transcription the defendant has not waived his right to a transcript.

** Angel v. Commonwealth, JAN11, VaSC No. 092341
Opinion: Lacy - VaApp Judge: Unk (Affirmed) - Trial Judge: Unk, 17VaCir (affirmed)
(1) The requirement under Virginia law that a parent be present for a transfer hearing in juvenile court is statutory and violating it is not a constitutional violation. (2) There is no constitutional requirement that a parent be present at non-adjudicatory hearings.

EVIDENCE

** HEARSAY / STATE OF MIND - Swanson v. Commonwealth, MAY10, VaApp No.0163-09-3: (1) If a hearsay statement contains an obvious falsehood or contrivance it will not be allowed into evidence. (2) The judge is the person who decides if something is an obvious falsehood or contrivance. (3) If there has been credible evidence introduced contradicting the statement sought to be introduced the judge is entitled to decided the statement is a falsehood rather than an indication of state of mind.

** OPENED THE DOOR - Swanson v. Commonwealth, MAY10, VaApp No. 0163-09-3: (1) The "opened the door" rationale for asking questions that would normally not be allowed under hearsay rules is only allowed for impeachment or rehabilitation of a witness. (2) The party trying to use statements under this rule must be able to show the verity of the events described in the hearsay. (3) In this case a witness testified that a man told him he'd gotten a title at DMV and the defendant tried to ask about things the defendant had told the witness he'd been told by someone at DMV. This was not about impeachment and there was no proof the DMV conversation took place. (4) Case distinguishes Jones v. Commonwealth, 50 Va. App. 437, 650 S.E.2d 859 (2007).

Statement of Future Criminal Acts

** Wood v. Commonwealth, NOV10, VaApp No. 2215-09-2: When an intoxicated person tells an officer that she is going to do something dangerous the statement is admissible as evidence because it demonstrates her level of impairment which has manifested itself in lack of critical judgment.

** ATTACK ON WITNESS: Andrews v. Commonwealth, SEP10, VaSC No. 100374: (1) When a defendant attacks and threatens to kill a codefendant while they are both in jail evidence of the attack can be presented to the jury as being probative of consciousness of guilt. (2) When a defendant commits an act of aggression against a witness, without any direct evidence as to the point of the attack, the primary question is what the likely effect of the attack would be. (3) The trier of fact is determines what the likely effect was.

** Joyce v. Commonwealth, AUG10, VaApp No. 1397-09-1: (1) Because VCIN "are routinely used and relied on by the Virginia State Police in the regular course of business" it can be introduced into evidence under the business record exception. (2) VCIN can be used to prove a defendant uses the alias which is on a conviction order.

** HEARSAY: Andrews v. Commonwealth, SEP10, VaSC No. 100374: Using an NCIC to show that an unknown police officer took a report from a relative of the defendant, reporting the theft of a weapon of the same type used by the defendant, is inadmissible hearsay.

** BEST EVIDENCE – Midkiff v. Commonwealth, JUN10, VaSC No 091793 **[CONFIRMING VaApp No. 2393-07-3]**: (1) The best evidence rule only applies to copies of papers. (2) Computer images which (a) are printed out and (b) which the defendant does not assert were altered or manipulated from the images on the hard drive (c) are reliable and can be entered into evidence.

** CHARACTER EVIDENCE: Argenbright v. Commonwealth, SEP10, VaApp No. 1758-09-3: (1) There are two tests to determine whether character evidence offered on the defendant's behalf is admissable during trial: (a) is the testimony offered for the proper purpose, and (b) has a proper foundation been laid for admission of the evidence. (2) The two purposes for which character evidence is allowed in trial are (a) reputation for pertinent character traits which would make it improbable that a person with those traits would have committed the accused offense, and (b) if the defendant has testified on his own behalf and his character for truthfulness has been called into question. (3) In larceny cases the defendant is allowed to put witnesses on the stand to testify as to his reputation for truthfulness. (4) Admissible character evidence may not be (a) testimony about (i) specific acts, (ii) specific custom, or (iii) a specific course of conduct, or (b) the personal opinion of a witness, or (c) a special reputation of the defendant based upon a particular event. (5) A character witness may only summarize the reputation of the defendant in the community. (6) Trial court did not excede its discretion when it excluded the testimony of witnesses who could not state that they had specifically discussed the defendant's truthfulness with multiple members of the community.

Introduction of Prior Convictions

Lampkin v. Commonwealth, MAR11, VaApp No. 0954-10-3
Opinion: Haley. Trial Judge: Strauss, PITTSYLVANIA (Affirmed)
(1) If an order is not signed it is authenticated if it is in an order book and an order is recorded in the order book on the last day of each term showing the signature of each judge presiding during the term. (2) There is no requirement that an order be entered showing when the term began for the unsigned order to be valid.

Cousins v. Commonwealth, MAY10, VaApp No. 1318-09-3: (1) A defendant may cross examine a witness as to whether he is in the same gang as the victim. (2) Gang membership is relevant as to (a) the fact of bias as well as its (b) source and (c) strength.

CHAIN OF EVIDENCE / CERTIFICATE OF ANALYSIS – Herndon v. Commonwealth, JUN10, VaSC No. 091265: When the officer describes the substance in depth and the packaging generally and the lab describes the substance (pre-analysis) generally and the packaging in depth they are not in conflict and the certificate can be entered into evidence.

Satterwhite v. Commonwealth, JUL10, VaApp No. 0849-09-1: (1) The fact that a declarant dies three weeks after being mortally wounded does not make declarations on the date of his wounding inadmissible. (2) It is the declarant's state of mind which determines whether the statement is a dying declaration. (3) A declarant does not have to say he knows that he is dying for a declaration to be an exception to the hearsay rule, it can be inferred that he believed himself to be dying from the circumstances.

Andrews v. Commonwealth, SEP10, VaSC No. 100374: As the defendant is forbidden to introduce evidence as to prison conditions so too is the prosecution forbidden to argue prison conditions in his closing.

Sufficient to Prove Constructive Possession

Cordon v. Commonwealth, NOV10, VaSC No. 092592: When a person has stated two days previous that a bedroom in his uncle's house was his, but gives another address as the place he actually lives, when the police find portable contraband in the room two days later constructive possession is not proven.

Angel v. Commonwealth, JAN11, VaSC No. 092341
Opinion: Lacy - VaApp Judge: Unk (Affirmed) - Trial Judge: Unk, 17VaCir (affirmed)
(1) The admission of misdemeanor sexual assault evidence and rape evidence in trials joined for both insular offenses is allowed if the evidence in both shows the same person committed the crimes.

