CONSTITUTION

Ex Post Facto: US Const. Article I Sections 9 & 10:

Peugh v. US, JUN13, USSC No. 12–62: (1) Sentencing guidelines must be the ones in effect at time of the crime, not time of sentencing. (2) The presence of discretion does not displace the protections of the Ex Post Facto Clause.

Va. Const. Art. V § 12

Montgomery v. Commonwealth, DEC13, VaApp No. 2300-12-1: (1) A governor cannot condition an appeal upon the issuance of a writ of actual innocence because that would put an executive power entirely in the hands of the judiciary. (2) If a conditional pardon's condition is found unconstitutional the pardon becomes complete. (3) Finding a single condition unconstitutional does not void all the conditions of a conditional appeal.

4th Amendment

Search & Seizure

Florida v. Jardines, MAR13, USSC No. 11-564: (1) Officers entering the curtilage of the house in order to obtain information need a search warrant. (2) An officer may conduct a search in "open fields" without a warrant. (3) The curtilage is part of the house for 4th Amendment purposes. (4) A policeman has the same right as everyone else to approach the front door and knock, but has no right to go further.

Missouri v. McNeely, APR13, USSC No. 11-1425: (1) An invasion of bodily integrity, such as a blood draw, implicates an individual's most personal and deep-rooted expectations of privacy. (2) Absent an emergency, a search warrant is required where intrusions into the human body are concerned, even when the search was conducted following a lawful arrest. (3) A court determining whether there are exigent circumstances allowing a warrantless intrusion into the body looks at the totality of circumstances. (4) The mere fact that the human body metabolizes alcohol is not sufficient by itself to provide an exigent circumstance.

Maryland v. King, JUN13, USSC No. 12–207: (1) A buccal swab to take a DNA sample is allowed because it identifies the person (a) making sure the person is who he says he is, and (b) allowing the government to know accurately what his prior record is for

determination of bail. (2) In the context of a valid arrest supported by probable cause an arrestee's expectation of privacy is not offended by the minor intrusion of a brief swab of his cheeks.

Peer to Peer Networking Programs

Rideout v. Commonwealth, FEB13, VaApp No. 0513-13-2: (1) By simply installing file-sharing software onto his computer, appellant has failed to demonstrate an expectation of privacy that society is prepared to accept as reasonable. (2) Even if a person attempts to turn off all the file sharing ability of a peer to peer sharing program he assumes the risk that he did not because of the type of program. (3) Law enforcement agents who access files from a suspect's computer via a peer to peer sharing program are not violating the 4th Amendment because those files are available to the public.

Consent of the Person Still at Residence after the Arrest

Fernandez v. California, FEB13, USSC No. 12-7822: (1) If a resident objects to a search of his resident before being arrested and removed police can later return to the residence and get valid approval to search it from a co-resident. (2) While (a) the police cannot remove an individual solely to get him out of the way so a co-resident can consent, (b) if the removal is objectively reasonable the subsequent co-resident permission is valid. (3) The removed resident's objection to a search does not remain after the removal.

Valid Consent to Search

US v. Robertson, DEC13, 4Cir No. 12-4486: When the area is dominated by police presence (3 cars & 5 officers), the defendant had no way to leave a bus shelter except through an officer standing in the door, all the other people from the shelter are being questioned by other officers, and the officer in the door begins the conversation with a hostile question (got anything illegal on you) – the defendant was not free to leave and when the officer asked to search him and the defendant turned and put his hands on his head, without saying anything, this was not a voluntary search.

Ross v. Commonwealth, APR13, VaApp No. 0888-12-3: (1) The exigent circumstances exception to the warrant requirement has two parts: (a) probable cause, and (b) exigent circumstances. (2) The emergency exception to the warrant requirement (a) does not require probable cause, but (b) the police must be entering under a belief that someone's health or physical safety is at risk. (3) Under the emergency exception, an officer may enter without a warrant if there is an imminent threat of violence. (4) Police may seize any evidence in plain view during their emergency activities. (5) To determine whether the emergency exception applies a

court should look to the totality of the circumstances. (6) When a person refuses to let a DSS worker into his home and runs into the home upon arrival of police, these facts alone are not enough to create an emergency exception to the warrant requirement or justify a community caretaker function on the part of the police.

SEARCH WARRANT

Jeffers v. Commonwealth, JUN13, VaApp No. 0573-12-2: (1) Police officers are to interpret the terms of warrants reasonably, not narrowly. (2) Search warrants are not directed at persons; they authorize the search of places and the seizure of things. (3) The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought. (4) If a search warrant identifies a residence and its outbuildings to be searched, the fact that a person is living in an outbuilding (barn) does not invalidate the warrant.

US v. Green, JAN14, 4Cir No. 12-4879: (1) When the continued detention in order to perform a dog sniff of a vehicle is de minimis there is no constitutional violation. (2) A criminal history check on someone pulled over for a minor traffic violation is de minimis if for a short time (4 minutes) and does not violate the constitution. (3) A dog with a 25.88% accuracey rate in the field (43% in cases where officers say there were probably drugs previously) is sufficient for constitutional probable cause – especially when the officers report the dog is 100% in training.

SEARCH OF IMPOUNDED VEHICLE

Fauntleroy v. Commonwealth, JUL13, VaApp No.1084-12-1: (1) The police may conduct a warrantless inventory search of a vehicle provided the following conditions are met: (a) the vehicle must be lawfully impounded; (b) the impoundment and subsequent search must be conducted pursuant to standard police procedures; and (c) the impoundment and subsequent search must not be a pretextual surrogate for an improper investigatory motive. (2) If a defendant objects only on unlawful impoundment grounds he does not preserve an objection on the other requirements. (3) A vehicle with a false inspection sticker can be presumed unsafe to drive and therefore can be impounded. (4) A vehicle can be impounded in order to protect the arrestee's property when its driver is arrested away from his home. (5) A vehicle which is parked in a way that impedes traffic can be impounded.

US v. Williams, JAN14, 4Cir No.12-4374: A police officer's inability to identify the correct code section at the time of a stop does not undermine valid probable cause or reasonable suspicion that a driver violated a traffic law.

Wording of Warrant

US v. Dargan, DEC13, 4Cir No 13-4171: (1) When a search warrant names a general category of things searched for and a list of examples, the officers are not limited strictly to the examples listed. (2) Officers are not required to assume that a retail bag only contains retail items.

US v. Jackson, AUG13, 4Cir No. 12–4559: Trash in a trash can in an alley open to the use of individuals from several adjacent apartments is neither in a place where searching it violates (a) the Jardines trespass test, nor (b) the Katz reasonable expectation of privacy test.

Car Passenger

US v. George, OCT13, 4Cir No. 12-5043: (1) To conduct a lawful frisk of a passenger during a traffic stop the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous. (2) (a) The officer need not be absolutely certain that the individual is armed; (b) the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. (3) The reasonable suspicion standard is an objective one, and the officer's subjective state of mind is not considered. (4) Factors which can be use to determine the objective standard include (a) crime of the area, (b) nervous behaviour, (c) evasive behaviour, and (d) suspicious movements suggesting the presence of a weapon. (5) Multiple factors may be taken together to create a reasonable suspicion even where each factor, taken alone, would be insufficient. (6) Objective suspicion cannot be rebutted based merely on a piecemeal refutation of each individual fact and inference.

STANDING (Vehicle / Package)

U.S. v. Castellanos, MAY13, 4Cir No. 12–4108: (1) In order to assert 4th Amendment rights the defendant must first show ownership or possession of a vehicle. (2) In order to assert a reasonable expectation of privacy in a package addressed to him under a fictitious name the defendant must admit to being the person to whom the package was addressed.

5th Amendment

Double Jeopardy

Collateral Estoppel: Factual Findings

Davis v. Commonwealth, FEB13, VaApp No.1873-12-2: (1) When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. (2) The party seeking the protection of collateral estoppel carries the burden of showing that the verdict in the prior action necessarily decided the precise issue he seeks to now preclude. (3) When a prior acquittal was a general verdict deciding whether an issue has been collaterally estopped is done by examining the record of a prior proceeding, taking into account (a) the pleadings, (b) evidence, (c) charge, and (d) other relevant matters. (4) The question addressed in a collateral estoppel hearing is whether a rational trier of fact could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. (5) If a general district court judge rules that a defendant is not guilty of reckless handling of a firearm based on the fact that the Commonwealth has not proven the defendant handled the firearm then the Commonwealth is estopped from basing various subsequent murder charges on the handling of the firearm.

Morva v. Warden Sussex I, APR13, VaSC No. 102281: Capital murder while incarcerated, capital murder of an officer, and capital murder of more than one person within three years each have different elements and conviction of all three does not violate double jeopardy.

