CONSTITUTION

Statute: Facial Unconstitutionality / As Applied

Toghill v. Commonwealth, FEB15, VaSC No. 140414: (1) Facial challenges of a statute's constitutionality are disfavored. (2) In order to show a statute facially unconstitutional a defendant must show (a) it is unconstitutional as applied to him and (b) it would not be constitutional in any context. (3) If a statute is constitutional as applied to a litigant, (a) she lacks standing to assert a facial constitutional challenge to it, and (b) the statute is not facially unconstitutional because it has at least one constitutional application. (4) It is preferable to (a) enjoin unconstitutional applications of a statute, or (b) sever unconstitutional sections of a statute (c) instead of invalidating an entire statute. (5) The framework for determining what to do when a statute is unconstitutional as applied: (a) The "normal rule" is that a statute may be declared invalid (i) to the extent that it becomes unconstitutional, but (ii) it will otherwise be left intact. (b) A court should not supplant the legislature by rewriting a law to conform it to constitutional requirements while trying to salvage it. (c) A court cannot use its remedial powers to circumvent the intent of the legislature.

4th Amendment

Search & Seizure

Things Hanging from Rearview Mirror

Mason v. Commonwealth, FEB15, VaApp No. 1542-13-2: (1) The standard of review for reasonable suspicion is objective and requires an officer to explain what he saw, but not explain his opinion why the observations were suspicious. (2) If an item hanging from a rearview window could block the view of a highway or anything on it there is reasonable suspicion that it violates 46.2-1054 and an investigative detention is authorized. (3) There is no *per se* rule that whenever something is hanging from a rearview mirror it provides reasonable suspicion. (4) Tries to limit this case to the facts before it (3X5" parking permit).

Mistake of Law

Heien v. North Carolina, DEC14, USSC No. 13-604: (1) Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. (2) The officer may be reasonably mistaken on either factual or legal grounds. (3) Whether an officer makes (a) a reasonable mistake of fact or (b) a reasonable mistake of law, (c) neither is a ground for suppressing evidence. (4) Reasonable mistakes must be objectively reasonable

– not subjectively.

Court Imposed Loss of 4th Amendment Rights

Murry v. Commonwealth, SEP14, VaSC No. 131137: (1) A 4th Amendment wavier (a) in a plea agreement is valid, but (b) a trial court's imposition of this condition must be reasonable. (2) Probation conditions must be reasonable in light of the nature of the offense, the defendant's background, and the surrounding circumstances. (3) In order to determine if s probation condition is reasonable a court must weigh (a) a defendant's privacy interests against (b) the Commonwealth's interests in imposing the condition in light of (i) the defendant's offenses, (ii) his background, and (iii) the surrounding circumstances. (4) The warrantless search of a probationer, (a) supported by reasonable suspicion and (b) authorized by a condition of probation, is reasonable under the Fourth Amendment. (5) There must be reasonable suspicion in order to search a probationer or his property. (6) For a complete waiver of 4th Amendment Rights to be valid it must be necessary to (a) facilitate rehabilitation, and (b) protect the public. (6) Granting law enforcement (as opposed to probation officers) the power to conduct warrantless searches could sanction intimidating and harassing searches unrelated to the defendant's rehabilitation or public safety.

Cell Phones

Riley v. California, JUN14, USSC No. 13-132: (1) Searching an arrestee for the fruits and evidence of a crime is an exception to the warrant requirement. (2) A post arrest search is limited to an area within the arrestee's area of immediate control. (3) Personal property immediately associated with the arrestee can be searched without concern over the potential loss of evidence or specific possible danger to the officer. [crumpled cigarette package] (4) Because (a) there is neither (i) danger to the officer nor (ii) potential for evidence to be destroyed, (b) officers must get a search warrant if they are going to access an arrestee's data from his cell phone. (5) Officers remain free to examine the physical aspects of a phone to ensure it is not a physical threat. (6) In exigent circumstances an officer may access the data on a phone without a search warrant. (7) Officers who recover a phone in circumstances which suggest the phone will be the target of an imminent wipe attempt may access its data. (8) If officers recover a phone in an unlocked state they can turn the locking function off. [equivalent to freezing a scene]

Mis-stating Authority

U.S. v. Saafir, JUN14, 4Cir No. 13-4049: (1) A search or seizure is unreasonable and therefore unconstitutional if it is premised on a law enforcement officer's misstatement of his or her authority. (2) An officer may not manufacture probable cause through a false claim of legal authority that constitutes a threat to

violate the Fourth Amendment. (3) If an officer wrongfully informs a suspect that he has a right to search and the suspect then makes statements which provide probable cause the search based on those statements is unconstitutional.

Car Stop – Anonymous Call

Navarette v. California, APR14, USSC No. 12-9490: (1) The reasonable suspicion necessary to justify a traffic stop is dependent upon both (a) the content of information possessed by police and (b) its degree of reliability, (c) taking into account the totality of the circumstances. (2) Under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. (3) An anonymous tip which (a) provides innocent details and (b) predicts future behavior is sufficiently reliable to create reasonable suspicion of criminal activity. (4) When (a) an anonymous caller identifies a vehicle make and model and its license number, (b) the caller reports that it committed a criminal act (ran her off the road), (c) the police find the vehicle shortly thereafter on the same road, and (d) the call was to a 911 center (which has legally required caller ID) the tip is reliable enough to merit a stop.

Good Faith Violation of the 4th Amendment

U.S. v. Stephens, AUG14, 4Cir No. 12-4625: (1) A good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances. (2) Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

5th Amendment

Double Jeopardy

Martinez v. Illinois, MAY14, USSC No. 13-5967: (1) The swearing of a jury is a bright line upon which jeopardy attaches. (2) Dismissing a case for lack of presentation of evidence by the prosecutor means that the government is barred from a retrial. (3) When the government refuses to dismiss pretrial and participates in jury selection, the refusal of the government to participate in the trial after a jury is sworn does not keep double jeopardy from attaching.

Sandoval v. Commonwealth, FEB15, VaApp No. 1554-13-4: (1) The Double Jeopardy Clause does not apply where the same conduct is used to support convictions for separate and distinct crimes. (2) Two or more distinct and separate offenses may grow out of a single incident or occurrence, warranting the prosecution and punishment of an offender for each. (3) When the same act

or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each offense charged requires proof of an additional fact which the other does not. (4) A court (a) views the elements of the offenses generally and conceptually, (b) not as charged in a specific instance and (c) double jeopardy violation exists only if the offenses always require proof of the same elements. (5) When (a) the General Assembly authorizes cumulative punishments for multiple charges of the same offense (b) the prosecutor may seek and the trial court may impose cumulative punishments in a single trial.

