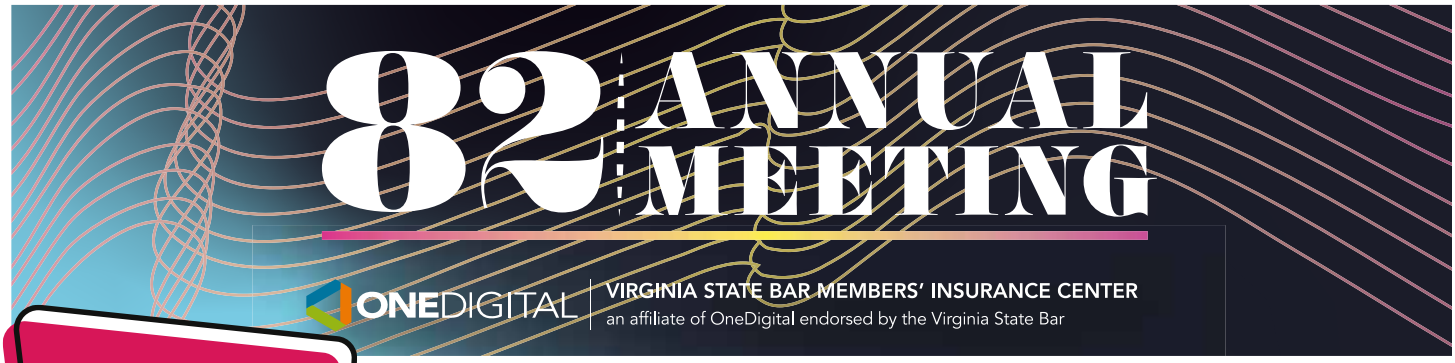
Criminal Law News

Volume 50, Number 4
May 2021

The Newsletter of the Criminal Law Section of the Virginia State Bar



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Convicting the Innocent
June 14 • 1:00pm - 2:00pm

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Convicting the Innocent

This presentation will draw on substantial experience studying and correcting wrongful convictions. This experience teaches two fundamental lessons: (1) no one wants to convict an innocent person; and (2) correcting a wrongful conviction is incredibly difficult. Wrongful convictions do not involve "an evil mastermind," they involve good people engaged in the routine performance of their jobs as defense attorneys, prosecutors, judges, jurors, scientists, and law enforcement. Sometimes they do those jobs poorly, or just not great, and the result is a cascade of small errors and missed opportunities that lead to a catastrophic failure of the justice system. Because of the difficulty of correcting wrongful convictions, and the primacy of finality over truth mandated by Virginia's "21 day rule," the only sure way to correct a wrongful conviction is to prevent it from occurring. We will be presenting statistical evidence as well as personal experience - including comments from a Virginia exoneree.

Panelists

Hon. Michael R. Doucette is a circuit court judge in the 24th Judicial Circuit. Previously, he was a member of the Lynchburg Commonwealth's Attorney's Office from 1984 to 2017, serving the last 12 years as the elected Commonwealth's Attorney. He then became the first Executive Director of the Virginia Association of Commonwealth's Attorneys (VACA) in 2018. In 2003, Mike was honored by VACA with the Von Schuch Award as the outstanding assistant Commonwealth's Attorney. In 2011, Virginia's Lawyer's Weekly chose him as one of its 31 honorees for "Leader of the Law." In 2014, he received the VACA's Robert F. Horan Jr. Award as the outstanding Commonwealth's Attorney, and the Virginia Association of Chiefs of Police President's Award. In 2017, he received VACA's Michael R. Doucette Award for Lecturers of Merit.
Mike is a past president of VACA, and chaired the Protective Order subcommittee of the Governor's Domestic Violence Prevention Advisory Board as well as the Virginia Criminal Justice Services Board. He has served on the Virginia State Crime Commission, the Virginia Supreme Court's Special Committee on Criminal Discovery Rules, the Virginia Criminal Justice Conference and as president of the board of directors for the Virginia Legal Aid Society. He serves on the Board of Governors of the Criminal Law Section of the Virginia State Bar and on the Virginia Supreme Court's Model Jury Instruction Committee.