§ 19.2-324.1 – Harmless Error Statute

Va AG Opinion, Question from Scott Surovell (Va. Delegate) 23AUG13: § 19.2-324.1, a new statute requiring a harmless error review by Virginia appellate courts after the appellate court has determined that certain evidence was improperly admitted does not violate double jeopardy when it requires a case's return to the trial court if the error was not harmless.

Right to Remain Silent

Salinas v. Texas, JUN13, USSC No. 12-246: (1) A witness need not expressly invoke the right to remain silent where some form of official compulsion denies him a free choice to admit, to deny, or to refuse to answer.
(2) Examples: (a) A defendant is not required to take the stand and assert his right

during trial. (b) A witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. (c) Threats to withdraw a governmental benefit such as public employment sometimes make exercise of the privilege so costly that it need not be affirmatively asserted. (d) Where assertion of the privilege would itself tend to incriminate witnesses can exercise the privilege through silence. (3) **[3 Judges]** In (a) a voluntary conversation with law enforcement, (b) a defendant's refusal to answer a question, (c) without asserting the right to remain silent, (d) allows the refusal to be used against him at trial. (4) **[2 Judges]** There is nothing in the 5th Amendment which requires the prosecution to not comment on the defendant's assertion of his right not to testify.

Miranda – Offer to Help

US v. Johnson, OCT13, 4Cir No. 12-4176: When a defendant has been arrested and tells an officer that he has information which he will trade for a better outcome it is not a violation of Miranda for the officer to ask what the information is because the officer would not anticipate that the defendant would then tell him information which incriminates the defendant.

Miranda – In the Residence

US v. Hashime, OCT13, 4Cir No. 12-5039: (1) When deciding if a person is in custody for Miranda purposes the question is whether under the totality of the circumstances, a suspect's freedom of action was curtailed to a degree associated with formal arrest. (2) The custody question is objective and asks whether a reasonable man in the suspect's position would have understood his situation to be one of custody. (3) Factors which can be considered in deciding whether questioning was custodial: (a) the time, (b) place and (c) purpose of the encounter, (d) the words used by the officer, (e) the officer's tone of voice and (f) general demeanor, (g) the presence of multiple officers, (h) the potential display of a weapon by an officer, (i) whether there was any physical contact between the officer and the defendant, (j) the suspect's isolation and (k) separation from family, and (l) physical restrictions. (4) Telling a person he can leave (a) is probative of whether a reasonable person would believe himself in custody, (b) but it is not sufficient by itself to show lack of custody. (5) Although questioning at the suspect's home (a) are generally be less likely to be custodial, (b) questioning in the home while it is under law enforcement control tends to show a custodial interrogation. (6) The mindset of the person being questioned is not relevant to the objective question of custodial interrogation.

Kansas v. Cheever, DEC13, USSC No. 12-609: (1) When a criminal defendant (a) neither initiates a psychiatric evaluation (b) nor attempts to introduce any psychiatric evidence, (c) his compelled statements to a psychiatrist cannot be used against him. (2) The Fifth Amendment allows the prosecution to present evidence from an

evaluation to rebut the defendant's affirmative defense of extreme emotional disturbance. (3) When a defendant puts forth his “mental status” as negating intent the prosecution can present evidence from a previous mental evaluation to rebut. (4) “Mental status” is broader than “mental disease or defect” and includes voluntary intoxication. (5) The fact that the mental state put forth by the defense was temporary does not keep the prosecution from offering evidence from the mental evaluation.

Required Records Doctrine

US v. Under Seal, DEC13, 4Cir No. 13-4267: (1) For the required records doctrine to fall outside the 5th Amendment there are three requirements: (a) the purposes of the United States' inquiry must be essentially regulatory; (b) information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and (c) the records themselves must have assumed public aspects which render them at least analogous to a public document. (2) A recordkeeping requirement is “essentially regulatory” if (a) it is imposed in an essentially noncriminal and regulatory area of inquiry and (b) is not directed to a selective group inherently suspect of criminal activity. (3) The fact that a statute has a criminal law purpose in addition to its civil purpose does not mean it is not essentially regulatory. (4) If the government's purpose in imposing the regulatory scheme is essentially regulatory, then it necessarily has some public aspects.

Due Process

Metrish v. Lancaster, MAY13, USSC No. 12-547: (1) If a law is judicially changed in an unforseeable manner after the date of the offense then applying the change to the defendant violates due process. (2) Retroactive application of a judicial decision which is a judicial expansion of narrow and precise statutory language violates due process. (3) Judicial abolishment of an obsolete common law rule which has never been relied upon by the appellate courts (outside of dicta) does not violate due process. (4) Applying (a) a post-offense superior appellate court's ruling (b) which overruled an inferior appellate court's well established interpretation of a statute (c) when the superior appellate court had not previously addressed the statute's interpretation (d) does not violate due process.

6th Amendment

Speedy Trial

Jury

Notification of Offense

MANDATORY MINIMUMS

Alleyne v. US, JUN13, USSC No. 11–9335: (1) Facts that increase a mandatory statutory minimum (a) are part of the substantive offense, and (b) must be included in the charging document in order to allow the defendant to predict the legally applicable penalty from the face of the indictment. (2) The fact that an act aggravates the legally prescribed range of allowable sentences makes it an element of a separate, aggravated offense that must be found by the fact finder, whether the increase is in minimum or maximum punishment. (3) The fact that the sentence, even without the aggravating factor, could result in the same sentence as the mandatory minimum does not impact on the constitutional requirement that the aggravating factor must be found by the finder of fact for the mandatory minimum to be applied. (4) The requirement that factors giving rise to mandatory minimums must be in the charging document does not mean that any fact that influences judicial discretion in sentencing must be found by a jury. (5) Overrules Harris v. United States, 536 U. S. 545 (2002).

Right to Confront Accuser

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.

US v. Dargan, DEC13, 4Cir No 13-4171: (1) A statement must be testimonial to be covered by the confrontation clause. (2) A statement is testimonial if a reasonable person would expect it to be used at trial. (3) Statements made to a cellmate are not expected to be used at trial and therefore are not testimonial.

PRISON PHONE CALLS

US v. Jones, MAY13, 4CIR No. 12–4211: (1) Statements are testimonial when a reasonable person in the declarant's position would have expected his statements to be used at trial. (2) If the declarant does not expect or intend to bear witness against another in a later proceeding his statements are not testimonial. (3) The fact that the speaker knows his statement could be used in a trial does not mean the statement was testimonial. (4) Recordings of prison phone calls (a) are not made for use at trial and (b) the speaker making them does not intend to testify against the defendant and therefore the statements made are not testimonial.

Value of Stolen Items - Receipt

Robertson v. Commonwealth, MAR13, VaApp en banc No. 0477-11-3: (1) When two people create the “receipt” which is introduced to show the value of items stolen from a store, the person who supervised the creation of this document can testify and (2) any flaws in the supervisor's knowledge goes to the weight of the evidence, not its admissibility.

In Sentencing Hearing

Blunt v. Commonwealth, APR13, VaApp No. 0766-12-2: The right to confront is a trial right and does not apply in a sentencing hearing.

Process to Obtain Witnesses

Right to Counsel

INEFFECTIVE ASSISTANCE OF COUNSEL / PLEA AGREEMENT

Laster v. Russell, JUN13, VaSC No. 121282: (1) If a defendant was never told of a plea agreement before trial, in order to establish that this was prejudicial the habeas petitioner must show a reasonable probability that (a) the prosecution would not have withdrawn the plea, and (b) the judge would not have rejected the plea.

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.

US v. Dehlinger, JAN14, 4Cir No. 12-7121: (1) A lawyer's concurrent representation of multiple conflicting clients raises a high probability of prejudice. (2) In concurrent representation cases, a defendant can establish a Sixth Amendment violation by showing defective performance, without a showing of probable effect upon the outcome of trial (eliminating second part of Strickland test). (3) It must be shown that counsel actively represented conflicting interests. (4) Because conflict is possible in every instance of multiple representation, the mere possibility is not enough to establish ineffective assistance. (5) When a conflict is shown there is a three prong test: (a) The defendant must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. (b) The defendant must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. (c) The defendant must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Ineffective Assistance - Misunderstanding of Law

Hinton v. Alabama, FEB13, USSC No. 13-6440: When a defense attorney does not realize the law has changed and is forced to hire an expert the defense attorney considers inadequate because of this failure, the defense attorney has been constitutionally ineffective.