PROCEDURE

Pretrial

Indictment

** Reed v. Commonwealth, MAR11, VaSC No. 091803
Opinion: Koontz, Trial Judge: Sharp, STAFFORD (Affirmed)
(1) An indictment does not have to be signed by the foreperson of the grand jury. (2) The valid indictment need only be found a true bill by the grand jury, announced as such in open court by the clerk with the grand jury's acquiescence, and the true bill be entered into the record. (3) It is a fatal defect if the record does state that the indictment was "delivered in court by the grand jury, and its finding recorded." (4) Although the failure of a foreperson to sign an indictment is a defect in form, it is not so defective to be unconstitutional under 19.2-227.

** Atkins v. Commonwealth, AUG10, VaApp No. 1864-09-1: The fact that a mandatory minimum sentence is required when an element is proven does not require that element to be included in the indictment because the mandatory minimum is just part of the sentencing range.

** Wade v. Commonwealth, AUG10, VaApp No. 2636-09-1: (1) There is no distinction between an accessory and a principal for a misdemeanor. (2) If a defendant does an act which would be an accessory or principal in the second degree to a misdemeanor he is a principal in the first degree. (3) 18.2-23's only lays out the punishment for conspiracy to trespass, there is no requirement that the only person who can be convicted of a misdemeanor is the actual perpetrator. (footnote 2)

Jurisdiction

** IMMEDIATE RESULT DOCTRINE: Goble v. Commonwealth, SEP10, VaApp No. 1976-09-3: (1) Under the Immediate Result Doctrine in Virginia, if a criminal act is partially completed in Virginia there is jurisdiction in Virginia to prosecute the crime.

** Mohamed v. Commonwealth, APR10, VaApp No. 1078-09-4: Although subject matter jurisdiction can be raised at any time, the judge's authority to exercise his subject matter jurisdiction must be raised at trial or it is waived.

** Kelso v. Commonwealth, AUG10, VaApp No. 0316-09-2: (1) While subject matter jurisdiction is not waivable, territorial jurisdiction is waived if it is not raised in the trial court.

** RULES OF SUPREME COURT: Smith v. Commonwealth, JUN10, VaApp No. 0422-09-1: (1) The Rules of the Supreme Court of Virginia are not jurisdictional, they are merely mandatory non-jurisdictional rule requirements. (2) A court has authority to hear a case (a) dependent upon it having (i) subject matter jurisdiction, (ii) personal jurisdiction over the parties, and (iii) territorial jurisdiction, (b) as required by (i) constitution or (ii) statute. (3) Even when a court has jurisdiction it does not have the power to reach the merits of the case if the parties do not comply with all mandatory requirements in the Rules of the Virginia Supreme Court.

Venue

** Kelso v. Commonwealth, AUG10, VaApp No. 0316-09-2: (1) Venue is not a substantive element of a crime. (2) The prosecution does not have to prove venue beyond a reasonable doubt. (3) The prosecution only has to "produce evidence sufficient to give rise to a strong presumption that the offense was committed within the jurisdiction of the court." (4) The evidence establishing the strong presumption can either be (a) circumstantial or (b) direct.

Pretrial Motions

** De Novo Appeal of JDR Judgment

Congdon v. Commonwealth, FEB11, VaApp No. 0531-10-2:
Opinion: Kelsley, Trial Judge: Hauler, 12VaCir (Affirmed)
(1) If a defendant waives his right to a de novo appeal from the juvenile and domestic relations court, in a plea agreement with the Commonwealth, the defendant cannot appeal the court's decision (normally allowed under § 16.1-296 (A)). (2) The lower court's order cannot take away the defendant's right to appeal, but the defendant can bargain it away as part of his plea agreement with the Commonwealth. (3) A district court guilty plea is inadmissible in the de novo trial in the circuit court.

** WITHDRAWAL OF JURY WAIVER ON DAY OF TRIAL: Cokes Jr. v Commonwealth, JUN10, VaSC No. 091507: (1) There are three factors to consider when determining whether a judge has abused his discretion in denying a withdrawal of a jury waiver on the day a bench trial is scheduled: (a) whether a jury could be impaneled that day, (b) whether the motion was made to delay the

trial, & (c) whether a continuance would unduly (i) delay the trial or (ii) impede the cause of justice. (2) The fact that a case had been continued once before and that the prosecution has all its witnesses in court and is prepared to go forward does not, without further evidence on the record, provide enough evidence for the appellate court to do anything more than speculate about the three factors and therefore requires the appellate court to find an abuse of discretion.

** Speedy Trial – 19.2-243

Brown v. Commonwealth, DEC10, VaApp No. 2421-09-4: (1) When speedy trial has been tolled by a declaration that the defendant is incompetent the time does not begin to run again when the doctor opines the defendant is competent, but when the judge has a hearing and declares the defendant competent. (2) There is nothing in 19.2-169.1 that states the speedy trial clock starts to run if the judge violates the law by not having a prompt hearing to determine if the defendant is competent. (3) The defendant does not have the ability to rely on the the promptness requirement to restart the speedy trial clock because the defendant can call for the hearing himself.

Howard v. Commonwealth, MAR11, VaSC No. 100912
Opinion: Lacy, VaApp Judge: (Affirmed), Trial Judge: ,BOTETOURT (Affirmed)
(1) If a defendant does not object to a judge sua sponte continuing a case, speedy trial is waived.

Arraignment

Plea

** Alford Plea – Sex Offender

Carroll v. Commonwealth, NOV10, VaSC No. 091987 **[AFFIRMING VaApp No. 1860-08-4]**: Even if a defendant pleads under Alford his failure to admit the sexual act he is accused of during mandated therapy is a violation of his probation.

Trial

Jury Selection

Cousins v. Commonwealth, MAY10, VaApp No. 1318-09-3: In a case where the victim or witnesses may be gang related, the defendant is allowed to question the venire jury members as to whether they or their family members are affiliated with a gang.

WITHERSPOONING: Andrews v. Commonwealth, SEP10, VaSC No. 100374: (1) When a potential juror says that she could not impose the death penalty unless guilt had been proven beyond a shadow of a doubt and she was 100% sure of guilt, and that she would rely on a higher authority in making her decision, it is within the trial court's discretion to sustain the Commonwealth's motion to strike for cause. (2) The standard to be applied by the circuit court in determining whether to retain a member of the venire on the jury panel is whether her answers during voir dire examination indicate to the court something that would prevent or substantially impair the performance of her duties as a juror in accordance with the court's instructions and the juror's oath.

Opening Argument

Motion to Strike

Affirmative Defense

** Goble v. Commonwealth, SEP10, VaApp No. 1976-09-3: (1) Limiting language in a statute may be a negative element, which must be proven by the Commonwealth, or a statutory defense, which must be asserted by the defendant. (2) To determine the nature of limiting language a court must consider (a) the intent of the statute, and (b) the ability of the respective parties to assert the facts needed to satisfy the limiting language. (3) Four factors are to be considered: (a) The wording of the exception and its role in relation to the other words in the statute; (b) whether in light of the situation prompting legislative action, the exception is essential to complete the general prohibition intended; (c) whether the exception makes an excuse or justification for what would otherwise be criminal conduct; (d) and whether the matter is peculiarly within the knowledge of the defendant.

