# CONSTITUTION

## 4th Amendment

### Search & Seizure

* * * Jail Search

Florence v. Board of Chosen Freholders of County of Burlington, APR12, USSC No. 10-945: Requiring an incoming prisoner, charged with a non-indictable crime, to strip for a visual search and engage in health requirements (shower with delousing agent) is not an unconstitutional search.

* * Seizure of an Individual During Search of a Residence

Bailey v. United States, FEB13, USSC No. 11-770: (1) Detention of an individuals found within or immediately outside a residence being searched under warrant is constitutional **without** (a) suspicion that the individual is involved in criminal activity, or (b) suspicion that the individual is a danger to the officers. (2) The rationales for allow detention during the search of a residence are (a) officer safety, (b) facilitating the completion of the search, (c) preventing flight, and (d) the intrusion upon the individual's right is minimal. (3) If a person returns to a residence during a search the police can detain that person. (4) When an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe. (5) the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place. (6) It is unconstitutional to watch someone leave a residence before a search warrant is served, follow that person away from the residence, and seize that individual for no other reason then that he left the residence.

* * Seizure of Individual by Officer – Floodlight & Non-Submission

Beasley v. Commonwealth, JUL12, VaApp No. 1534-11-1: (1) An officer suddenly confronting an individual by pointing a blinding flashlight at him so as to stun him is a seizure. (2) Without testimony as to the light's brightness, the spotlight on a police car does not establish a seizure of the individuals in the vehicle at which the light is pointed. (3) A person is seized when (a) the officer uses force or (b) the person submits to the officer's authority. (4) A person who initially obeys an officer's command and then acts contrary to that instruction

has not submitted to the officer's authority even if the officer commands him several times as long as he continues to act contrary to the officer's instructions.

* * Traffic Checkpoints

Despisito v. Commonwealth, JUN12, VaApp No. 0849-11-2: If all other factors are outside the officer's discretion, allowing an officer to choose the exact time within general parameters (lunch time) and to choose the end time within set parameters (30 minutes to 2 hours) of a checkpoint is not unconstitutional.

* * Jail Search After Unconstitutional Arrest

Echavarry v. Commonwealth, MAY12, VaApp No. 1010-11-4: (1) When the officers violate the 4th Amendment, resulting in an arrest, the subsequent discovery of contraband on the person of the defendant when he is searched at jail is sufficiently attenuated from the initial constitutional violation that it should not be suppressed. (2) But-for causation is not the test used to determine whether evidence is tainted by an unconstitutional search or seizure such that suppression is an appropriate remedy. (3) The taint of an unlawful search or seizure can dissipate when the causal connection to the purported illegality is remote, when an independent actor's free will breaks the causal chain, or when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.

* * Community Caretaker: Package Left Behind

Knight v. Commonwealth, DEC12, VaApp No.0066-12-3: (1) The community caretaker exception requires that an officer have an objectively reasonable belief that his conduct in searching a closed container, such as the backpack here, is necessary to provide aid or to protect members of the public from physical harm. (2) For a warrantless search of a closed container to be upheld as permitted within the Fourth Amendment, the warrantless entry must be totally divorced from a criminal investigation. (3) The test used to determine whether the search of the container was a valid community caretaker function is if it was reasonable for the officer to believe the search was needed to (a) protect the owner's property while it remained in police custody; (b) protect police against claims or disputes concerning lost or stolen property; or (c) protect the public and the police from physical danger. (4) An owner maintains an expectation of privacy in lost or mislaid items diminished to the extent that the finder may examine and

search the lost property to determine its owner [footnote 5].

* * Fruit of the Poisonous Tree:

Knight v. Commonwealth, DEC12, VaApp No.0066-12-3: (1) When an unconstitutional search has revealed contraband the determining factor in whether later developed evidence establishing presence of the same contraband is excluded is whether the later developed evidence came by exploiting the unconstitutionally obtained information or by means sufficiently distinguishable to be purged of the primary taint. (2) Unconstitutionally searching a container a suspect has left at a location, finding contraband, and then immediately going and telling the suspect to tell what's in the container does not purge the original taint when the suspect admits to the contraband.

* Dog Sniff Non-Searches : Standards

Florida v. Harris, FEB13, USSC No. 11-817: (1) An inflexible set of evidentiary requirements should not be required to determine probable cause. (2) An inflexible set of evidentiary requirements cannot be applied in determining whether a dog's alert is sufficient for probable cause. (3) The record of a dog's performance in field conditions is potentially flawed and training records can provide a better representation of the dog's capabilities.

* Good Faith Reliance:

Bellamy v. Commonwealth, MAY12, VaApp No. 0199-11-1: When an officer arrests and searches an individual after having been misinformed by dispatch that there is an outstanding warrant the exclusionary remedy does not apply because the officer is acting in good faith.

Tizon v. Commonwealth, APR12, VaApp No. 1967-10-4: (1) Probable cause is supposed to rely on a common sense approach not a hypertechnical, rigid, and legalistic analysis. (2) Probable cause does not require a showing that the belief be correct or more likely than not. (3) Probable cause only requires a showing that there is a substantial possibility of criminal activity. (4) Absence of probable cause to believe a suspect committed the particular crime for which he was arrested does not necessarily invalidate the arrest if the officer possessed sufficient objective information to support an arrest on a different charge.

HARMLESS ERROR:

Foltz v. Commonwealth, SEP12, VaSC No. 110832: Assuming the police use of a gps tracker was unconstitutional when it led them to start following the defendant around and therefore intervene when the defendant put on a mask, abducted, and attempted to rape a woman, their testimony is harmless error because the woman testified that the defendant abducted and tried to rape her.

Exigent Circumstances - Burglary

Washington v. Commonwealth, JUL12, VaApp No. 1428-11-2: When clearly new tracks lead from the site of one burglary to another residence and the door of the second residence opens when knocked on the police are justified in entering the second residence end doing a protective sweep.

Amin v. Henrico, OCT12, VaApp No. 0861-11-2: When three police cars pulled up behind the defendant's parked car, three officers approached the car, and the officers asked for and held the defendant's driver's license, it was a consensual encounter because the lights of the patrol cars were not on, the cars were parked far enough back that the defendant could have pulled out, and the officers did not tell the defendant he was a suspect in a particular crime.

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# 5th Amendment

## Double Jeopardy

* * Acquittal Based on an Element Not Part of the Crime

Evans v. Michigan, FEB13, USSC No. 11-1327: (1) The Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is based upon an egregiously erroneous foundation. (2) An acquittal precludes retrial even if (a) it is premised upon an erroneous decision to exclude evidence, or (b) a mistaken understanding of what evidence would suffice to sustain a conviction, or (c) a misconstruction of the statute defining the requirements to convict. (3) An acquittal encompasses any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. (4) If a trial court incorrectly rules that a certain element must be proven in order to convict on an offense it is a misconstruction of the statute defining requirements to convict and a directed acquittal (approximately equivalent to a motion to strike evidence in Virginia) because that element was not proven, jeopardy attaches.

Blueford v. Arkansas, MAY12, USSC No. 10-1320: When the jury is given verdict possibilities to be considered in a series (capital murder, 2d degree murder, voluntary manslaughter, involuntary manslaughter) tells the judge that it has decided the defendant is not guilty of the first two offenses, but has hung on the third, no double jeopardy attaches on the first two offenses after a mistrial because no verdict was rendered.