Right to Remain Silent

Robinson v. Commonwealth, APR14, VaApp No. 0207-13-1: (1) Refusing the presence of a parent during the questioning of a minor (a) is a circumstance that weighs against the admissibility of a confession, but (b) it is not dispositive of whether a juvenile's confession was voluntary. (2) An officer mistakenly telling the defendant that he was an adult for purposes of the charge (a) does not rise to the level of such deliberate deception or coercion as would compel a suspect to involuntarily confess and (b) it does not impede the suspect's ability to understand the nature of his rights and the consequences of abandoning them.

Due Process

Delay in Indictment

Sandoval v. Commonwealth, FEB15, VaApp No. 1554-13-4: Due process principles bar a prosecution for preindictment delay only when (1) the defendant incurred actual prejudice as a result of the delay and (2) the prosecutor intentionally delayed indicting the defendant to gain a tactical advantage. (3) The defendant bears the burden of proving both actual prejudice and improper purpose. (4) The defendant must prove (a) actual and concrete prejudice as a result of the delay, (b) not merely speculative prejudice. (5) A defendant is not entitled to an even hand in plea negotiations with the Commonwealth, and (6) the Commonwealth was not required to entrench its position based on the status quo at the time of appellant's offenses.

Ramsey v. Commonwealth, MAY14, VaApp No.2023-12-4: When there is a statutory requirement of privacy in certain records the trial court balances the state's interest in providing private records with the accused's rights when it either (a) does an in camera review and turns over relevant parts, or (b) orders the commonwealth attorney to review the records and turn over relevant parts.

Witness Identification

Fowler v. Joyner, JUN14, 4Cir No. 13-4: (1) The constitutional solution for a questionable witness identification is to put the witness in front of a jury and let the jury decide truthfulness and accuracy. (2) Eyewitness identifications need be suppressed only if the procedures used to obtain the identification were so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law. (3) The first test in determining whether a witness identification should be suppressed is whether the identification procedure employed by the police was both (a) suggestive and (b) unnecessary. (4) Secondly, the court must assess, on a case-by-case basis, whether improper police conduct created a substantial likelihood of misidentification. (5) In determining whether there was a substantial likelihood, the court will (a) consider (i) the opportunity of the witness to view the criminal at the time of the crime, (ii) the witness' degree of attention, (iii) the accuracy of the witness' prior description of the criminal, (iv) the level of certainty demonstrated by the witness at the confrontation, and (v) the length of time between the crime and the confrontation, and (b) then weigh these factors against the corrupting effect of the suggestive identification itself.

Brady Violation

Hicks v. Director, FEB15, VaSC No. 131945: In a Brady violation (1) the evidence not disclosed to the accused must be favorable to the accused, either (a) because it is exculpatory, or (b) because it may be used for impeachment; (2) the evidence not disclosed must have been withheld by the Commonwealth either (a) willfully or (b) inadvertently; (3) there must be prejudice against the accused; and (4) the failure to disclose must be material. (5) A failure to disclose is material if it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

6th Amendment

Speedy Trial

Jury

US v. Ramirez-Castillo, APR14, 4Cir No. 13-4158: (1) The trial court cannot tell a jury that it does not have to determine an element of an offense, even if the parties have stipulated it, because that relieves the jury of its duty to independently find all facts. (2) It is not constitutional to have a jury determine whether all the elements have occurred, but not ask it whether the defendant is guilty or not guilty. (3) Not having the jury determine guilt or innocence is plain error, a structural error, and it is not harmless.

Barnes v. Joyner, MAY14, 4Cir No. 13-5: (1) There is a rebuttable presumption of prejudice when a juror has spoken to someone outside the jury about the case. (2) If a juror has spoken to someone outside the jury there must be a hearing to determine if the contact was harmless to the defendant. (3) In order to get the rebuttable presumption the party trying to get the verdict overturned must show the conversation was more than an "innocuous intervention." (4) The factors to be considered in determining whether the communication was more than an "innocuous intervention" are "any private contact; any private communication; any tampering; directly or indirectly with a juror during a trial; about the matter before the jury." (5) When a defense attorney makes a theological statement during closing arguments, a juror calling her pastor to discuss the theological argument bears on the jury's sentencing determination and therefore is more than an innocuous intervention.

Hurst v. Joyner, JUL14, 4Cir 13-6: (1) When a defendant shows that a juror asked her father for biblical passages concerning the imposition of the death penalty and he pointed some out to her there is a credible allegation of a private communication about the matter pending before the jury, entitling the defendant to the presumption of prejudice and an evidentiary hearing.

Notification of Offense

Right to Confront Accuser

Official Documents

Adjei v. Commonwealth, SEP14, VaApp No. 1380-13-2: (1) A document is only

testimonial if its primary purpose is to be used in a prosecution. (2) The fact that it is possible that a document could be used in a prosecution does not make it testimonial.

Primary Purpose (Although Not Labeled as Such in Opinion)

Dadzie Anaman v. Commonwealth, FEB15, VaApp No. 2465-13-4: A business record is not testimonial because it is not created to be presented in a prosecution.

Whitehurst v. Commonwealth, MAR14, VaApp No. 0531-13-1: (1) Trial strategy and tactics can be made by counsel without the consent of the defendant, including (a) what evidence should be introduced, (b) what stipulations should be made, (c) what objections should be raised, and (d) what pre-trial motions should be filed. (2) The only decisions solely at the discretion of the defendant are (a) what to plead, (b) whether to waive the jury, (c) whether to testify, and (d) whether to appeal. (3) If a defendant's attorney does not file the counter notice under 19.2-187, thereby waiving the presence of the analyst, the presence of the analyst is waived even if the defendant was not consulted as to whether the analyst should be required to testify.

Child Witness

Turner v. Commonwealth, MAY14, VaApp No. 0352-13-1: (1) In a case with an accusing child witness (a) the witness must be competent, (b) the witness must be under oath, (c) the defendant must have the ability to contemporaneously cross examine, and (d) the judge, jury, and defendant must be able to observe the child as he testifies. (2) The confrontation clause guarantees a face-to-face meeting with the witness before the trier of fact. (3) The fact that the General Assembly has provided a statute allowing a child to testify via video does not preclude a child in front of a jury from testifying by writing his testimony.

Written Testimony

Turner v. Commonwealth, MAY14, VaApp No. 0352-13-1: (1) While the Confrontation Clause guarantees a right to observe an adverse witness' demeanor while she is testifying, it does not guarantee the right to observe an adverse witness' demeanor in whatever way, and to whatever extent, a defendant prefers. (2) When (a) a witness writes a portion of her testimony in front of the jury, judge, and defendant so her demeanor can be observed, and (b) the defense has an opportunity for contemporaneous cross examination (c) there is no violation of the right to confront.

DMV Transcript

Boone v. Virginia, MAY14, VaApp No. 1510-13-2: A DMV record is kept for a governmental agency to determine if a person is eligible to drive and therefore is non-testimonial in nature.