** Williams v. Commonwealth, DEC10, VaApp No. 0201-10-2: (1) In determining whether specific limiting language is an element of the offense or a statutory

defense, a court should look both to (a) the intent of the statute as a whole and (b) the ability of the respective parties to assert the existence or absence of the underlying facts sustaining the applicability of the limitation. (2) Things to be considered in determining whether limiting language is an affirmative defense are (a) the wording of the exception and its role in relation to the other words in the statute, and (b) if the exception is needed to complete the prohibition intended, and (c) whether the exception excuses or justifies something that would otherwise be criminal, and (d) if the negation of a fact lies peculiarly within the knowledge of the defendant.

Jury Instructions

Keefer v. Commonwealth, JUL10, VaApp no. 0004-09-4: (1) Language of a specific court decision does not immutably dictate the content of a jury instruction. (2) A trial court may not emphasize in its instructions certain evidence for a jury to use in deciding intent. (3) It is reversible error for a trial judge to single out for emphasis a part of the evidence tending to establish a particular fact in the instructions. (4) Using language from the rationale in a particular decision as language in an instruction raises the danger of emphasizing particular facts in the case at bar.

Alford v. Commonwealth, AUG 10, VaApp No. 2125-09-3: (1) If the defendant agrees to an erroneous jury instruction the defendant may not appeal on the basis of the wrong instruction. (2) The ends of justice exception only allows an agreed upon jury instruction to be appealed if (a) a proper jury instruction is absent and (b) the evidence fails to prove an essential element of the crime. (3) The ends of justice exception is allowed when the defendant affirmatively proves that an element of the crime did not occur.

Closing Arguments

** Blanton v. Commonwealth, SEP10, VaSC No. 091878: (1) An objection to a statement made by the prosecutor in closing statements does not preserve an error unless the defendant moves for a curative instruction or a mistrial. (2) When a motion for a mistrial is made the judge must determine, considering the entire case, whether the defendant's rights are so indelibly prejudiced as to necessitate a new trial.

** Andrews v. Commonwealth, SEP10, VaSC No. 100374: As the defendant is forbidden to introduce evidence as to prison conditions so too is the prosecution forbidden to argue prison conditions in his closing.

Mistrial

** Angel v. Commonwealth, JAN11, VaSC No. 092341
Opinion: Lacy - VaApp Judge: Unk (Affirmed) - Trial Judge: Unk, 17VaCir (affirmed)
(1) If a defendant makes an objection during the Commowealth's rebuttal, is denied, and the Commonwealth immediately rests, the defense attorney can make a motion for mistrial immediately after the jury has retired to deliberate.

Rendering a Verdict

** Rice v. Commonwealth, JAN11, VaApp No. 2331-09-3
Opinion: Frank – Trial Judge: Apgar, 23VaCir (Afirmed)
(1) If evidence is presented to the jury on 4 charges and the judge on 1 charge at the same time, collateral estoppel does not prevent the judge from rendering a verdict inconsistent with the jury's 4 “not guilty” findings after the jury has rendered its verdict.

Sentencing

Jury Sentencing

MINORS - Saunders v. Commonwealth, APR10, VaApp No. 0610-09-3: (1) Under 16.1-271, if a minor has previously been convicted of an offense as an adult, in subsequent jury trials jury sentencing applies rather than 16.1-272's judicial sentencing scheme. (2) Even if the first conviction as an adult occurs while the second charge is pending the second charge is subject to sentencing by jury.

Saunders v. Commonwealth, MAR11, VaSC No. 100906
Opinion: Carrico, VaApp Judge: (Affirmed), Trial Judge: , LYNCHBURG (Affirmed)
(1) Once a juvenile has convicted as an adult all subsequent jury trials for the juvenile will have jury sentencing.

Pending Imposition of Sentence

** Bottoms v. Commonwealth, JAN11, VaSC No. 092498
Opinion: Kontz – VaApp Judge: Unk (Overturned) – Trial Judge: Unk 11VaCir (Overturned)
(1) Prior to imposition of sentence, if the defendant wants to withdraw his guilty plea the trial court need only decide (a) if the withdrawal is being made in good faith, and (b) the motion to withdraw the plea is premised upon a reasonable basis that the defendant can present substantive, and not merely dilatory or formal, defenses to the charges. (2) Prior to sentencing, the plea colloquy is not relevant in determining whether the defendant should be allowed to withdraw his guilty plea.

Judicial Imposition of Sentence

** ALLOCUTION: Montgomery v. Commonwealth, AUG10, VaApp No. 0827-09-1: (1) Allocution is not a constitutional right; it is only a statutory requirement. (2) Failure to allow the defendant allocution is a trial error instead of a structural error and therefore it is subject to a harmless error analysis. (3) To preserve an allocution error the defense must both (a) object, and (b) proffer the statement that would have been made. (4) If a proffer is made (a) it must be one that would mitigate (i.e. contrition for the offense) and (b) the judge must indicate that he will not consider it for the error not to have been harmless. (5) If the defendant did not argue at trial that deprivation of allocution violates due process he does not preserve the argument for appeal.

Advisement

** Hernandez v. Commonwealth, JAN11, VaSC No. 092524
Opinion: Russell – VaApp Judge: Haley (Overturned) – Trial Judge: Kemler, 18VaCir (Overturned)
(1) Until the court enters a written order finding the defendant guilty of a crime, the court has the inherent authority to take the matter under advisement or to continue the case for disposition at a later date. (2) Once a judge has found someone guilty of a crime the punishment must be as laid out by the General Assembly. (3) A judge's statement that there is enough evidence to support a conviction is not a finding of guilt. (3) The VaSC makes no finding as to whether a case can be deferred/continued/taken under advisement with a promise of a particular disposition at a later date.

Post Trial

Within 21 Days

AFTER DISCOVERED EVIDENCE: MATERIALITY - Orndorf v. Commonwealth, APR10, VaSC No. 090907: (1) In order to get a new trial based on after discovered evidence the defendant must prove the evidence (a) appears to 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 such as should produce opposite results on the merits at another trial. (2) In determining the materiality of the after discovered evidence, when the evidence supporting the new trial motion is contradicted by evidence in opposition to the motion, the circuit court (a) is not permitted to presume that the moving party's evidence is true but (b) is required to weigh all the evidence presented.

Post 21 Days

** Writs: Coram Nobis & Audita Querela

Commonwealth v. Morris, JAN11, VaSC No. 092163 & 092346
Opinion: Lemons - Trial Judge: Haddock, 18VaCir (overturned) Trial Judge: Morrison, 4VaCir (overturned)
(1) The writ of Audita Querela is writ only available for use in civil cases and cannot be used to modify a criminal sentence. (2) A writ of Coram Vorbis is only available if (a) it's for an error of facts not apparent on the record, and (b) the error is not attributable to the applicant, and (c) if the error had been known to the judge it would have prevented rendition of judgment. (3) A writ of coram nobis cannot proceed from new evidence or facts. (4) Coram nobis can only correct (a) clerical errors, and (b) errors of fact. (5) Errors of fact must not merely be enough to render the conviction voidable, they must make it impossible to render a judgment. (6) Ineffective assistance of counsel does not fall within the bounds of a writ of coram nobis.