## Right to Remain Silent

Tizon v. Commonwealth, APR12, VaApp No. 1967-10-4: (1) A suspect must be in custody for Miranda to apply, but merely being detained is not enough to require Miranda warnings. (2) Miranda is not required during a temporary investigative detention. (3) Statements made when the officer first arrives at the scene and is trying to determine what happened do not require Miranda. (4) Voluntary statements made without questions from an officer, while being driven to the police station, do not require Miranda.

Kuhne v. Commonwealth, NOV12, VaApp No. 0563-11-4: (1) If police purposefully engage in a two step interrogation – questioning until getting a

confession, reading Miranda, and then leading the suspect back through the confession – the statements made while in custody must be excluded. (2) If police inadvertently engage in a two step interrogation the statements are admissible.

### Due Process

* Picture Lineup / Witness Identification

Smith v. Commonwealth, NOV12, VaApp No. 2159-11-1: (1) Witness identification violates due process when both (a) the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime, and (b) these circumstances damage the reliability of the identification to the extent that there exists a very substantial likelihood of irreparable misidentification. (2) If the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth. (3) The defendant must prove that both elements of the due process violation have occurred, (4) A purely innocuous characteristic (not a characteristic given as part of the victim's description) found solely in the photo of the suspect in the picture line-up is not sufficient to establish suggestive circumstances. (5) Because there is an implication that a photo line-up contains a picture of the suspect and the witness would assume the suspect is in the line-up, it is not a constitutional error if the officer indicates to the victim that the suspect is in the line-up.

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## 6th Amendment

### Speedy Trial

### Jury

Bay v. Commonwealth, AUG12, VaApp No. 0585-11-1: (1) There is no per se rule that residents of a locality wherein a terrorist act has occurred must be eliminated from sitting in the trial of the terrorist act. (2) Determination as to whether a resident can be fair in a trial of a terrorist act that occurred in the

locality should be done in voir dire. (3) Those things which have been ruled per se juror disqualifications are (a) venireman is currently represented by an attorney in the case, (b) venireman is brother of an officer who will testify, (c) venireman is a stockholder in a party of the litigation, and (d) venireman is related to the victim within the ninth degree. (4) Those things which have specifically ruled as not being per se juror disqualifications are (a) juror related to a prosecution witness, (b) juror has a current or past acquaintance with a prosecution witness, (c) juror has an association with a law enforcement officer, (d) juror is a former client of the Commonwealth Attorney, (e) juror is employed by the corporate victim, (f) juror has been a victim of a similar crime, and (g) juror has the potential to be a victim of a similar crime.

## Notification of Offense

## Right to Confront Accuser

* * * ? ? ? Williams v. Illinois, JUN12, USSC No. 10-8505: (1) **FOUR JUSTICES ONLY**: At least in bench trials, inadmissible out of court statements (DNA analysis) which an expert talks about in explaining the basis for his opinion are not offered for their truth and therefore are not subject to the confrontation clause. **NOTE**: This relies strongly on Federal Rule 703 which does not track with Virginia Rule 2:703(b). (2) **FOUR JUSTICES ONLY**: Statements which fall under the confrontation clause have two characteristics. (a) They involve out of court statements having a primary purpose of accusing a defendant of a crime. (b) They involve formalized statements such as affidavits, prior testimony, or confessions. (3)(a) A DNA report from before the offender is identified is non-testimonial because its primary purpose was not to obtain evidence for the trial of the offender, but to catch an offender. (b) DNA evidence is not inherently inculpatory; it exculpates everyone but the offender. (c) Requiring the technicians who worked on preparing a profile to testify is economically expensive and would discourage the use of DNA in favor of less reliable evidence. (d) The defendant is not prejudiced because he can subpoena the technicians who prepared the profile. (4) **JUSTICE THOMAS ONLY, rejecting both above but concurring**: (a) A rule of evidence does not trump the right to confront, especially one that was created contrary to the common law rule it replaced. (b) The confrontation clause regulates only those statements with indicia of solemnity so that they are formalized testimonial materials, including depositions, affidavits, prior testimony, or statements from formalized dialogue such as custodial interrogation.

19.2-187 – Division of Forensic Science Analyst

Pope v. Commonwealth, JUL12, VaApp No. 2558-10-2: When (a) data is received from a lab authorized to test it by the Division of Forensic Science and (b) an analyst at the Division does her own analysis of the data, the data gathered the certificate is admissible.

18.2-459 – Summary Contempt Appeal Letter

Parham v. Commonwealth, JUL12, VaApp No. 1528-11-2: The use of a letter to provide evidence to the circuit court on an appeal of a summary judgement, instead of having the district court judge testify, neither violates the right to

confront under the 6th Amendment nor due process.

## Process to Obtain Witnesses

## Right to Counsel

* * Conflict of Interest

Spence v. Commonwealth, JUL12, VaApp No. 1195-11-1: (1) An unconstitutional conflict of interest occurs only when there is (a) an actual conflict which (b) adversely affects the lawyer's performance. (2) A mere theoretical concern that an attorney's performance might be adversely affected is not enough to establish a conflict of interest. (3) The Virginia Rules of Professional Conduct do not establish the standards the court applies in determining whether there is a constitutional conflict of interest. (4) If one attorney in an office has an actual conflict it does not impute that conflict to all members of the office (note this constitutional rule is different than Virginia Rule of Professional Conduct No. 1:10).

* * Waiver of Conflict:

Beshah v. Commonwealth, MAY12, VaApp No. 2070-10-4: (1) A trial court is not constitutionally required to honor a waiver of conflict free representation. (2) The trial court's interest in the appearance and reality of proper representation cannot be overridden by a defendant's waiver of conflict. (3) It is inconsequential that no actual conflict developed as long as a potential for conflict existed at the time the judge removed the attorney from the case.

Tizon v. Commonwealth, APR12, VaApp No. 1967-10-4: If the trial judge gives a prompt, explicit, curative instruction to the jurors after an improper mention of a request for counsel there is no need for a mistrial.

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# 8th Amendment

## Excessive Bail

## Excessive Fines

## Cruel & Unusual Punishment

* * * Miller v. Alabama, JUN12, USSC No. 10-9646: (1) Because a mandatory sentence of life in prison does not allow the sentencer to consider the mitigating qualities of youth, it is not constitutional to mandate life in prison for anyone under 18 years of age convicted of murder. (2) Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, (a) immaturity, (b) impetuosity, and (c) failure to appreciate risks and consequences. (3) It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. (4) It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. (5) It ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. **[NOTE: See Angel v. Commonwealth, JAN11, VaSC No. 092341 (life imprisonment okay in Virginia because of geriatric parole)]**

* * Method & Choice of Execution

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: When the court has determined that one method of execution (electrocution) is constitutionally valid and the prisoner has the choice of execution forms, the court will not consider whether the other form of execution (lethal injection) is constitutional.

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# 14th Amendment

## Equal Protection / Due Process

* * * Brady Disclosures

Tuma v. Commonwealth, JUN12, VaApp No. 0919-10-2: (1) For a Brady violation, (a) the evidence must be (I) exculpatory or (ii) impeaching, and (b) the government must have suppressed the evidence either (i) purposefully or (ii) inadvertently, and (c) prejudice must occur. (2) Prejudice occurs when there is a likelihood of a different result sufficient to undermine confidence in the trial's outcome. (3) Prejudice does not mean that it is more likely than not that a jury would have rendered a different verdict. (4) The prosecutor must examine the evidence and determine when the evidence becomes prejudicial to the point that it must be disclosed. (5) For evidence to be exculpatory it must (a) be material to (I) innocence or (ii) the degree of lesser offense for conviction, or (b) the degree of punishment, or (c) the impeachment of a witness as to pertinent facts. (6) When the eyewitnesses' testimony is the only thing linking the defendant to the crime, statements which contradict trial testimony made by that witness are plainly material. (7) The prosecutor's duty to disclose impeachment evidence arises only when the witness makes inconsistent statements. (8) A prosecutor has an affirmative duty to discover evidence favorable to the defense. (9) Brady violations are not subject to harmless error review. (10) If the prosecution has not reviewed a tape of a witness interview prior to the trial (relying on officers' notes) the prosecutor has not fulfilled his obligation under Brady.