Process to Obtain Witnesses

Right to Counsel

Huguely v. Commonwealth, MAR14, VaApp No. 1697-12-2: (1) When a defendant is represented by two attorneys there is no per se constitutional violation if the trial continues while one of them is too sick to participate. (2) A trial judge's discretion in deciding to continue with one of the defendant's two attorneys is correct so long as it is not an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.

Continuance to Replace Counsel

Brown v. Commonwealth, OCT14, VaSC No. 131038: (1) An indigent defendant does not have the right to choose who will represent him. (2) Appellate review of a challenge under the Sixth Amendment right to choice of counsel is not forward-looking. (3) When an indigent defendant asks for a continuance on the trial date so that he can hire new counsel he is not entitled to it if he does not provide evidence such as (a) change of financial circumstance, (b) third party willingness to pay, or (c) an attorney willing to work pro bono publico. (4) The fact that the defendant was able to hire an attorney after trial is not relevant as to whether he provided the evidence prior to the trial.

US v. Mason, DEC14, 4Cir No. 12-8042: (1) Failing to bring a novel or long-shot contention is not ineffective assistance of counsel. (2) Attorneys are not ineffective if they choose between two constitutional argument and choose the one more common and more likely to succeed.

8th Amendment

Excessive Bail

Excessive Fines

Cruel & Unusual Punishment

Hall v. Florida, May14, USSC No. 12-10882: (1) Strictly disallowing a mental incapacity defense to any capital defendant with an IQ score over a definite number is not constitutional. (2) When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.

Life in Prison for a Minor

Johnson v. Commonwealth, MAR14, VaApp No. 1941-12-3: (1) Because 1st degree murder is a class 2 felony (20 - life) it (a) does not mandate life in prison and (b) allows geriatric parole. (2) Sentencing a minor to life in prison is not unconstitutional if the sentence was not mandatory and allow a chance at release from prison.

Murder: Sentencing a Minor

Jones v. Commonwealth, OCT14, VaSC No. 131385: (1) Because (a) 18.2-10 does not set a mandatory minimum sentence for a class one felony and, (b) therefore a judge retains the ability to suspend a portion of the life sentence under 19.2-303, (c) it is not unconstitutional to sentence a minor to life.

US v. Cobler, APR14, 4Cir No. 13-4170: (1) A sentence may be challenged as disproportionate to the crime in two ways: (a) As Applied (for a particular case), or (b) Categorically (for all cases of a type). (2) There is a two part test to determine whether an As Applied challenge is successful. (a) The court must first determine that there is an inference of gross disproportionality by comparing the severity of the sentence to the crime of conviction. (b) The court must then compare similar defendants in the jurisdiction and outside the jurisdiction to see if there is actually a grossly disproportionate sentence. (3) There is a two part test to determine if a Categorical challenge is successful. (a) The court must

determine that there is a national consensus against the particular sentencing practice expressed in legislative enactments and state practices. (b) Then the court must independently determine whether the punishment violates the constitution.

14th Amendment

Equal Protection

EVIDENCE

DNA Database

Rule 2:803(6):
Business Record Exception to Hearsay Rule

Dadzie Anaman v. Commonwealth, FEB15, VaApp No. 2465-13-4: (1) Per the Rule, a business record can be authenticated by a custodian or "other qualified witness." (2) An "Unauthorized Use" form for a credit card is admissible as a business record. (3) A business' fraud investigator can be used to introduce a business record if she testifies that (a) it was made and kept in the ordinary course of business, (b) it was made at or near the time the information contained within it was being reported, (c) she had knowledge of how Unauthorized Declaration of Use forms are maintained, and (d) she had access to Unauthorized Declaration of Use forms as part of her job duties.

Ramsey v. Commonwealth, MAY14, VaApp No.2023-12-4: (1) Expert testimony based upon the allele frequency database maintained by the Virginia Department of Forensics is not excludeable as hearsay. (2) DNA testing results, including the database used to perform the testing as well as the DNA profile comparison, to be presumptively reliable and properly admitted, the issue having been determined by the legislature in Code § 19.2-270.5.

Evidence of a 3d Party Committing the Crime

Ramsey v. Commonwealth, MAY14, VaApp No.2023-12-4: (1) In order to present evidence that a third party committed the crime a defendant must prove a nexus between the third party and the crime. (2) In order to present evidence that another person committed the crime (a) facts and circumstances must tend to clearly point to the other person as the guilty party, but (b) the evidence need only raise questions as to the defendant's guilt not prove the third party's guilt. (3) Once a nexus has been established evidence of third party guilt is to be liberally allowed by the trial court. (4) (a) Evidence that the third party was in the community, had previously been convicted of a similar crime, was on probation, and was performing poorly on probation, (b) combined with the defendant's claim that the third party was present and actually committed the crime (c) is not adequate to provide a nexus to the crime.

Hostile Witness

Ramsey v. Commonwealth, MAY14, VaApp No.2023-12-4: (1) The fact that a third party witness may have committed the crime the defendant is accused of does not require the judge to declare he has an adverse interest [financial or personal per 8.01-401(A)] and therefore a hostile witness.

2:803(8):
Public Record Hearsay Exception - DMV Transcript

Boone v. Virginia, MAY14, VaApp No. 1510-13-2: A DMV transcript is allowed into evidence because it is non-testimonial as it is kept by a governmental agency to determine eligibility to drive.

Character Evidence

Gardener v. Commonwealth, JUN14, VaSC No. 131166:
(1) Character is used as a synonym for reputation. (2) Character evidence is not limited to truth, veracity, and peacefulness. (3) The defendant may introduce evidence as to his character as to any trait relevant to the case. (4) Bad character witnesses offered by the prosecution can only testify as to reputation before the criminal event. (5) Character witnesses offered by the defense are not limited to testifying as to reputation before the criminal event.

Accomplice Testimony

Via v. Commonwealth, JUN14, VaSC No. 131574: (1) An accomplice is someone who could be charged for the same offense. (2) An accomplice's testimony cannot be corroborated by the testimony of another accomplice. (3) A defendant is entitle to a cautionary instruction if there is uncorroborated accomplice testimony.

Judicial Notice

Williams v. Commonwealth, Jun14, VaApp No. 1730-13-1: (1) A trial court may take judicial notice of facts that are either (a) so generally known within the jurisdiction or (b) so easily ascertainable by reference to reliable sources (c) that reasonably informed people in the community would not regard them as reasonably subject to dispute. (2) The fact of judicial notice (a) must appear from the record, but (b) it is not necessary that the trial court use the words “judicial notice.” (3) When (a) a party asks the judge to take judicial notice of a fact and (b) the judge makes a ruling which requires that fact to have been proven (c) that fact has been judicially noticed whether the judge says so or not.

