CONSTITUTION

4th Amendment

Search & Seizure

U.S. v. Jones, Jan12, USSC 10-1259:
(1) When a government agent trespasses upon the chattels of a person it is a search. (2) Placing a gps device on a vehicle is a trespass and therefore requires a warrant. (3) If a tracking device is placed upon an item before it comes into the possession of the person, while in possession of a third party, it is not a search.

GPS ATTACHED TO VEHICLE

Foltz v. Commonwealth, APR11, VaApp No. 0521-09-4 (en banc):
If officers suspect a person of a crime and act in an unconstitutional manner to discover evidence which increases their suspicion to the point that further investigation is done in a constitutional manner, the discovery of a new crime which occurs entirely while the officers are now engaged in the new investigation is a constitutional investigation.

SEARCH PASSENGER OF A VEHICLE

Commonwealth v. Smith, APR11, VaSC No. 092561 (OVERRULING VaApp):
(1) Information an officer has concerning a driver or passenger's prior record is highly relevant in determining whether an officer has reasonable suspicion that a person is armed and dangerous. (2) The fact that the passenger is a felon, was arrested 11 months prior for felon in possession of a firearm, and was arrested 6 months prior for distributing drugs is enough to allow the officer to do a weapons pat down. (3) There are two conditions for a valid stop and frisk: (a) the stop must be constitutionally valid and (b) the officer must reasonably believe the person is armed and dangerous.

Vehicle Stop

Morris v. Virginia Beach, APR11, VaApp No. 0580-10-1:
(1) The fact that an oversize truck has taken safety precautions (warning trucks before and behind) does not mean that an officer must assume the truck is appropriately permitted. (2) An officer may stop the truck to resolve any uncertainties.

Farm Use Vehicles

Shifflett v. Commonwealth, OCT11, VaApp No. 1951-10-3:
(1) An unregistered farm vehicle must be used solely for agricultural and horticultural tasks. (2) An officer who puls over an unregistered farm vehicle with three passengers, at 10 p.m., after a snow storm has a reasonable articulable suspicion that it is being driven illegally.

Branham v. Commonwealth, JAN12, VaSC No. 110263:
(1) The 4th Amendment does not require any level of suspicion to justify non-coercive questioning by officers, including a request for identification. (2) If a citizen is not pulled over for a traffic violation the citizen is not required to turn over his driver's license. (3) If the officer asks for the citizen's license and the citizen complies it is consensual and not a seizure.

U.S. v. Edwards, DEC11, 4Cir No. 10-4256:
(1) Searching inside a suspect's underwear is a strip search. (2) To determine if a sexually invasive search is reasonable the court must consider (a) the place the search was conducted, (b) the scope of the intrusion, (c) the manner in which the search was conducted, and (d) the justification for the search. (3) Strip searches should be done in private. (4) The manner in which contraband is removed during a sexually invasive search must be considered in determining whether the search was reasonable. (5) An otherwise constitutional search may be impermissible if done in a cruel, painful, or dangerous manner. (6) When officers remove drugs which are tied to a suspect's penis at night by flashlight, using a knife, it is unconstitutional.

U.S. v. Gaines, JAN12, 4Cir No. 11-4032:
(1) When contraband is found subsequent to an unconstitutional search or seizure, the determination as to whether the taint has been purged from the evidence requires consideration of (a) the amount of time between the unconstitutional act and the acquisition of the evidence, (b) the presence of intervening circumstances, and (c) the purpose and flagrancy of the unconstitutional act. (2) If police find contraband during an unconstitutional search or seizure, but actually seize the contraband after the suspect commits a crime (assault on an officer), the seizure is unconstitutional and the contraband must be suppressed.

Terry Pat Down

US v. Powell, NOV11, 4Cir No. 08-4696:
(1) The mere fact that someone has a record does not, by itself, justify a pat down. (2) A violent prior record can justify a pat down. (3) When the officer receives information that the suspect has "priors" for a violent criminal offense it is not enough to justify a pat down without (a) a date of the prior and/or (b) information as to whether the suspect was convicted. (4) A suspect handing an officer a license which, when checked, turns out to be suspended is not enough to justify a pat down.

US v. Doyle, MAY11, 4Cir no. 09-4603:
(1) Evidence of child molestation does not support a search warrant for child pornography. (2) A person telling an officer what he had been told by a minor child is not enough to support a search warrant. (3) An allegation of a nude picture of a child is not enough to support a search warrant for child pornography without more information in order to determine the picture is lewd. (4) If the time of the possession of the child pornography is not in the affidavit (a) the warrant is not valid and (b) an officer would know it is not valid.

US v. Massenberg, MAY11, 4Cir 10-4209:
(1) The fact that the suspect stands a foot away from his companions, does not look at the officer when asked to allow a search, and refuses to allow a search (when companions allow one) is not enough to provide reasonable suspicion for a search. (2) "The government cannot rely on whatever facts are present, no matter how innocent, as indicia of suspicious activity."

US v. DiGiovanni, JUL11, 4Cir No. 10-4417:
(1) An officer can ask question not related to the purpose of a traffic stop as long as the questions do not extend the time of the stop beyond a de minimus amount. (2) If an officer spends over ten minutes asking a detained driver about things not related to the traffic stop before conducting investigation related to the stop, it is an unconstitutional seizure. (3) There is no specific time that a traffic stop should last, but the mere fact that it only lasted 15 minutes does not render it constitutional. (4) The mere facts that the officer handed back license and registration and said "you are free to go" do not establish that the suspect's detention ended – other circumstances pertaining at the time must be examined.

U.S. v. Ortiz, FEB12, 4Cir No. 11-4193:
If a suspect gives permission to search his car during a period of time when the officers are forbidden to search by their agency's policy the permission extends , if the suspect does not revoke it, to a later time period when the agency's policy allows the search.

5th Amendment

Double Jeopardy

Legislative Intent

Tharrington v. Commonwealth, SEP11, VaApp No. 1573-10-1:
(1) When the legislature makes clear its intent to punish a defendant twice for the same offense under two different statutes there is no double jeopardy and no need to prove the two crimes each have a separate element. (2) Grand Larceny and Grand Larceny with the Intent to Sell can both be charged and convicted for the same offense.

Johnson v. Commonwealth, MAY11, VaApp No. 0439-10-1:
(1) Malicious Wounding (18,2-51) and Maiming by Mob (18.2-41) each have a different element the other does not have and therefore both can be charged at the same time. (2) Maiming by Mob requires a mob and Malicious wounding does not. (3) Malicious Wounding requires malice while Maiming by Mob only requires unlawful wounding (the statute states maliciously or unlawfully . . .).

Right to Remain Silent

Miranda and Prisoners

Howes v. Fields, FEB12, USSC No. 10-680:
(1) The fact that (a) no charges have been filed on the subject the officer is questioning the prisoner about and (b) the prisoner is not being held on a charge related to the subject of the questioning do not mean the prisoner is not entitled to Miranda warnings. (2) The fact that a prisoner is (a) imprisoned, (b) questioned in private, and (c) questioned about events in the outside world does not mean that he is in custody for Miranda purposes. (3) Detention alone is not enough to establish custody for Miranda. (4) The fact that a prisoner is imprisoned is not enough to require Miranda because (a) a prisoner will not be suffering from the shock of recent arrest, (b) a prisoner is not likely to be lured into speaking in hopes of prompt release, and (c) a prisoner knows the officers questioning him lack the power to reduce the duration of his incarceration. (5) Questioning a prisoner in private does not require Miranda warnings because he is merely being separated from prisoners, not friends and family. (6) Questioning a prisoner about something that happened outside the walls of the prison does not require Miranda warnings because it has just as much potential for criminal liability as questioning about events inside the walls. (7) When a prisoner is unrestrained and told he can leave and go back to his cell when he wishes there is no custody for Miranda purposes.