* * * Prosecuting Defendants under Different Theories

Farmer v. Commonwealth, JAN13, VaApp No. 0191-12-2: (1) The use of inconsistent theories in the separate trials of co-defendants is *not* a violation of the due-process clause as long as there is no showing of (a) prosecutorial misconduct or (b) bad faith.

* * Jail Search

Florence v. Board of Chosen Freholders of County of Burlington, APR12, USSC No. 10-945: Requiring an incoming prisoner, charged with a non-indictable crime, to strip for a visual search and engage in health requirements (shower with delousing agent) is not a violation of equal protection rights.

18.2-459 – Summary Contempt Appeal Letter

Parham v. Commonwealth, JUL12, VaApp No. 1528-11-2: The use of a letter to provide evidence to the circuit court on an appeal of a summary judgement, instead of having the district court judge testify, neither violates the right to confront nor due process under the 14th Amendment.

# EVIDENCE

* * * Admission of Non-Final Order to Prove Juvenile Adjudication of Guilt

Perry v. Commonwealth, MAR13, VaApp No. 2171-11-1: A non-final record of an adjudicatory hearing, which records that the juvenile pled guilty and was found guilty, is sufficient to prove a juvenile adjudication of delinquency even without the final order after sentencing.

Chain of Custody

Pope v. Commonwealth, JUL12, VaApp No. 2558-10-2: (1) All that is required to establish a chain of custody is that the Commonwealth's evidence afford reasonable assurance that the exhibits at trial are (a) the same and (b) in the same condition as they were when first obtained. (2) Gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility.

(Mis)Identification of the Defendant

Cuffee v. Commonwealth, JAN13, VaApp No. 1971-11-1: In determining whether an eyewitness identification of the defendant at trial is correct the factors to be considered are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Beshah v. Commonwealth, MAY12, VaApp No. 2070-10-4: If a finder of fact finds a defendant's testimony not to be credible it can then consider the non-credible testimony as further evidence of guilt.

Rules 2:105 & 2:802 – Limited Introduction of Hearsay Document

Justiss v. Commonwealth, DEC12, VaApp No. 2600-11-3: (1) An item containing inadmissible hearsay can be introduced to prove other issues with an appropriate admonishment to the jury about its proper use. (2) Packaging from BB gun, found at defendant's residence, can be admitted to prove defendant owned such a gun.

Rule 2:403 – Undo Prejudice

Burnette v. Commonwealth, JUL12, VaApp No. 1158-11-3: A defendant's stipulation with regards to the cause of the victim's death does not allow the appellant to sanitize the evidence and thus preclude the Commonwealth from introducing photographs showing the dead victim, even if the pictures may be considered gruesome.

* * * ??? Rules 2:403 & 2:705 – Confusing the Jury & Facts or Data Used in Testimony

Pope v. Commonwealth, JUL12, VaApp No. 2558-10-2: (1) When scientific evidence is offered, the trial court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system. (2) If there are two statistical models for analyzing data, the trial judge can exclude the model offered by the defendant on grounds that (a) it is not reliable and (b) risks confusing the jury if he has the following evidence: (c) a statement that the relevant scientific communities had been unable to come to a conclusion as to which of the two statistical models was most appropriate, (d) the trial court's appointed expert is unfamiliar with the statistical model the defendant wants to introduce, (e) the Division of Forensic Science has decided not to use the statistical model the defendant wants to introduce, (f) no Virginia court has found the defendant's model reliable, and (g) the National Research Council of the National Academy of Science recommends using the model the defense wants to introduce, but the the Virginia Division of Forensic Science does not follow that recommendation.

* * Rule 2:404(b) & Rule 2:409 – Prior Bad Acts – Child Abuse

Burnette v. Commonwealth, JUL12, VaApp No. 1158-11-3: Prior bad acts against the minor can be introduced to show defendant's (1) prior relationship, (2) feelings, (3) conduct, and (4) attitude involving the child.

* * Rule 2:703(b) - Expert:

Burnette v. Commonwealth, JUL12, VaApp No. 1158-11-3: (1) A doctor called to testify about the victim's cause of death is not a sociologist and therefore not qualified to testify about the profile of a likely offender. (2) In footnote 5, the court notes, without deciding the issue, that other States have rejected profile evidence as (a) irrelevant, (b) inadmissible character evidence, or (c) invading the province of the jury.

* * Rule 2:703(b) - Expert:

Earnest v. Commonwealth, DEC12, VaApp No. 0366-11-3: (1) If the expert's testimony is going to be about academic analysis of various studies on a subject, it is inadmissible because (a) it does not address or rebut the analysis performed in the lab, and (b) it is hearsay. (2) An expert testifying that she knows of no documents supporting an opposing expert's assertions is not allowed because it is hearsay. (3) An expert cannot testify about a report or another case because it is hearsay. (4) In Virginia an expert can only testify on the basis of her personal observations or from evidence introduced at trial.

Rule 2:704(b) – Expert Testimony / Ultimate Question of Fact

Justiss v. Commonwealth, DEC12, VaApp No. 2600-11-3: (1) An expert may state opinions on matters not of (a) common knowledge or (b) interest. (2) An expert cannot offer an opinion when facts and circumstances are such that common people can understand them. (3) An expert cannot offer an opinion as to an ultimate fact at issue. (4) If an element of the crime is that a deadly weapon was used the expert cannot testify that the weapon has “the capacity to cause serious bodily injury or death.”

Rule 2:803(2) – Hearsay Exception: Excited Utterance

Hicks v. Commonwealth, MAY12, VaApp No. 1431-11-4: (1) Excited utterances must (a) be spontaneous and impulsive, (b) prompted by a startling event, (c) occur under circumstances which preclude a presumption of deliberation, and (d) the speaker must have first hand knowledge of the event. (2) In determining whether an excited utterance has occurred the trial court can consider (a) the speaker's physical condition, (b) the speaker's emotional condition, and (c) time lapse from startling event. (3) Neither (a) time nor (b) distance from the startling event is absolutely conclusive. (4) If the statement is made in response to a question, the circumstances must be evaluated to determine (a) whether the inquiry gave the speaker a chance to deliberate, and (b) whether the question influenced the speaker's statement. (5) The fact that the speaker is trying to give as much information as possible does not mean it is not an excited utterance.

* Rule 2:804 - Hearsay Exception: Unavailability to Testify – “Memory Loss”

Turner v. Commonwealth, JUN12, VaSC No. 111563: (1) A trial judge abuses his discretion when the witness' testimony is unavailable because of a claimed memory loss if the judge does not question the witness about the memory loss and determine that it is authentic. (2) Feigned memory loss is a refusal to testify and must be met with (a) an order to testify and (b) a consideration of a contempt finding if the witness refuse to testify. (3) Only after a persistent refusal to testify, despite judicial pressures and an order to testify, can refusal to testify allow a witness' testimony to be declared unavailable.