During Appeal

** Harris v. Commonwealth, NOV10, VaApp No. 2795-09-1: Even if the case has been appealed to the court of appeals or the supreme court, the circuit court, per 19.2-303, maintains the power to alter the convict's sentence if (1) she has not been transferred to the department of corrections, (2) it is compatible with public interest to alter the sentence, and (3) there are circumstances in mitigation of the offense.

Merritt v. Commonwealth, MAR10, VaApp No. 1871-08-1: If a Trial Court Judge has dismissed a motion to set aside a verdict because it is pending before the Court of Appeals, the Court of Appeals does not have jurisdiction to hear the motion because it is not on appeal from a decision made by the trial court during the trial.

SUBSTANTIVE

Violent Crimes

** DOMESTIC ASSAULT & BATTERY 18.2-57.2 – United States v. White, JUN10, 4Cir No. 09-4114: (1) A conviction under 18.2-57.2 does not, without further evidence, qualify as a "misdemeanor crime of domestic violence" under 18 USC 921(g)(9) – possessing a firearm after being convicted of a misdemeanor crime of domestic violence. (2) Virginia uses the common law definition of battery only requiring that the touching be in a rude, insolent, or angry manner. (3) Virginia does not require violence for a conviction of battery. (4) In order to determine whether a violent crime has occurred the prosecution may present court documents, other than the order of conviction, from the misdemeanor conviction to establish the violence.

18.2-57 Assault:

** Clark v. Commonwealth, MAY10, VASC No. 091305 **[AFFIRMING VaApp No. 2656-07-2]**: (1) Virginia has combined the elements of traditional criminal assault and tort assault. (2) Criminal assault occurs when (a) an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm or (b) engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim.(3) Threats combined with a second approach of a victim and blocking the victim's path is enough to prove an intent to place the victim in fear or apprehension of bodily harm and convict of assault.

18.2-57: Battery

** Hodnett v. Commonwealth, MAY10, VaApp No. 0702-09-3: If a person throws a single item hitting a person and then throws a second item and hits the same person, each act is a separate and complete battery.

Abduction 18.2-47

** Collins v. Commonwealth, DEC10, VaApp No. 2598-09-2: Unless a person has a bounty hunter license specifically from Virginia, grabbing a bail jumper in Virginia is abduction (even if the abductor has a bounty hunting license from another State).

18.2-47 & 18.2-48 – Abduction: The Incidental Detention Doctrine

** Smith v. Commonwealth, AUG10, VaApp No. 0808-09-2: (1) Restraint or asportation which is an intrinsic element of a crime cannot be charged as abduction. (2) An abduction can be charged only if the detention or asportation committed in the act of abduction is not merely incidental to, the restraint employed in the commission of the other crime. (3) Whether an abduction is incidental to another crime is a question of law. (4) There are 4 factors to consider in determining whether the detention or asportation is an incidental or an abduction: (a) the duration of the detention or asportation, (b) whether the detention or asportation occurred during the commission of a separate offense, (c) whether the detention or asportation which occurred is inherent in the separate offense, & (d) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense. (5) A detention or asportation which is "merely useful" to a crime is not intrinsic and therefore a defendant can be convicted of abduction. (6) A lie which deceives someone into going to the place where another crime is committed can be, at the fact finder's finding it so, an abduction.

Aggravated Involuntary Manslaughter – 18.2-36.1

** Davis v. Commonwealth, JAN11 VaApp No. 2581-09-2
Opinion: Frank – Trial Judge: Osborn, 10VaCir (Affirmed)
(1) Since a DUI defendant can be convicted solely on BAC, without being intoxicated and aggravated involuntary manslaughter requires intoxication, but no BAC, DUI is not a lesser included offense and there there is no double jeopardy issue.

** 18.2-31 Capital Murder – MULTIPLE MURDERS: Andrews v. Commonwealth, SEP10, VaSC No. 100374: Convicting a defendant under a capital offense of both 18.2-31(7), multiple murders in same act or transaction, and 18.2-31(8), multiple murders within 3 year, violates double jeopardy.

** Capital Murder – SENTENCING WITNESS TESTIMONY: Andrews v. Commonwealth, SEP10, VaSC No. 100374: Although testimony of unadjudicated crimes is allowed to show future dangerousness and victim impact testimony is allowed to show vileness, testimony about victim impact from an unadjudicated crime is not allowed.

ASSAULT OR BATTERY 18.2-57 – Parish v. Commonwealth, JUN10, VaApp No. 1435-09-4: (1) Battery (a) does not require injury to the victim's corporeal person; (b) it is sufficient if it does injury to the victim's mind or feelings. (2) An offender must intend to do bodily harm to be convicted of battery. (3) An intent to do bodily harm may be inferred if the touching is done in a rude, insolent, or angry manner.

(4) An assault requires an overt act beyond speech. (5) In assault the overt act must either be meant (a) to inflict bodily harm or (b) to place the victim in fear or apprehension of bodily harm.

Involuntary Manslaughter: Noakes v. Commonwealth, SEP10, VaSC No. 091911 **[AFFIRMING VaApp No. 0295-08-2]**: (1) Involuntary manslaughter caused by an otherwise legal act only occurs when the legal act is done in a method so grossly negligent and as to show a reckless disregard for human life. (2) Gross negligence is criminal negligence when (a) acts of a wanton or willful character, (b) (i) committed or (ii) omitted, (c) show a reckless or indifferent disregard of the rights of others, (d)under circumstances (i) reasonably calculated to produce injury, or (ii) which make it not improbable that injury will be occasioned, and (e) the offender knows, or is charged with the knowledge of, the probable result of his acts. (3) Gross negligence need only indicate a callous disregard for human life without rising to the level of malice. (4) The grossly negligent act must proximately cause the accidental death. (5) The prosecution does not have to prove that the defendant knew her acts would cause a death, but only that she should have known that her act created a substantial risk of harm.

18.2-478 – Escape by Force

Hall v. Commonwealth, NOV10, VaSC No. 100160 **[AFFIRMING VaApp No. 2328-08-3]**: (1) To prove escape by force the Commonwealth must prove (a) the accused was in the officer's custody, and (b) the accused was charged with a criminal offense before he was taken into custody, and (c) the accused escaped by (i) force or (ii) violence. (2) Persons arrested are always in custody for the purposes of applying 18.2-478. (3) An arrest occurs when (a) an officer restrains an individual or (b) the an individual submits to an officer's authority. (4) When an officer tell a person he is under arrest for outstanding warrants and lays hands upon the person that person is in custody.