Commonwealth v. Quarles, JAN11, VaSC No. 110775:
(1) After a suspect has asserted his Miranda rights, when officers talk about the case and inculpatory evidence in front of the suspect it is only "subtle compulsion." (2) The test of whether the conversation in front of the suspect was unconstitutional is whether the officers should have known that their statements were reasonably likely to elicit an incriminating response from the suspect. (3) Discussing the fact that the suspect has invoked his Miranda rights in front of him and saying "That's fine. I'm not the person who robbed the white lady and hit her in the head with a brick" and "If that's the story he wants to tell the judge, then, that's fine" is not enough for officers to know that it was reasonably likely to elicit an incriminating response.

Stevens v. Commonwealth, JAN12, VaSC No. 110402:
(1) Things that happen and statements which are made after the suspect invokes his right to have counsel present during questioning cannot be used to determine if the invocation was ambiguous. (2) Circumstances prior to and at the time of the assertion are to be considered in determining if it was ambiguous. (3) A defendant who has been brought to the courthouse to have an attorney appointed, but has not yet had one appointed, can state to an officer who has just informed him of his right to a lawyer present "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" but this will not be a sufficiently unambiguous assertion of his right to counsel to exclude statements made thereafter.

"LACK OF REMORSE"

Prieto v. Commonwealth, JAN11, VaSC No. 110632:
(1) The test as to whether a prosecutor's statement is an unconstitutional comment on the defendant not testifying at trial is whether, in the circumstances of the particular case, the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. (2) The prosecutor commenting that he had heard no remorse does not violate the right to remain silent if the prosecutor is commenting on the characterization of the defendant's behavior by other witnesses.

U.S. v. Jones, JAN12, 4Cir No. 10-4442 & 10-4698:
(1) During the arrest of a suspect in the suspect's house officers may conduct a protective sweep of the house which (a) consists of a cursory inspection of spaces where a person might be found, and (b) lasts no longer than it takes to complete the arrest and depart. (2) Police need only reasonable articulable suspicion of the presence of others in the house to justify the sweep.

Miranda

Brooks v. Commonwealth, JUN11, VaSC No. 091047:
When an officer has permission to search a house for something else and finds drugs, it is not necessary to tell the house's owner his Miranda rights before asking if the drugs are his.

Due Process

Suggestive ID's

Perry v. New Hampshire, NOV11, USSC No. 10-8974:
(1) To determine whether due process has been violated in a witness identification of the defendant (a) the trial court must decide whether the police used an unnecessarily suggestive identification procedure, and (b) whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible. (2) If a suggestive situation was not arranged by the police there is no due process violation.

Brady

Smith v. Cain, JAN12, USSC No. 10-8145:
When (1) the only evidence connecting a defendant to a crime is an eyewitness and (2) the government fails to turn over statements by the witness in which he states he cannot identify the perpetrator (3) there is a Brady violation.

Brady / Napue

Porter v. Warden Sussex I, MAR12, VaSC No. 091615:
(1) The government is not required to turn over information the defense could obtain through its own investigation. (2) A Brady violation (a) occurs when exculpatory evidence is either (i) not turned over, or (ii) turned over so late it of no use to the defense, and (b) there is a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. (3) In order to find a violation of Napue (a) the testimony must have been false, (b) the prosecutor must have known it was false, and (c) the falsity must have affected the jury's judgment.

Failure to Disclose Exculpatory or Impeachment Evidence

Doss v. Commonwealth, JAN12, VaApp No. 1136-10-3:
(1) Three things must be shown to prove a Brady violation: (a) the (i) exculpatory or (ii) impeachment evidence must be favorable to the accused, and (b) the government must have (i) purposefully or (ii) inadvertently suppressed the evidence, and (c) prejudice must have ensued. (2) Although a defendant need not show by a preponderance that disclosure of the suppressed evidence would have resulted in an acquittal, the defendant must show a reasonable probability that, considering the omitted evidence with the entirety of the admitted evidence, a jury would have entertained a reasonable doubt of guilt.

6th Amendment

Speedy Trial

Jury

FAIR CROSS SECTION REQUIREMENT

Prieto v. Commonwealth, JAN11, VaSC No. 110632:
The test as to whether there is a fair cross section of the community in the jury, a defendant must prove that: (1) a group qualifying as 'distinctive' (2) is not fairly and reasonably represented in jury venires, and (3) systematic exclusion in the jury selection process accounts for the underrepresentation.

U.S. v. Cabrera-Beltran, NOV11, 4Cir No. 10-4084:
Striking jurors for cause because they would understand the language spoken by witnesses and state that they would not be able to restrict themselves to considering only the testimony as translated is not a violation of the right to a jury because jurors would be relying on different evidence.

Batson Analysis

US v. Barnette, MAY11, 4Cir No. 10-2:
(1) Proper analysis of a Batson claim requires the court to engage in comparative analysis of jurors. (2) If (a) members of one protected class are struck and members of another class are not and (b) the reasons given for the strike are applicable to both (c) this is evidence tending to prove purposeful discrimination. (3) Trial and appellate courts cannot use reasons other than those provided by the striking party to justify the strikes.

Notification of Offense

Right to Confront Accuser

Lab Results (Primary Purpose)

Sanders v. Commonwealth, JUN11, VaSC No. 101870:
If a lab does not know the purpose of an analysis, which could be for criminal investigative purposes or medical purposes, the report returned by the lab is not testimonial and can be admitted without analyst present in court. [venereal disease test sent by child abuse pediatrician at the child abuse clinic of a hospital to a lab in Cali.]

U.S. v. Summers, DEC11, 4Cir No. 06-5009:
If technicians have gotten data which the analyst uses to compose a report the technicians are not needed to testify in court.

USA v. Powell, MAY11, 4Cir No. 09-4012:
(1) Evidence introduced at sentencing need only be reliable. (2) A defendant is not entitled to the same right of cross examination in a sentencing hearing as he is at trial.

Process to Obtain Witnesses

Right to Counsel

Ineffective Assistance of Counsel: Plea Agreement

Missouri v. Frye, MAR12, USSC No. 10-444:
(1) Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. (2) If defense counsel does not inform his client of a plea offer (unreasonable behavior), in order to show prejudice the defendant must show (a) a reasonable probability they would have accepted the earlier plea offer and (b) a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.

Lafler v. Cooper, Mar12, USSC No. 10-209:
(1) If (a) a plea offer was rejected because of attorney error and (b) the plea offer would have been for a lesser sentence on the same charges of which the defendant was convicted, (c) the remedy is for the trial court to have an evidentiary hearing and (d) determine if there is a reasonable probability that but for counsel's errors the defendant would have accepted the plea and (e) then determine whether the defendant should (i) receive the term of imprisonment the government offered in the plea, (ii) the sentence he received at trial, or (iii) something in between. (2) If (a) an offer was for a guilty plea to a lesser offense, or (b) if a mandatory sentence confines a judge's sentencing discretion after trial, (c) the prosecutor must reoffer the plea agreement and the judge will decide whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed. (3) In determining the remedy to be applied, the trial court may consider (a) the defendant's previous willingness or unwillingness to accept responsibility for his actions and (b) any facts of the case which came to light after the plea offer had been made.

Burrell v. Commonwealth, JUN11, VaApp No. 0488-10-1: (1) When a suspect indicates to an officer that he does not want to answer some questions without an attorney he must be specific as to what questions or the officer can continue to question him.