Rule 2:804(b)(1) – Hearsay Exceptions (Unavailable): Prior Testimony

Hicks v. Commonwealth, MAY12, VaApp No. 1431-11-4: (1) To introduce prior testimony, (a) the witness must be unavailable, (b) the prior testimony must have been under oath, (c) the prior testimony must have been (i) accurately recorded or (ii) stated with clarity and detail, and (d) (i) the defendant must have been present, (ii) with counsel, and (iii) given an opportunity to cross examine. (2) Witnesses provide enough clarity and detail when (a) they confirm the most important facts and (b) provide sufficient details to establish their familiarity with the testimony at the original hearing.

# PROCEDURE

## Pretrial

### Preliminary Hearing

### Indictment

* * Indicting Principals in the Second Degree

Farmer v. Commonwealth, JAN13, VaApp No. 0191-12-2: (1) Principals in the second degree may be indicted, tried, convicted, and punished as principals in the first degree.

### Jurisdiction

Juvenile Insanity:

D.L.G. v. Commonwealth, APR12, VaApp No. 0725-11-1:
If a juvenile does not assert his right to be tried as an adult under 16.1-270 the juvenile cannot assert insanity as a defense.

### Venue

Bay v. Commonwealth, AUG12, VaApp No. 0585-11-1: The General Assembly intends terrorism cases to be tried in the city or county where the offense occurred.

### Pretrial Motions

* * FOIA Requests – Officer's Records

Harmon v. Ewing, FEB12, VaSC No. 121118: (1) A person can use a FOIA request to get a list of all arrests that an officer has made. (2) A person cannot use FOIA to get the personnel record of an officer. (3) A person cannot use FOIA to get a list of cases in which an officer was involved, but not the arresting officer.

* 19.2-76.1 - Capias Which Should Have Been Destroyed

Boone v. Commonwealth, JUL12, VaApp No. 1790-11-1: Even if the capias was supposed to have been destroyed under 19.2-76.1, if the capias has not been destroyed it is still valid.

Expert Assistance for Defendant

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: (1) A defendant must show (a) a particularized need that expert services will materially assist him in preparing his defense and (b) that denial of such services will result in a fundamentally unfair trial. (2) A particularized need is more than a mere hope that favorable evidence can be obtained through the services of an expert.

### Arraignment

### Plea

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## Trial

### Jury Selection

* * * Mayfield v. Commonwealth, APR12, VaApp No. 0882-11-1:
(1) There is no *per se* rule presuming that a juror related to a prosecution witness is biased. (2) There is no *per se* rule presuming that any type of relationship (ie acquaintance past or present) demonstrates bias. (3) There is a *per se* rule excluding jurors with a close blood relationship to prosecution witnesses in order to maintain public confidence in the judicial system. (4) If defense counsel argues for a strike based on bias it does not preserve the argument that the strike should have been made for public confidence.

* * Taylor v. Commonwealth, OCT12, VaApp No. 0956-11-2: (1) It is error to deny a strike for cause of a venireman who says he will “try” to be impartial, after first stating a bias. (2) Any reasonable doubt as to a venireman's bias must be resolved in favor of the defendant. (3) Rehabilitation of a witness by the judge or Commonwealth through leading questions does not remove the shown

bias. (4) If a party asks a general question about a prejudice (do you favor officers over citizens) but does no follow-up on veniremen who indicate the prejudice, the lack of follow-up may not provide enough information to require a strike for cause.

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: (1) A party has a right to ask a venireman directly any relevant question to ascertain (a) whether he is related to either party, or (b) has any interest in the cause, or (c) has expressed or formed any opinion, or (d) is sensible of any bias or prejudice therein. (2) A judge (a) must allow parties to ascertain whether jurors are neutral, but (b) it is within the judge's authority to determine whether the parties have had sufficient opportunity to do so. (3) A juror may not be struck because of her position on the death penalty unless it would affect her ability to follow instructions from the bench and obey her oath. (4) A party is not entitled to ask a juror's view about the death penalty. (5) It is proper to ask the jurors whether they will consider mitigating evidence. (6) Questions about specific types of mitigating evidence are not allowed because (a) they are meant to find out a juror's opinion about specific evidence, but (b) they are not relevant to finding out whether the juror has a prejudice. (7) (a) As long as the judge allows a defendant to ask sufficient questions to preserve his right to an impartial jury, (b) the defendant is not entitled to ask a question (i) repetitively or (ii) in his preferred form. (8) A party is not entitled to ask questions about irrelevant evidence (prison conditions). (9) If the judge is making improper comments during voir dire or speaking loudly so that jurors can hear during bench conferences the defense counsel must object at the time rather than later.

Garcia v. Commonwealth, JUN12, VaApp No. 0343-11-4: (1) In Virginia, unlike the federal system, it is prejudicial error if a party is forced to use a peremptory strike to remove a juror who should have been removed for cause. (2) The trial judge should resolve any doubt about impartiality of the potential juror in favor of the party asking her removal. (3) An abstract concern, such as living near the crime scene or family of the defendant, does not evince bias or partiality. (4) A juror who shows partiality or bias can only be rehabilitated by her own words, not by giving predictable responses to suggestive questions by an attorney or judge.

## Opening Argument

Tizon v. Commonwealth, APR12, VaApp No. 1967-10-4: If a party does not immediately object, make a motion for mistrial, or ask for a curative instruction

pertaining to a statement made during the opening any such action is waived.

## Motion to Strike

## Affirmative Defense

### Jury Instructions

Wells v. Commonwealth, MAY12, VaApp No. 0864-11-4: Once a jury instruction is given it is the law of the case and no appeal can proceed from it unless it was objected to.

### Closing Arguments

Tizon v. Commonwealth, APR12, VaApp No. 1967-10-4: Merely objecting to an improper statement made during closing without asking for a mistrial or curative instruction does not preserve the issue for appeal.

### Mistrial

Tizon v. Commonwealth, APR12, VaApp No. 1967-10-4: When a judge denies a motion for a mistrial, but instructs the jury to disregard evidence improperly put before it, the jury is presumed to follow the prompt, explicit, and curative instruction.

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## Sentencing

### Jury Sentencing

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: Because the the jury has already determined an aggravating factor to be present in order to convict a defendant of capital murder the sentence phase is not required to be split into two portions – the first of which would determine an aggravating factor and the second of which would determine whether to impose death.

* * * Resentencing:

Booker v. Commonwealth, APR12, VaApp No. 0549-11-2:
(1) 19.2-295.1 allows the circumstances around a conviction to be presented during a resentencing because the original jury would have that information from the trial. (2) The circumstances presented must be necessary to (a) show the nature of the offense charged, and (b) show the circumstances under which the offense was committed. (3) The evidence introduced at sentencing must be the

same evidence as presented at the original trial. (4) A statement of facts is not the same evidence and therefore cannot be read to the resentencing jury without both parties agreeing to allow it.

## Pending Imposition of Sentence

* * * Motion to Withdraw Guilty Plea:

Booker v. Commonwealth, DEC12, VaApp No. 1730-11-1 & 1916-11-1: (1) Prior to sentencing, as a threshold matter a motion to withdraw a guilty plea must be (a) duly made in good faith and sustained (b) by proofs. (2) The motion should be granted (a) even if the plea was merely entered inadvisedly (b) if there is a reasonable defense. (3) The proffered defense must be (a) substantive and (b) reasonable. (4) The proffered defense cannot be (a) dilatory or (b) merely formal. (5) Defenses that go beyond merely formal include include (a) self-defense, (b) alibi, (c) insanity, or a (d) defense based on a proffer of specific evidence that, if accepted by the fact finder, would defeat the prosecution's case. (6) When the defendant offers nothing more than that the prosecution must prove its case, this is defense is merely formal. (7) The fact that the evidence was only circumstantial is not a reason to withdraw a guilty plea. (8) While duress may be a reason for allowing a guilty plea to be withdrawn, the duress must be more than the regular stresses involved in a criminal prosecution. (9) The bare fact that a juror might find for the defendant is not enough to justify a withdrawal of a guilty plea. (10) The trial court should consider whether withdrawing a guilty plea is prejudicial to the Commonwealth. (11) If the Commonwealth has partially or fully fulfilled its obligations in a plea agreement by dismissing or amending charges prejudice has occurred.