Hearsay: Official Written Document Exception

Adjei v. Commonwealth, SEP14, VaApp No. 1380-13-2: (1) Hearsay applies to oral and written testimony. (2) A judge sitting as fact finder who states that he will not consider potentially prejudicial hearsay is presumed to do as he stated. (3) Under the “official written document” exception to hearsay, if a document is

authenticated by the custodian or the custodian's supervisor it is admissible as evidence of the facts therein. (4) The information entered into the document must (a) be within the personal knowledge and observation of the individual entering it, and (b) be gained within the scope of her duties. (5) The exception does not extend to (a) things not within the personal knowledge of the enterer or (b) opinions expressed in the document. (6) The law does not require the use of the specific words "custodian" or "person to whom the custodian reports" in order for a certification to meet the requirements of the official records exception.

Rule 2:704(b):
Testimony as to Ultimate Fact

Gregory v. Commonwealth, NOV14, VaApp No. 0691-13-2: (1) It is improper for an expert witness to opine that a person accused of selling drugs was "running a business" because it expresses an opinion on the ultimate fact of whether the defendant was a dealer.

Fingerprints

Winslow v. Commonwealth, DEC14, VaApp No. 1447-13-4: (1) When the Commonwealth relies solely upon fingerprint evidence to identify a criminal agent, it bears the burden of excluding every reasonable hypothesis of innocence which flows from the evidence. (2) The prosecution is not required to affirmatively and conclusively prove to a certainty that the print could not have been made other than at a time when the crime was committed. (3) In order to establish criminal agency, fingerprint evidence need be joined with evidence of other circumstances tending to reasonably exclude the hypothesis that the print was made at some other time than during commission of the crime. (4) If circumstantial evidence relating to the print show the defendant to be present at the time of the offense it is a rational inference that the defendant is the criminal agent.

Rule 2:103(a)(2) & Code § 8.01-384:
Proffered Evidence

Creamer v. Commonwealth, JAN15, VaApp No. 0367-14-2: (1) The proponent of evidence that the trial court excludes must proffer the evidence to preserve his appeal. (2) At trial, the purpose of the proffer is to (a) resolve the issue at trial, and (b) provide a sufficient record for appellate review. (3) For appeal, the purpose of a proffer is to allow the appellate courts to decide (a) if the trial court erred, and (b) if the error was harmless. (4) A proponent of evidence has a duty to contemporaneously offer why the evidence should be introduced. (5) Only contemporaneous proffers may be considered on appeal – not untimely proffers offered later. (6) A mid-trial proffer (a) need not include a witness' complete testimony, but (b) must provide a proffer that is sufficiently detailed to give the trial judge a fair opportunity to resolve the issue correctly and

contemporaneously.

PROCEDURE

Pretrial

Preliminary Hearing

Indictment

Indictments After a Transfer Hearing

Holliday v. Commonwealth, DEC14, VaApp No. 2003-13-1: (1) Once a juvenile court has transferred a juvenile for trial as an adult (per § 16.1-269.1), the commonwealth can indict the defendant on charges ancillary to the transferred charges even though those charges were not addressed in juvenile court.

Alleging Factors for Mandatory Minimum

Butler v. Commonwealth, OCT14, VaApp No. 1213-13-2: (1) Not alleging a factor which must be found to impose a mandatory minimum is not a violation of the requirement laid out by the USSC in Alleyne v. United States, 133 S. Ct. 2151 (2013), when there is a bench trial because no jury was involved.

Date

Farhoumand v. Commonwealth, OCT14, VaSC No. 140012: (1) (a) Unless the date of the crime is an element, (b) if the Commonwealth alleges occurrence on one date, (b) but proves it on another (c) the conviction is valid. (2) There can be a due process issue if an alibi is in the mix.

19.2-215.9:
Multi-Jurisdictional Grand Jury – Court Reporter

Robinson v. Commonwealth, SEP14, VaApp No. 0097-13-2: (1) The statutory requirement that a court reporter be present and recording during a grand jury is directory, not mandatory. (2) There is no exclusionary rule for the violation of a procedural statute unless the defendant is deprived of a constitutional right. (3) Adherence to a procedural statute (a) is required required to the extent necessary to insure due process, (b) but any determination whether a party has suffered prejudice constituting a denial of due process is made on a case-by-case basis. (4) The primary function of recording the proceedings is to maintain a record and transcript for the use, benefit, and convenience of the grand juries – not to provide a record for the defendant.

19.2-231:
Amending from Grand Larceny to Aggravated Petit Larceny

Charles v. Commonwealth, APR14, VaApp No. 0790-13-1: (1) It does not change the nature or character of an offense to change a grand larceny to larceny third or subsequent. (2) Where there is similarity of (a) purpose and (b) subject matter of the statutes involved, an amendment to an indictment that changes the statute under which a defendant is charged does not change the nature or character of the offense charged. (3) An analysis of whether an amendment complies with 19.2-231 (a) is not based on the elements of the offense, but (b) the proven conduct of the defendant. (4) Amending a grand larceny indictment so that the Commonwealth does not have to prove $200 or more was taken does not change the nature and character of an offense. (5) The proof of prior convictions (a) is pertinent to punishment only and (b) is not an element of the offense and therefore an amendment to larceny third or subsequent does not change the character or nature of the offense.

Howard v. Commonwealth, AUG14, VaApp No. 0820-13-1: (1) An indictment returned by a grand jury does not have to be read aloud in court when it is returned in order to be valid. (2) There is no requirement that an electronic order memorializing the grand jury proceedings have a copy of the indictment attached to it in order for the indictment to be valid.

Jurisdiction

19.2-8:
Statute of Limitations on Lesser Included Misdemeanors

Taylor v. Commonwealth, JAN15, VaApp No. 2213-13-3: A defendant charged with a felony cannot be convicted of a lesser included misdemeanor if the felony was charged after the statute of limitations had run on the misdemeanor. // But for petit larceny see 19.2-289 //

Venue

19.2-247:
Homicide : Location Where Body Found

Kirby v. Commonwealth, SEP14, VaApp No. 2307-12-2: (1) When the location that a homicide occurs is unknown then, per 19.2-247, the homicide is prosecuted where the body is found. (2) If the body is found in one municipality, but within the jurisdictional overlap of a second municipality as provided by statute, it can be tried in the second jurisdiction. [in this case the mile allowed into Richmond under 19.2-250(B)– for counties generally the 300 yards allowed under 19.2-249]

Williams v. Commonwealth, Jun14, VaApp No. 1730-13-1: (1) Venue must be challenged in a motion to dismiss the indictment, not a motion to strike. (2) Venue is not an element of the crime and need not be proven beyond a reasonable doubt. (3) To establish proper venue, evidence, direct or circumstantial, must raise a strong presumption that the crime occurred within the territorial jurisdiction of the court.