18.2-36 - Manslaughter & 18.2-371.1(B) - Felony Child Neglect

Whitfield v. Commonwealth, DEC10, VaApp No. 0243-10-2: When a driver of a van delivering children to day care does not follow several safety procedures the company had in place and a child dies in the closed car it is criminal negligence.

Sex Crimes

§ 18.2-374.1:1 – Possession of Child Pornography

** Chapman v. Commonwealth, AUG10, VaApp No. 1210-09-4: (1) Subsection (A) of this statute requires that if the pictures are in the internet cache 3 or more must be present in order to charge an individual with possession of child pornography. (2) This requirement sets a threshold and after the threshold has been met the defendant can be charged for each picture in the cache. (3) The statute does not limit the prosecution to one charge for every 3 pictures.

Aggravated Sexual Battery:

** Nicholson v. Commonwealth, JUL10, VaApp 0168-09-4: (1) Aggravated sexual battery requires "sexual abuse" per 18.2-67.3(A)(2) and sexual abuse requires "force" per 18.2-67.10(6)(b). (2) When the General Assembly uses "force" in a statute it does not mean actual force. (3) If an act is (a) taken against the victim's will or (b) without legal consent there is constructive force. (4) If a person is mentally incapacitated so that he does not understand the nature and consequences of the act convincing him to partake in sexual contact is the use of constructive force.

** 18.2-349: Use of Vehicle to Aid Prostitution

Bakran v. Commonwealth, OCT10, VaApp No. 2510-09-1: (1) If a defendant drives his vehicle to the place he solicits prostitution he violates this statute. (2) If a defendant drives his vehicle to where he intends to complete the sexual act he violates this statute.

§ 18.2-374.3 – Soliciting Sex with an Under 15 Year Old via a Communication System

Grafmuller v. Commonwealth, AUG10, VaApp No. 1327-09-1: The statute imposes a mandatory minimum 5 year sentence for "any person he knows or has reason to believe is a child less than 15 years of age." (2) If the offender believes the person he is contacting is a child then the person is a child for the purposes of the statute, even if the person is actually an adult, and therefore the mandatory minimum 5 year sentence must be applied.

Drug Crimes

** § 18.2-255(A)(ii) – Causing a Person Under 18 to Assist in the Distribution of Marijuana

Kelso v. Commonwealth, AUG10, VaApp No. 0316-09-2: (1) Unlike most distribution offenses, this is a continuing offense. (2) Activities of the Seller or the juvenile in different counties can make jurisdiction and venue valid in each county.

Possession Of Marijuana With Intent: 18.2-248.1

** Brown v. Commonwealth, MAR10, VaApp No. 0811-09-1 (Judge Powell): (1) The General Assembly has amended so that “stalks, fiber, oil and cake” are included in weight as long as other parts of the plant are mixed in. (2) By changing the statute, the General Assembly has overruled Hill v. Commonwealth, DEC93, VaApp No. 0620-92-2.

Williams v. Commonwealth, DEC10, VaApp No. 0201-10-2: It is an affirmative defense that the defendant had a valid prescription.

Constructive Possession

Ervin v. Commonwealth, JAN11, VaApp No. 0861-09-1 (en banc – original unpublished),
Opinion: Beales (overturning Opinion: Alston),
Trial Judge: Piersall , 3VaCir (Affirmed)
(1) The facts that defendant was in sole possession of a vehicle, there was a strong odor of marijuana, and defendant just told this police it wasn't his car rather than looking in the glove compartment for the registration, and the key in the ignition opened the glove compartment where the police found marijuana is enough to put the defendant in constructive possession of the marijuana. (2) If the marijuana is in 23 separate baggies it is sufficient evidence of intent to distribute.

Look Out

Merritt v. Commonwealth, JAN11, VaApp No. 1871-08-1 (en banc)
Opinion: McClanahan - 1st VaApp Judge: Humphreys (Overturned) – Trial Judge: O'Brien, 2VaCir (Affirmed)
(1) When an individual arrives at a bus station, gets out of the car, goes to a bus, watches two people get out of the bus without greeting them, shadows the two individuals back to the car, stands 30 feet away while the individuals and the driver load baggage into the trunk, then returns to the car, has drugs found on

the ground next to his car window, and is found next to a console with a firearm in it and a glove compartment with ammo, he is a lookout and guilty of distribution as a principal in the 2d degree.

Holloway v. Commonwealth, FEB11, VaApp No. 0828-08-1:
En Banc Opinion: Frank, VaApp Judge: Alston (overruled), Trial Judge: Morrison, 3VaCir (affirmed)
(1) Factors which Virginia Courts use in determining whether possession is for distribution: (a) packaging, (b) quantity, (c) presence or lack of use paraphernalia, (d) expert testimony, and (e) the presence of large amounts of money. (2) The Commonwealth does not have to present evidence on each of these factors.

Theft / Property Crimes

** Marsh v. Virginia, FEB11, VaApp No. 2396-09-4
Opinion: Humphreys, Trial Judge: Thacher, 19VaCir (Affirmed)
(1) The existence of a trespassory taking permits the inference that the taker intended to steal the property. (2) Taking another's property intending at the time of taking (a) to use it temporarily and (b) to return it unconditionally within a reasonable time and (c) having a substantial ability to do does not fulfill the elements of larceny. (3) Intending to return an item after the owner has met a condition required by the taker does not negate larceny. (4) If a condition is placed on the return of an object taken by (a) the taker, or (b) a third party it does not establish a larceny. (5) If a defendant takes an item, pawns it, and does not have the prospective financial ability to get the items out of pawn he has committed larceny.

** LARCENY – Trespassory Taking: Carter v. Commonwealth, JUN10, VaSC No. 091895 **[AFFIRMING VaApp No. 0203-08-2]**: (1) To prove larceny, the prosecution must show a trespassory taking. (2) Usually, in cases involving theft from stores a trespassory taking is established by showing that the offender left the store with an item. (3) Trespassory taking is also established when an offender asserts ownership of an item without leaving the store. (4) Taking an item from a shelf and going straight to the customer service in order to claim ownership of that item and get the money for a refund is a trespassory taking and therefore a larceny. (5) While (a) an intent to return negates larceny, (b) the intent to return must be unconditional.

** Car Value

Walker v. Commonwealth, JAN11, VaSC No. 100263
Opinion: Russell – VaApp Judge: Unk (Affirmed) – Trial Judge: Unk, 8VaCir (Affirmed)
(1) Under 8.01-419.1, the Commonwealth can use the Bluebook to establish a car's value. (2) The information from a Bluebook is not testimonial.

** 18.2-118 – Fraudulent Conversion of Leased Property

McDowell v. Commonwealth, NOV10, VaApp No. 0200-10-2: If the notice letter is mailed to a more specific address than the address on the lease agreement, including the apartment number rather than just the building address, the letter is still prima facie evidence of the Commonwealth's case.