* * Reopening the Case

Morgan v. Commonwealth, OCT12, VaApp No. 1408-11-1: If the trial court adhered to the proper legal or constitutional evidentiary introduction standard during the guilt phase of a trial and that standard changes before the sentence is rendered the trial court can reopen the case in order to allow the Commonwealth to introduce the evidence in a manner consistent with the new standard (assume bench trial).

* Motion to Withdraw Guilty Plea:

Branch v. Commonwealth, AUG12, VaApp No. 2102-11-1: (1) A motion to withdraw a guilty plea made prior to sentencing should only be granted if a two-part test is satisfied: (a) the motion is made in good faith, and (b) the defense advanced in support of the motion is reasonable and not merely dilatory or formal. (2) A motion to withdraw a guilty plea may be denied if it would cause significant prejudice to the Commonwealth. (3) It is not appropriate to withdraw a guilty plea because the defendant does not like the potential sentence.

* Motion to Withdraw Guilty Plea:

Hubbard v. Commonwealth, MAY12, VaApp No. 0217-11-1: (1) Prior to sentencing, when a defendant (a) makes a good faith motion to withdraw her guilty plea, and (b) it is sustained by proofs, (c) the defendant should be allowed to withdraw the guilty plea. (2) The asserted defense cannot be merely dilatory or formal. (3) The issue is not whether a court thinks a jury or other fact finder would necessarily accept the defense, but rather whether the proffered defense is one that the law would recognize as such if the fact finder found credible the facts supporting it. (4) A motion to withdraw a guilty plea may be appropriately denied where the record indicates that there has been some form of significant prejudice to the Commonwealth. (5) Prejudice to the Commonwealth includes (a) the Commonwealth having dropped or amended charges per a plea agreement, or (b) the purpose of the delay is to cause undue delay in the administration of justice, or (c) a demonstration of bad faith or misconduct by the defendant.

## Judicial Imposition of Sentence

* * * No Weekend Time on Felonies

Attorney General Opinion 12-062: When the General Assembly changed § 53.1-131.1, replacing “criminal offense” with “misdemeanor” it removed the power of judges in felony cases to sentence a person convicted of a felony crime to weekend or non-consecutive time in jail.

* * * Mandatory Minimums Running Concurrent

Brown v. Commonwealth, NOV12, VaSC No. 120112: While a mandatory

minimum sentence requires the sentence be imposed without (a) suspension or (b) delay, mandatory minimum sentences (c) can be run concurrently.

* * * Mandatory Minimums Running Concurrent

Commonwealth v. Jefferson, OCT12, VaApp No. 0012-12-4: (1) In general, mandatory minimum sentences can run concurrent to each other. (2) Under eight code sections mandatory minimum sentences cannot run concurrently with any other sentences: § 18.2-53.1; § 18.2-248; § 18.2-248.01; § 18.2-248.03; § 18.2-248.1; § 18.2-248.5; § 18.2-255.2; § 18.2-270; § 18.2-308.2; § 18.2-308.4; § 53.1-203 **[note that 18.2-53.1 was removed from this list a month later by Brown v. Commonwealth, NOV12, VaSC No. 120112]**

* * Interstate Agreement on Detainers

Dorr v. Commonwealth, NOV12, VaSc No. 112131: (1) When a defendant is brought from another state pursuant to the Interstate Agreement on Detainers and held in Virginia for trial on his Virginia charges, the time he is in a Virginia jail waiting for trial counts against his sentence in the other State, not his Virginia sentence. (2) In Virginia, the default is that sentences run consecutively (19.2-308) and another State's order to run the sentences concurrently has no affect on whether the Virginia sentence runs consecutively.

* * Advisement

Starrs v. Commonwealth, OCT12, VaApp No. 2516-11-4: After a finding of guilt, a judge cannot take a case under advisement for a period of time and dismiss the case upon completion of terms (unless a statute states she can).

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: While (1) it is proper for a court to consider a defendant's present tense (a) refusal to accept responsibility, or (b) show remorse, (2) it may not be linked to (a) his prior claim of innocence or (b) not guilty plea or exercise of his right to remain silent.

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# Post Trial

## Within 21 Days

Withdrawing a Guilty Plea:

Johnson v. Anis, SEP12, VaSC No. 111937: (1) After a defendant has been sentenced he can only withdraw his guilty plea if there is manifest injustice (per 19.2-296). (2) Prior to sentencing a defendant can be allowed to withdraw his plea if the least surprise or influence caused a defendant to plead guilty when he had any defense at all.

Motion to Withdraw Guilty Plea:

Howell v. Commonwealth, OCT12, VaApp No. 0130-12-2: (1) After a sentence has been imposed a guilty plea can be withdrawn only to correct manifest injustice such as (a) an involuntary guilty plea, or (b) a plea based on an agreement which has been rescinded, or (c) affirmative evidence in the record showing (I) innocence or (ii) lack of criminal offense. (2) Not liking the sentence imposed is not a ground for withdrawing the guilty plea. (3) The defendant must affirmatively show the manifest injustice.

## Post 21 Days

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

Dressner v. Commonwealth, JAN13, VaSC No. 120496: If a person is charged with a crime, but the charge is amended to a crime which is not a lesser included offense of the original crime, the person can have the original crime expunged from her record even though she pled guilty to the amended offense.

* 19.2-303 – Reduction of Active Sentence

Stokes v. Commonwealth, JAN13, VaApp No. 0090-12-1: Even if a prisoner is transferred from jail to the DOC in direct violation of the trial court's order, the trial court loses all jurisdiction to modify the sentence under 19.2-303 once the prisoner has been transferred to the DOC.

## During Appeal

* * Belew v. Commonwealth, JUN12, VaSC No. 110532: (1) Under Va Code sec. 8.01-428(B), prior to the filing of the petition for appeal, if the court reporter has failed to file a transcript due to an oversight or inadvertent ommission the

trial court can enter an order requiring the court reporter to file the missing transcript and make it part of the record of appeal, even if the usual period for the filing of a transcript has passed.  (2) An appeal is docketed in the appellate courts when the petition for appeal has been received, not when the trial record is received or the appellate court generates a case number.

# SUBSTANTIVE

## Violent Crimes

* * * Murder & Juveniles:

Miller v. Alabama, JUN12, USSC No. 10-9646: (1) Because a mandatory sentence of life in prison does not allow the sentencer to consider the mitigating qualities of youth, it is not constitutional to mandate life in prison for anyone under 18 years of age convicted of murder. (2) Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, (a) immaturity, (b) impetuosity, and (c) failure to appreciate risks and consequences. (3) It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. (4) It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. (5) It ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. **[NOTE: See Angel v. Commonwealth, JAN11, VaSC No. 092341 (life imprisonment okay in Virginia because of geriatric parole)]**

* * * 18.2-51: Malicious Wounding

Knight v. Commonwealth, NOV12, VaAp No. 0768-11-3: (1) Driving a vehicle at an extremely high speed in an area with stores and a significant amount of traffic allows a jury to imply malice. (2) In implied malice the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist. (3) The specific intent of a person can be inferred if the intent flows naturally from the conduct proven. (4) Driving at extreme speed, in a shopping area, through traffic, into a turn lane, and causing a multi-car wreck allows an inference that the driver intended to maim, disable, or kill.