US v. Smith, MAY11, 4Cir No. 09-4760:
(1) A defendant who is receiving court appointed counsel does not get to choose his counsel. (2) The question as to whether conflict between a defendant and her attorney is such that a new attorney should be appointed does not hinge upon (a) choice of counsel or (b) whether the defendant has a meaningful relationship with her counsel. (3) It is a denial of counsel to force a defendant to go to trial if communication with his attorney has broken down to the point that it is impossible to mount an adequate defense. (4) A court can deny substitution of counsel when the defendant's behavior creates the problem. (5) If a defendant's communication with his attorney broken down to a constitutionally infirm level then a guilty plea by the defendant is invalid because it is neither knowing nor voluntary. (6) If a defendant raises an objection to counsel which seems to have some substance, the judge is required to make a thorough inquiry into the basis of the defendant's allegations (best done with the prosecutor absent from the courtroom).

U.S. v. Perez, NOV11, 4Cir No. 09-4150:
In determining whether a trial court abused its discretion in deny new court appointed counsel (a)(i) the timeliness of the complaint, (ii) adequacy of the court's inquiry into the defendant's complaint, and (iii) whether the attorney/client conflict is so great that it results in a total lack of communication between counsel and defendant (b) are weighed against the trial court's interest in the orderly administration of justice.

8th Amendment

Excessive Bail

Excessive Fines

Cruel & Unusual Punishment

Cole v. Commonwealth, AUG11, VaApp No. 0320-10-2:
Proportionality review is not available for any sentence less than life without parole.

14th Amendment

Equal Protection

U.S. v. Cabrera-Beltran, NOV11, 4Cir No. 10-4084:
Striking jurors for cause because they would understand the language spoken by witnesses and state that they would not be able to restrict themselves to considering only the testimony as translated is not a violation of equal protection guarantees.

Cole v. Commonwealth, AUG11, VaApp No. 0320-10-2:
The fact that statutes overlap does not render them constitutionally invalid and the prosecution may proceed under either statute.

EVIDENCE

Prior Consistent Statements

Anderson v. Virginia, VaSC No. 110069:
(1) The general rule is that prior consistent statements cannot be entered into evidence to bolster a witness' testimony. (2) A prior consistent out of court statement can be introduced to bolster a witness' testimony if the witness' credibility has been challenged. (3) In order for a prior consistent witness statement to be admitted to bolster testimony the prior consistent statement must have been made prior to the existence of a motive to falsify. (4) If the opposing party introduces prior statements inconsistent with the witness' testimony then prior consistent statements can be introduced. (5) There prior to motive to falsify requirement if the opposing party has introduced prior inconsistent statements. (6) The prior consistent statement (a) is introduced only for the fact of its utterance, (b) for credibility purposes only, (c) not for its truth and (d) therefore is not hearsay.

Turner v. Commonwealth, JUL11, VaApp No. 1809-10-1:
(1) When a witness claims to have forgotten testimony he has made in prior hearings (preliminary), there is a duty (a) to explore how much he has forgotten and (b) whether the forgetting is actual or merely a refusal to testify. (2) If a victim is “forgetting” as a manner of refusing to testify the court should order the witness to testify and consider using its contempt powers. (3) If a witness persists in pretending not to remember, he is unavailable to testify and testimony from prior hearings can be entered instead. (4) A former attorney for the defendant can be called to testify as to what occurred in a prior hearing. (5) Once information becomes generally known at a public hearing, an attorney violates no rule of professional conduct when he testifies regarding information previously publicly relayed and generally known.

Testimony About Prior Offenses

Doss v. Commonwealth, JAN12, VaApp No. 1136-10-3:
(1) Introduction of evidence of prior crimes is generally not admissible because it can prejudice the finder of fact. (2) An exception to the rule is showing the conduct and feeling of the accused toward his victim, (a) if it establishes their prior relations, or (b) if it tends to prove any relevant element of the offense charged. (3) Such evidence is permissible in cases (a) where the (i) motive, (ii) intent or (iii) knowledge of the accused is involved, or (b) where the evidence is connected with or leads up to the offense for which the accused is on trial. (4) Testimony of other crimes is admissible where the other crimes constitute a part of the general scheme of which the crime charged is a part. (5) Evidence of prior drug-related conduct is irrelevant and inadmissible and does not qualify as an exception where there has been no showing of an intimate relation or connection between the prior conduct and an element of the crime charged.

Isaac v. Commonwealth, MAY11, VaApp No. 0669-10-4:
(1) If a defendant objects to evidence introduced by the Commonwealth but introduces the same, or similar, evidence during the defendant's case in chief the defendant waives her objection. (2) There is an exception to this rule for evidence elicited during cross examination or rebuttal. (3) The rebuttal exception does not apply when the same or similar evidence is introduced in the defendant's case in chief in order to prove a point, explain it away or offer a more favorable explanation. (4) The rebuttal exception does apply when the defense cross examines about the evidence and the defendant testifies to lack of knowledge of it in his case in chief, but does not use it as a point of proof.

Racial Epitaph

Landeck v. Commonwealth, MAR12, VaApp Nos. 0332-11-2 & 0365-11-2:
The introduction of a racial epitaph os allowed to prove malice.

Expert Testimony

Sanders v. Commonwealth, JUN11, VaSC No. 101870:
(1) Unlike in civil cases, in a criminal case an expert may not rely on inadmissible evidence to form the opinion she expresses in court. (footnote 1)

Perry v. Commonwealth, AUG11, VaApp No. 1282-10-1:
(1) Whether a statement is an excited utterance and therefore an exception to the hearsay rule is within the sound discretion of the trial court. (2) An excited utterance must be spontaneous and impulsive. (3) The statement must have been prompted by a startling event. (4) The speaker must have first hand knowledge of the event. (5) The length of time since the event and the distance from the event are factors to be considered but not solely determinative. (6) The physical condition and emotional stability of the speaker must be considered. (7) The test is whether the statement is the event speaking thru the speaker or the speaker speaking about the event (res gestae).

PROCEDURE

Pretrial

Preliminary Hearing

Wilson v. Commonwealth, JUL11, VaApp No. 0728-10-1:
In any preliminary hearing for forced sodomy, inanimate object penetration or rape, in which the spouse is the complaining witness, the JDR court can, but is not required to, order a report to see if counseling could be feasible and effective.

Indictment

Fatal Variance

Purvy v. Commonwealth, DEC11, VaApp No. 0336-11-1:
(1) An indictment must give the defendant notice of the nature and character of the accusations against him. (2) A technical distinction or error in form between the indictment and the offense proven which does not result in injury to the accused is not a ground for dismissal. (3) A fatal variance occurs when the indictment charges a wholly different offense than the the one proved. (4) The offense as charged must be proven. (5) Generally, (a) an indictment citing a criminal statute incorporates its contents by reference, but (b)
when the descriptive text of an indictment narrows the factual allegation, it limits the scope of the incorporation. (6) Indicting someone for failing to register as a sex offender is fatally variant from proving he lied on his registration forms, even though both are under the same code section.

Jurisdiction

Jurisdiction to Exercise Jurisdiction

Smith v. Commonwealth, MAR12, VaApp No. 0186-11-2:
(1) Subject matter jurisdiction is not waived by a defendant's plea and can be raised at any time. (2) The jurisdiction to exercise subject matter jurisdiction is a type of jurisdiction itself and must be objected to at trial. (3) A guilty or no contest plea waives jurisdiction to exercise subject matter jurisdiction.

Venue

Taylor v. Commonwealth, APR11, VaApp No. 1292-10-2:
(1) A crime must be tried in the jurisdiction wherein it occurred. (2) The prosecution must prove the crime occurred in the jurisdiction to a strong presumption. (3) The Commonwealth may not rely on a greater offense to prove venue where the evidence fails to prove the defendant committed the greater offense and the lesser-included offense could not be properly charged in the jurisdiction.

19.2-244 Venue for a Communication Offense

Spiker v. Commonwealth, JUL11, VaApp No. 0626-10-2:
Venue for a communication offense is appropriate where the communication is completed (received).