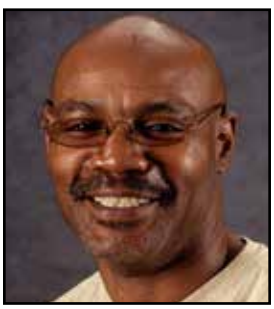
Steven D. Benjamin is an attorney in private practice with the Richmond, Virginia firm of Benjamin & DesPortes. He serves as Special Counsel to the Virginia Senate Courts of Justice (Judiciary) Committee, and is a member of the Virginia Board of Forensic Science and the Virginia Indigent Defense Commission. He is a Past President of the Virginia Association of Criminal Defense Lawyers. Mr. Benjamin was counsel in the landmark Virginia Supreme Court decision recognizing a constitutional right to forensic expert assistance at state expense for indigent defendants. He helped establish and chair an annual Advanced Indigent Defense Training Seminar to draw top lecturers from across the country to train Virginia's defenders. With his law partner, he won the non-DNA exoneration and release of a man serving a life sentence for a murder he did not commit. He assisted the State Crime Commission in the creation of Virginia's Writs of Actual Innocence. When biological evidence was discovered in twenty years of old case files stored in Virginia's crime laboratories, he helped persuade state political leadership to order statewide DNA testing. He is a recipient of the Virginia State Bar's Lewis F. Powell Pro Bono Award, is a frequent lecturer on criminal justice and defense issues, and is a Fellow of the American Board of Criminal Lawyers.

Betty Layne DesPortes received her JD from the University of Virginia School of Law and her MS in forensic science from Virginia Commonwealth University. Betty Layne is a Past President of the American Academy of Forensic Sciences and a Fellow of the American Board of Criminal Lawyers. She served as Chair of the Forensic Sciences Foundation, Inc. and on the American Bar Association's Task Force on Biological Evidence as a

representative of the National Association of Criminal Defense Lawyers. She also served on the ABA Task Force on the Presentation of Forensic Science Evidence. She has actively sought reform of Virginia's indigent defense system and is committed to improving indigent defense forensic resources. In 1996, Betty Layne and her law partner, Steven D. Benjamin, obtained a landmark Virginia Supreme Court decision recognizing the constitutional right of an indigent criminal defendant to expert forensic assistance. Since 2005 she has assisted with speaker recruitment and planning of the Virginia Chief Justice's Advanced Indigent Criminal Defense Training Seminar. In 2001, Betty Layne and Steve obtained the exoneration and release of Jeffrey David Cox, a man who was serving a life sentence for a murder he did not commit.

Jon B. Gould is Foundation Professor in Criminology, Justice, and Law at Arizona State University, Phoenix (January 2020-present). He received a Ph.D. in Political Science from the University of Chicago Political Science, a J.D. cum laude from Harvard Law School, an M.P.P. Harvard University, John F. Kennedy School of Government, and an A.B. from the University of Michigan, *with highest distinction and highest honors in public policy*. He has served as a Senior Policy Advisor, U.S. Department of Justice, Washington, D.C. (2016) leading policy development on criminal justice reform, and facilitating deliberations involving multiple offices and interests, including those within the Department of Justice and outside constituencies. He was Director, Law and Social Sciences Program National Science Foundation, Arlington, Virginia. As Chair, Innocence Commission for Virginia he helped to create a non-profit organization and coordinated five-person steering committee, seven-member advisory board, and eleven law firms in an 18-month, $500,000 project to analyze erroneous convictions in Virginia and recommend reforms. (2003-2008).