* * 18.2-33 Felony Murder

Hylton v. Commonwealth, APR12, VaApp No. 0055-11-3: (1) The commission of any felonious act not excepted in 18.2-33, during which a death occurs, supplies

the malice needed for second degree murder. (2) The felonious acts underlying felony murder are not limited to those from which death is a foreseeable consequence. (3) The *res gestae* rule restricts felony murder to homicides 'so closely related to the felony in time, place, and causal connection as to make it a part of the same criminal enterprise. (4) Illegally possessing a drug and leaving it where a young child can find it, mistake it for his medicine and die from an overdose is felony murder based on possession (18.2-250).

Capital Murder / Vileness / Torture

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: (1) Torture can be (a) psychological or (b) physical. (2) The psychological aspect of torture may be established where the victim is in intense fear and is aware of, but helpless to prevent, impending death for an appreciable lapse of time. (3) Evidence that a victim was alive and conscious through some of a multiple blow beating that killed her is enough to allow a jury to consider torture as an aggravating factor.

Capital Murder / Future Dangerousness

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: (1) In determining future dangerousness, the test is (a) not whether the defendant would be able to commit murder in prison, but (b) whether he has the mental inclination to do so. (2) Restrictions on the ability of a defendant to commit murder while in prison are not relevant evidence and therefore not admitted in either (a) rebuttal or (b) as mitigating evidence. (3) Evidence (a) as to whether a defendant is inclined to commit violence in prison is admissible, (b) but not as to whether prison conditions render him incapable of doing the violence. (4) Testimony relevant to a defendant's propensity to commit violence while incarcerated necessarily must be personalized to the defendant based on his specific, individual past behavior or record. (5) The mere fact that an attribute is shared by others from whom a statistical model has been compiled, and that the statistical model predicts certain behavior, is neither relevant to the defendant's character nor a foundation for expert opinion. (6) Future dangerousness to society means society as a whole, not merely those in prison.

Capital Murder / Intoxication

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: (1) Mere intoxication is not enough to make capital murder a non-viable charge. (2) Intoxication must be so great that it rendered the defendant incapable of premeditation. (3) Evidence

that the defendant was drinking the day of the offense is not enough to establish the required level of intoxication. (4) Evidence that the defendant had been drinking in the weeks prior to the offense is irrelevant.

Abduction / Rape:

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: (1) Abduction is any detention exceeding the minimum necessary to complete the required elements of another offense. (2) In determining whether the detention exceeded minimum necessary (a) the time and (b) the distance between the abduction and other offense should be considered as well as (c) the quality and (d) the quantity of force and intimidation used. (3) Pummeling a person into unconsciousness is a level of force beyond that necessary for rape and therefore constitutes an abduction.

Determining Abduction with Other Charges

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: Whether the detention established by the evidence is the kind of restraint which is an intrinsic element of crimes such as rape, robbery, and assault is a question of law to be determined by the court, not the jury.

18.2-371.1: Child Abuse

Burnette v. Commonwealth, JUL12, VaApp No. 1158-11-3: (1) A person cannot be convicted of child abuse if (a) other people had significant access to the child during the period in which the harm occurred and (b) no evidence is presented excluding the other people. (2) Mere opportunity is not enough to convict a defendant of child abuse. (3) If two people had access to the child and the person other than the defendant testifies that he did not harm the child the jury can accept his testimony as the deciders of fact and convict the defendant. (4) Prior bad acts against the minor can be introduced to show defendant's (a) prior relationship, (b) feelings, (c) conduct, and (d) attitude involving the child.

18.2-46.8: Terrorism Venue

Bay v. Commonwealth, AUG12, VaApp No. 0585-11-1: The General Assembly intends terrorism cases to be tried in the city or county where the offense occurred.

# Sex Crimes

* * * 18.2-387.1 – Obscene Sexual Display

Barnes v. Commonwealth, MAR13, VaApp No. 0271-12-1: (1) A "public place," as used in Code §§ 18.2-387 and 18.2-387.1 comprises places and circumstances where the offender does not have a reasonable expectation of privacy, because of the foreseeability of a non-consenting public witness. (2) Standing by the bars at the front of his cell in first floor lockup masturbating, appellant was in open view to staff, other inmates, and anyone authorized access and therefore non-consenting persons could view his act and he was in public.

# Drug Crimes

# Theft / Property Crimes

* * * 18.2-172 – Forgery

Beshah v. Commonwealth, MAY12, VaApp No. 2070-10-4: (1) In order to prove forgery the Commonwealth must prove the writing or alteration could operate to the potential prejudice of another. (2) Forging medical records for work the forger has not done benefits the forger because she is getting paid without doing her work. (3) Lying about medical treatment which was not performed (a) prejudices the patient because it leads to incorrect treatment, and (b) potentially prejudices the patient because it could lead to a decline in his medical condition.

* 18.2-111 – Embezzlement

Leftwich AKA Banning v. Commonwealth, FEB13, VaApp No. 2349-11-2: (1) The three ways of committing embezzlement are to misappropriate property (a) received for another or for her employer, or (b) by virtue of her office, trust, or employment, or (c) which shall have been entrusted or delivered to her by another. (2) If an employee's contract states she will turn over all funds and checks received for doing work of the kind the office does, and all her work in

that field will be solely for the office, if she takes checks, written to her name, sent to her by the government for that type of work, she has misappropriated property received for another.

18.2-111 – Embezzlement

Wells v. Commonwealth, MAY12, VaApp No. 0864-11-4: A person who commits an embezzlement does not have to obtain any personal benefit from it.

18.2-178 – Obtaining Money or Property by False Pretense:

Austin v. Commonwealth, APR12, VaApp No. 1107-11-2: (1) To prove a fraud the Commonwealth must show (a) an intent to defraud; (b) an actual fraud; (c) use of false pretenses for the purpose of perpetrating the fraud; and (d) accomplishment of the fraud by means of the false pretenses used for the purpose. (2) Fraudulent intent must have existed at the time the transaction took place. (3) Intent to defraud is found by examining the conduct and representations of the accused at the time of the transaction. (4) Among the factors probative of fraudulent intent are (a) whether the accused avoided contact with the victims post transaction, and (b) whether the accused perpetrated more than one fraud at a time.

## Weapon Crimes

* * * 18.2-308.2(A) – Felon in Possession of a Firearm

Baker v. Commonwealth, NOV12, VaSC No. 120252: (1) Possession of the same firearm cannot be broken up into time periods to determine multiple possessions [overruling Court of Appeals rationale] (2) When a defendant continually possesses the same firearm over a period of time he can be convicted of separate possessions for each separate act or occurrence that can be proven by the government. - in this case (a) stealing the pistol, (b) trying to sell the pistol on day one, & (c) selling the pistol on day two. (3) VERY STRONG, WELL REASONED DISSENT BY JUSTICE POWELL.

* * * 18.2-53.1 – Use of a Firearm in a Felony

Brown v. Commonwealth, NOV12, VaSC No. 120112: While convictions of use of a firearm in a felony cannot run concurrently with the underlying offense, multiple convictions of use of firearms in felonies can run concurrently with each

other and and any other offenses.

* * * Admission of Non-Final Order to Prove Juvenile Adjudication of Guilt

18.2-308.2(A) - Possession of a Firearm by Person Previously Delinquent (Felony Analogy)

Perry v. Commonwealth, MAR13, VaApp No. 2171-11-1: A non-final record of an adjudicatory hearing, which records that the juvenile pled guilty and was found guilty, is sufficient to prove a juvenile adjudication of delinquency even without the final order after sentencing.