Pretrial Motions

Nolle Prosequi

Duggins v. Commonwealth, MAR12, VaApp No. 2200-10-4:
(1) A trial judge should grant a motion to nolle prosequi unless (a) the circumstances manifest a vindictive intent (b) resulting in (i) oppressive and unfair trial tactics or (ii) other prosecutorial misconduct. (2) A nolle prosequi should be granted if the Commonwealth attorney shows a lack of adequate foresight and preparation. (3) A judge in a new trial of identical charges cannot bar the prosecution simply because he disagrees with the previous nolle prosequi. (4) A nolle prosequi can act as a bar to a new prosecution if (a) double jeopardy has attached, (b) it causes a delay in violation of the federal constitutional speedy trial guarantee, or (c) it is used as an unconstitutional weapon of prosecutorial misconduct. (5) The fact that a judge found no good cause to continue a case does not mean that there is no good cause to nolle prosequi the same case.

Moore v. Commonwealth, MAR12, VaApp No. 1926-10-4:
A court should not interfere with the Commonwealth's decision to seek a *nolle prosequi* unless the court determines that the exercise of such discretion is clearly contrary to public interest.

Trying Defendants Jointly

Allen v. Commonwealth, AUG11, VaApp No. 0755-10-2:
(1) If the prosecution shows good cause there is a presumption in favor of a joint trial. (2) Once the prosecution has shown good cause it becomes the defendant's burden to show prejudice which shall result from a joint trial. (3) The fact that evidence is stronger against one defendant than the other does not constitute prejudice. (4) The fact that separate trials would more likely result in an acquittal does not matter.

Severance

Doss v. Commonwealth, JAN12, VaApp No. 1136-10-3:
(1) If the defendant does not agree to have his charges tried together the test for severability is whether (a) justice requires separate trials, and (b) the offenses meet the requirements of Rule 3A:6(b). (2) Under Rule 3A:6(b), two or more offenses may be joined in a single indictment 'if the offenses are (a) based on the same act or transaction, or (b) on two or more acts or transactions that are (i) connected or (ii) constitute parts of a common scheme or plan. (3) Two offenses from different dates can be tried together if they are (a) connected, or (b) part of a common scheme or plan. (4) Connected crimes are closely blended in (a) place, (b) time, and (c) means of commission. (5) A common scheme or plan exists when the offenses are part of a plan which ties the offenses together and demonstrates the objective of the offenses was a goal not achievable by the commission of any of the individual offenses. (6) Gradation is a connection and therefore allows joint trial. (7) If a defendant is charged both with an initial violation of a code section and a subsequent violation requiring proof of a first violation the offenses can be tried together because the first is necessary to prove the second. (8) Justice requires separate trials when evidence of one crime is not admissible in the other.

JUDGE RECUSAL

Prieto v. Commonwealth, JAN11, VaSC No. 110632:
(1) In making the recusal decision, the judge must be guided not only by (a) the true state of his impartiality, but also by (b) the public perception of his fairness. (2)The burden of proving a judge's bias or prejudice lies with the party seeking recusal. (3) A judge who has previously pronounced a death penalty on an individual is not required to recuse himself if the case is returned to the trial court. (4) The (a) formation or (b) expression of an opinion as to the guilt of the accused based on information acquired during prior judicial proceedings is not grounds for recusal. (5) For a judge to be recused based on comments occurring in the record, (a) those comments must be taken in the context of the record as a whole and (b) a reasonable person, with knowledge of all the facts of the case, would question the judge's impartiality.

19.2-218.2 Motion to Remand to JDR Court for Potential Counseling

Wilson v. Commonwealth, JUL11, VaApp No. 0728-10-1:
If there has been a preliminary hearing in a lower court, the circuit court cannot remand forced sodomy, inanimate penetration, or rape wherein the complaining witness is a spouse to the JDR court for a hearing on the feasibility and appropriateness of counseling.

Void After Mistrial

Flanagan v. Commonwealth, AUG11, VaApp No. 0781-10-3:
(1) If a pretrial motion is made before a mistrial, the motion must be made again before any subsequent trial or it is not preserved.

Arraignment

Plea

Withdrawing a Guilty Plea

Williams v. Commonwealth, DEC11, VaApp No. 2524-10-4:
(1) A guilty plea retraction should not be denied if (a) the plea of guilty was (i) submitted in good faith under an honest mistake of material fact or facts, or if (ii) it was induced by fraud, coercion or undue influence and would not otherwise have been made, and (b) any reasonable ground is offered for going to the jury. (2) Fear of a larger sentence does not constitute undue influence. (3) A reasonable defense sufficient to support the withdrawal of a guilty plea is one (a) based upon a proposition of the law, or (b) supported by credible testimony, supported by affidavit. (4) A bare challenge to the victim's testimony or credibility is not sufficient to withdraw the guilty plea.

Trial

Jury Selection

REHABILITATION OF A BIASED JUROR

Scott v. Commonwealth, MAY11, VaApp No. 2305-09-2:
(1) Rehabilitation of a juror who has shown bias requires more than a statement from the juror that he will be impartial. (2) Proper rehabilitation requires (a) instructing the juror on the correct principal of law, (b) having the juror acknowledge he can apply the correct principal of law, (c) and having the juror reconcile the principal with his earlier statement. (3) A juror cannot be proven impartial by his assent to persuasive suggestions (leading questions) by either (a) the judge or (b) the attorneys.

Opening Argument

Motion to Strike

Dickerson v. Commonwealth, JUN11, VaApp No. 1215-10-1:
(1) In a bench trial, a defendant does not need to renew his motion to strike at the close of the evidence as long as he argues the legal insufficiency of the evidence in his closing argument. (2) A closing argument which addresses other issues - such as (a) a statute of limitations, (b) an affirmative defense, (c) the weight of the evidence, or the credibility of witnesses – does not address the legal insufficiency argument.

Admissibility of Evidence

Perry v. Commonwealth, AUG11, VaApp No. 1282-10-1:
(1) A motion to strike is about the sufficiency of the evidence, not its admissibility. (2) Arguing the admissibility of evidence during the motion to strike does not preserve the issue for appeal.

Renewing Motions

McDowell v. Commonwealth, NOV11, VaSC No. 102478:
When a defendant puts on evidence after the prosecution's case in chief, the defendant must renew his motion to strike the evidence and give his reasons therefore or the legal sufficiency of the evidence is waived for appeal.

Taylor v. Commonwealth, APR11, VaApp No. 1292-10-2: If the defense presents evidence it waives any motion to strike made at the close of the prosecution's evidence and must make a motion to strike at the end of all evidence.

Affirmative Defense

Jury Instructions

Landeck v. Commonwealth, MAR12, VaApp Nos. 0332-11-2 & 0365-11-2:
(1) Jury instructions must clearly state the law and cover all the issue the evidence raises. (2) An instruction is proper only if supported by more than a scintilla of evidence.

Closing Arguments

Landeck v. Commonwealth, MAR12, VaApp Nos. 0332-11-2 & 0365-11-2:
(1) Error arising from an improper argument (a) is usually cured by prompt and decisive action of the trial court and (b) not by granting a motion for a mistrial. (2) A mistrial must be granted only when improper statements are so impressive as to remain in the minds of the jurors and influence their verdict.(3) If there is only a generalized cautionary instruction given it does not cure the error. (4) A judge must (a) immediately sustain the objection to the error, (b) promptly instruct the jurors to disregard the erroneous argument and (c) tell the jurors it was improper.

Mistrial

Perry v. Commonwealth, AUG11, VaApp No. 1282-10-1:
When the defense has knowledge of potential juror misconduct during the trial (sleeping) he must object contemporaneously; he cannot wait until after the verdict and then ask for a mistrial.