Ineffective Assistance of Counsel - Guilty Plea

US v. Dyess, SEP13, 4Cir No. 11-7355: (1) If the actions of trial counsel relate to pleading guilty, to prove ineffectiveness it must be shown that there was a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. (2) Whether the defendant would have subjectively preferred to go to trial is not dispositive. (3) The reviewing court must determine whether proceeding to trial would have been objectively reasonable in light of all the facts. (4) It is not constitutionally defective to hire an investigator who cannot confirm suspected matters. (5) An attorney's failure to anticipate a change in the law is not constitutionally infirm.

Morva v. Warden Sussex I, APR13, VaSC No. 102281: Counsel is not ineffective because of a tactical decision not to present evidence which could be "double edged."

8th Amendment

Excessive Bail

Excessive Fines

Cruel & Unusual Punishment

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.

US v. Hunter, NOV13, 4Cir No. 12-5035: (1) When a defendant is given a higher sentence under a recidivism statute (a) 100% of the punishment is for the offense of conviction and (b) none is for (i) the prior convictions or (ii) the defendant's status as a recidivist. (2) A defendant's enhanced sentence is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one. (3) It is not cruel and unusual to use the defendant's prior record to enhance the punishment of current offense.

14th Amendment

Equal Protection

Commonwealth v. Tuma, APR13, VaSC No. 121177: (1) Brady is not violated, as a matter of law, when impeachment evidence is made available to a defendant during trial if the defendant has sufficient time to make use of it at trial. (2) The prosecution can satisfy its constitutional obligation by disclosure of Brady materials at trial. (3) It is irrelevant when the prosecution came into custody of the Brady evidence. (4) A defendant cannot claim error unless he first asked for a recess or continuance to cure any issues raised by evidence being turned over late. (5) TAPE NEVER GIVEN TO DEFENDANT UNTIL AFTER TRIAL.

Brady

United States v. Fisher, APR13, 4Cir No. 11-6781: (1) A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by (a) threats (or promises to discontinue improper harassment), (b) misrepresentation (including unfulfilled or unfulfillable promises), or (c) perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g.bribes). (2) To set aside a plea as involuntary, a defendant who was fully aware of the direct consequences of the plea must show that (a) some egregiously impermissible conduct such as (i) threats, (ii) blatant misrepresentations, or (iii) untoward blandishments by government agents came before the entry of his plea and (b) the misconduct influenced his decision to plead guilty. (3) When an officer lies to get a search warrant it is an affirmative misrepresentation striking at the integrity of the prosecution and violates the due process rights of the defendant unless he is notified before his plea. (4) The fact that the prosecutor did not know of the police officer's lie does not cure the constitutional violation.

EVIDENCE

The Corpus Delicti Rule

Allen v. Commonwealth, JAN14, VaSC No. 130304: (1) The Corpus Delicti Rule: The Commonwealth must introduce evidence independent of an extrajudicial confession to prove that the confessed crime actually occurred. (2) Merely proving the crime happened is not enough to satisfy the rule. (3) Evidence merely placing the defendant within the geographic proximity of a crime is insufficient corroboration of a confession to having committed such crimes within the area. (4) If the facts offered to satisfy the slight corroboration requirement are just as consistent with non-commission of the offense as with its commission, then slight corroboration does not exist. (5) In addition to proving the corpus delicti the Commonwealth must also prove the defendant did it. (6) Slight corroboration of the confession is required to establish corpus delicti beyond a reasonable doubt. (7) Slight corroboration neither requires (a) all the contents of the confession nor (b) all the elements of the crime. (8) Slight corroboration may be proved by either direct or circumstantial evidence. (9) Slight corroboration exists when physical evidence relates to the confessed illegal act. (10) Eyewitness testimony detailing the occurrence of the illegal act can help satisfy the slight corroboration requirement. (11) The corpus delicit of sexual offenses against a minor cannot be proven by showing opportunity or regular activity.

Introduction of more than one conviction to prove prior felony

Boone v. Commonwealth, APR13, VaSC No. 121144: (1) The Commonwealth may introduce more than one offense to prove the defendant is a felon in case because (a) the Commonwealth is not required to trust that jurors will believe one piece of evidence, and (b) the priors might be overturned. (2) Follows Pittman v. Commonwealth, 17 Va. App. 33 (1993), which allowed introduction of more priors than two to prove the two priors in a felony petit larceny. (3) The trial court is not required to allow all the priors of the defendant to be introduced. (4) A trial judge can refuse to allow the introduction of prior felony convictions which are (a) cumulative or (b) more prejudicial than probative.

Rule 2:804(b)(3) Hearsay Exception – Declaration Against Penal Interest

Bailey v. Commonwealth, NOV13, VaApp No. 0465-12-2: (1) The statement-against-penal-interest exception requires the proponent to prove (a) unavailability, and (b) that the statement was against the declarant's interest at the time it was made, (c) and the declarant was subjectively aware of this fact, and (d) that the record contains evidence

other than the declaration itself establishing its reliability. (2) When a defendant chooses not to testify, as a matter of law he is not unavailable and cannot call witnesses to testify who would provide his statements against penal interest (drug deal gone bad, not a robbery). (3) Recognized "unavailability" include (a) a dead declarant, (b) a declarant to ill to testify, (c) an insane declarant, (d) the declarant is absent from the Commonwealth, (e) after due diligence the declarant cannot be located, (f) the decclarant cannot be compelled to testify, and (g) the other side has caused the declarant's absence. (4) The defendant cannot use the hearsay exception as a sword – getting his evidence in – while using the right not to testify as a shield – avoiding cross examination.

PRIOR CONVICTION ORDERS (WARRANTS)

Farmer v. Commonwealth, AUG13, VaApp No. 1389-12-1: (1) A prior conviction carries a presumption of regularity until proven otherwise. (2) Evidence is competent for purposes of proving a prior conviction when that evidence requires no conjecture or surmise to reach the conclusion that the defendant had indeed been convicted of the predicate offense or offenses. (3) The fact that the judge did not enter the defendant's plea on the warrant (required by 19.2-307) does not mean that the warrant is inadmissible for the purposes of proving a prior conviction. (4) When the defendant received a jail sentence, but the judge did not check the "defendant present" box on the warrant, there is a presumption that the defendant was present because the law requires his presence for that sentence.

§ 8.01-389(A) - "Preserved" Documents [Va Rule 2:901]

Snowden v. Commonwealth, OCT13, VaApp No. 1570-12-1: (1) Under § 8.01-389, a judicial record may be authenticated by the written certification of the clerk of the court holding the record. (2) Under § 16.1-69.55 when felony cases are certified to the grand jury, all documents concerning that case are certified to the clerk of the appropriate circuit court. (3) Records are preserved where they are being held, not where they originate. (4) Records which originate in the general district courts can be certified by the circuit court clerk and admitted into evidence.

Va AG Opinion, Question from La Bravia Jenkins (Commonwealth Attorney of Fredericksburg) 07JUN13: (1) (a) Once a foundation has been laid, (b) the results of a preliminary breath test can be used in cases of (i) underage possession of alcohol, (ii) possession, or (iii) consumption of alcoholic beverages by an interdicted person and (iv) public intoxication. (2) "An important element in the admissibility of the preliminary breath test is the foundation that the machine was working properly."

Hearsay in Probation Hearings

Saunders v. Commonwealth, FEB13, VaApp No. 1630-12-2: (1) In probation hearings, two tests have emerged for determining whether the denial of the right to confrontation will comport with constitutional due process. (2) The reliability test permits admission of testimonial hearsay in revocation proceedings if it possesses substantial guarantees of trustworthiness. (3) The balancing test requires the court to weigh the interests of the defendant in cross-examining his accusers against the interest of the prosecution in denying confrontation.

Ferrell v. Commonwealth, JUN13 VaApp No. 2379-11-2: (1) The acquittal order of a principal in the first degree is not admissible in the trial of a principal in the second degree. (2) Neither under (a) the common law nor under (b) collateral estoppel is the conviction of a principal in the second degree precluded by the acquittal of a principal in the first degree. (3) Differing results in the separate trials could have been the result of (a) lenity, (b) a different retelling of facts by key witnesses, (c) dissimilar strategic decisions of counsel, (d) disparate evidentiary rulings, (e) divergent arguments of counsel, or (f) disagreement between the two juries about the persuasive force of the totality of the evidence.