Marvin Anderson In 1982, a young black man raped a young white woman in Hanover County, Virginia. During the assault, the rapist told the victim he had a white girlfriend. Based solely on the fact that he lived with a white woman, 18 year-old Marvin Anderson became a suspect in the rape. Because Marvin Anderson had no criminal record, the police used a color photo taken from his employee identification card in the photo array they showed the victim. She selected his picture—the only color photo in the array. After viewing his photo, she also selected him in a lineup. Although Marvin Anderson differed from the victim's initial description of the rapist in complexion and facial hair, lacked the scratches on his face that the victim gave the rapist, and had several witnesses to prove he was home at the time of the attack, the victim's identification was sufficient to convict Mr. Anderson. At 18 years old, Marvin Anderson was sentenced to serve 210 years in prison for a rape he did not commit. Six years later, John Otis Lincoln confessed to the rape, but a judge decided Lincoln's confession was not credible and refused to overturn Marvin Anderson's conviction. In December of 2001, more than 15 years after he was convicted, the Mid-Atlantic Innocence Project used DNA testing to prove his innocence. In 2002, he was pardoned by the Governor of Virginia, and the conviction was expunged from his record. In 2003, John Otis Lincoln was convicted of the rape based in part on the DNA evidence. Today, Marvin Anderson serves on the Board of Directors for the Innocence Project and has three children. He is a retired Chief of the Hanover, Virginia Fire Department.



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Chair's Column

Gene Fishel

Virginia blesses us with many wonders. One of the great pleasures of my position as prosecutor and head of the Computer Crime Section in the Virginia Attorney General's Office over these past 18 years has been traveling to every corner of our great Commonwealth and experiencing its geographical diversity. As we hover near home these days, it is wise counsel to break from our legal work and step out to the Virginia just beyond our doorstep. Seneca recognized millennia ago that, "Travel and change of place impart new vigor to the mind."

Head to where three states intersect at the profound Cumberland Gap in Lee County and explore the trails, waterfalls, and deep wilderness of the Appalachians. Follow the verdant, rolling hills of the Piedmont region to Martinsville/ Henry County and Patrick County and explore the unspoiled natural beauty of Fairy Stone State Park and Philpott Lake and the downhome feel of the area's quaint shops and eateries. Travel to Tidewater and stand at Fort Monroe's edge at Old Point Comfort in Hampton overlooking the mouth of the Chesapeake Bay and reflect on the significant and fraught centuries of history that occurred before you. Cruise up the Eastern Shore and enjoy an oyster fritter sandwich in Chincoteague as you gaze across the serene wetlands of the Assateague National Wildlife Refuge with its distinctive red and white lighthouse standing sentry. Traverse the cobblestoned streets of Old Town Alexandria and the exciting cultural crossroads of our nation that is the Northern Virginia / D.C. corridor with its museums, arts, and sports. Behold the pastoral beauty of Virginia's wine and horse country and peruse infinitely charming towns such as Middleburg, Gordonsville, and Culpeper. Discover an overlook on Skyline Drive in the Blue Ridge Mountains and marvel at the ethereal vistas and majesty of the Shenandoah Valley. Ponder the powerful historical legacy of Richmond as you navigate the capital region and its James River rapids, and then immerse yourself in its thriving arts and restaurant scene.

Virginia's treasures are too great to fully list but interwoven throughout and coloring them are its people. I have had the immeasurable privilege of working with devoted prosecutors, defense attorneys, law enforcement officers, judges, academics, and the general citizenry in all the Commonwealth's regions. It is they who breathe life into the storied and varied fabric of Virginia.

Virginia's diversity is also notably reflected within our Criminal Law Section and its Board of Governors. I would like to thank the Section and the Board, including Vice-Chair Daniel Vinson, Secretary LaBravia Jenkins, and Immediate Past Chair Seth Weston, for the honor of serving as Chair this past year. I particularly want to acknowledge Maureen Stengel and Professor Ron Bacigal for their decades of service to the Bar and Section, and their invaluable assistance to my tenure. With the recent abolition of capital punishment in Virginia, I would also be remiss if I did not recognize and thank Professor Bacigal for his dedication as editor of the Virginia Capital Case Trial Manual. The Criminal Law Section created and funded the manual for Virginia's criminal law practitioners 30 years ago. As a result of the Professor's work, the Commonwealth's Attorneys, defense bar, and Virginia Supreme Court elevated it in their capital training sessions as an indispensable tool for handling capital cases.