** Rowland v. Commonwealth, MAR11, VaSC No. 101003
Opinion: Goodwyn, VaApp Judge: Unk (Overruled), Trial Judge: Unk, CITY RICHMOND (Overruled)
(1) A burglary is completed when the offender enters the structure, not when the underlying offense is complete. (2) Overruled Creasy v. Commonwealth, 9 Va. App. 470, 389 S.E.2d 316 (1990).

** 18.2-111: Embezzlement

Brown v. Commonwealth, MAY10, VaApp. 0666-09-4: If a person gains possession of an employer's property, but it is not gained because the employer entrusted him with it, there is no embezzlement.

18.2-195: Credit Card Fraud

Kovalaske v. Commonwealth, MAY10, VaApp. No. 1066-09-2: If a person is sent with a credit card to a store on a one day to make a specific purchase it is wrongful possession if he keeps the card and later uses it without permission.

18.2-272: Uttering:

Brown v. Commonwealth, MAY10, VaApp. 0666-09-4: In order to convict a person of uttering the Commonwealth must prove the item passed was a forgery.

18.2-95 – Grand Larceny

Williams v. Commonwealth, AUG10, VaApp No. 1355-09-1: (1) If the defendant was the passenger in a stolen vehicle which he told someone was stolen, the vehicle stopped to pick up a friend of the defendant (not a friend of the driver), the car stopped so the people in it could talk to the defendant's cousin, and the defendant said “Oh, so far today we haven’t gotten arrested” when all in it abandoned the car – a rational jury could find that the defendant had joint dominion and control over the vehicle. (2) Unexplained possession of a recently stolen item is sufficient to infer larceny of that item.

Weapon Crimes

** § 18.2-53.1 Use of Weapon in a Burglary

Rowland v. Commonwealth, MAR11, VaSC No. 101003
Opinion: Goodwyn, VaApp Judge: Unk (Overruled), Trial Judge: Unk, CITY RICHMOND (Overruled)
(1) Use of a weapon in a burglary requires the weapon to be used when the offender is entering the structure, not during the crime he entered the structure to do.

** Previously Adjudicated a Delinquent Minor

Preston v. Commonwealth, Jan11, VaSC No. 100596
Opinion: Kinser – VaApp Judge: Unk (Overturned) – Trial Judge: Unk, 21VaCir (Overturned)
(1) When a petition states the charged act was a Breaking and Entering, but the separate disposition page states only "guilty" and "25 hours c.s." it is not enough to prove beyond a reasonable doubt that the defendant had been adjudicated responsible for a Breaking and Entering.

** 18.2-308.4(B): Possession of Firearm Within Arms Reach and Drugs:

Hunter v. Commonwealth, MAR10, VaApp No. 2989-08-2 (Judge Petty): (1) The language in subsection B that the firearm must be "on or about his person" requires more than constructive possession. (2) "On or about his person" means (a) possessing the firearm "on . . . his person", or (b) that (i) the defendant was aware of both the presence and character of the firearm, that (ii) the firearm was within the accused's dominion and control, and that (iii) the firearm was readily accessible for prompt and immediate use. (3) The fact that a firearm was locked in a glove compartment is not dispositive as to whether it was "on or about his person." (4) The fact that a passenger neither has keys to the car nor keys to the glove compartment (a) precludes him from having the weapon inside accessible for prompt and immediate use and means that (b) it is not "on or about his person."

** 18.2-308.1: Weapon on School Grounds

McNamara v. Commonwealth, MAY10, VaApp. No. 2849-08-4: (1) Although the statute makes it illegal to have a weapon on school grounds, there is an exception under 18.2-308.1(B)(vi) for a "knife having a metal blade, in or upon a motor vehicle." (2) A machete is a knife and if it is found on school grounds, in a car, it does not violate the statute.

** 18.2-279 Discharging a Firearm At or Against an Occupied Building
Ellis v. Commonwealth, MAR11, VaSC No. 100506
Opinion: Koontz, VaApp Judge: (Affirmed), Trial Judge: , NEWPORT NEWS (Affirmed)
(1) 18.2-279 does not require a specific intent to fire at or against a particular building. (2) The evidence need only show that a defendant who unlawfully discharges a firearm knew or should have known that an occupied building or buildings were in his line of fire.

** 18.2-308.2:2 – False Statement on Firearm Purchase Form

Smith v. Commonwealth, NOV10, VaApp (en banc) No. 0364-09-1: (1) If a defendant filled out a portion of the firearm purchase form without knowing the meaning of the question she has willfully and intentionally falsified the form. (2) By not attempting to clarify the meaning of the question the defendant has made a conscious effort to avoid learning the truth.

§ 18.2-53.1 Use of Weapon in a Felony

Courtney v. Commonwealth, MAR11, VaSC No. 100776
Opinion: Lemons, VaApp Judge: (Affirmed), Trial Judge: (Affirmed)
(1) If the defendant claims to have an unseen firearm during the commission of a felony, but no firearm is found when the offender is shortly thereafter captured, it is a question of fact for the trier of fact to decide whether there was actually a firearm used in the felony.

18.2-53.1: Use Firearm in a Felony:

Startin v. Commonwealth, MAR10, VaApp No. 2837-08-4 (Judge Powell – *en banc*): A replica, non-working firearm is a firearm under this statute.

Startin v. Commonwealth, MAR11, VaSC No. 100778
Opinion: Lemons, VaApp Judge: (Affirmed), Trial Judge: , FAIRFAX (Affirmed)
(1) “Firearm” in this statute is to be given a broad construction. (2) A non-operable replica of a firearm is a firearm under this statute.

18.2-308.2: Possession of a Firearm by a Convicted Violent Felon

Johnson v. Commonwealth, MAY10, VaApp. No. 2919-08-3: It is constitutional for the General Assembly to mandate a specific sentence (5 years out of 5 years possible).

POSSESSION OF A FIREARM - § 18.2-308.4 & § 18.2-308.2
Atkins v. Commonwealth, AUG10, VaApp No. 1864-09-1: (1) An individual can constructively possess a firearm. (2) Firearms can be jointly possessed. (3)

Under § 18.2-308.4(B), the language “on or about his person” does not mean that possession must be actual.

18.2-308.2 - Possession of Firearm as Felony

Redmond v. Commonwealth, NOV10, VaApp No. 2443-09-4: (1) It may be inferred that the owner or occupant of property also possesses contraband located on the premises, if the owner or occupant is shown (a) to have exercised dominion and control over the premises and (b) to have known of the presence, nature and character of the contraband at the time of such ownership or occupancy. (2) If a person's name is on the deed and his joint-tenant tries to contact him when the search warrant is served the person has dominion and control over the premises. (3) When the defendant has visited the property and the firearms are in plain sight (a) he knew of their presence, nature, and character and (b) had access to the firearms.