SIDE-SWITCHING DOCTRINE

Chappelle v. Commonwealth, AUG13, VaApp No. 0606-12-1: (1) The side-switching doctrine is a civil doctrine which has never been applied to criminal cases and the Court of Appeals “assumes without deciding” that it applies in criminal cases. (2) The side-switching doctrine is used when a party seeks to disqualify an opposing party’s expert witness because the expert had been previously an expert in use by the party seeking disqualification. (3) The doctrine has a two part test: (a) Was it objectively reasonable for the party seeking disqualification to conclude that a confidential relationship existed between that party and the expert? (b) Did the the party seeking disqualification disclose any confidential or privileged information to the expert witness? (4) It is party seeking disqualification's burden under the side-switching doctrine to prove, or particularize, the actual disclosure of confidential information. (5) Confidential disclosures include discussion of (a) a party’s strategies in litigation, (b) the kinds of experts that the retaining party expected to employ, (c) a party’s views of the strengths and weaknesses of each side’s case, (d) the role of each of the litigant’s expert witnesses to be hired, (e) anticipated defenses, (f) counsel’s theory of the case, and (g) counsel’s mental impressions. (6) The statement of the lawyer involved is not enough to prove the disclosure. (7) The defendant can question the expert, on the record, as to whether any confidential information was disclosed.

Value of Stolen Items - Receipt

Robertson v. Commonwealth, MAR13, VaApp en banc No. 0477-11-3: (1) When two people create the “receipt” which is introduced to show the value of items stolen from a store, the person who supervised the creation of this document can testify and (2) any flaws in the supervisor's knowledge goes to the weight of the evidence, not its admissibility.

Hearsay – Computer Created Records

Godoy v. Commonwealth, MAY13, VaApp No. 0369-12-4 : If a record is created without the entry of the data by a human it is not subject to the hearsay rule. (2) Reliability is the test for determining the admissibility of relevant records that are generated without human input.

Prieto v. Warden Sussex I, SEP13, VaSC No. 122054: (1) A prior conviction introduced from a court of competent jurisdiction cannot be challenged because that conviction is given a presumption of regularity, until the contrary appears. (2) While a habeas is pending “the contrary has not appeared” and the convictions cannot be challenged.

PROCEDURE

Pretrial

Preliminary Hearing

Saunders v. Commonwealth, FEB13, VaApp No. 1630-12-2: Failure to hold a preliminary hearing for a parole violation is (1) harmless error and (2) irrelevant after the full evidentiary hearing has taken place.

Indictment

Jurisdiction

Probation Violation: Collateral Attack on the Constitutionality of the Underlying Conviction

Saunders v. Commonwealth, FEB13, VaApp No. 1630-12-2: (1) A party may assail a void judgment at any time, by either direct or collateral assault. (2) A court lacks jurisdiction to enter a criminal judgment if the judgment is predicated upon an unconstitutional or otherwise invalid statute or ordinance. (3) Retroactive application of a constitutional ruling in the context of a collateral review of a criminal conviction is permitted if it the new ruling places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to prescribe. (4) If the Supreme Court of Virginia and the Federal 4th Circuit have conflicting rulings on the constitutionality of a statute, courts in Virginia must follow the constitutional rulings of the Virginia Supreme Court. (5) Only decisions of the United States Supreme Court can supersede binding precedent from the Virginia Supreme Court.

Venue

FILING OFF A FIREARM SERIAL NUMBER

Bonner v. Commonwealth, JUL13, VaApp (en banc) No. 0565-11-2: (1) The Commonwealth has the burden of establishing venue. (2) Venue does not have to be proven beyond a reasonable doubt because it is not an element of the crime. (3) Venue is established when evidence is shown establishing a strong presumption that

the crime occurred within the jurisdiction of the court. (4) Venue may be established by direct or circumstantial evidence. (5) Unless there is a specific statutory exception, under Va Code sec. 19.2-244 venue lies in the county or city where an offense occurred. (6) Destroying the serial number of a firearm is a discrete and non-continuing act and therefore venue lies only where the act is shown to have been done.

Pretrial Motions

Similar Crimes from Another State

Dillsworth v. Commonwealth, MAY13, VaApp No. 0870-12-4: (1) In deciding whether a Virginia offense is "substantially similar" to another State's offense, courts look to the elements of the two offenses rather than to the offender's conduct. (2) A crime in another state is not "substantially similar" to the most closely corresponding crime under Virginia law if the other State's law permits convictions for acts which could not be the basis for convictions under the similar Virginia law. (3) If (a) there are separate crimes under another State's statute, and (b) one crime is substantially similar to the appropriate Virginia statute while the other is not, and (c) the State that previously convicted the defendant specified that the conviction was under the section substantially similar to the Virginia law, then (d) the requirement that the previous conviction be of a statute "substantially similar" to a Virginia statute is satisfied.

§ 16.1-69.25: Request for a Bill of Particulars by the Commonwealth in GDC

Va AG Opinion, Question from Scott Surovell (Va Delegate) 16AUG13: A Commonwealth Attorney can ask for a bill of particulars in GDC if a defendant files a motion to suppress evidence as unconstitutionally obtained (not allowed in Circuit Court per § 19.2-266.2(C)).

Competency

Dang v. Commonwealth, JAN14, VaSC No. 130553: (1) When the defendant has already been afforded a competency evaluation in which he is found competent, the circuit court need not order a second evaluation unless it is presented with a substantial change in circumstances. (2) Neither (a) low intelligence, (b) mental deficiency, (c) nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial. (3) The legal test for competency is (a) whether the

defendant has sufficient presentability to consult with his lawyer with a reasonable degree of rational understanding, and (b) has a rational as well as factual understanding of the proceedings against him. (4) The trial court is not required to adopt a defense attorney's belief that his client is incompetent.

Arraignment

Plea

PLEA AGREEMENT

Smith v. Commonwealth, JUN13, VaSC No. 121579: (1) The law in effect at the time of the plea agreement is made is as much a part of the contract as if incorporated therein. (2) Contracts are deemed to implicitly incorporate (a) the existing law and (b) the reserved power of the state to amend the law or enact additional laws for the public welfare. (3) A defendant does not have a vested contractual right under Va Const. Art. I Sec. 11 not to have the law change after the plea agreement has been finalized in court. (4) Because no contractual rights vest, there is no due process violation when the law changes after a plea agreement has been finalized in court.

Rule 3A:8(c)(2) - Written Pleas

Winslow v. Commonwealth, NOV13, VaApp No. 2113-12-1: (1) If a defendant enters into an unwritten plea agreement, without objecting to it not being written, he cannot get it overturned by the appellate courts by claiming it was void ab initio or the the ends of justice exception should apply. (2) The court strongly hints that the transcript may fulfill the written requirement.

Trial

Jury Selection

Prieto v. Warden Sussex I, SEP13, VaSC No. 122054: (1) Seating a juror who was from outside the Commonwealth is not a structural error, but simply an error in the trial process. (2) Seating a juror from outside Virginia is governed by the ordinary rules of juror disqualification. (3) After a jury has been sworn, claims of juror disqualification can only be brought (a) with leave of the court, (b) upon a showing the disability be such as to probably cause injustice in a criminal case to the Commonwealth or to the accused.

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.

Strikes for Cause

Simmons v. Commonwealth, FEB13, VaApp No. 1893-12-1: When jurors indicate they believe in a higher standard of behavior than the law requires they are not required to be struck for cause if the judge solicits answers from them indicating they will apply the law rather than their particular belief of what is right or wrong.

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

Affirmative Defense

Jury Instructions

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.

Closing Arguments

Mistrial

Sentencing

Jury Sentencing

Pending Imposition of Sentence

Withdrawing Guilty Plea After Recommended Sentence

Pritchett v. Commonwealth, APR13, VaApp No. 0830-12-3: (1) In order to withdraw a guilty plea (a) the defendant must have received poor or erroneous advice from counsel and (b) have a reasonable defense, that is not (i) dilatory or (ii) formal. (2) Rule 3A:8(c)(2) states that a defendant does not have a right to withdraw his guilty plea when a recommended sentence is refused, as long as the Commonwealth lives up to its part of the bargain. (3) The courts can rely on the mandatory colloquy confirming that the defendant understands he cannot withdraw his guilty plea once he pleads guilty and gets a recommended sentence to deny his motion to withdraw his guilty plea.

Judicial Imposition of Sentence

ADVISEMENT

Starrs v. Commonwealth, JAN13, VaSC No. 122028: (1) Once a trial court has adjudicated guilt it must follow the statutory penalties for the crime of which it has convicted the defendant. (2) The acceptance and entry of a guilty plea does not constitute a formal adjudication of guilt. (3) A circuit court, upon accepting and entering a defendant's guilty pleas in a written order, still retains the inherent authority to (a) withhold a finding of guilt, to (b) defer the disposition, and to (c) consider an outcome other than a felony conviction.

Ex Post Facto: US Const. Article I Sections 9 & 10:

Peugh v. US, JUN13, USSC No. 12–62: (1) Sentencing guidelines must be the ones in effect at time of the crime, not time of sentencing. (2) The presence of discretion does not displace the protections of the Ex Post Facto Clause.