The Criminal Law Section and its Board of Governors will surely continue in the coming years to reach every corner of the Commonwealth as they provide essential resources for Virginia's attorneys. As I have discovered, exploring those corners, and serving the Section are immensely rewarding endeavors. ✧

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Jones v. Mississippi, 141 S.Ct. 1307 (2021). Prior decisions establish that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. However, the constitution does not require a sentencer to make either a separate factual finding, or an on-the-record sentencing expla¬nation with an "implicit finding," of permanent incorrigibility before sentencing a murderer under 18 to life without parole. Although the sentencer must follow a certain process—considering an offender's youth and attendant char¬acteristics—there is no requirement for a particular finding regarding incorrigibility.

Torres v. Madrid, 141 S.Ct. 989 (2021). The officers fired their service pistols 13 times to stop Torres, striking her twice, but she still managed to escape. Torres later sought damages from the officers under 42 U. S. C. §1983, claiming that the officers used excessive force against her and that the shooting constituted an unreasonable seizure under the Fourth Amendment. The lower courts held that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." The Supreme Court vacated, holding that the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.

The Court distinguished seizures by force from a seizure by acquisition of control which involves either voluntary submission to a show of authority or the ter¬mination of freedom of movement. In contrast, a seizure by force requires the use of force with intent to restrain.

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

United States v. Soloff, 993 F.3d 240 (2021). While it is "best for district courts to be explicit when accepting or rejecting plea agreements …. Where the record furnishes sufficient evidence to conclude that a district court constructively accepted the plea agreement, the court's failure to explicitly accept the agreement will not undo the parties' bargain."

United States v. Drakeford, 992 F.3d 255 (2021). The Court found that the police lacked adequate facts for a stop and search. The concurrence went beyond the facts of this case and offered general guidance governing the deference to be given police. "In the half century since *Terry v. Ohio* we have afforded greater and greater weight to officers' 'training and experience'—often at the expense of the robust judicial scrutiny that the Fourth Amendment demands…. Our practice of affording strong deference to 'training and experience' has costs. For starters, it incentivizes veteran officers to lean on their 'impressions' instead of doing the hard work of building a case, fact by fact." The concurrence suggested that judges "dial down" the deference given police officers and treat them like other expert witnesses. "If a veteran officer catches something that would elude a novice—a code word, a pattern, etc.—he may of course rely on it, so long as he can later explain in court why the fact is significant. But if an officer's explanation is paltry or conclusory, as in this case, the judge must not hesitate to assign it less weight."

United States v. Sharif Ali, 991 F.3d 561(2021). When a trial court has denied a request to sequester witnesses from the courtroom while other witnesses offer testimony, a presumption of prejudice is applied. However, the presumption does not apply as to contact between witnesses outside the courtroom. When trial courts exercise discretionary authority to strengthen their sequestration orders outside of the courtroom, defendants must show that they were harmed by out-of-courtroom conversations between witnesses.

United States v. Myers, 986 F.3d 453 (2021). Noting that drug crimes are frequently uncovered after automobiles with multiple occupants are stopped for traffic violations, the defendant argued that police lacked particularized suspicion with respect to the defendant passenger as opposed to the driver of the vehicle. The Court upheld the arrest because this was not a case where "mere propinquity to others independently suspected of criminal activity" is advanced as the basis for probable

cause, such as was the case of a customer frequenting a bar being searched by law enforcement for drugs, *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). Instead, the community of conduct suggested by the totality of the circumstances particularized the suspicion as to all occupants of the vehicle and thus justified their arrest. See, *Maryland v. Pringle*, 540 U.S. 366, 373 (2003).

