Criminal Law News

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

52nd Annual Seminar Speakers Confirmed

G. Zachary Terwilliger to speak in Charlottesville
Mark A. Dupree to speak in Williamsburg

G. Zachary Terwilliger will speak in Charlottesville.

He is a Partner at Vinson & Elkins LLP in Washington, D.C. Mr. Terwilliger advises corporate clients and individuals who are subject to criminal investigations and civil enforcement actions as well as handling uniquely Washington problems related to congressional inquiries and interfacing with leadership at the highest levels of the Department of Justice. Prior to joining Vinson and Elkins, Mr. Terwilliger served for fourteen years at the Department of Justice, and his most recent position was as the U. S. Attorney for the Eastern District of Virginia. Mr. Terwilliger also served as an Associate Deputy Attorney General with responsibility for criminal matters. Mr. Terwilliger also spent over a decade as an Assistant United States Attorney in the Eastern District of Virginia. Mr. Terwilliger graduated with highest honors from William & Mary School of Law. He obtained his undergraduate degree at the University of Virginia.

Mark A. Dupree, will speak in Williamsburg.

As District Attorney of Wyandotte County, Kansas his administration has increased the felony trial conviction rate by 27%, and successfully created the first ever "Conviction Integrity Unit" in the state of Kansas, since re-named "Community Integrity Unit" which is responsible for ensuring that convictions obtained previously still hold integrity today and holding law enforcement accountable with the establishment of a hotline for residents to register complaints. His efforts for transforming the traditional manner in which District Attorney's Offices have operated has been recognized nationally, with articles featured twice in the New York Times. Community involvement is the bedrock of his administration which leads the way in speaking at schools, neighborhood watch meetings, church gatherings, and civic organizations. Assistant District Attorneys go into

Details at http://www.vsb.org/site/sections/criminal/annual-seminar

Virginia State Bar
52nd Annual Criminal Law Seminar

February 4, 2022 • Charlottesville • Doubletree Hotel
February 11, 2022 • Williamsburg • Doubletree Hotel

8:00 Late Registration and Exhibits

8:15 Welcome and Opening Remarks

8:30 Recent Developments and Criminal Law Update
Annual update on Criminal Law and Procedure
• *Professor Corinna Lain, University of Richmond School of Law*

10:00 Break

10:15 What You Need to Know When Representing Juvenile Clients
A JDR judge and Department of Juvenile Justice officials offer practical advice and alternative dispositions for juvenile defendants.
• *Hon. Tanya Bullock, Stephanie Garrison, Valerie Boykin*

11:15 Plea Bargaining in a New World
A prosecutor, defense attorney and circuit court judge provide guidance on negotiating and reaching plea agreements in the age of criminal justice reform
• *Graven Craig, Hon. Michael R. Doucette, Hon. Spencer Morgan*

12:15 Lunch Presentations

Charlottesville: **G. Zachary Terwilliger**
Former US Attorney, Eastern District of Virginia

Williamsburg: **Mark A. Dupree**
District Attorney, Wyandotte County, Kansas

1:30 Update on Ethics: How to Avoid Trouble with the Bar
An examination of ethics in the new age of criminal law.
• *Leslie A.T. Haley*

2:55 Break

3:05 Legislative Update on Laws that Affect Your Criminal Practice
Staff Attorney of the Commonwealth's Attorneys Services Counsel covers the most recent legislation that comprises criminal justice reform movement.
• *Elliott Casey*

4:05 Toolkit on Police-Citizen Encounters
The panel will discuss police encounters under the new statutes and how to advise your clients and law enforcement officers.
• *Ronald Bacigal, Moderator, Christopher Brown, Hon. David M. Hicks, Michelle Rhone, Daymen Robinson*

5:00 Closing Remarks and Adjournment

https://www.vacle.org/product.aspx?zpid=7475

Chair's Column

J. Daniel Vinson

I am delighted to announce the 52nd Annual Criminal Law Seminar. I feel particularly excited for our 2022 seminar because our sessions will once again be offered in person. After much contemplation and deliberation, the Criminal Law Section's Board of Governors elected to return to the traditional in-person CLE format. I trust that you are as eager as the Board to see each other again. The Charlottesville Seminar is scheduled for February 4, 2022, and the Williamsburg Seminar is scheduled for February 11, 2022.