Motor Vehicles:

** DUI – Rix v. Commonwealth, AUG10, VaApp No. 1424-09-1: If a drunk passenger changes places with a driver while the keys are in the ignition and the car is running, the former passenger is in dominion of the a vehicle in operation and therefore guilty of DUI.

** 18.2-268.3 First Offense Failure to Submit to Blood or Breath Test (DUI)

Kozmina v. Commonwealth, MAR11, VaSC No. 092395
Opinion: Lemons, Trial Judge: Thacher, FAIRFAX (Affirmed)
(1) A Commonwealth Attorney can prosecute a first offense failure to submit to blood or breath test.

** Roseborough v. Commonwealth, JAN11, VaSC No. 100507
Opinion: Russell – VaApp Judge: Beales (Overturned) – Trial Judge: Kloch, 3 18VaCir (Overturned)
(1) The roads in a gated community are not public highways and therefore there is no implied consent for a breath or blood test. (2) An accident in a gated community did not take place on a public highway and thus the officer cannot arrest the driver. (3) Even if the defendant voluntarily took the breath test after an illegal arrest it is inadmissible as evidence.
NOTE: As of 01 July 2010, the law under § 19.2-81(D) has been changed to allow officers to arrest anyone with probable cause that the person drove DUI within three hours.

** DUI – 18.2-266

Nelson v. Commonwealth, JAN11, VaSC No. 100395
Opinion Carrico – VaApp Judge: Alston (Affirmed) – Trial Judge: Williams, 19VaCir (Affirmed)
(1) If a key is in the ignition in the off position the defendant cannot be convicted of DUI. (2) If the key is in the ignition and turned so that the electricity is on, but the motor is not running, the defendant can be convicted of DUI.

** Davis v. Commonwealth, JAN11 VaApp No. 2581-09-2
Opinion: Frank – Trial Judge: Osborn, 10VaCir (Affirmed)
(1) If BAC is .08 or more there is no requirement of evidence of erratic driving, performance on sobriety tests, or any other evidence that the defendant is intoxicated.

46.2-301: Driving Suspended

Harris v. Commonwealth, MAY10, VaApp. No. 0406-09-2: A conviction for driving

suspended under a locality's ordinance can be used as a previous conviction for a driving suspended 3d conviction.

Other

** 4.01-103(A) - Child Endangerment

Carosi v. Commonwealth, NOV10, VaSC No. 100143: (1) The fact that the defendant did not possess the drugs in a house does not mean she was unaware of their presence and nature for child endangerment charges. (2) Reasonable minds could differ on whether rearing a child in home where drugs are readily accessible is endangerment of the child. (3) The determination of whether endangerment of a child (criminal negligence) exists in a house where drugs are present is a factual issue.

** 18.2-479: Escape without Force

Thomas v. Commonwealth, MAR10, VaApp No. 3047-08-1 (Judge Humphreys): (1) In order to convict someone under this charge he must have written charges. (2) If someone is arrested, breaks free, and runs away he cannot be convicted under this statute unless he was arrested pursuant to a written accusation or complaint.

** Costruction Fraud – 18.2-200.1

Bottoms v. Commonwealth, JAN11, VaSC No. 092498
Opinion: Kontz – VaApp Judge: Unk (Overturned) – Trial Judge: Unk 11VaCir (Overturned)
(1) Defendant must intend fraud at the time he receives the money. (b) Defendant may possess intent to defraud if he begins the work, but abandons it. (c) Intent to defraud can be shown if the work is completed, but the work is so poor that the finder of fact determines that the defendant intended to render inferior performance.

18.2-371.1(A) Child Abuse & 40.1-103 Child Endangerment

King Jr. v. Commonwealth, APR10, VaApp No. 0451-09-4: (1) Neither Child Abuse - § 18.2-371.1(A) - nor Child Endangerment - § 40.1-103(A) - are lesser included offenses of the other. (2) Child abuse requires serious physical harm and child endangerment does not. (3) Child endangerment requires that a child's life, health, or morality be put at risk, but child abuse has nothing to do with moral endangerment.

Criminal Street Gang with Juvenile Members – 18.2-46.2 & 18.2-46.3:

Phillips v. Commonwealth, JUL10, VaApp No. 0482-09-1: (1) If the charged crime is one in which the existence a criminal street crime must be shown the

two prior convictions establishing the crime must have occurred prior to the charged crime. (2) The charged crime cannot serve as the predicate crime. (3) Two felonious convictions of the same person cannot serve as the predicate convictions if they are part of a common transaction. (4) Acts which have been confessed to, but not resulted in a criminal conviction, can serve as predicates establishing the criminal street gang. (5) The fact that a member of the gang has achieved a certain rank and that an officer testified that to achieve that rank a person would have to break the law can establish the predicate offenses. (6) When a juvenile joins a criminal street gang, his entry into the gang does not provide the juvenile member for the crime involved.

29.1-553 Selling Wild Animal Parts

Goble v. Commonwealth, SEP10, VaApp No. 1976-09-3: (1) The phrase “except as provided by law” in the statute is a statutory defense (affirmative defense).

18.2-200.1: Construction Fraud

Testerman v. Commonwealth, OCT10, VaApp No. 2823-09-4: (1) It does not matter whether the prepayment was to pay for materials or labor. (2) The test for construction fraud is whether a defendant received an advance as a result of construction he promised to perform.

18.2-371(B)(1) – Felony Child Endangerment

Wood v. Commonwealth, NOV10, VaApp No. 2215-09-2: Driving while extremely intoxicated (.22) and having two children in the car is conduct gross, wanton, and culpable.

3.1-6570 – Animal Cruelty

Sullivan v. Commonwealth, NOV10, VaSC No. 100431: If a horse is down for 30 hours, unable to get food or water, has had diseases which led to its final emaciated condition over a period of time, and never been treated by a veterinarian the owner can be found guilty of animal cruelty.

Criminal Act for the Benefit of a Criminal Street Gang

Taybron v. Commonwealth, JAN11, VaApp No. 2834-09-1
Opinion: Elder – Trial Judge: Hutton, 8VaCir (Overturned)
(1) If members of different local gangs copy a national gang's colors, symbols, and language this does not mean that they are both in that national gang. (2) Convictions of gang members in a different local gang which copies the symbols etc. of the same national gang as the defendant's gang copies are not enough to

provide the prerequisite convictions to prove a criminal street gang.

PROBATION

** Sex Offender – Alford Plea

Carroll v. Commonwealth, NOV10, VaSC No. 091987 **[AFFIRMING VaApp No. 1860-08-4]**: Even if a defendant pleads under Alford his failure to admit the sexual act he is accused of during mandated therapy is a violation of his probation.

** Mohamed v. Commonwealth, APR10, VaApp No. 1078-09-4: (1) Even if the time that a sentence has been suspended for has passed the trial court still has subject matter jurisdiction. (2) Under § 19.2-306(A), the court can revoke a suspended sentence for violations that occur during probation or suspended sentence.