Maldonada-Meji v. Commonwealth, JAN10, VaSC No 130204: A defendant remains under indictment for the term of the advisement because the court has not yet found guilt or non-guilt.

Murry v. Commonwealth, JUN13, VaApp No. 0522-12-2: (1) Code § 19.2-303 allows a trial judge to suspend a defendant's sentence following conviction and place that defendant on probation "under such conditions as the court shall determine." (2) Under this statute the trial court has wide discretion to determine what conditions are to be imposed in each particular case . (3) A condition of probation must be reasonable, having due regard to (a) the nature of the offense, (b) the background of the offender, and (c) the surrounding circumstances. (4) If a trial court is concerned a defendant convicted of a sexual charge will reoffend and conceal his new offense, the trial judge may make a waiver of the defendant's 4th Amendment rights for life mandatory.

9.1-902(H) – Notification to Defendant of Right to Withdraw Plea – Registration - Minors

Hamilton v. Commonwealth, MAR13, VaApp No. 1922-11-4: (1) The statute only requires notification for cases (a) wherein a defendant will be required to register, (b) not all cases involving minors. (2) This statute's requirement that a judge inform the defendant of his right to withdraw his guilty plea is directory, not mandatory. (2) Because the statute is directory, the defendant must show harm or prejudice that has occurred in order to have relief. (3) The fact that the judge did not inform the defendant of his right to withdraw his guilty plea did not deprive the defendant of that right.

Blunt v. Commonwealth, APR13, VaApp No. 0766-12-2: (1) During a sentencing hearing the following can be admissible: (a) prior juvenile adjudications, (b) dismissed juvenile charges and pending charges, (c) charges for which the accused has been indicted, but not convicted, (d) offenses for which the defendant has been convicted, but not sentenced, (e) convictions on appeal, and (f) evidence of unadjudicated criminal activity. (2) Hearsay is allowed in a sentencing hearing provided it has some indicia of credibility.

19.2-305.1 – Restitution

Sigler v. Commonwealth, APR13, VaApp No. 0822-12-1: (1) A victim of a theft can offer his opinion as to the value of the property. (2) In determining the appropriate amount of restitution, (a) a court may consider hearsay evidence that bears minimal indicia of reliability. (b) so long as the defendant is given an opportunity to refute that evidence. (3) When no list of things stolen and their value is offered the judge should consider that in judging the weight of the evidence.

Commitment after a finding of NGRI

Bates v. Commonwealth, JAN14, VaSC No. 130259: (1) § 19.2-182.7 does not require a judge to personally find a location for each person found NGRI in order to make an unacceptable conditional release plan acceptable.

§ 53.1-187 Sentencing Concurrent

Va AG Opinion, Question from Sheriff Lawhorne (High Sheriff Alexandria) 28JUN13: (1) A jail sentence is not tolled during the period when the inmate is temporarily transferred to another jurisdiction for a court appearance. (2) An outside jurisdiction temporarily holding a convict cannot bar the jail whence the prisoner came from crediting that time to the prisoner. (3) If a court in a second jurisdiction which is temporarily holding the prisoner orders concurrent time only the time from which the prisoner has been held at the second facility counts (none before).

Post Trial

Within 21 Days

MOTION TO REOPEN / RECONSIDER

Thomas v. Commonwealth, MAY13, VaApp No. 0217-12-1: (1) Whether to accept a motion to (a) reopen an evidentiary record or (b) to reconsider a prior ruling is wholly in the discretion of the trial court. (2) The party seeking to reopen must (a) point out some error on the face of the record, or (b) show some legal excuse for his failure to present his full defense at or before the time of entry of the ruling. (3) A defendant cannot get a case reopened just because he wants to raise a defense he did not raise prior to the ruling. (4) **Valid Excuse Standard**: In order to reopen a case the defense must show that (a) he has exercised due diligence in making the best of prior opportunities to address the issue , and (b) either (i) he has new evidence that a reasonable investigation would not have uncovered previously, or (ii) there has been

an unforeseen judicial ruling affecting the issue ruled upon by the trial court. (5) In deciding whether to reopen, the judge may consider (a) the orderly management of its docket and (b) any prior pattern of delay caused by the moving party . (6) A party cannot get a matter reopened in order to withdraw an evidentiary stipulation it previously made.

Prieto v. Warden Sussex I, SEP13, VaSC No. 122054: (1) The testimony of jurors should not be received to impeach their verdict and (2) the best evidence of a juror's opinion in a case is the unanimous verdict reached by the jury.

Post 21 Days

§ 19.2-303 - Suspension of Individual's Sentence

Holland v. Commonwealth, OCT13, VaApp No. 0965-12-3: (1) Per the statute, the trial judge loses jurisdiction to suspend any part of the sentence once the individual has been transferred to DOC. (2) Once an individual has been transferred from federal custody to Virginia DOC the trial judge loses jurisdiction to suspend the Virginia sentence. (3) Any order purporting to suspend an individual's sentence after the defendant has been transferred to DOC is void ab initio. (4) Before suspending part of a previously imposed sentence under the statute the trial judge must find (a) that suspending or modifying the unserved portion of the sentence would be compatible with the public interest, and (2) that there are circumstances in mitigation of the offense. (5) When a trial court suspends the imposition of a sentence pending a 19.2-303 hearing has not implicitly found the two conditions needed to suspend the sentence. (6) Once an individual has been transferred to DOC an order suspending imposition of his sentence pending a 19.2-303 hearing is void.

During Appeal

SUBSTANTIVE

Violent Crimes

§ 16.1-253.2 Felony Violation of Protective Order - "Furtive"

Calloway v. Commonwealth, AUG13, VaApp No. 0387-12-3: When a person tries to sneak into a house and makes enough noise to be heard that does not mean it is not furtive.

§ 18.2-57(C) Assault / Battery on Law Enforcement

US v. Carthorne, AUG13, 4Cir No. 11–4870: (1) Assault and battery of a law enforcement officer is not an act of violence for federal sentencing purposes.

§ 18.2-51 Malicious Wounding – Single Blow

Burkeen v. Commonwealth, OCT13, VaSC No. 122178: (1) Under ordinary circumstances an intent to maim may not be presumed from a blow with a bare fist. (2) An assault with a bare fist may be attended with such circumstances of violence and brutality that an intent to kill may be presumed. (3) A finder of fact should consider both (a) the method by which a victim is wounded, and (b) the circumstances under which that injury was inflicted in determining whether there is sufficient evidence to prove an intent to maim, disfigure, disable or kill. (4) A single blow can support a finding of intent to maim.

18.2-33 – Felony Murder – Drugs

Woodard v. Commonwealth, MAR13 VaApp No. 2048-11-3: (1) In felony murder the killing must be so closely related to the felony in (a) time, (b) place, and (c) causal connection as to make it part of the same criminal enterprise. (2) All three elements must be shown to establish felony murder. (3) When a sale of drugs is completed and the drugs are ingested at a later place and time the death is not part of the res gestae of the sale.

Felony Murder - DUI

Montano v. Commopnwealth, MAR13, VaApp no. 0286-12-4: (1) An accidental death accompanied by a felonious act has an implied malice. (2) Felony murder is not limited to felonies from which death is foreseeable. (4) The felony and homicide must

(a) be part of a continuous transaction, and (b) be closely related in (i) time, and (ii) place, and (iii) causal connection. (5) Felony driving under the influence is inherently dangerous and the driving is inextricably linked to the accidental homicide in a wreck.

Smith v. Commonwealth, APR13, VaApp No. 0197-12-2: When (1) the firearm is seen already drawn immediately after the defendant broke in and (2) the defendant used the firearm to silence the victim after it is seen, there is sufficient evidence to support a conviction for using the firearm while breaking in.

Sex Crimes

§ 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.

§ 18.2-370.1(A) – Indecent Liberties with a Minor – Supervisory Relationship

Linnon v. Commonwealth, JAN14, VaSC No. 130179: (1) The key question in determining whether a given relationship falls within the statute is whether the defendant had the responsibility for and control of the minor's safety and well being. (2) When (a) a school administrator assigns a teacher part of the administrator's duty to supervise and care for students and (b) this assignment is in addition to the teacher's classroom duties, (c) it encompasses students not enrolled in the teacher's classes. (3) Monitoring the cafeteria once a week and the sidewalk outside the building before and after classes establishes a teacher's relationship with students other than those in his classes. (4) A defendant (a) may maintain the required relationship even when the proscribed acts occur outside the context giving rise to it and (b) whether such a relationship is maintained at the time of the offending conduct is a matter for the finder of fact to determine. (5) The fact that a supervisory relationship is currently in abeyance does not end it if there is a known past and an anticipated, imminent future to the relationship.