Rendering Verdict

Sentencing

Jury Sentencing

UNADJUDICATED OFFENSES

Prieto v. Commonwealth, JAN11, VaSC No. 110632:
(1) Unadjudicated offenses are allowed in capital sentencing hearings to establish future dangerousness. (2) In order for a judge to allow an unadjudicated act into evidence, (a) he does not have to find it proven to a preponderance, but (b) only that, looking at the evidence to be presented, a jury could reasonably find the act took place.

VICTIM IMPACT

Prieto v. Commonwealth, JAN11, VaSC No. 110632:
(1) Victim impact evidence is allowed when their probative value is not outweighed by their prejudicial affect. (2) Victim impact evidence must be limited to the crime being tried.

COMMONWEALTH PSYCHIATRIC TESTIMONY

Prieto v. Commonwealth, JAN11, VaSC No. 110632:
(1) Once the defense has given notice of intent to use a psychiatric defense in mitigation during the sentencing hearing, the prosecution has a right to have a psychiatrist examine the defendant. (2) A prosecution psychiatrist examining the witness is not limited to questions concerning only mitigation. (3) A psychiatric witness for the prosecution can testify that the defendant refused to cooperate in his examination.

Pending Imposition of Sentence

Wilson v. Commonwealth, JUL11, VaApp No. 0728-10-1:
When convicted of forced sodomy or inanimate object penetration of a spouse, a defendant may be referred to counseling by the court only if both the prosecution and the victim agree.

Judicial Imposition of Sentence

Reducing a Conviction from Felony to Misdemeanor

Burrell v. Commonwealth, MAR12, VaSC No.111297:
(1) If a trial judge orders a sentence which will reduce a felony to a misdemeanor at a date later than 21 days from the entry of the sentencing order the sentence is void *ab initio*. (2) A sentencing Order is a final order and therefore appealable. (3) A sentence is void *ab initio* if the trial judge did not have the power to impose such a judgment. (4) A defendant (a) cannot invite error in a sentence void *ab initio* and therefore, (b) the fact he entered into a plea agreement does not mean that he cannot raise the voidness of the trial court's order.

Taylor v. Commonwealth, JUN11, VaApp No.2236-09-1:
Upon a finding of facts sufficient for guilt, a trial judge does not have the power to reduce a conviction to a lesser offense or to dismiss it.

19.2-303 Suspending Imposition of Sentence is Not Advisement

Epps v. Commonwealth, NOV11, VaApp No. 1799-10-4:
(1) 19.2-303 allows a judge to suspend a sentence or suspend the imposition of a sentence. (2) 19.2-303 does not allow a judge to not find a defendant guilty after determining facts are sufficient to find the defendant guilty.

Restitution

Burriesci v. Commonwealth, NOV11, VaApp No. 1945-10-2:
(1) The trial judge has wide latitude in determining the amount of restitution. (2) The restitution amount must (a) be supported by a preponderance of the evidence and (b) be reasonable in relation to the nature of the offense. (3) Restitution cannot be ordered for things indirectly related to the offense (installation of an alarm system post-theft, etc.).

Post Trial

Within 21 Days

Post 21 Days

Reducing a Conviction from Felony to Misdemeanor

Burrell v. Commonwealth, MAR12, VaSC No.111297:
(1) 19.2-303 only allows the judge to suspend a sentence. (2) It does not allow the judge to change the nature of the sentence (reduce from felony to misdemeanor).

192.-392.2(A)(1) Expungement of a Charge Not Guilty by Reason of Insanity

Eastlack v. Commonwealth, JUN11, VaSC No. 100650:
A finding of Not Guilty by Reason of Insanity is not an acquital and therefore cannot be expunged.

Flanagan v. Commonwealth, AUG11, VaApp No. 0781-10-3:
A motion to set aside a verdict after 21 days does not preserve any issues.

During Appeal

Statement of Facts

Lacava v. Commonwealth, MAR12, VaSC No. 110711:
(1) Must be filed within 55 days. (2) (a) Opposing party must be notified at time of filing, and (b) the notification must state that the statement of facts will be presented to the trial judge shall be within 15 to 20 days. (3) The trial judge must (a) sign the statement of facts, (b) correct and sign the statement of facts, or (c) if the trial judge cannot remember or accurately reconstruct the trial he must hold a new trial. (4) An unsigned statement of facts will be remanded by the appellate courts for the trial judge to do step (3).

SUBSTANTIVE

Violent Crimes

18.2-47(A) ~ ABDUCTION

Burton v. Commonwealth, APR11, VaSC No. 101282 (Reversing VaApp): (1) There are three elements to abduction: (a) Detention, (b) intent to deprive of personal liberty, and (c) no legal justification or excuse. (2) The use of deception to detain a victim by having her remain in a certain location, or even in a certain position, so that the defendant can observe her for sexual purposes does not fulfill the second element of abduction.

Collins v. Commonwealth, JAN11, VaSC No. 110067:
A bondsman licensed in another State who grabs a person in Virginia is guilty of abduction unless he is also licensed in Virginia.

18.2-60(A)(1) Knowingly Communicating a Written Threat

Holcomb v. Commonwealth, JUN11, VaApp No. 0546-10-1:
(1) Posting a threat on a web site open to the public, without specifically directing the victim to the site, is knowingly communicating a threat. (2) Threats of physical harm do not need to be directly expressed, but may be communicated in veiled statements, such as violent rap lyrics referring to the victim's family and historical occurrences the victim would recognize.

§ 18.2-371.1(A) - Child Neglect

Carrington v. Commonwealth, Feb12, VaApp No. 2559-10-2:
(1) The defendant is not required to be the sole person in charge of the child when the child is injured in order to be charged under this statute. (2) A person who lives in a residence and helps care for a child living there can be charged under this statute.

18.2-41 Maiming by Mob

Johnson v. Commonwealth, MAY11, VaApp No. 0439-10-1:
(1) The fact that a group of people initially formed for a legal purpose does not preclude it from turning into a mob at some point. (2) To show that a group has transformed into a mob the Commonwealth must show that its members formed an intent to commit an act of violence. (3) No particular words or express agreements are required to prove the forming of a mob. (4) Circumstances during the forming of the group and after it has been formed can be considered in determining whether it became a mob.

18.2-51 Malicious Wounding

Johnson v. Commonwealth, MAY11, VaApp No. 0439-10-1:
(1) Medical records are not required to prove a wounding. (2) A "wound" is the breaking of the skin. (3) Breaking of the skin inside the mouth, nose or ear is a wounding.

Maiming by Mob

Johnson v. Commonwealth, AUG11, VaApp No. 2091-10-1;
(1) To convict of maiming by mob the prosecutor must show (a) the defendant was a member of a mob, (b) the mob caused bodily injury to a person, and (c) the mob acted with either (I) malicious or (ii) unlawful intent to maim, disable, disfigure, or kill the victim. (2) A legal assembly can change into a mob by adopting an unlawful intent to commit violence. (3) Every person in the mob is criminally liable even though he may not personally, actively encouraged, aided, or countenanced the maiming.

18.2-51 Malicious Bodily Injury

English v. Virginia, OCT11, VaApp No. 1638-10-3:
(1) Wounding requires a breaking of the skin. (2) Bodily Injury includes detriment, hurt, loss, or impairment which can be considered an injury to the body. (3) Broken bones or bruises are not required to prove bodily injury. (4) Soft tissue injuries which require medical care and have some residual effect are bodily injuries. (5) No medical testimony is needed to prove an injury.

Sex Crimes

18.2-370(A)(1) Indecent Liberties – Exposure to a Minor

Simon v. Commonwealth, MAY11, VaApp No. 0909-10-4:
(1) Previous Virginia Supreme Court cases which said that indecent exposure was a lesser included offense of indecent liberties were merely dicta, (2) The purposefully obscene exposure required in indecent exposure is broader than the lascivious intent required in indecent liberties and therefore indecent exposure is not a lesser included offense of lascivious intent. (3) Indecent exposure does not require that the victim be under a certain age and indecent liberties does. (4) Indecent exposure is not a lesser included offense of indecent liberties.