Pretrial Motions

19.2-124:
Bail & Appeals Thereof

Shannon v. Commonwealth, FEB15, VaSC No. 141455: A court making a bond decision has a duty to articulate the basis of its ruling sufficiently to enable a reviewing court to make an objective determination that the court below has not abused its discretion.

Bill of Particulars

Paduano v. Commonwealth, DEC14, VaApp No. 0816-13-3: (1) The purpose of a bill of particulars is to state sufficient facts regarding the crime to inform an accused in advance of the offense for which he is to be tried. (2) Ordinarily, an indictment sufficiently charges a statutory offense if it follows the language of the statute. (3) when the statutory language does not in itself fully and clearly set forth all material elements of the offense, a trial court may direct the filing of a bill of particulars. (4) The decisive consideration in each case is whether the matter claimed to be left out of the indictment has resulted in depriving an accused of a substantial right and subjects him to the danger of being tried upon a charge for which he has not been indicted. (5) A bill of particulars is not a tool for the defense to expand discovery.

19.2-266.2:
Pleading Constitutional Violations with Particularity

Gregory v. Commonwealth, NOV14, VaApp No. 0691-13-2: (1) Giving notice that the defense intends to move to suppress evidence based on a 5th Amendment violation, without referring to Miranda or custodial interrogation, does not give notice of the argument as required by the statute.

Ramsey v. Commonwealth, MAY14, VaApp No.2023-12-4: When there is a statutory requirement of privacy in certain records the trial court balances the state's interest in providing private records with the accused's rights when it either (a) does an in camera review and turns over relevant parts, or (b) orders the commonwealth attorney to review the records and turn over relevant parts.

Arraignment

Plea

Trial

Jury Selection

Brown v. Commonwealth, NOV14, VaApp No. 0269-13-3: (1) Courts have wide discretion to decide how to handle jury problems that arise during trial. (2) The rule that "any reasonable doubt as to a juror's qualifications must be resolved in favor of the accused" (a) only applies if the defendant is attempting to strike a juror, (b) not if the defendant wants a juror to remain on the jury.

Questions:

Huguely v. Commonwealth, MAR14, VaApp No. 1697-12-2: (1) A judge is only required to allow a question if it concerns (a) whether he is related to either party, (b) has any interest in the cause, (c) has expressed or formed any opinion, or (d) is sensible of any bias or prejudice. (2) It is entirely at the judge's discretion as to whether to allow questions outside these four areas.

Juror Impartiality

Huguely v. Commonwealth, MAR14, VaApp No. 1697-12-2: (1) A juror who has a casual impression as to the case is not per se disqualified from serving. (2) A juror must have a firm and abiding conviction in order to be disqualified.

Opening Argument

Evidence

Motion to Strike

Commonwealth v. Herring, JUN14, VaSC No. 130989: In a bench trial the motion to strike is preserved if an argument is made that the evidence is insufficient

during closing arguments.

Affirmative Defense

Jury Instructions

Williams v. Commonwealth, JAN15, VaApp No. 0700-14-2: (1) A defendant (a) is entitled to an instruction upon his theory of the case (b) only when such instruction is supported by some appreciable evidence. (2) A jury instruction must be supported by more than a scintilla of evidence. (3) Evidence must provide the necessary quantum of independent evidence to support an instruction on the lesser-included offense. (4) The jury's ability to reject evidence does not supply the affirmative evidence necessary to support a jury instruction.

SENTENCING: Informing the Jury on the Affect of Time Already Served in Jail

Bruton v. Commonwealth, APR14, VaApp No. 1636-12-1: (1) The Coward rule generally holds that a jury should impose a sentence it believes just and not concern itself with what could happen to modify the time served in the future. (2) Juries fixing a term of confinement should have the benefit of all significant and appropriate information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decision. (3) The jury should not be instructed on changes in the sentence which might occur based upon the defendant's future conduct and the government's assessment of that conduct. (4) When the defendant has introduced the amount of time he has served in jail prior to trial the judge may inform the jury that this time is required to be credited toward his sentence because there is no discretion involved.

Huguely v. Commonwealth, MAR14, VaApp No. 1697-12-2: If the judge rejects a proper instruction on the law there is no error if he has allowed another proper instruction on the same point of law.

Via v. Commonwealth, JUN14, VaSC No. 131574: (1) An accomplice is someone who could be charged for the same offense. (2) An accomplice's testimony cannot be corroborated by the testimony of another accomplice. (3) A defendant is entitle to a cautionary instruction if there is uncorroborated accomplice testimony.

Closing Arguments

Mistrial

Motion to Set Aside Jury Verdict

Wagoner v. Commonwealth, APR14, VaApp No. 2233-12-3: When deciding how to rule on a motion to set aside the jury verdict, a trial court applies the same principles that apply to a motion to strike the evidence.

Sentencing

Jury Sentencing

Impermissible Sentence

Commonwealth v. Greer, JUL14, VaApp No. 1898-13-1: If a jury returns a sentence less than the mandatory minimum the judge must impanel a new jury and have another sentencing hearing.

Not Unanimous

Webb v. Commonwealth, FEB15, VaApp No. 2181-13-3: If a jury returns a sentence which is not agreed upon by all the jurors (1) the judge may sentence if the defendant, Commonwealth, and judge agree to such a sentencing or (2) the judge must impanel a new jury to decide the sentence. (3) It is a miscarriage of justice for a judge to accept a non-unanimous sentence.

Pending Imposition of Sentence

Advisement

Harris v. Commonwealth, JUN14, VaApp No. 0558-13-1: (In dicta) When a judge takes a case under advisement he does not have the right to do anything but find the defendant guilty or not guilty.

Judicial Imposition of Sentence

53.1-116:
Good Time From JDR Sentence

VaAG Opinion, Question from Judge Bushnell, 10JUL14: If a defendant is charged while a minor, but turns 18 prior to disposition, the year sentence he can

be sentenced to under 16.1-284 (a) receives good time credit if the charge is a misdemeanor, but (b) does not if the charge is a felony.

Imposing Two Sentences Under a Single Statute

Paduano v. Commonwealth, DEC14, VaApp No. 0816-13-3: (1) Unless the plain language of a statute indicates that a defendant cannot be punished for two different acts made illegal by the same statute he can.

Class 1 Felony

Jones v. Commonwealth, OCT14, VaSC No. 131385: (1) A judge can suspend the life sentence imposed in a class 1 felony.

Amin v. Henrico, APR14, VaApp No. 0861-11-2: If a conviction order states that a defendant has been found guilty of an ordinance which does not criminalize the act done by the defendant because the General Assembly has not authorized such an ordinance then the conviction is void ab initio.

Post Trial

Within 21 Days

Post 21 Days

Jones v. Commonwealth, OCT14, VaSC No. 131385: (1) If an original sentencing order was void ab initio then a trial court can vacate it after 21 days.