18.2-361(A) – Anti-Sodomy Law

McDonald v. Moose, MAR13, 4Cir No. 11-7427: Virginia's anti-sodomy law is unconstitutional.

§ 18.2-472.l(A) Failure to Register – Post Incarceration Supervision

Va AG Opinion: Question from Judge Carrico (GDC Petersburg) 12JUL13: This statute lays out a specific supervision period for misdemeanors (6 months) and even if a second or subsequent event occurs (a felony), if the charge is reduced to a misdemeanor the judge can only impose the supervision period for the misdemeanor.

Drug Crimes

§ 18.2-247 Imitation Controlled Substance

Powell v. Commonwealth, NOV13, VaApp No. 1825-12-3: (1) An imitation controlled substance is (a) any pill, capsule, tablet, or substance in any form whatsoever (b) that by express or implied representation (c) is (i) intended or (ii) appears to imitate a controlled substance subject to abuse. (2) The Commonwealth must prove the substance is not a controlled substance subject to abuse. (3) If a person sells someone a schedule VI drug (imitating a higher schedule drug) the schedule VI drug is not subject to abuse because the statute does not define schedule VI drugs as having potential for abuse.

Theft / Property Crimes

Value of Copper Pipes

Grimes v. Commonwealth, OCT13, VaApp No. 0293-13-1: (1) The value of copper piping stolen from a house cannot be determined by replacement cost. (2) The court does not decide whether the value for a larceny is scrap value or value of the pipes before destroyed by the thieves. [footnote 4]

§ 18.2-117 Failure to Return Bailed Property

Reed v. Commonwealth, AUG13, VaApp No. 1280-12-1: (1) The intent of a defendant in this kind of case is to not return the item when required. (2) This statute does not require an intent to permanently deprive the owner of the item.

Value of Stolen Items - Receipt

Robertson v. Commonwealth, MAR13, VaApp en banc No. 0477-11-3: (1) When two people create the “receipt” which is introduced to show the value of items stolen from a store, the person who supervised the creation of this document can testify and (2) any

flaws in the supervisor's knowledge goes to the weight of the evidence, not its admissibility.

§ 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.

§ 18.2-90 & 18.2-91: B&E – Crawlspace

Grimes v. Commonwealth, OCT13, VaApp No. 0293-13-1: A crawlspace under a house is part of the house for purposes of this statute.

Weapon Crimes

18.2-308.2: Possession of a Firearm by a Felon

Barlow v. Commonwealth, APR13, VaApp No. 0666-12-1: (1) The Commonwealth does not have to provide a certificate proclaiming that a firearm is a firearm in order to prove the fact. (2) The fact that a firearm was disassembled and in disrepair does not change its nature as a firearm. (3) A pistol without its barrel can still be found factually to be a firearm.

18.2-308.2: Introduction of more than one conviction to prove prior felony

Boone v. Commonwealth, APR13, VaSC No. 121144: (1) The Commonwealth may introduce more than one offense to prove the defendant is a felon in case because (a) the Commonwealth is not required to trust that jurors will believe one piece of evidence, and (b) the priors might be overturned. (2) Follows Pittman v. Commonwealth, 17 Va. App. 33 (1993), which allowed introduction of more priors than two to prove the two priors in a felony petit larceny. (3) The trial court is not required to allow all the priors of the defendant to be introduced. (4) A trial judge can refuse to allow the introduction of prior felony convictions which are (a) cumulative or (b) more

prejudicial than probative.

ATTEMPT TO PURCHASE FIREARM

Watkins v. Commonwealth, AUG13, VaApp No. 1124-12-1: (1) Submitting a firearm purchase form is sufficient to complete an attempt to illegally purchase.

§ 18.2-308.2:2(K) – False Information on Firearm Purchase Form

Maldonada-Meji v. Commonwealth, JAN10, VaSC No 130204: While a felony case is under advisement, anticipating amendment to a misdemeanor, the defendant is still under indictment for a felony and an answer that she is not on the form violates the law.

FILING OFF A FIREARM SERIAL NUMBER

Bonner v. Commonwealth, JUL13, VaApp (en banc) No. 0565-11-2: (1) The Commonwealth has the burden of establishing venue. (2) Venue does not have to be proven beyond a reasonable doubt because it is not an element of the crime. (3) Venue is established when evidence is shown establishing a strong presumption that the crime occurred within the jurisdiction of the court. (4) Venue may be established by direct or circumstantial evidence. (5) Unless there is a specific statutory exception, under Va Code sec. 19.2-244 venue lies in the county or city where an offense occurred. (6) Destroying the serial number of a firearm is a discrete and non-continuing act and therefore venue lies only where the act is shown to have been done.

§ 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 an 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.

§ 18.2-308.2 Felon in Possession of a Firearm

Jordan v. Commonwealth, SEP13, VaSC No. 121835: If the defendant (1) presents something that appears to be a firearm and (2) threatens someone with it, (3) the finder of fact can determine that the item was a firearm (4) even if the actual item is not found.

18.2-308(A) – Limitation on Carrying a Concealed Firearm

Va AG Opinion, Question of Richard Black (Va. Senator) 11OCT13: It does not violate the law if a volunteer fire department forbids its members from carrying a concealed weapon at the firehouse.

Motor Vehicles:

18.2-266 - DUI - No Intent

Case v. Commonwealth, FEB13, VaApp No. 2188-12-4: (1) There is no intent requirement for a DUI conviction. (2) An intoxicated person behind the wheel with the keys in the ignition is operating that vehicle. (3) A man who was left unconscious in the passenger seat of a running vehicle and found later unconscious in the driver's seat of the same vehicle with the vehicle in gear and his foot on the brake is guilty of DUI.

18.2-266 DUI – Private Property

Sarafin v. Commonwealth, OCT13, VaApp No. 1753-12-2: (1) When the Supreme Court said, in Enriquez v. Commonwealth, 283 Va. 511 (2012), that "in discerning whether an intoxicated person seated behind the steering wheel of a motor vehicle on a public roadway with the key inserted into the ignition switch of the vehicle is in actual physical control of the vehicle, the position of the key in the ignition switch is not determinative", the "on a public roadway" language was dicta – not binding precedent. (2) Despite the fact that the definition of operate for 18.2-266 has referred to 46.2-100's definition of Operator, the "on a highway" section of 46.2-100 does not apply to 18.2-266. (3) Because 18.2-266 does not specify that operation must occur on a public highway, it is not a requirement of the statute.

§ 18.2-266 – DUI - Blood Test

Patterson v. Commonwealth, NOV13. VaApp No. 1909-12-3: (1) The implied consent statute as it is presently enacted does not permit the arrestee to elect whether to

submit to a breath test or a blood test. (2) The implied consent statute does not impose any obligation upon the police officer to offer (a) a breath test, or (b) any test. (3) Test results from a breath or blood test are not necessary or required to prove driving under the influence of alcohol or drugs. (4) When an officer believes the intoxication results from drugs or a mixture of drugs and alcohol the officer can have blood drawn for testing rather then using a breathalizer.

§ 18.2-268.3 - Breath Test Refusal - Refusal Form

D'Amico v. Commonwealth, FEB13, VaSC No. 130549: (1) The proper execution of the refusal form is irrelevant because it is not an element of the offense. (2) When one officer reads the form to the refusor and another takes the form to the magistrate and the second incorrectly tells the magistrate she read the form to the refusor it is irrelevant to guilt and introduction of the form is harmless error.

§ 46.2-300 – Notice of Suspension

Carew v. Commonwealth, NOV13, VaApp No. 0153-13-4: (1) The gravamen of this offense is the act of operating a motor vehicle by a driver who has not obtained a valid operator's license by making a lawful application and passing the required examination. (2) A license is not suspended until notice of that status is received by the holder. (3) When a conviction under 46.2-300 is based upon the fact that the defendant's license has been suspended the Commonwealth must prove notice of suspension.

§ 46.2-357 - Habitual Offender / Intent

Claytor v. Commonwealth, DEC13, VaApp No. 0309-13-3: (1) The subjective intent of the person driving as a habitual offender is irrelevant. (2) In order to be convicted a person must know he was originally declared a habitual offender. (3) A person does not have to have believed he was still a habitual offender when caught driving in order to be convicted. (4) A person must (a) seek an affirmative assurance that he no longer has the habitual offender status and (b) receive affirmative assurance that he is not in order to attempt an affirmative defense.