The Seminar will begin with Recent Developments and Criminal Law Update, a thorough review of the myriad of changes in criminal law in Virginia over the past year. The remaining five sessions of the Seminar will further explore the evolving nature of the practice of criminal law in an age of criminal justice reform, including ethics and legislative updates. Additionally, there will be three panel discussions covering a wide array of pertinent topics including: the practical application of alternative dispositions in juvenile criminal cases, plea bargaining, and police-citizen encounters.

I am also pleased to announce our luncheon speakers for the 2022 Seminar. In Charlottesville, we will welcome G. Zachary Terwilliger, former United States Attorney for the Eastern District of Virginia. Mark A. Dupree, District Attorney of Wyandotte County, Kansas will speak in Williamsburg. I am confident that each will provide a timely and thought-provoking presentation.

I hope that you share in the Board's excitement to, once again, convene in person and will be able to carve time out of your busy schedules to join us. ✧

The Honorable Donald W. Lemons, Chief Justice of the Supreme Court of Virginia, will receive the 2022 Carrico Professionalism Award at the 52nd Annual Criminal Law Seminar in Williamsburg.

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

City of Tahlequah v. Bond, S.Ct. (2021). The doctrine of qualified immunity shields officers from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law." We have repeatedly told courts not to define clearly established law at too high a level of generality. It is not enough that a rule be suggested by then-existing precedent; the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Such specificity is "especially important in the Fourth Amendment context," where it is "sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts."

Rivas-Villegas v. Cortesluna, S.Ct. (2021). Repeated much of the language in ***City of Tahlequah v. Bond***, [above] and added: Although "this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate."

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Coleman, F.3d 11/9 The stop of defendant was lawful because a reasonable officer could conclude based on the totality of the circumstances that Coleman was engaged in various unlawful activities, namely, trespassing on school grounds, commission of a parking violation, and unlawfully operating a vehicle under the influence. "These facts are sufficient to support a finding of reasonable suspicion for an investigative stop because a reasonable officer could suspect that Coleman was trespassing on school grounds, in violation of the school board policy and Virginia Code section 18.2- 128(b)." In addition, a crossbow was seen in the backseat of Coleman's vehicle. "A reasonable officer could conclude that, though it may have been lawful, Coleman was in possession of a dangerous weapon on school grounds, which could be used to harm students, faculty, and/or staff at the school." Authorities, "when faced with the credible threat of [weapon] violence, must have flexibility to respond in the manner most appropriate to protect the lives of students."

Walters v. Martin, F.3d 11/18 "At bottom, Walters cannot meet the high bar to overcome our deferential standard of review [on habeas corpus]. The state court's finding on the first Frye prong that Walters failed to demonstrate a reasonable probability that he would have accepted the March plea offer had [defense counsel] timely conveyed it to him was not 'an unreasonable determination of the facts.'"

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Commonwealth v. Cady, 863 S.E.2d 858 (2021). "No evidence suggested that Cady's view of the motorcyclist was obstructed by environmental conditions or that Cady was experiencing a medical emergency. The large burgundy motorcycle was stopped directly in front of Cady in his lane and within his full, unobstructed view, and the motorcyclist had his left turn signal on while waiting to make a left turn. The collision occurred on a straight stretch of road on a clear, sunny day. Based upon this evidence, a rational trier of fact could reasonably infer that the accident in this case was not the result of a 'split-second, momentary failure to keep a lookout,' constituting only simple negligence, but rather a 'lengthy, total, and complete' failure to keep a lookout, satisfying the mens rea requirement for reckless driving in violation of Code § 46.2-852. The Court of Appeals erred in concluding otherwise."

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Fields v. Commonwealth, Va. App. (11/15) At a rally titled "Unite the Right" in Charlottesville, defendant drove a car into a group of pedestrians killing one person and injuring others. He was convicted of first-degree murder and several malicious wounding charges. The Court upheld the denial of a motion to change venue, noting that the sheer volume of publicity is not sufficient, in and of itself, to justify a change of venue. The Court also upheld the admission of Memes depicting a car driving destructively into a crowd of protestors as probative of Fields' intent due to the memes' striking similarity to the act Fields committed. Lastly, a portrait-style photograph of Adolph Hitler was admissible for the purpose of determining Fields' intent, motive, and state of mind - that he was motivated by hatred for ethnic and political groups when he ran his car into the counter-protestors.