During Appeal

SUBSTANTIVE

Violent Crimes

18.2-51:
Malicious and Unlawful Wounding

Williams v. Commonwealth, JAN15, VaApp No. 0700-14-2: (1) Unlawful wounding is a lesser included offense of malicious wounding that lacks only the element of malice. (2) Malice is a state of mind that can be expressed or implied by the circumstances of the attack. (3) Malice is shown by (a) the doing of a purposeful or willful act (a) done with a sedate, deliberate mind, and formed design, or (b) committed a purposeful and cruel act without any or without great provocation. (4) Malice can be inferred (a) from the deliberate use of a deadly weapon (b) unless, from all the evidence, there is reasonable doubt as to whether malice existed.

18.2-51:
Malice and Heat of Passion

Williams v. Commonwealth, JAN15, VaApp No. 0700-14-2: (1) Heat of passion can negate malice even if the act is deliberate and purposeful. (2) Heat of passion can rise (a)when provocation reasonably produces fear that causes one to act on impulse without conscious reflection, or (b) from *furor brevis* (brief insanity from anger: "Ira furor brevis est") that renders him deaf to the voice of reason. (3) The law requires simultaneous (a) reasonable provocation, and (b) passion. (4) When (a) the victim of a crime did not cause the passion (b) heat of passion is not available as a defense.

Murder 1st & 2nd Degree & Double Jeopardy

Holley v. Commonwealth, DEC14, VaApp No. 0939-13-1: (1) There can be only one homicide conviction per dead body. (2) The statutes which lay out the punishments for murder are not separate crimes, but gradiations on punishment for a single crime. (3) A defendant cannot be convicted of both first degree felony murder and second degree murder even though each has separate elements.

Murder: Sentencing a Minor

Jones v. Commonwealth, OCT14, VaSC No. 131385: (1) Because (a) 18.2-10_ does not set a mandatory minimum sentence for a class one felony and, (b) therefore a judge retains the ability to suspend a portion of the life sentence under 19.2-303, (c) it is not unconstitutional to sentence a minor to life.

Robbery and Assault

Adeniran v. Commonwealth, AUG14, VaApp No. 1317-13-4: (1) Because the intimidation element of robbery can be based on words alone, but an assault must be based upon an overt act consisting of more than mere words, assault is not a lesser included crime of a robbery.

18.2-47: Abduction - Intent

Commonwealth v. Herring, JUN14, VaSC No. 130989: Detention is not enough to prove the intent requirement of the statute.

Robbery – Impersonating a Police Officer

Fagan v. Commonwealth, MAY14, VaApp No.1184-13-1: (1) A robbery can be accomplished by violence or intimidation. (2) When defendants pretend to be police officers and assert police authority in order to take the victims' property they have taken the property via intimidation. (3) It is not larceny by trick because the victims were not tricked into voluntarily relinquishing the property.

18.2-51.6: Strangulation: Wounding or Bodily Injury

Dawson v. Commonwealth, MAY14, VaApp No. 1226-13-2: (1) Wounding requires the breaking of skin. (2) Bodily injury (a) is to be given its ordinary everyday meaning and (b) requires no technical, anatomical definition. (3) To prove a bodily injury, the victim need not experience any observable wounds, cuts, or breaking of the skin. (4) The prosecution does not have to prove broken bones or bruises to prove bodily injury. (5) A bruise is sufficient to prove bodily injury during a strangulation.

18.2-51: Malicious Wounding

Dominguez v. Pruett, APR14, VaSC No. 131091: (1) It is possible for an assailant to intend to permanently injure a victim, but only succeed in temporarily injuring him. (2) The severity and permanence of the actual wounds are only dispositive when a defendant is charged with aggravated malicious wounding [18.2-51.2]. (3) The fact that the acts were motivated by the desire to obtain money does not cancel out an intent to kill or permanently injure the victim. (4) A jury should consider (1) the method by which a victim is wounded, and (2) the circumstances under which the injury was inflicted in determining whether there is sufficient evidence to prove intent to permanently maim, disfigure or disable a victim. (5) The intent to permanently injure (a) may be presumed from a single blow with a bare fist or a kick, (b) where that single blow is combined with

circumstances of violence and brutality.

Sex Crimes

§ 18.2-370(A)(1):
Indecent Liberties

Sandoval v. Commonwealth, FEB15, VaApp No. 1554-13-4: (1) Under the plain language of the statute, the simple act of proposing or inviting constitutes the completed crime. (2) Each distinguishable incident in which an adult articulates a proposal to a minor constitutes a violation even if they occurred as part of a common act, transaction, or scheme. (3) Only conviction of a second or subsequent offense is forbidden if part of a common act, transaction, or scheme.

§ 18.2-374.1:
Manufacturing Child Porn

Sandoval v. Commonwealth, FEB15, VaApp No. 1554-13-4: (1) Because Code § 18.2-374.1(A) defines as "a" picture as production of child porn, each picture taken is a violation of the statute.

18.2-63:
Carnal Knowledge: Multiple Charges

Paduano v. Commonwealth, DEC14, VaApp No. 0816-13-3: If during the same occurrence a defendant commits more than one act prohibited by the statute he can be charged with more than one criminal act.

18.2-370:
Exposing Genitalia Involving a Minor

Farhoumand v. Commonwealth, OCT14, VaSC No. 140012: (1) Exposure under this statute requires visual exposure. (2) Tactile exposure must be prosecuted under the sexual battery statute [18.2-67.4 & 18.2-67.10].

18.2-361(A):
Sodomy with a Minor

Toghill v. Commonwealth, FEB15, VaSC No. 140414: (1) The 4th Circuit was wrong in MacDonald v. Moose, 710 F.3d 154 (4th Cir. 2013), when it held that an adult could not be convicted of sodomy with a child because the statute was facially unconstitutional. (2) The statute was constitutional as applied to cases of

adults and minors.

18.2-672.1:
Failing to Register

Shell v. Commonwealth, OCT14, VaApp No. 2070-13-1: (1) There is a presumption of regularity in prior convictions for failing to register. (2) When a person has pled guilty previously to this offense and records of that plea have been introduced into evidence he cannot claim that the Commonwealth has not proven he was convicted of an offense requiring registration.

§ 18.2-374.1:1:
Possession of Child Porn

Papol v. Commonwealth, MAR14, VaApp No. 1765-12-1: (1) The fact that the pictures were all downloaded at the same time does not bear on the number possessed. (2) Because the statute requires a predicate "violation" instead of a "conviction", the simultaneous possession of 12 pictures can support one 1st time possession conviction and 11 second or subsequent possession convictions.

18.2-371:
Contributing to the Delinquency of a Minor

VaAG Opinion, Question from Senator McEachin, 23MAY14: Leaving a child alone in a room with someone required to register as a violent sexual predator is not a violation of the statute as long as the responsible adult stays in the residence.