§ 46.2-852 – General Reckless Driving – Using a Cell Phone

Va AG Opinion, Scott Surovell (Va. Delegate) 28JUN13: (1) if a driver operates a vehicle on a highway recklessly or at a speed in a manner so as to endanger the life, limb, or property of any person, while using a hand held personal communication device, that driver can be charged and convicted of reckless driving regardless of whether there are grounds to support a violation of§ 46.2-1078.1. (2) The mere use of a hand held personal communication device likely would be insufficient, standing

alone, to support a conviction of reckless driving.

Chambliss v. Commonwealth, OCT13, VaApp No. 0983-12-2: When a conspiracy to elude begins in one municipality and continues in a second, the second municipality can charge conspiracy to elude.

§ 46.2-894 - Leaving the Scene of an Accident

Belew v. Commonwealth, MAY13, VaApp No. 1168-10-2 : (1) Injury under the statute includes “soft tissue” injury such as muscle pain or damage. (2) Pain in back muscles after an accident qualifies as injury.

§ 18.2-36 - Involuntary Vehicular Manslaughter: Driving Exhausted

Cheung v. Commonwealth, FEB14, VaApp No. 0322-13-2: (1) Involuntary manslaughter in the operation of a motor vehicle is defined as (a) an accidental killing which, although (b) unintended, is (c) the proximate result of negligence so gross, wanton, and culpable as to show a reckless disregard of human life. (2) Involuntary vehicular manslaughter is the result of criminal negligence. (3) Criminal negligence is (a) (i) acting consciously in disregard of another person’s rights or (ii) acting with reckless indifference to the consequences, (b) with the defendant aware, (i) from his knowledge of existing circumstances and conditions, (ii) that his conduct probably would cause injury to another. (4) Criminal negligence has also been defined as conduct so gross and culpable as to indicate a callous disregard of human life. (5) The cumulative effect of a series of connected, or independent negligent acts causing a death may be considered in determining if a defendant has exhibited a reckless disregard for human life. (6) In determining the degree of negligence sufficient to support a conviction of vehicular involuntary manslaughter, the accused’s conscious awareness of the risk of injury created by his conduct is necessarily a significant factor. (7) When a driver (a) undertakes a trip of substantial distance and time (b) while in a tired and sleepy condition, (c) knowing he is in such a condition, and (d) operates his vehicle for a number of hours in this impaired state before the fatal accident he has committed involuntary manslaughter.

Va AG Opinion, Question from Linwood Gregory (Commonwealth Attorney New Kent County) 15NOV13: When two contiguous sections of the same road, in different counties, have each been declared separately “no through truck” zones, a truck driver living in one of the zones cannot legally drive through the zone in the other county.

Va AG Opinion, Question from Colonel Flaherty (Superintendent, Department of State Police) 08MAR13: Under § 46.2-100 the PS50 “Scoot Coupe” would be classified as a "motor vehicle" and the PS 150 “Sport Coupe” would be classified as a "motorcycle."

Other

ATTEMPT:

Watkins v. Commonwealth, AUG13, VaApp No. 1124-12-1: (1) An attempt is composed of two elements: (a) the intent to commit the crime, and (b) a direct, ***ineffectual*** act done towards its commission. (2) A direct, ineffectual act, done toward the commission of an offense (a) need not be the last proximate act toward completion, but (b) it must go beyond mere preparation and be done to produce the intended result. (3) The attempt is the direct movement toward the commission after the preparations are made . (4) If a person has done a direct act toward completion of the act, but abandons the attempt thereafter, he has still completed the attempt.

§ 18.2-168 Forging a Public Record

Henry v. Commonwealth, FEB13, VaApp No. 0631-13-2: (1) In order to be a forgery the false information given must render the entire document fraudulent and not authentic. (2) A single lie in a document does not despoil the entire document. (3) Giving false identifying information transforms a document into something other than it purports to be. (4) A lie about financial circumstances on an application for a court appointed attorney does not make the document a forgery.

§§ 19.2-161 & 19.2-159(B)(2) - Perjury in Application for Court Appointed Attorney

Henry v. Commonwealth, FEB13, VaApp No. 0631-13-2: (1) All real estate owned by a defendant must be listed. (2) The fact that the real estate could not readily be converted into cash is irrelevant. (3) Real estate is to be considered in terms of the amounts which could be raised by a loan on the property.

Contempt of Court

Amos v. Commonwealth, APR13, VaApp No. 1667-11-4: (1) In summary contempt, a defendant must be given an opportunity to speak on her own behalf. (2) A defendant must be given an opportunity to object immediately before or after the finding of contempt. (3) Application of summary contempt is limited to misconduct (a) in open court, (b) in the presence of the judge, (c) which disturbs the court's business, (d) where all of the essential elements of the misconduct are under the eye of the court, (e) are actually observed by the court, and (f) where immediate punishment is essential to prevent demoralization of the court's authority before the public. (4) Demonstrable lies by a witness rely on evidence which comes from outside the court

and therefore the witness cannot be found in summary contempt.

18.2-22 & 18.2-23 Continuing Conspiracy

Chambliss v. Commonwealth, OCT13, VaApp No. 0983-12-2: (1) Conspiracy is an agreement between two or more persons by concerted action to commit an offense. (2) Conspiracy is complete when the parties agree to commit an offense. (3) An overt act in furtherance of the conspiracy is not required to prove it . (4) The existence of a conspiracy may be proven by circumstantial evidence. (5) Five factors are probative in determining whether a conspiracy is single continuing conspiracy: (a) the time periods in which the activities occurred; (b) the statutory offenses as charged in the indictments; (c) the places where the activities occurred; (d) the persons acting as co-conspirators; and (e) the overt acts or other descriptions of the offenses charged that indicate the nature and scope of the activities to be prosecuted.

Va AG Opinion, Question from Robert W. Duncan (Executive Director Virginia Department of Game & Inland Fisheries) 19JUL13: (1) An Indian who habitually resides on an Indian reservation or an Indian that is a member of a Virginia recognized tribe who resides in the Commonwealth is not required to obtain a license to fish in Virginia's inland waters, or to hunt or trap in Virginia. (2) Members of the Virginia tribes that were parties to the Treaty of 1677 with England are not required to obtain a license to fish or oyster in Virginia's tidal waters provided the activity is limited to harvesting for sustenance. (3) Virginia Indians are bound by the trapping, hunting and fishing laws and regulations of the Commonwealth regardless of whether they are on or off a reservation.

PROBATION

Jacobs v. Commonwealth, MAR13, VaApp No. 2447-11-4: (1) Per 19.2-306(C), if a defendant is found to have violated probation the judge shall revoke the sentence and may resuspend part of it. (2) If a judge states only that he is revoking a certain amount of the sentence (a) that does not mean that he is cutting short the rest of probation (b) because he does not have the power to do that.

Probation Violation: Collateral Attack on the Constitutionality of the Underlying Conviction

Saunders v. Commonwealth, FEB13, VaApp No. 1630-12-2: (1) A party may assail a void judgment at any time, by either direct or collateral assault. (2) A court lacks jurisdiction to enter a criminal judgment if the judgment is predicated upon an unconstitutional or otherwise invalid statute or ordinance. (3) Retroactive application of a constitutional ruling in the context of a collateral review of a criminal conviction is permitted if it the new ruling places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to prescribe. (4) If the Supreme Court of Virginia and the Federal 4th Circuit have conflicting rulings on the constitutionality of a statute, courts in Virginia must follow the constitutional rulings of the Virginia Supreme Court. (5) Only decisions of the United States Supreme Court can supersede binding precedent from the Virginia Supreme Court.

Hearsay in Probation Hearings

Saunders v. Commonwealth, FEB13, VaApp No. 1630-12-2: (1) In probation hearings, two tests have emerged for determining whether the denial of the right to confrontation will comport with constitutional due process. (2) The reliability test permits admission of testimonial hearsay in revocation proceedings if it possesses substantial guarantees of trustworthiness. (3) The balancing test requires the court to weigh the interests of the defendant in cross-examining his accusers against the interest of the prosecution in denying confrontation.

APPEALS

Appellee Argument

5A:12 – SUFFICIENT IDENTIFICATION OF INSUFFICIENT EVIDENCE

Calloway v. Commonwealth, AUG13, VaApp No. 0387-12-3: (1) 5A:12 only applies to the petition for appeal and is supplanted by 5A:20 for the actual brief of the appeal. (2) If the Commonwealth seeks to challenge the sufficiency of an assignment of error under Rule 5A:12, it must do so prior to the granting of the petition for appeal. (3) The Commonwealth's failure to object to the sufficiency of the assignment of error under Rule 5A:12 prior to the granting of the petition for appeal will be considered a waiver of that objection.