McCarthy v. Commonwealth, Va. App. (11/9). Although the trial court erred in relying on the community caretaker doctrine to uphold the officers' search of appellant's motel room, the lawful, the "wrong reason, right result" doctrine authorized the search under the emergency aid exception. That exception permits the police to "'enter and investigate when someone's health or physical safety is genuinely threatened." Here "the officers believed appellant was suffering from an overdose. So naturally, they began to look for clues to not only confirm that belief but also to determine what substance appellant had taken." Although acknowledging that the search of the drawer of the nightstand in between the motel room's beds was "extensive, … this Court cannot say it was a step beyond what the circumstances before the officers reasonably required." The Court also held that amendments to Code § 18.2-251.03's bar to prosecution for drug possession did not apply retroactively.

Nelson v. Commonwealth, 73 Va. App. 617, 863 S.E.2d 886 (2021)." The evidence was sufficient to prove that the appellant used constructive force against the sleeping victim to commit aggravated sexual battery " In the context of sexual offenses force is defined to include both actual and constructive force. Constructive force is established if the act was undertaken "without the victim's consent" and "against [the] victim's will." Proof of a lack of consent "provides 'all the force [that] the law demands as an element of the crime.'" A victim is unable to give consent for sexual contact while sleeping. In the instant case, the appellant took advantage of the fact that the victim was incapacitated by sleep to accomplish the touching that constituted sexual abuse. The sleeping victim could not and did not consent.

Barney v. Commonwealth, 73 Va. App. 599, 863 S.E.2d 877 (2021). "It is not enough for a jury to find that the accused used her finger, or that the object concealed in the pocket looked like it could be a gun. For a jury to convict the accused, it must find that the accused, in fact, used or attempted to use an actual firearm or an object so physically similar

to a working firearm that it appeared to have the same functionality as one." The trial court erred in refusing jury instructions [beyond the Model Jury Instructions] which sought to clarify the "firearm" requirement for use of a firearm in the commission of a felony. Code § 18.2-53.1

DeLuca v. Commonwealth, 73 Va. App. 567, 863 S.E.2d 861 (2021). Because counsel's testimony was never "prejudicial" to DeLuca, counsel's appearance as both lawyer and witness at the hearing was not automatically prohibited by the lawyer-witness rule. [Rule 3.7 of the Rules of Professional Conduct "[a] lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness.] "Ultimately, DeLuca's challenge based on his claim of being deprived of counsel fails because he never was deprived of counsel. His counsel represented him at the hearing on the motion, argued the motions, and in no way undermined DeLuca's position with his testimony. His response to the open-ended question asked by the trial court allowed him to provide any and all information he would have offered via proffer, and the mere fact that he was under oath and subject to cross-examination did not prevent him from attempting to advance DeLuca's interests. As such, DeLuca's counsel was, at all times during the hearing, DeLuca's counsel both nominally and in fact. Accordingly, DeLuca's Sixth Amendment right to counsel was not violated."

Morgan v. Commonwealth, 73 Va. App. 512, 863 S.E.2d 19 (2021). Upheld conviction for falsely pretending to be a police officer, Code § 18.2-174, "based on three primary facts: (1) he drove a police interceptor model Crown Victoria equipped with red, white, and blue emergency lights; (2) he flashed the vehicle's red and white emergency lights and tailgated other motorists, causing one motorist to slow down significantly in response; and (3) after his arrest, the police discovered that his vehicle contained various police paraphernalia and equipment."

White v. Commonwealth, 73 Va. App.535 S.E.2d 493 (2021).The opinion sets forth an enlightening discussion and application of the ten factors courts have considered when deciding whether exigent circumstances justify a warrantless search. [The search in this case was not justified by valid exigent circumstances].

Davis v. Commonwealth, 73 Va. App. 500, 863 S.E.2d 13 (2021). If an out of court statement "has legitimate probative value that is unrelated to the truth of the matters asserted, it should be admitted even if it could also be offered to prove the truth asserted." The assertion that a person did not like to sell drugs to boys was not offered for its truth. It was offered to prove why defendant sought assistance in making a purchase. Similarly, a person's communication that he was in a red Toyota, was not offered for its truth. Instead, the statement showed that there were ongoing communications between two parties in the minutes leading up to the shooting.

MEMBER RESOURCES AREA

http://www.vsb.org/site/sections/criminal/

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Criminal Law News

Virginia State Bar
1111 East Main Street, Suite 700
Richmond, Virginia 23219-0026

Newsletter Editor: Professor Ronald J. Bacigal, University of Richmond School of Law

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