Drug Crimes

18.2-248 & 18.2-247:
Distribution of Imitation Controlled Substance

Powell v. Commonwealth, JAN15, VaSC No. 132028: Unlike schedule I-V drugs, a schedule VI drug is not subject to abuse and therefore it can be sold as an imitation controlled substance.

Theft / Property Crimes

Breaking & Entering

Grimes v. Commonwealth, OCT14, VaSC No. 131847: (1) A crawlspace is part of the house and therefore a defendant can be convicted of breaking and entering if he only enters it.

18.2-118:
Failure to Return Leased Property (Car)

Masika v. Commonwealth, MAY14, VaApp No. 0575-13-1: (1) While failure to return a leased vehicle could support a conviction under 18.2-117, it cannot lead to a conviction under 18.2-118.

19.2-231:
Amending from Grand Larceny to Aggravated Petit Larceny

Charles v. Commonwealth, APR14, VaApp No. 0790-13-1: (1) It does not change the nature or character of an offense to change a grand larceny to larceny third or subsequent. (2) Where there is similarity of (a) purpose and (b) subject matter of the statutes involved, an amendment to an indictment that changes the statute under which a defendant is charged does not change the nature or character of the offense charged. (3) An analysis of whether an amendment complies with 19.2-231 (a) is not based on the elements of the offense, but (b) the proven conduct of the defendant. (4) Amending a grand larceny indictment so that the Commonwealth does not have to prove $200 or more was taken does not change the nature and character of an offense. (5) The proof of prior convictions (a) is pertinent to punishment only and (b) is not an element of the offense and therefore an amendment to larceny third or subsequent does not change the character or nature of the offense.

§ 18.2-200.1:
Construction Fraud

Dennos v. Commonwealth, MAR14, VaApp No. 0635-13-1: (1) Intent to prove construction fraud can be proven by showing (a) a contractor's false statements, (b) failure to perform the work, (c) failure to buy material or hire labor with advanced funds, (d) efforts to avoid communicating with the home owner, and (e) refusing to return the funds.

Single Larceny Doctrine

Dennos v. Commonwealth, MAR14, VaApp No. 0635-13-1: A series of larcenous acts can constitute a single larceny if the several acts were done pursuant to a single impulse **and** in execution of a general fraudulent scheme.

Weapon Crimes

18.2-85:
Explosives and Recreational Use

VaAG Opinion, Question from Mr. Davenport (CWA Chesterfield), 01OCT14: Possession of an explosive material (tannerite) is not illegal if possessed for recreational purposes.

§ 18.2-308(B):
Carry Concealed Weapon: Exception for Residence and Curtilage

Foley v. Commonwealth, MAR14, VaApp No. 0619-13-3: (1) Proving that the defendant was on his curtilage is an affirmative defense. (2) Curtilage includes the cluster of buildings constituting the habitation or dwelling place, whether enclosed with an inner fence or not. (3) The fact that a defendant was on a non-exclusive easement through his property is not per se proof that he was or was not on his curtilage. (4) The four factors used in considering whether a portion of a statute is an affirmative defense: (a) The wording of the exception and its role in relation to the other words in the statute; (b) Whether, in light of the situation prompting legislative action, the exception is essential to complete the general prohibition intended; (c) Whether the exception makes an excuse or justification for what would otherwise be criminal conduct; and (d) Whether the matter is peculiarly within the knowledge of the defendant.

Motor Vehicles:

Blood Draw from a Hospitalized DUI Suspect

VaAG Opinion, Question from Colonel Flaherty (VSP), 19DEC14: If a DUI suspect is taken to the hospital, the summons issued acts as an arrest and the officer (a) can require a blood test and (b) should remain at the hospital until such time as it is done. (c) If the suspect refuses the test he can be charged with refusal under 18.2-268.3.

Search of Cell Phone (Suspected Texting)

VaAG Opinion, Question from Delegate Bulova, 06FEB15: An officer may not search the cell phone of a person he suspects of texting while driving unless he first obtains a search warrant.

§ 46.2-817:
Eluding

Jones v. Commonwealth, FEB15, VaApp No. 0087-14-4: (1) The difference between misdemeanor eluding and felony eluding is that the felony offense requires sufficient proof that the defendant's behavior interfered with or endangered the operation of the law-enforcement vehicle or endangered a person

DUI

Sarafin v. Commonwealth, OCT14, VaSC No. 131747: (1) If a person is (a) sitting in a car (b) with the keys in the ignition (c) he is operating the vehicle (d) whether the key is turned or not. (2) Unless operating a moped, there is no requirement that the operating be on a "public highway" in order to convict of a DUI [correcting scrivener's error from Enriquez).

Improper Driving:

Blevins v. Commonwealth, AUG14, VaApp No. 1508-13-4: (1) A jury cannot be given the option to convict someone charged with reckless driving of improper driving. (2) Only a judge or commonwealth attorney can change a reckless driving to improper.

Habitual Offender

Boone v. Virginia, MAY14, VaApp No. 1510-13-2: (1) There is no requirement that the prosecutor provide a copy of the initial order declaring the defendant to be a habitual offender (DMV may have done it independently). (2) A DMV transcript can be used to prove the fact that the defendant was declared a habitual offender.

Other

Contempt – Refusing to Turn Over the Pet per Protective Order

VaAG Opinion, Question from Judge Filson, 21NOV14: If a magistrate, as part of an EPO, grants the family pet to the protected and the other party refuses to turn it over the remedy is a show cause for indirect contempt carrying punishment of up to $500 and up to 6 months (unless a jury is empaneled).

Bigamy

VaAG Opinion, Question from Delegate Marshall, 09DEC14: Same sex marriages and marriages of bisexuals and transgendered are legal and constitutional, but bigamous marriages are not.

18.2-168: Uttering a Public Document

Goodwin v. Commonwealth, FEB15, VaApp No. 0190-14-3: (1) A forged document is uttered when a person (a) knows it is false, but (b) offers it as genuine (c) whether or not it is accepted. (2) Uttering does not occur only when in pursuit of a purpose specifically mentioned in the forged writing.

18.2-479.1: Resisting Arrest

Joseph v. Commonwealth, FEB15, VaApp No. 1968-13-1: (1) The statute requires someone to flee an arresting officer to be convicted. (2) Fleeing requires evidence of (a) running away or (b) physical movement beyond the scope of the officer's immediate span of control.

18.2-22 & 18.2-23: Conspiracy

Velez-Suarez v. Commonwealth, JAN15, VaApp No. 1269-13-4: (1) The Commonwealth must prove beyond a reasonable doubt there was (a) an agreement (b) between two or more people (c) to commit an offense (d) in concert. (2) Agreement can be proven by circumstantial evidence. (3) Conspiracy requires no act in furtherance of the offense. (4) While subsequent acts may be necessary to prove agreement they are not an element of the crime. (5) Each member of a conspiracy (a) is responsible for the criminal acts other members do (b) in furtherance of the conspiracy (c) even if they were not planned or anticipated.