United States v. Haas, 986 F.3d 467 (2021). To obtain a *Franks v. Delaware*, 438 U.S. 154 (1978 hearing, a defendant must make a "substantial preliminary showing" to overcome the "presumption of validity with respect to the affidavit supporting the search warrant." But the presence (or absence) of probable cause is not the proper subject of a *Franks* hearing.

United States. v. Pulley, 987 F.3d 370 (2021). Under Franks, "What the officer affiant should have known does not matter if he did not in fact know. Reckless disregard is a subjective inquiry; it is not negligence nor even gross negligence. To establish a Franks violation, the particular affiant must have been subjectively aware that the false statement or omission would create a risk of misleading the reviewing magistrate judge and nevertheless chose to run that risk."

United States v. White, 987 F.3d 340 (2021). Having found "no controlling Virginia precedent," the Fourth Circuit certified this request - "that the Supreme Court of Virginia exercise its discretion to answer the following question: Under Virginia common law, can an individual be convicted of robbery by means of threatening to accuse the victim of having committed sodomy?"

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Kenner v. Commonwealth, 854 S.E.2d 493 (2021). "In addressing the appropriate time to poll the jury the plain language of Rule 3A:17 states only that it may be done 'when a verdict is returned.' Construing this language in the context of a bifurcated trial proceeding, the request to poll the jury should occur directly after the verdict for which counsel wants the jury to be polled." Thus, "where the punishment phase has begun, a motion to poll the jury as to its guilty verdict generally comes too late."

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Barrow v. Commonwealth, No. 0769-20-3, 2021 WL 1618267, (. Apr. 27, 2021) "The judicial order directing trial courts to 'liberally' grant continuances for any impact caused by the COVID-19 crisis added a factor for the trial court to consider. However, it certainly did not require a trial court to grant a continuance every time a party invoked the magic word 'COVID.' The discretion to grant or deny the continuance after weighing all the factors and circumstances resided with the trial court. We conclude the trial court did not abuse its discretion when it denied Barrow's request for a continuance."

Barnett v. Commonwealth, 73 Va. App. 111, 855 S.E.2d 874 (2021). Upheld conviction of violating "Code § 18.2-41, which imposes criminal liability upon "[a]ny and every person composing a mob which shall maliciously or unlawfully shoot, stab, cut[,] or wound any person, or by any means cause him bodily injury with intent to maim, disable, disfigure[,] or kill him[.]" "Criminal accountability flows from being a member of the mob, regardless of whether the member aids and abets in the [wounding]." Granting the appropriate deference to the jury as the finder of fact, the jury properly determined that three men shared a common intent to inflict bodily injury on the victim and that appellant did not abandon or contradict this intent prior to the wounding.

Commonwealth v. Thomas, 73 Va. App. 121, 855 S.E.2d 879 (2021). Reversed the circuit court's decision to grant bail. Code § 19.2-120(A) states that: "The judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is currently charged with: 1. An act of violence as defined in § 19.2-297.1; 2. An offense for which the maximum sentence is life imprisonment or death. Code § 19.2-120(B)." Despite the significant evidence favoring the denial of bail, the lack of evidence favoring release on bail, and the presumption itself, the circuit court made no factual findings to support its conclusion that defendant had borne his burden of persuasion that he was neither a flight risk nor danger to the public and should be released on bail.

Lopez v. Commonwealth, 73 Va. App. 70, 854 S.E.2d 660 (2021). Upheld conviction under Code § 18.2-478 - "if any person lawfully in the custody of any police officer on a charge of criminal offense escapes from such custody by force or violence, he shall be guilty of a Class 6 felony."

The charge of criminal contempt is a "criminal offense" as that phrase is used in Code § 18.2-478, and the evidence sufficiently proved that defendant had the intent to impede the officer in the performance of his official duties when defendant grabbed the officer's stun weapon and baton.