** Cuthbertson v. Commonwealth, JUL10, VaApp No. 0868-09-4: Procedures for the governance of probation are governed by the statutes in place when the probation begins after incarceration, not the time when the sentence is imposed.

Canty v. Commonwealth, OCT10, VaApp No. 0691-09-1: (1) If a violation event occurs before a previous revocation hearing, but was not dealt with in that hearing, the probationer can have his sentence revoked for that violation. (2) A probation violation only addresses the issues raised in it and does not foreclose any other post-conviction issues not raised.

APPEALS

Appellee Argument

** Right Result Wrong Reason Doctrine

Perry v. Commonwealth, NOV10, VaSC No. 092418 **[AFFIRMING VaApp No. 0945-08-4]**: (1) However erroneous the reasons of the trial court, if the judgment is right, it will not be overturned. (2) If additional facts are needed to support an argument made for the first time on appeal the right result wrong reason doctrine cannot be applied. (3) The Whitehead requirement that an argument be made in court by the appellee is overruled.

** Right Result Wrong Reason Doctrine

Banks v. Commonwealth, NOV10, VaSC No. 092455: The right result wrong reason doctrine cannot be applied if the trial court has not made a finding about conflicting evidence as to the new reason.

Appellant Argument

RULE CHANGE

** FUGITIVE DISENTITLEMENT DOCTRINE: Reid v. Commonwealth, AUG10, VaApp No. 1571-09-3: (1) When a convicted individual becomes a fugitive while his appeal is pending the appeal will be dismissed. (2) There are 3 things which must be proven to invoke the fugitive disentitlement doctrine: (a) the petitioner is a fugitive, (b) there is a nexus between the appeal and the petitioner being a fugitive, And (c) dismissal must be necessary to effectuate the policy concerns underlying the doctrine. (3) “The 'nexus' requirement is actually an evaluation of whether an appellant’s status as a fugitive impacts the appellate process.” (4) By failing to produce himself, so that he could be subject to any decision of the appellate courts, petitioner establishes a nexus between his fugitive status and the appeal. (5) The poilcy behind the doctrine is that (a) a fugitive cannot have the decisions of the court enforced against him, (b) it is inequitable to allow a fugitive access to the courts to determine a claim, and (c) it is necessary to discourage escape and encourage voluntary surrenders. (6) The doctrine should be employed only when no lesser sanction is available.

** Smith v. Commonwealth, MAR11, VaSC No. 101357
Opinion: Lacy, VaApp Judge: Unk (Affirmed)
(1) The failure of the appellant to arrange for the timely filing of a necessary transcript does not deny the appellate courts jurisdiction. (2) Failing to file a necessary transcript waives the issue which the appellant preserved in the transcript.

** Change of Constitutional Standard After Trial

McGhee v. Commonwealth, NOV10, VaSC No. 091274: If a defendant preserves an error based upon current constitutional standards and the standard changes during the appeal the defendant has not preserved an appeal under the new standard.

** Alford v. Commonwealth, AUG 10, VaApp No. 2125-09-3: (1) If the defendant agrees to an erroneous jury instruction the defendant may not appeal on the basis of the wrong instruction. (2) The ends of justice exception only allows an agreed upon jury instruction to be appealed if (a) a proper jury instruction is absent and (b) the evidence fails to prove an essential element of the crime. (3) The ends of justice exception is allowed when the defendant affirmatively proves that an element of the crime did not occur.

** Plea Agreement Violation

Carroll v. Commonwealth, NOV10, VaSC No. 091987 **[AFFIRMING VaApp No. 1860-08-4]**: (1) The defendant must lay his finger on the error in his Statement of Questions Presented to the appellate courts. (2) If the appellant is claiming breach of plea agreement she must specifically state so.

Merritt v. Commonwealth, MAR10, VaApp No. 1871-08-1: If a Trial Court Judge has dismissed a motion to set aside a verdict because it is pending before the Court of Appeals, the Court of Appeals does not have jurisdiction to hear the motion because it is not on appeal from a decision made by the trial court during the trial.

ENDS OF JUSTICE:

Thomas v. Commonwealth, MAR10, VaApp No. 3047-08-1: The ends of justice exception to the requirement under 5A:18 requires the defendant to show (1) the conduct for which the defendant was convicted was not a crime, or (2) an element of the offense did not occur.

Smith v. Commonwealth, JUN10, VaApp No. 0422-09-1: (1) If a petitioner files a petition without having secured necessary transcripts, the appellate court has

jurisdiction. (2) Filing the petition without the necessary transcripts waives the issue raised in the petition. (3) The appellate court will not dismiss the petition filed without the transcript; it will uphold the trial court's ruling.

Ends of Justice:

McDowell v. Commonwealth, NOV10, VaApp No. 0200-10-2: (1) In order to avail herself of the ends of justice exception to preservation of an issue at trial (a) the appellant must demonstrate that she was convicted for conduct that was not a criminal offense or (b) the record must affirmatively prove that an element of the offense did not occur. (2) In examining a case for miscarriage of justice, an appellate court determines whether the record contains affirmative evidence of (a) innocence or (b) lack of a criminal offense.

Williams v. Commonwealth, DEC10, VaApp No. 0201-10-2: If a motion is made pre-trial, but not actually argued before the judge, it is not preserved for appeal.

Writs

Standards of Review

Remedies

** Baker v. Commonwealth, OCT10, VaApp No. 0865-09-1: (1) If (a) a defendant has pled guilty and (b) preserved a constitutional argument for review under 19.2-254 and (c) the appellate court finds that the constitution had been violated, (d) the appellate court cannot engage in a (i) harmless error or (ii) inevitable discovery analysis. (e) Once the court has determined a constitutional error exists which has been preserved under 19.2-254 the case must be remanded to the trial court.

HABEAS

** WRIT OF ACTUAL INNOCENCE: Turner v. Commonwealth, JUN10, VaApp No. 1836-07-1: (1) A co-defendant's credible recantation, which states the petitioner had nothing to do with the offense, does not provide a court with clear and convincing evidence that no rational fact finder could have found the petitioner guilty. (2) When the Court of Appeals sends a case back to the circuit court for a determination of facts, the Court of Appeals is bound to “consider” the circuit court's finding unless the factual findings are plainly wrong or without evidence to support them. (3) In order to get a writ of actual innocence a petitioner must demonstrate by clear and convincing evidence that based on all of the evidence in the record, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. (4) When a recantation is credible, the court must weigh it against the remaining evidence to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt.

** Pethtel v. Ballard, AUG10, 4Cir No. 09-6075: When a State violates the trial before return (aka the anti-shuttling) provision of the Interstate Agreement on Detainers Act the violation is not cognizable in a federal habeas procedure.

** Wilson v. Corcoran, DEC10, USSC No. 10-91: (1) A federal court cannot base a habeas upon violation of state law. (2) All federal habeases must be based upon violation of federal law.