

# Criminal Law News

Volume 51, Number 3  
January 2022

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

## 52nd Annual Criminal Law Seminar Friday, February 11, 2022

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**Presented via Live Webcast and Telephone**

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*Although originally anticipated as a live seminar,  
the 52nd Annual Criminal Law Seminar will now  
be presented as a  
live webcast or telephone program only.*



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# Virginia State Bar 52<sup>nd</sup> Annual Criminal Law Seminar

Friday, February 11, 2022

Presented via Live Webcast and Telephone

**8:15 am Welcome and Opening Remarks**

- *LaBravia J. Jenkins*

**8:30 am Recent Developments and Criminal Law Update**

An annual comprehensive review of developments in substantive and procedural criminal law.

- *Professor Corinna Lain, University of Richmond School of Law*

**10:00 am Break**

**10:15 am What You Need to Know When Representing Juvenile Clients**

A panel discussion on alternative disposition and practical advice for juvenile defendants.

- *Hon. Tanya Bullock, Juvenile and Domestic Relations Court, Virginia Beach*
- *Stephanie Garrison, Department of Juvenile Justice, Richmond*
- *Linda McWilliams, Department of Juvenile Justice, Richmond*

**11:15 am Break**

**11:30 am Plea Bargaining in a New World**

An expert panel discussing guidance on negotiating and reaching plea agreements in the age of Criminal Justice Reform

- *Graven W. Craig, CraigWilliams PLC, Louisa*
- *Hon. Michael R. Doucette, Nelson County Circuit Court, Lovingston*
- *Hon. J. Spencer Morgan, III, Commonwealth's Attorney, Accomac*

**12:30 pm Lunch Break**

**1:00 pm What's New with COVID, Legislative Changes and VSB Updates – an Ethics Perspective**

Review the latest changes in criminal law ethics rules

- *Leslie A. T. Haley, ParkHaley, LLP, Richmond*

**2:25 pm Break**

**2:35 pm Legislative Update on Laws that Affect Your Criminal Practice**

Learn the most recent legislation that comprises criminal justice reform movement.

- *Elliott J. Casey, Commonwealth's Attorney's Services Council, Williamsburg*

**3:35 pm Break**

**3:45 pm Toolkit on Police-Citizen Encounters**

This panel will discuss police encounters under the new laws and how to advise your clients and law enforcement officers

- *Hon. David M. Hicks, General District Court, Richmond*
- *Lieutenant Michelle Rhone, Hampton Police Division Training Academy, Hampton*
- *Daymen W.X. Robinson, Law Office of Daymen W.X. Robinson, Norfolk*
- *Christopher E. Brown, The Brown Law Firm, PLLC, Alexandria*

**4:45 pm Closing Remarks and Adjournment**

## Speakers

**Professor Corinna Barrett Lain** is the S.D. Roberts & Sandra Moore Professor of Law at the University of Richmond School of Law, where she teaches a variety of courses in the criminal law area, including criminal procedure, evidence, and the



death penalty. Professor Lain's scholarship, which challenges conventional wisdom about the role of judicial review in the Supreme Court's criminal procedure, death penalty, and constitutional law cases, has been published in the top law reviews in the country, including the *Stanford Law Review*, *University of Pennsylvania Law Review*, *UCLA Law Review*, *Georgetown Law Journal*, and *Duke Law Journal*. Professor Lain graduated summa cum laude from the College of William and Mary in 1992, and received her J.D. from the University of Virginia in 1996, where she was elected to Order of the Coif. She clerked on the Tenth Circuit and then prosecuted for three years in Henrico County before entering the academy in 2001. Professor Lain is a recipient of the University of Richmond's Distinguished Educator Award and is also a veteran of the United States Army.

**Hon. Tanya Bullock** currently serves as a presiding Judge of the Virginia Beach Juvenile and Domestic Relations District Court. She is a graduate of North Carolina State University and received her Juris Doctor degree from Regent University School of Law in



2000. In 2016 Judge Bullock received an Executive Certificate in Multi-System Integration from Georgetown University's Center for Juvenile Justice Reform. After graduating from law school, Judge Bullock worked as a prosecutor in the Norfolk and Virginia Beach Commonwealth Attorney's Offices.

Subsequently, she entered into private practice and started her own law firm. She is an adjunct professor at Norfolk State University. In addition, she is a proud graduate of the CIVIC Leadership Institute. She is currently the First Vice President of the Association of District Court Judges, a member of the Virginia Council of Juvenile and Domestic Relations District Court Judges and was appointed by the Chief Justice of the Virginia Supreme Court to numerous Committees.

**Hon. Michael R. Doucette** is a circuit court judge in the 24th Judicial Circuit, sitting in Nelson County and the City of Lynchburg. 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. Mike is a graduate of the University of Connecticut (1981) and the Marshall-Wythe School of Law, the College of William & Mary (1984). He served overseas with the United States Air Force (1973-76) and the Connecticut Air National Guard (1976-79).