18.2-67.3 Aggravated Sexual Battery

Gonzin v. Commonwealth, OCT11, VaApp No. 1441-10-2:
(1) The use of force, threat, or intimidation is not enough to make a sexual battery an aggravated sexual battery. (2) When a victim is not 13 or 14 years old and no weapon is used or threatened, the prosecution must prove serious bodily or mental injury to the victim for aggravated sexual battery. (3) That the victim received some mental and physical injuries is not enough make them serious. (4) In order to prove aggravated sexual battery the prosecution must prove mental or physical injury such that (a) it is grave in appearance, or (b) requires considerable care, or (c) is attended with danger. (5) Being upset about the attack does not constitute serious mental injury. (6) Failure to prove this element reduces the offense to misdemeanor sexual battery.

18.2-472.1(B) Failure to Register as Sex Offender

Marshall v. Commonwealth, MAY11, VaApp No. 0782-10-3:
(1) The language "knowingly" in the statute does not mean that the defendant has to have a specific intent not to register. (2) The defendant only has to know he is failing to register.

Purvy v. Commonwealth, DEC11, Record No. 0336-11-1:
Indicting someone for failing to register as a sex offender is fatally variant from proving he lied on his registration forms, even though both are under the same code section.

18.2-374.3 Communicating with a Minor to Solicit Illegal Activity

Spiker v. Commonwealth, JUL11, VaApp No. 0626-10-2:
It is appropriate to prosecute an illegal communication with a minor in the venue where it is received.

Drug Crimes

18.2-250 Intent to Possess

Sierra v. Commonwealth, MAR12, VaApp No. 0032-11-1:
The possession statute only requires (1) that the defendant intend to possess a controlled substance, (2) not that he intended to possess a specific controlled substance.

Knowledge of Nature and Character

Christian v. Commonwealth, FEB11, VaApp No. 0231-11-2:
(1) When (a) a defendant picks up an item he believes to be a drug, (b) an officer later finds that item on the defendant, and (c) the lab reveals it was the drug the defendant thought it was, the defendant had knowledge of the character and nature of the item. (2) A defendant's knowledge of the nature and character of a drug may be shown by evidence of the (a) acts, (b) statements, (c) conduct of the accused, or (d) other facts or circumstances tending to demonstrate the accused's guilty knowledge of the drug. (3) Giving a false name tends to indicate knowledge of nature and character.

18.2-255(A)(ii) Venue for Causing a Minor to Assist in Distribution of Marijuana

Kelso v. Commonwealth, JUN11, VaSC No. 101866:
Venue is appropriate where the minor distributes marijuana even if it is a different jurisdiction than where the adult gave the minor the marijuana.

Theft / Property Crimes

Single Larceny Doctrine

Moore v. Commonwealth, MAR12, VaApp No. 1926-10-4:
(1) When deciding whether the single larceny doctrine applies to a particular case, a court must consider (a) primarily the intent of the thief and (b) thereafter (i) the location of the items taken, (ii) the lapse of time between the takings, (iii) the general and specific intent of the taker, (iv) the number of owners of the items taken and (v) whether intervening events occurred between the takings. (2) When a defendant has given three bad notes to a bank at the same time, but withdraws the money credited to her account on several different occasions, the single larceny doctrine does not apply. (3) The single larceny doctrine does not apply to uttering charges.

18.2-95 (18.2-108) Larceny / Receiving : Value

Little v. Commonwealth, MAR12, VaApp No. 1136-11-4:
(1) While the price to replace an item (a) is not dispositive of the value of the item at the time it is stolen, (b) it is a factor that can be considered. (2) A display item is presumed to be new and functional. (3) A display item which the store does not intend to sell has no sale value to the store. (4) If the value of the display item is sufficiently high ($1,450), the trial court is not wrong in finding that the $200 element has been proven.

18.2-91 Burglary

Towler v. Commonwealth, DEC11, VaApp No. 0990-10-3:
(1) If a defendant entered a store to commit a robbery there is not a larceny and 18.2-91 may not be the proper statue to convict the defendant (18.2-90 is for robberies). (2) If the defendant intended to steal drugs from a pharmacy during the robbery 18.2-91 is an appropriate charge because the defendant intended to illegally possess scheduled drugs.

18.2-58: Robbery

Price v. Commonwealth, MAR12, VaApp No. 0192-11-3:
When a person (1) is detained by force in one part of her residence and (2) her property is stolen from another part of the residence (3) it is a robbery because the detention by force prevents her from defending her property.

Felony Petit Larceny

Pitts v. Commonwealth, OCT11, VaApp No. 2039-10-1:
(1) The types of predicate crimes which can be used to establish a felony petit larceny are (a) any larceny, and (b) any offense deemed a larceny, and (c) any offense punished as a larceny, and (d) any substantially similar offense in another jurisdiction. (2) Attempted petit larceny is punished as petit larceny is and therefore is a predicate crime for felony petit larceny.

Burton v. Virginia, MAY11, VaApp No. 0470-10-2:
(1) Opinion testimony as to value by the owner is allowed regardless of the owner's knowledge of property values. (2) Opinion testimony as to value by a non-owner is allowed if the person has knowledge of the value or has had ample opportunity to form a correct opinion as to value. (3) No special training or experience is required to testify as to value, just familiarity with the property. (4) When a defendant is found in possession of property matching the general description of property stolen it permits an inference of larceny.

Weapon Crimes

18.2-53.1 Use of Firearm in Felony

Hines v. Commonwealth, FEB12, VaApp No. 0228-11-2:
Although the language in the statute refers to the punishments of 3 years (1st offense) and 5 years (2+ offense) as “mandatory minimums” this does not mean that the judge can sentence the defendant to more than 3 or 5 years.

18.2-308.2 Felon in Possession of the Same Firearm

Baker v. Commonwealth, NOV11, VaApp No. 0162-11-1:
If a felon is in possession of the same firearm on different separate particular time periods he can be convicted of a charge of felon in possession of a firearm for each particular time period.

18.2-308.2:2 False Statement on a Firearm Purchase Form

Smith v. Commonwealth, NOV11, VaSC No. 102398:
(1) The prosecution is required to prove, beyond a reasonable doubt, that the defendant knew he was uttering a falsehood when he filled out the form. (2) If the defendant has not been informed of the date he will be indicted and fills out a firearm purchase after that date it is not sufficient to find beyond a reasonable doubt that he knowingly uttered a falsehood.

18.2-85 Possession of Explosives

Flanagan v. Commonwealth, AUG11, VaApp No. 0781-10-3:
(1) The exception allowing possession of explosives for educational, scientific, or other legal purpose is an affirmative defense. (2) Possessing explosives is a strict liability crime and does not require proof of malicious intent.

18.2-53.1 Use of Firearm in Felony

Towler v. Commonwealth, DEC11, VaApp No. 0990-10-3:
A firearm does not have to be touched or brandished; it need only be displayed (in waistband, pocket, etc.).

Motor Vehicles:

18.2-266 DUI - Operator

Enriquez v. Commonwealth, MAR12, VaSC No. 110818:
When an intoxicated person is seated behind the steering wheel of a motor vehicle on a public highway and the key is in the ignition switch, he is in actual physical control of the vehicle and, therefore, is guilty of operating the vehicle while under the influence of alcohol.

Branham v. Commonwealth, JAN12, VaSC No. 110263:
A citizen is not required to turn over his license to an officer under 46.2-104 unless he has received a signal to stop from a law enforcement officer.