Appellant Argument

Rule 5A:12(c)(1) – Assigning Errors

Findlay v. Commonwealth, JAN14, VaSC No. 130409: (1) Litigants are required to identify with specificity the error committed by the trial court. (2) When an assigned error points to a specific ruling of the court it is sufficient to present the error to the appellate court. (3) The appellant does not have to explain why the trial court was in error in his assignment of error.

Linnon v. Commonwealth, JAN14, VaSC No. 130179: (1) One party may not rely on the objection of another party to preserve an argument for appeal without expressly joining in the objection. (2) If (a) a defendant has just argued a motion to strike and (b) the court considers jury instructions after the motion to strike and (c) denies a jury instruction proposed by the defendant (d) which is based upon the same argument put forth in the motion to strike, and (e) the defendant objects without argument, (f) the objection is preserved because the trial court was aware of the argument.

Ends of Justice

Gordon v. Commonwealth, APR13, VaApp No. 0940-12-2: If a judge sentences a defendant to more than the statute allows the ends of justice exception to the objection requirement applies.

§ 8.01-384(A) - Contemporaneous Objection Not Allowed

Commonwealth v. Amos, FEB13, VaSC No. 130757: (1) When a defendant is not allowed an opportunity to contemporaneously object by the trial court she is not precluded from raising that issue on appeal. (2) If the trial judge does not allow a contemporaneous objection there is no requirement that the party bring the matter back before the trial judge at a later point to obtain a ruling on the objection she would have made.

§ 8.01-384(A) - Contemporaneous Objection: Attorney Not Present

Maxwell v. Commonwealth, FEB13, VaSC No. 130810: If an attorney is gone to lunch and a judge addresses a jury question the attorney does not have the opportunity to object contemporaneously and therefore can raise the judge's communication with the jurors on appeal.

§ 8.01-384(A) - Contemporaneous Objection: Delayed by the Judge

Maxwell v. Commonwealth, FEB13, VaSC No. 130810: (1) An objection against the Commonwealth's closing argument must be made at the time of argument. (2) The fact that the trial judge told the defense attorney to wait until after closing arguments does not forgive the defense attorney of his obligation to make the objection and explain it at that moment. (3) Telling the judge that a party has a motion to be heard outside the presence of the jury is not an objection.

Types of Voidness & Ends of Justice

Winslow v. Commonwealth, NOV13, VaApp No. 2113-12-1: (1) An order (a) is void ab initio if the trial court had no jurisdiction and (b) can be challenged without a contemporaneous objection in the trial court. (2) An order is voidable if the trial court had jurisdiction, but ruled incorrectly, and a contemporaneous objection is required for an appeal. (3) The Ends of Justice exception as applied in criminal cases usually requires (a) a showing that the defendant 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.

Jurisdiction

Void ab Initio

Amin v. Henrico, OCT13, VaSC No. 122035: (1) An order that is void ab initio may be impeached directly or collaterally by all persons, anywhere, at any time, or in any

manner. (2) The 21 day rule (per Rule 1:1) does not apply to orders which are void ab initio. (3) Once a Virginia appellate court has accepted jurisdiction in a case under any question, the petitioner may raise the fact that the trial court's ruling was void ab initio and the court cannot reject it for lack of jurisdiction.

Writs

Actual Innocence - Recantation

Montgomery v. Commonwealth, DEC13, VaApp No. 2300-12-1: (1) To obtain a writ of actual innocence Montgomery must prove by clear and convincing evidence that the newly-discovered evidence: (a) was previously unknown or unavailable to him or his attorney at the time the conviction became final in the circuit court; (b) could not have been discovered through due diligence before the expiration of the 21 days following the entry of the final order of conviction; (c) (i) is material, and (ii) when considered with all of the other evidence in the record, proves that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (d) is not merely cumulative, corroborative, or collateral. (2) For recantation evidence to be material, the recantation must be true. (3) The Petitioner has the burden of proving to the Court of Appeals, by clear and convincing evidence, that the victim's recantations are true. (4) Recanting original testimony is not material if all it proves is that the victim testified falsely on one of the two occasions—but not which one. (5) Recantation evidence (a) is generally questionable in character and (b) is widely viewed by the courts with suspicion because of the obvious opportunities and temptations for fraud. (6) Unless proven true, recantation evidence merely amounts to an attack on witness credibility by the witness herself. (7) A perjury conviction against the sole witness in the case for the testimony she gave against the defendant is sufficient to issue the writ.

Standards of Review

Reopening a Case by the Trial Court

Thomas v. Commonwealth, MAY13, VaApp No. 0217-12-1 : Whether a trial court should reopen and reconsider a matter already decided is reviewed under the highly deferential abuse-of-discretion standard .

Bonner v. Commonwealth, JUL13, VaApp (en banc) No. 0565-11-2 : (1) Before an appellate court can determine whether the Commonwealth met its burden in establishing a strong presumption that the offense was committed in the jurisdiction of the trial court, it must establish in the abstract where a proper venue is for the offense. (2) When reviewing venue, the appellate court must determine whether the evidence,

when viewed in the light most favorable to the Commonwealth, is sufficient to support the trial court's venue findings.

Jury Instructions

Sarafin v. Commonwealth, OCT13, VaApp No. 1753-12-2: (1) When reviewing a trial court's refusal to give a proffered jury instruction, the appellate courts view the evidence in the light most favorable to the proponent of the instruction. (2) Jury instructions are reviewed to see (a) that the law has been clearly stated and (b) that the instructions cover all issues which the evidence fairly raises. (3) As a mixed question of law and fact, jury instructions are revied de novo.

Remedies

Chatman v. Commonwealth, MAR13, VaApp en banc No. 0858-11-2: The Court of Appeals (1) can send a petition wherein the assignment of errors does not cite where the error was preserved back to the attorney to correct the error and (2) does not have to dismiss the petition.

Whitt v. Commonwealth, MAR13, VaApp en banc No. 0885-11-3: (1) An appellate court (a) should allow amendment of the assignment of error to correct (i) formal error, or (ii) errors of oversight, especially (b) when it makes the revised assignment of error (i) more precise, and (ii) is consistent with argument put forth at trial. (2) An appellate court should not allow amendment of an assignment of error which (a) enlarges the issue, or (b) allows new issues to be added.

Brooks v. Commonwealth, MAR13, VaApp en banc No. 2708-10-1: (1) The Court of Appeals (1) can send a petition wherein the assignment of errors does not cite where the error was preserved back to the attorney to correct the error and (2) does not have to dismiss the petition. (2) However, if the attorney cites the entire argument rather than the location of the actual objection a dismissal is appropriate.

Sentencing Guidelines

Woodard v. Commonwealth, FEB13, VaSC No. 130854: Because the sentencing guidelines are discretionary, the fact that conviction upon which the guidelines are based is reversed does not entitle the defendant to a new sentencing hearing using sentencing guidelines based upon remaining offenses.

Sentence Greater Than Allowed

Gordon v. Commonwealth, APR13, VaApp No. 0940-12-2: Because a sentence greater than allowed by the statute is void ab initio it must be returned to the trial court for resentencing.

HABEAS

Prieto v. Warden Sussex I, SEP13, VaSC No. 122054: A claim that a petitioner is mentally retarded and therefore cannot be executed is barred because it is a non-jurisdictional issue which could have been raised during the direct appeal process and therefore is non-cognizable in a habeas petition.

Sigmon v. Director, APR13, VaSC No. 121216: (1) Claims of ineffective assistance of counsel are not reviewable on direct appeal and thus can be raised only in a habeas corpus proceeding. (2) A direct appeal and habeas can proceed at the same time.

AEDPA - Federal Circuit Court Precedent

Marshall v. Rodgers, APR13, USSC No. 12-382: (1) AEDPA requires clearly laid out Supreme Court precedents in order for a federal court to overrule a State court in a habeas procedure. (2) An appellate panel may look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, however it may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to the Supreme Court, be accepted as correct.

AEDPA - Actual Innocence

McQuiggin v. Perkins, MAY13, USSC No. 12-126: (1) Actual innocence, if proven, allows a petitioner's habeas to be heard whether the impediment is a procedural bar, or expiration of the statute of limitations. (2) A federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown. (3) A federal habeas petitioner is entitled to equitable tolling only if (a) he has been pursuing his rights diligently, and (b) some extraordinary circumstance stood in his way and prevented timely filing.

INEFFECTIVE ASSISTANCE OF COUNSEL / PLEA AGREEMENT

Laster v. Russell, JUN13, VaSC No. 121282: (1) If a defendant was never told of a plea agreement before trial, in order to establish that this was prejudicial the habeas petitioner must show a reasonable probability that (a) the prosecution would not have withdrawn the plea, and (b) the judge would not have rejected the plea.