18.2-429(B): Harassing Calls to 911 Operators

Fountain v. Commonwealth, NOV14, 2212-13-1: (1) A person who calls 911 (a) without an initial intent to harass (b) cannot be convicted under this statute if they develop an intent to harass during the course of the phone call.

18.2-173:
Possession of Counterfeit Currency

Hawkins v. Commonwealth, OCT14, VaSC No. 131822: (1) The fact that counterfeit money was initially intended to be used toward an illegal purchase or to be used to pay an illegal debt does not shield the defendant from prosecution because the money will eventually reach innocent citizens. (2) The intent to utter counterfeit money can be inferred by circumstantial evidence including: (a) possessing a large number of counterfeit bills, (b) taking counterfeit bills to a place where transactions are likely to occur, and (c) segregating counterfeit bills from actual currency. (3) Throwing counterfeit money on the floor when arrested is evidence of knowledge it is counterfeit and intent to use the counterfeit money.

22.1-254:
Compulsory School Attendance

Blake v. Commonwealth, OCT14, VaSC No. 140081: (1) The requirement that a parent send her child to school (a) refers to enrolling the child (b) not ensuring the child is not tardy or absent.

Attempt:

Commonwealth v. Herring, JUN14, VaSC No. 130989: (1) An attempt is (a) any overt act done with the intent to commit the crime, (b) which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. (2) The overt act is not restricted to the last proximate act to the consummation of the crime in contemplation. (3) An overt act (a) is any act apparently adopted to produce the result intended (b) that is not mere preparation.

§ 18.2-369(B):
Abuse or Neglect of Incapacitated Adult Resulting in Death

Wagoner v. Commonwealth, APR14, VaApp No. 2233-12-3: (1) At both the motion to strike and a motion to overturn the jury's verdict the standard in question is whether a reasonable juror could conclude the actions of the defendant denied the victim a "substantial possibility of survival." (2) A 25% chance of survival if proper care is rendered is high enough that it becomes a jury question as to whether refusal to render such care violate this statute.

PROBATION

No Pertinent Cases

APPEALS

Appellee Argument

Assignment of Error:

Commonwealth v. Herring, JUN14, VaSC No. 130989: (1) In a bench trial, if the sufficiency of the evidence is raised in the closing argument it is preserved for appeal even if there was no motion to strike. (2) Under Rule 5A:12(c)(1)(ii), a motion to strike (a) is sufficient if the error alleged is pointed to in the record and (b) the appellant is not required to add a "because" element to the alleged error. (3) Rule 5:17(c)(1)(iii) does not prohibit the error alleged to the supreme court from differing from the error alleged in the court of appeals. (4) If the supreme court grants a petition on an assignment of error (a) any alteration to that assignment of error in the brief is ineffective, (b) but does not require the appeal be dismissed. (5) When a defendant argued that the Commonwealth has failed to prove the crime under the statute then the defendant has preserved an objection to sufficiency as to each element of the statute.

Ends of Justice

Masika v. Commonwealth, MAY14, VaApp No. 0575-13-1: When a person is convicted of a crime with evidence that could not possibly support the crime charged the "ends of justice" exception is available on appeal (usually means defendant committed a crime, but was convicted under the wrong statute).

Neff v. Commonwealth, MAY14, VaApp No. 1271-13-2: (1) If the petitioner does not appeal an underlying offense the petitioner cannot successfully appeal any other offense which is dependent on the underlying offense being unfounded. (2) A defendant who does not appeal a drunk in public conviction cannot argue that the drunk in public arrest was not legal and therefore the person had a legal right to resist.

Appellant Argument

Fugitive Disentitlement Doctrine

Lewis v. Commonwealth, SEP14, VaApp No. 0340-13-2: (1) An appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal. (2) Three elements are required in order to employ the Fugitive Disentitlement Doctrine: (a) the appellant must be a fugitive, (b) there must be a nexus between the current appeal and the appellant's status as a fugitive, and (c) dismissal must be necessary to effectuate the policy concerns underlying the doctrine. (3) Failing to report to the probation office after release

from jail renders one a fugitive. (4) If an appellant is a fugitive from the requirements of the conviction he is appealing there is a nexus between his fugitive status and the appeal. (5) Policy concerns under this doctrine include: (a) whether a party's fugitive status can render a judgment impossible to enforce; (b) the inequity of allowing a fugitive to call upon the resources of the Court for determination of his claims; and (c) the need to discourage the felony of escape and encourage voluntary surrenders.

Writs

Actual Innocence

Altizer v. Commonwealth, MAY14, VaApp No. 1280-13-3: Affidavits that provide evidence which would impeach the unrecanted testimony of the victim are not enough to establish actual innocence.

Standards of Review

Interpanel Accord Doctrine

Sandoval v. Commonwealth, FEB15, VaApp No. 1554-13-4: Under interpanel accord doctrine, a decision from a panel of the Court of Appeals cannot be overruled except by the Court of Appeals sitting en banc or by the Virginia Supreme Court.

Rule 5:25:
Good Cause Shown

Toghill v. Commonwealth, FEB15, VaSC No. 140414: (1) The Court can apply the good cause shown exception sua sponte. (2) When the 4th Circuit finds a statute unconstitutional after the defendant's trial the defendant has good cause shown as to why he did not object to it in a Virginia trial court.

Harmless Error Analysis - Questioning Whether Defendant's Felony involved Lying, Cheating, Or Stealing

Shifflet v. Commonwealth, JAN15, VaSC No. 140273: (1) When the prosecution asks details about a felony the defendant has been convicted of, if the prior conviction is dissimilar to that for which a defendant is presently on trial, its different nature means that its potential to prejudice the defendant unfairly will be minimal. (2) Asking a defendant if his felony conviction involved lying, cheating, or stealing is harmless error (a) if the defendant is charged with a sexual crime (b) because it could only be used for impeachment.

Remedies

Holley v. Commonwealth, DEC14, VaApp No. 0939-13-1: When an appellate court finds that two convictions cannot stand because one is a lesser included of the other the lesser included offense is the one which will be vacated.

Commonwealth v. Greer, JUL14, VaApp No. 1898-13-1: If a sentence is appealed by the Commonwealth because a jury gave a sentence below the mandatory minimum then the appellate court must remand the case to the trial court for another jury sentencing.

8.01-654(a)(2):
Timely Filing

Hicks v. Director, FEB15, VaSC No. 131945: (1) In a claim for habeas corpus relief based on a Brady violation, (a) the failure to disclose exculpatory evidence qualifies as obstruction by the Comonwealth that prevents the filing of a habeas claim for purposes tolling of the time limit for filing per Code § 8.01-229(D) (b) whether the failure was purposeful or inadvertent.