DUI – Switching Drivers

Rix v. Commonwealth, JUN11, VaSC No. 101737:
When a drunk passenger changes places with the former driver on the side of the road while the engine is running the former passenger is guilty of a DUI.

Thomas v. Commonwealth, JAN12, VaApp No. 0290-11-3:
46.2-357 – Driving as Habitual Offender
(1) A person declared a habitual offender prior to 46.2-355 changing to specifically say “revoked” in 1995 is still revoked.

Other

18.2-152.7:1 Computer Harassment

Barson v. Commonwealth, JUL11, VaApp en banc No. 2464-09-1:
(1) The limitation of obscenity to that which is pornographic is limited to 18.2-372, which applies only to Article 5 of Chapter 8 of Title 18.2: Crimes Involving Morals and Decency (2) For computer harassment, pornography is a sub-set of obscenity. (3) For computer harassment, obscenity is something (a) disgusting to the senses or (b) offensive or revolting as countering or violating some ideal or principle. (4) Under this statute the prosecution must prove both harassment and obscenity.

18.2-362 Bigamy / 20-38.1 Prohibited Marriages

Cole v. Commonwealth, AUG11, VaApp No. 0320-10-2:
(1) Although a bigamous marriage is void, it is still an illegal marriage under the statute. (2) The bigamy statute is not unconstitutionally vague because it (a) clearly makes it illegal to marry a second time while still married, and (b) it does not allow law enforcement to define what is and isn't legal. (3) The fact that there is a misdemeanor (20-38.1) forbidding anyone to marry prior to the dissolution of one of the parties' prior marriage does not make it unconstitutional to prosecute someone under the bigamy statute.

18.2-46.2(A) Participating in a Criminal Street Gang

Rushing v. Commonwealth, JUL11, VaApp No. 0723-10-1:
In proving prior criminal acts by members of the criminal street gang, in order to establish its status, (1) the crimes do not have to involve the defendant {2} nor does it have to be proven that the defendant knew the people involved.

Lebron v. Commonwealth, JUL11, VaApp No. 1405-10-3:
One person saying “Man up” to another is an indication that they are both in the Latin Kings.

18.2-46.1 Establishing a Group is a Criminal Street Gang

Salcedo v. Commonwealth, JUL11, VaApp No. 1325-10-3:
The two necessary predicate criminal acts which are needed to prove a criminal street gang can be established by an officer testifying that two members of a national gang, in other States, have been convicted of requisite crimes.

Conspiracy

Johnson v. Commonwealth, AUG11, VaApp No. 2091-10-1;
(1) Conspiracy need not be proven by proof of an explicit agreement. (2) Conspiracies are usually proven by indirect and circumstantial evidence, including the overt actions of the parties.

Criminal Street Gang

Johnson v. Commonwealth, AUG11, VaApp No. 2091-10-1;
(1) In order to prove that a group is a criminal street gang the prosecution must prove its members have (a) individually, or (b) as part of the group committed two or more predicate criminal acts. (2) The introduction of the defendant's prior conviction(s) can serve as evidence of the predicate offenses.

Participation in a Criminal Street Gang

Morris v. Commonwealth, OCT11, VaApp No. 1133-10-2:
(1) There are three elements to the crime of participating in a criminal street gang: (a) the defendant must participate in or be an active member of a criminal street gang, and (b) the defendant must knowingly and willingly participate in a predicate criminal act, and (c) the act must be done (i) for the benefit of, or (ii) at the direction of, or (iii) in association with the gang. (2) Even if one is not a member of the criminal street gang committing the predicate criminal act, participating with members of the criminal street gang is acting “in association with” the gang and therefore fulfills element iii.

PROBATION

Transfer of Sexually Violent Predators on Probation:

Commonwealth v. Blaxton, MAR12, VaSC No. 102360:
Supervision of sexually violent predators cannot be transferred outside the Commonwealth, even if they are on supervision for a different offense.

Hearsay

Henderson v. Commonwealth, FEB12, VaApp EN BANC No. 0688-10-4:
(1) Because probation hearings are not a part of the criminal prosecution, hearsay can be admitted during a probation hearing at the discretion of the court. (2) The test as to whether hearsay can be admitted is whether there is good cause to admit it. (3) (a) Two tests have developed to determine whether there is good cause and (b) the Court of Appeals declined to choose between them. (4) The reliability test allows the admission of hearsay evidence without a showing of cause for the declarant's absence if the evidence has substantial guarantees of trustworthiness. (5) Factors which bolster reliability: (a) corroborating evidence, (b) the statement is quite detailed, providing a fairly full account of the circumstances, (c) admissions from the defendant corroborate the challenged hearsay, (d) the defendant fails to present evidence, or (e) internal corroboration within the hearsay. (6) Factors which detract from reliability: (a) the statements come from an adversarial relationship between the person reporting the statement and the person who made it, (b) they represent self-serving statements, or (c) they contain multiple levels of hearsay. (7) Under the balancing test, a court weighs a defendant's interest in confronting a particular witness against the government's good cause for denying it, particularly focusing on the indicia of reliability of a given hearsay statement. (8) Under the balancing the accused has an interest in the presence of the witness in court even if there is some indicia of reliability. (9) Exceptions are allowed (a) if the evidence has a degree of reliability so high it overwhelms the need for the witness, or (b) if the defendant is the reason the witness is not in court. (10) If the witness is unavailable the court should just decide if the hearsay is reliable. (11) An officer testifying as to the statements of alleged victims in crimes which were never prosecuted can pass both tests.

Collateral Attack of Prior Probation Revocation

Dunham v. Commonwealth, FEB12, VaApp No. 2495-10-2:
(1) A defendant may not collaterally attack a previous hearing's extension of the time his sentence is suspended unless the original order was void *ab initio*. (2) A previous order was not void if the court had jurisdiction over (a) the subject matter and (b) parties. (3) Subject matter jurisdiction (a) is granted to courts by constitution or statute and (b) delineates a court's ability to adjudicate a defined class of cases or controversies. (4) Proceedings concerning the revocation of a sentence are within the subject matter of a trial court and therefore cannot be void *ab initio*.

Confessions without Further Evidence

Downey v. Commonwealth, OCT11, VaApp No. 1936-10-2:
An uncorroborated confession to violating probation conditions is enough for a judge to find that probation has been violated.

APPEALS

Appellee Argument

Appellant Argument

Extension of Time for Transcript

Lacava v. Commonwealth, MAR12, VaSC No. 110711:
(1) As the period for filing a motion for extension is 90 days and the Court of Appeals cannot require the appellant to show cause why he did not file the motion within 60 days. (2) An abuse of discretion can occur in three principal ways: (a) when a relevant factor that should have been given significant weight is not considered; (b) when an irrelevant or improper factor is considered and given significant weight; and (c) when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

Appealing from the Court of Appeals ~ Assignment of Error

Davis v. Commonwealth, NOV11, VaSC No. 102420:
(1) If the appellant appeals from the Court of Appeals, but does not assign error to the Court of Appeals the Virginia Supreme Court will dismiss the case for lack of jurisdiction to consider the appeal. (2) Assigning errors to the trial court when appealing from the Court of Appeals is not sufficient to give the Supreme Court jurisdiction.

Change in Law After Trial

Johnson v. Commonwealth, AUG11, VaApp No. 2091-10-1;
The perceived futility of objecting due to the current law does not allow the appellant to argue the point if the law changes post trial.

Ends of Justice

Hines v. Commonwealth, FEB12, VaApp No. 0228-11-2:
When a judge imposes a sentence greater than that allowed by law the appellant can be granted relief under the ends of justice exception to 5A:18.

Ends of Justice

Flanagan v. Commonwealth, AUG11, VaApp No. 0781-10-3:
(1) The “ends of justice” exception to the requirement under Rule 5A:18 (that a contemporaneous objection be made to preserve an issue) only applies if the defendant (a) demonstrates she was convicted of an offense that did not occur, or (b) the record affirmatively proves that an element of the offense did not occur. (2) It is not sufficient to demonstrate that the prosecution did not prove an element of the offense.