* * 18.2-308.2(B)(10) – Concealed Firearm – Glove Compartment Exception

Doulgerakis v. Commonwealth, FEB13, VaApp No. 0458-12-2: Because the General Assembly changed the bill which created this exception from “locked” to “secured”, a firearm in a closed, but unlocked, glove compartment is not concealed.

* * 18.2-299 / 18.2-300 – Sawed Off Shotgun

Person v. Commonwealth, AUG12, VaApp No, 1598-11-2 : If the shotgun is introduced in evidence then the Commonwealth does not have to introduce evidence as to the statutory requirements of a sawed off shotgun such as caliber or barrel length.

* * 18.2-308.2 – Felon in Possession of Firearm Ammunition

Williams v. Commonwealth, OCT12, VaApp No. 1031-11-2: (1) It is not necessary to prove that a round is operational to convict for possession. (2) Because 18.2-308.2(D) defines ammunition as “the combination of a cartridge, projectile, primer, or propellant”, it is only necessary to prove a combination of some of these elements instead of all of them. (3) If a cartridge, projectile, and primer are shown there is no need to prove the ammunition had propellant.

18.2-308.2 – Felon in Possession of a Firearm

Jordan v. Commonwealth, AUG12, VaApp No. 0307-11-1: (1) A jury may rely on a witness' assertion that the defendant had a firearm as proof sufficient for a

conviction. (2) A jury can infer that an item which looked like a firearm functioned as one. (3) The way that an item is displayed is highly probative as to whether it was a firearm.

## Motor Vehicles

* * * DUI Certificates:

Fitzgerald v. Commonwealth, DEC12, VaApp No. 0131-12-3: (1) Because the statute was amended in 2009 removing the requirement, the Commonwealth is no longer required to prove the breathalizer has been tested in the last six months in order to introduce the certificate of analysis. (2) The addition of the requirement that tests be done "on equipment maintained by the Department" does not mean that the Commonwealth must still prove that the machine has been tested within six months. (3) It is presumed that the Department has preformed its duties under the law. (4) The burden is on the defendant to prove that the machine was not properly cared for and that the failure to do so prejudiced the defendant. (5) Even if a failure is proven, it goes to the weight of the evidence, not its admissibility.

* * Motorcycle Helmets

Bennett et al. v. Commonwealth, AUG12, VaApp Nos. (1803 thru 1817)-11-1: (1) There is no requirement that a motorcycle helmet have a sticker certifying that it conforms with the appropriate standards. (2) Stating that a helmet is a novelty helmet does not establish whether it conforms with appropriate standards. (3) Admitting that one's helmet does not comply with the appropriate standards is enough to convict one for not wearing an appropriate helmet.

* * 46.2-1003 - Defective Equipment (brake light)

Otey v. Commonwealth, DEC12, VaApp No. 2439-11-2: (1) If (a) a device is mentioned in 46.2-1002 (lighting device, warning device, signal device) and (b) the device exceeds the minimum standard set by another statute, (c) if the part of the device that is in excess of the standard is broken the car is still subject to a defective equipment ticket under 46.2-1003. (2) Even though a car is only required to have two brake lights, if there is a third high brake light which is partially burnt out a defective equipment ticket is valid.

* 19.2-294.1 – DUI & General Reckless Driving

Lawson v. Commonwealth, DEC12, VaApp No. 2421-11-3: Even if the reckless driving conviction occurred in the general district court, the Commonwealth is forbidden by this statute from pursuing a DUI conviction.

# Other

* * * 18.2-152.7:1 Computer Harassment

Barson v. Commonwealth, JUN12, VaSC No. 111406 (overruling en banc Court of Appeals): (1) The definition of obscene from Va. Code sec. 18.2-372 was specifically adopted by the General Assembly to provide a constitutionally valid definition of obscenity. (2) The definition of obscene from Va. Code sec. 18.2-372 is to be used in other criminal law statutes where no definition is provided. (3) Lower courts cannot adopt a dictionary definition of obscenity rather than the definition in Va. Code sec. 18.2-372.

* * 18.2-152.7:1 Computer Harassment

Moter v. Commonwealth, FEB13, VaApp No. 1301-11-2: (1) There are three of types of computer harassment this statue makes illegal: (a) communicating obscene, vulgar, profane, lewd, lascivious, *or* indecent language, and (b) making any suggestion or proposal of an obscene nature, and (c) threatening any illegal or immoral act. (2) The three types of communications are disjunctive and proving any is sufficient to convict. (3) To convict of either of the first two types the Commonwealth must prove the communication was obscene. (4) Obscenity is defined in Virginia is defined by § 18.2-372 .

* * 18.2-427 Threatening Language over the Telephone

Rives v. Commonwealth, JUN12, VaSC No. 111492: (1) There are separate crimes under this statute, the elements of which include (a) use of a telephone or radio to communicate, (b) intending to (i) coerce, (ii) intimidate or (iii) harass, and (c) using (i) obscene language, (ii) obscene suggestions or proposals, or (iii) threats of illegal or immoral acts. (2) Threats of illegal or immoral acts do not require an obscene component. (3) Stating "I'm going to fuck you in the worst fucking way." and "And what's going to happen is not going to be pretty" is

sufficient that a finder of fact could conclude the defendant was threatening the victim with physical injury during a sexual offense.

* 18.2-456: Summary Contempt

Parham v. Commonwealth, JUL12, VaApp No. 1528-11-2: (1) A defendant balling up papers which are given to her by the court is contempt. (2) Misbehavior in the presence of the court does not require the party to obstruct or interrupt the administration of justice for a summary finding of contempt. (3) It is only misbehavior near the court which requires the party to obstruct or interrupt the administration of justice for a summary finding of contempt.

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

Rushing v. Commonwealth, JUN12, VaSC No. 111569: The fact that a person wears something generic (beads) that gang members wear does not prove that person to be a gang member.

18.2-26 - Attempt

Cuffee v. Commonwealth, JAN13, VaApp No. 1971-11-1: An attempted crime has two elements: (1) An intent to commit the crime, and (2) a direct, ineffectual act done toward the commission.

18.2-137: Purposeful Destruction of Property

Knight v. Commonwealth, NOV12, VaAp No. 0768-11-3: (1) It can be inferred that people specifically intend the consequences of their acts. (2) Driving at extreme speed, in a shopping area, through traffic, into a turn lane, and causing a multi-car wreck allows an inference that the driver intended to purposefully destroy property.

18.2-435 - Perjury by Conflicting Statements Under Oath

Sutphin v. Commonwealth, DEC12, VaApp No. 1376-11-2: In a perjury prosecution for giving conflicting testimony under oath, per 18.2-435, the Commonwealth is not required to provide two witnesses or a witness and corroborative evidence as it is under general perjury (18.2-434).

# PROBATION

* * * Hodgins v. Commonwealth, NOV12, VaApp No. 0899-11-3: When a defendant commits crimes while he or she is serving an active sentence he may be disciplined (1) through internal procedures in the prison, (2) by criminal prosecution for those new crimes, and (3) through the appropriate revocation of a suspended sentence that may still exist for that defendant. (4) The requirement of good behavior is implicit in every suspended sentence and (5) starts at the point when the suspended sentence has been pronounced.