Sarka v. Commonwealth, 73 Va. App. 56, 854 S.E.2d 204 (2021). The Commonwealth proved that appellant failed to return the equipment "within [thirty] days after expiration of the lease or rental period for such property stated in such written lease." Code § 18.2-118(A). The Court noted that "written notice of default is not required for a conviction under Code § 18.2-118. Rather, the statute provides that if written notice is sent by certified mail to the address of the lessee stated in the lease, and the property is not returned within thirty days after that notice, the Commonwealth has established 'prima facie evidence of intent to defraud.' Code § 18.2-118(B). The statute also provides that sending the notice by certified mail to "the address of lessee stated in the lease" is sufficient written notice; the statute does not require that the letter actually be received by the lessee." In addition, a defendant's "evasive conduct" and a "general lack of communication with the victim about any problems or other reasons asserted for non-payment or non-performance" are probative of intent to defraud.

Blackwell v. Commonwealth, 73 Va. App. 30, 854 S.E.2d 191(2021). Upheld conviction of Code § 18.2-386.1 for filming a nonconsenting minor. "The statute encompasses situations in which the subject evinces, whether by word or action, a desire not to be so photographed or videotaped or otherwise refuses to agree to such activity and situations in which the subject's words and actions evince neither consent nor a refusal to consent. In short, only a person who affirmatively consents falls outside of the statute's prohibition." The trial court erred in concluding that a minor is, as a matter of law, a "nonconsenting person," but such error was harmless.

Bagley v. Commonwealth, 73 Va. App. 1, 854 S.E.2d 177 (2021). The lawfulness of the warrantless search of a vehicle depends in part upon the custodial status of the suspect associated with it. A vehicle sweep justified by officer safety concerns is permissible if it occurs during an investigatory detention that falls short of an arrest. To conduct a weapons pat down of a person and a sweep of his vehicle, an officer must reasonably suspect that the person is "armed and presently dangerous" or may gain access to a weapon in the vehicle's passenger compartment. In this case, the protective sweep of the vehicle was justified by the same factors that supported the pat down of the suspect and the fact that the pat down did not yield a weapon.

Dandridge v. Commonwealth, 72 Va. App. 669, 852 S.E.2d 488 (2021). "The trial court erred in not giving the voluntary manslaughter instruction because there was credible evidence from which the jury could conclude Defendant acted in the heat of passion upon reasonable provocation, and thereby acted without malice." Because of the close relationship between self-defense and voluntary manslaughter, "it would be an unusual scenario in which the minimum quantum of evidence supports a self-defense instruction but not a voluntary manslaughter instruction. Therefore, the trial court's approval of the self-defense instruction supports our conclusion that there was more than a scintilla of credible evidence that the killing was not done with malice, and the voluntary manslaughter instruction was thereby required."

Pick v. Commonwealth, 72 Va. App. 651, 852 S.E.2d 479 (2021). Pursuant to Code § 19.2-62, a person does not criminally violate the wiretap act by acquiring an electronic communication when that person is a party to the communication. Appellant contended that a police officer posing as an underage female was not a party to the Omegle conversations because the chats were between appellant and the fictitious female - Lilly. The court held that "because the statutory definition of 'person' does not include personas, Lilly is not a 'person for purposes of the wiretap act." Hence, the officer was a "person who was a party to the communication[s]." As such, he was protected by the consent exception and therefore did not criminally violate Code § 19.2-62(A) by recording the contents of the Omegle chats.

Long v. Commonwealth, 72 Va. App. 700, 853 S.E.2d 65 (2021). The trial court properly admitted the officer's testimony as to information he obtained from an informant. "Information obtained from an informant must be reliable to be sufficient to establish a reasonable, articulable suspicion of criminal activity," but any doubt as to the reliability of the information raises an issue of the weight to be given those statements by the finder of fact – not an issue of admissibility. The Court also applied the collective knowledge doctrine – "When the instructing officer possesses sufficient knowledge to take a particular action without violating the Fourth Amendment, and when that knowledge is imputed to the responding officer, the responding officer can take action to the full extent of the constitutional latitude afforded to the instructing officer."

Criminal Law News

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