Good Cause

Perry v. Commonwealth, AUG11, VaApp No. 1282-10-1:
The “good cause” exception to the requirement under Rule 5A:18 (that a contemporaneous objection be made to preserve an issue) only applies if the defendant did not have the opportunity to object to a finding of the trial court.

Writs

Actual Innocence – Non-Biological

Turner v. Commonwealth, SEP11, VaSC No. 101457:
Even when an evidentiary hearing has been held and a recantation has been held credible that a codefendant acted alone in restraining and killing the victim, it is not enough to overcome the petitioner's conviction for deceptive abduction with intent to defile (petitioner told people at the bar he was going to have a threesome with her and they ended up in his car together) and felony murder.

Writ of Actual Innocence – Non-Physical Evidence

Haas v. Commonwealth, JAN12, VaSC No. 110599:
(1) The Court of Appeals is not required to send a writ to the Circuit Court for an evidentiary hearing; it can proceed from the record. (2) Because recantations by persons who testified against the defendant at trial are untrustworthy, it is not necessary to refer the case to the Circuit Court for evidentiary review.

Standards of Review

Wrong Judge Signed Statement of Facts

Smith v. Commonwealth, MAR12, VaApp No. 0186-11-2:
(1) The presumption that a statement of facts is binding upon an appellate court as an accurate recitation of the incidents at trial is a rebuttable presumption. (2) Where the evidence in the balance of the record indicates that the statement of facts does not accurately reflect the evidence and incidents of trial appellate courts are not bound by the statement of facts to the exclusion of the other evidence in the record. (3) A judge other than the one who heard a trial is not in position to resolve conflicts in the evidence and therefore, unless there is other evidence available in the record (outside the statement of facts) which resolve inconsistencies the case will be remanded to the trial court.

Interpanel Accord Doctrine

Towler v. Commonwealth, DEC11, VaApp No. 0990-10-3:
(1) A three judge panel of the Court of Appeals is bound by, and cannot overturn, precedent set by a previous three judge panel. (2) Only the Court of Appeals en banc or the Virginia Supreme Court can overturn precedent previously set by a panel of the Court of Appeals.

Right Result, Wrong Reason Doctrine

Towler v. Commonwealth, DEC11, VaApp No. 0990-10-3:
In determining whether to use the right result, wrong reason doctrine, the appellate court must determine whether the record demonstrates that all evidence necessary to the alternative ground for affirmance was before the circuit court and, if that evidence was conflicting, how it resolved the dispute, or weighed or credited contradicting testimony.

Conflicting Statements by the Prosecution's Witness

Commonwealth v. McNeal, JUN11, VaSC No. 101933:
(1) When the prosecutor's witness has made statements which both incriminate and make the putative crime impossible, the finder of fact decides which facts to give weight to and which to disregard. (2) The fact that the trial court disregarded exculpatory testimony does not render the decision plainly wrong or without evidence to support it and the appellate courts cannot overturn the conviction.

Remedies

Rushing v. Commonwealth, JUL11, VaApp No. 0723-10-1:
(1) If an appellant only asks for reversal and dismissal the appellate courts will only consider sufficiency of the evidence arguments. (2) In order for an appellate court to consider legal errors made by the trial court the appellant must ask for the remedy of remand.

Judge Did Not Sign Statement of Facts

Smith v. Commonwealth, MAR12, VaApp No. 0186-11-2:
(1) If the trial judge did not sign the statement of facts the case must be remanded by the appellate courts for the trial judge to sign the statement of facts or resolve any discrepancies. (2) A judge other than the one who heard a trial is not in position to resolve conflicts in the evidence and therefore, unless there is other evidence available in the record (outside the statement of facts) which resolve inconsistencies the case will be remanded to the trial court.

Death and the "Abatement Doctrine"

Bevel v. Commonwealth, NOV11, VaSC nos. 102246 & 102323:
(1) The death of a defendant during his appeal can render his appeal moot. (2) The appeal will not always be moot if it could affect an estate or have other effects. (3) The death of a defendant during the appeal does not render the conviction void ab initio.

HABEAS

E.C. v. Va. Department of Juvenile Justice, MAR12, VaSC No. 110523:
(1) Whether the court has jurisdiction to hear a habeas is based upon the petitioner's situation at time of filing, not on subsequent events (release from obligations of the sentence). (2) Courts do not have habeas jurisdiction if the petitioner has completed the sentence before filing. (3) The release of a petitioner from incarceration, probation, or parole does not render the petition moot when there are sufficient collateral consequences extending past the release.

Lahey v. Johnson, JAN12, VaSC No. 110552:
Even if the habeas petition is delivered to the court in a timely manner, if there is an error and the filing fee is less than required, the habeas is not filed until the correct amount of money is supplied.

Maples v. Thomas, JAN12, USSC No. 10-63:
(1) A state prisoner's habeas claims may not be entertained by a federal court when (a) a state court declined to address the claims because the prisoner had failed to meet a state procedural requirement, and (b) the state judgment rests on independent and adequate state procedural grounds. (2) Habeas relief can be had when something external to the petitioner which cannot fairly be attributed to him impeded his effort to comply with a State procedural rule. (3) Negligence on the part of the petitioner's lawyer is fairly attributed to the petitioner because the lawyer is the petitioner's agent and therefore is not grounds for habeas relief. (4) When an attorney abandons the case he is no longer part of the principal/agent relationship and habeas relief can be had for matters the attorney did not do.

Dishonest Juror

Porter v. Warden Sussex I, MAR12, VaSC No. 091615:
(1) A two part test is used to decide whether to require a new trial because a juror was allegedly dishonest during voir dire: (a) has the petitioner shown that a juror failed to answer honestly, and (b) would the correct answer have created a basis for a challenge for cause.

Greene v. Fisher, NOV11, USSC No. 10-637:
(1) An issue which has been adjudicated in State court is not grounds for habeas relief unless (a) the decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or, (b) the result was a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. (2) Under Teague v. Lane, 489 U. S. 288 (1989), habeas relief can be had based upon a USSC opinion changing the constitutional

rules of procedure if the rule change occurs before the conviction becomes final. (3) A conviction becomes final when (a) the State appeals have been exhausted or (b) after state appeals have been exhausted when time to appeal to the USSC has been time barred or exhausted. (4) Under the Antiterrorism and Effective Death Penalty Act of 1996, habeas can only arise if the change in constitutional precedent occurs before the last adjudication on the merits. (5) Example: Trial court holds X, court of appeals holds X, State supreme court grants appeal, new and contrary constitutional precedent occurs, State supreme court dismisses appeal as improvidently granted. (a) Conviction is final when the State supreme court dismisses the review. (b) Last adjudication on the merits occurs when the court of appeal renders its holding. (c) Habeas would be allowed by Teague but is barred by AEDP.

Elmore v. Ozmint, NOV11, 4Cir No. 07-14:
In a capital murder case it is ineffective assistance of counsel to simply rely on forensic evidence provided by the government.

Bowman v. Johnson, NOV11, VaSC No. 102471:
If the prosecution fails to correct false testimony of its witness and the defense has discovery which shows the falsehood at the time of trial, the defense should raise that argument during trial and on appeal; it will not be addressed in a habeas.

Byrd v. Johnson, APR11, VaSC No. 101289: (1) Failure to renew the motion to strike at the end of evidence presentation fails the performance prong of Strickland. (2) Filing a motion to set aside a verdict, but not arguing it to the trial court fails the performance prong of Strickland. (3) The defendant must affirmatively prove these failures were prejudicial, having an adverse effect on the defense so that there is a reasonable probability the result would have been different.