* * Without Witnesses to Confront:

Henderson v. Commonwealth, JAN13, VaSC No. 120512: (1) (a) Disallowing confrontation and (b) allowing hearsay (c) are both subject to a "good cause shown" standard. (2) When the trial court is applying the "good cause shown" standard it should explain its reasoning on the record. (3) There are two tests for "good cause shown" to not require confrontation: (a) the reliability test, and (b) the balancing test. (4) The **reliability test** allows testimonial hearsay if it has substantial guarantees of trustworthiness. (5) Some testimonial statements which are reliable are (a) detailed police reports, (b) statements given under oath, (c) statements by probationer corroborating the accusation, (d) statements corroborated by (i) third party witnesses, or (ii) physical evidence, (e) hearsay exceptions, (f) when there is evidence of past offenses similar to current accusations, and (g) when a probationer fails to offer contradictory evidence. (6)The **balancing test** requires the court to weigh the interests of the defendant in cross-examining his accusers against the interests of the prosecution in denying confrontation. (7) The two tests overlap and are not mutually exclusive. (8) The reliability of evidence may be so strong that it overwhelms the defendant's right to confront. (9) When (a) the defendant has caused the witness not to be present due to chicanery, threat, violence, or (b) she waives her (i) right to confrontation and (ii) hearsay objections so (c) the balancing test will not be applied. (10) To decide whether admission of the hearsay will violate the defendant's limited right to confront the judge must know the evidence through (a) proffer, (b) stipulation, or (c) conditional admission of the evidence.

* Bay v. Commonwealth, AUG12, VaApp No. 0585-11-1: If a defendant has previously been sentenced to detention and/or diversion, the time spent in the program counts as time served while incarcerated.

* Clarke v. Commonwealth, MAY12, VaApp No. 1562-10-4: If a judge is aware of factors which are not the basis of the current probation violation, but does not consider them in determining the sentence for the current violation, the factors may be the basis for a subsequent violation (pending charges).

Minimum Constitutional Requirements

Henderson v. Commonwealth, JAN13, VaSC No. 120512: The minimal due process requirements for a probation hearing include (1) written notice of the claimed violations, and (2) disclosure to the of evidence against probationer, and (3) opportunity to be heard in person and to present witnesses and documentary evidence, and (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), and (5) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers, and (6) a written statement by the factfinders as to the evidence relied on and reasons for revocation.

# APPEALS

## Appellee Argument

* * * Sutphin v. Commonwealth, DEC12, VaApp No. 1376-11-2: Even when the "ends of justice" exception applies and a defendant is not clearly not guilty of the offense of conviction, the Court of Appeals will not apply the "ends of justice" exception unless the petitioner asks it to be applied.

* * Elliott v. Commonwealth, OCT 12, VaApp No. 1784-11-1: (1) A petitioner is bound by the evidence he presented at trial during an appeal. (2) If a petitioner denied giving permission to search at trial he cannot claim as error that his permission was given involuntarily.

* Evans v. Commonwealth, DEC12, VaApp No. 2244-11-3: (1) Failing (a) to file timely or (b) to identify the case being appealed is a substantive error which will cause the appellate court to dismiss the case because it does not have jurisdiction. (2) Putting a wrong case number, and nothing else, on the notice of appeal is a substantive error even if both the petitioner and petitioned submit arguments on the correct case.

Lawlor v. Commonwealth, JAN13, VaSC No. 120481: Assignments of error which are filed but not listed or argued in the opening brief are waived.

Ends of Justice

Pope v. Commonwealth, JUL12, VaApp No. 2558-10-2: (1) In order to use the ends of justice exception, a defendant must affirmatively show that a miscarriage of justice has occurred, not that a miscarriage *might* have occurred. (2) To establish that a clear miscarriage of justice has occurred, (a) an appellant must demonstrate that he 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. (3) When a defendant has ample opportunity to bring his due process claim to the trial court's attention but fails to do so, the good cause exception does not apply.

Amin v. Henrico, OCT12, VaApp No. 0861-11-2: If the appellate court accepts one error for argument, the petitioner cannot unilaterally add another error for the court's consideration.

Coleman v. Commonwealth, AUG12, VaApp No. 0469-11-1: (1) If a petitioner assigns an error which does not address the actual finding of the trial court the Court of Appeals has no jurisdiction to hear the petition.

Tizon v. Commonwealth, APR12, VaApp No. 1967-10-4: Merely objecting to an improper statement made during closing without asking for a mistrial or curative instruction does not preserve the issue for appeal.

Wells v. Commonwealth, MAY12, VaApp No. 0864-11-4: Once a jury instruction is given it is the law of the case and no appeal can proceed from it unless it was objected to.

# Appellant Argument

# Writs

Mandamus

Kelley v. Stamos, JAN13, VaSC No. 120579: (1) Mandamus is prospective only and is not to be granted to undo an action already done. (2) If a court order is final a writ of mandamus cannot be issued to change it. (3) Because a writ of mandamus lies only for a ministerial act, when the Commonwealth tries to get a writ of mandamus against a judge the defendant is not a necessary party. (4) If a Commonwealth Attorney has the right to file a writ of mandamus his assistants do as well. (5) A general district court has jurisdiction to amend a charge to another unrelated charge under 16.1-129.2 and therefore such an amendment is not ministerial, even if it is in error. (6) The fact that the warrant has guilty written on it and scratched out does not make a sufficient record for an appellant court to determine the circumstance of the scratching out (error correction or advisement).

# Standards of Review

* * * Conley v. Commonwealth, NOV12, VaSC No. 120139: An evenly divided Court of Appeals, sitting en banc, cannot overrule the finding of a three judge panel. Only a majority, en banc, can overrule a three judge panel.

Rule 5A:20(e) – Stating the Standard of Review

Mitchell v. Commonwealth, JUL12, VaApp No. 1400-11-1: (1) Citing a single case in the entire brief, which only states that an offense must be proven in the trial court beyond a reasonable doubt, does not fulfill the obligation to inform the appellate court of the standard of review it must apply to the issue raised. (2) The standard of review rule is not jurisdictional, but strict compliance with the rules permits a reviewing court to ascertain the integrity of the parties' assertions, which is essential to an accurate determination of the issues raised on appeal. (3) Failing to cite legal authority as to the standard to be applied by the appellate court waives the appeal.

Scope: Hylton v. Commonwealth, APR12, VaApp No. 0055-11-3:
If the Commonwealth has advanced two reasons that facts in a case are sufficient to sustain a conviction, appellate courts should not address the other reason because (1) it would amount to an advisory opinion on an inessential subject, and (2) a case should be decided solely on the best and narrowest grounds.

# Remedies

# HABEAS

Court Recharacterizing a Pro Se Motion as a Habeas Petition

Dorr v. Commonwealth, NOV12, VaSc No. 112131: (1) The court must (a) notify the pro se petitioner it intends to recharacterize the motion, and (b) the court must explain to the pro se petitioner the legal ramifications of the recharacterization. (2) If the court does not take these steps the recharactrized habeas petition does not bar subsequent habeas petitions. (3) Notification and explanation serves the purposes of (a) allowing the petitioner to withdraw or amend his motion, and (b) allowing the petitioner to challenge the recharacterization. (4) If the pro se petitioner files a subsequent petition for habeas corpus and it is challenged as barred, the fact that the first petition was recharacterized without notice and explanation can be pled to lift the bar.

PROBATION VIOLATION:

Booker v. Director, Department of Corrections, JUN12, VaSC No. 111363: Although defendant exhausted his direct appeals in August of 2010 and filed the habeas corpus petition in June 2011, the one year limit, under Va. Code sec 8.01-654(A)(2), for filing a petition for habeas corpus not from a criminal conviction or sentence began to run on 16 June 2009 when the trial court entered the order revoking his probation. Dismissed as untimely filed.