**Elliott J. Casey** is a Staff Attorney for the Virginia Commonwealth's Attorneys' Services Council. He has 15 years' experience as a prosecutor, having served as an Assistant Commonwealth's Attorney for the County of Albemarle, the City of Alexandria and the County



of Arlington in Virginia, and several more years experience in law enforcement and as an attorney. A graduate of the University of Virginia School of Law, Elliott also served as a Special Assistant United States Attorney for the Western District of Virginia. He specializes in digital evidence, Fourth

Amendment issues, and complex financial crime. Elliott also instructs law enforcement agencies throughout the Virginia and D.C. area and investigators around the United States. He instructs for the National Immigrant Women's Advocacy Project, the National White Collar Crime Center, the National Health Care Anti-Fraud Association, and many other groups.

**Hon. Spencer Morgan**, a native of

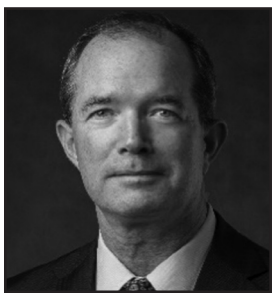


Virginia attended Kenyon College and obtained a Bachelor's Degree in both English Literature and Political Science. After college, Spencer worked on Capitol Hill for almost seven years.

He then attended law school

at Mercer University in Macon, Georgia. After a year of working a wide variety of legal jobs and passing the bar, Spencer found his way to Accomack County and started serving as an Assistant Commonwealth's Attorney under the tutelage of Gary Agar. Since becoming Commonwealth's Attorney in 2016, Spencer has worked hard to ensure the safety of the community and seek fair outcomes for all parties from the criminal justice system in Accomack County.

**Graven Craig** since graduation from George



Mason University Law School in 1997, Graven has been in practice in Louisa, VA, where he focuses his practice on criminal defense and plaintiff's personal injury law.

**Leslie A.T. Haley** is currently providing legal ethics and law office management advice and counsel to lawyers and law firms, as well as representing lawyers and judges in disciplinary and admissions actions. She is the former Senior Assistant Ethics Counsel for



the Virginia State Bar where she spent fourteen years advising Virginia lawyers on questions of ethics, lawyer advertising and unauthorized practice of law. She is a frequent author and lecturer on various CLE topics both in Virginia and on a national level and teaches Professional Responsibility and Legal Skills at William and Mary School of Law. Ms. Haley is a Past President of the Greater Richmond Bar Foundation board, a member of the Lewis F. Powell, Jr. American Inn of Court, a Fellow of the Virginia Law Foundation and a past-president of the Metropolitan Richmond Women's Bar Association. She is also a 2010 recipient of the Influential Women of Virginia Award and serves as the Midlothian District representative to the Chesterfield County Board of Supervisors.

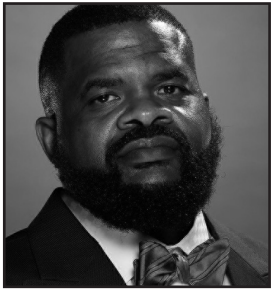
**Lt. Michelle Rhone** joined the Hampton Police



Division in 2002 with duty assignments in Patrol Operations, Narcotics Interdiction, Coliseum Business District, and the Ft. Monroe transition project, Investigations, Central Records, Personnel & Recruiting and the Training Academy. She served on the Division's Honor Guard and currently serves as a Crisis Negotiator and Critical Incident Stress Management team member. Lt. Rhone graduated from Old Dominion University with a degree in Criminal Justice and Benedictine University with a Master's Degree in Management and Organizational Behavior. She attended the Christopher Newport University Leadership Institute, Department of Homeland

Security Leadership Academy and the University of Richmond Professional Executive Leadership Seminar. Lt. Rhone also consulted for Randy Means & Associates by editing and writing police policy for various police agencies across the United States. She is currently a Public Safety Leadership adjunct professor at Old Dominion University.

**Daymen Robinson** graduated from Norfolk State University cum laude with a B.A. in Political Science with a Pre-Law concentration. He went on to attend the School of Law at the College of William & Mary where he was the esteemed recipient of both



the school's Oliver Hill and Thurgood Marshall Awards. Before going into private practice, Robinson served as an Assistant Public Defender for the City of Norfolk. He defended adult and juvenile cases involving misdemeanor and violent felonies, including murder, robbery, rape, aggravated assault, drug possession and distribution, as well as gun-related offenses. Robinson is a member of the South Hampton Roads Bar Association, National Association of Criminal Defense Lawyers, Virginia Association of Criminal Defense Lawyers and Virginia Trial Lawyers Association.

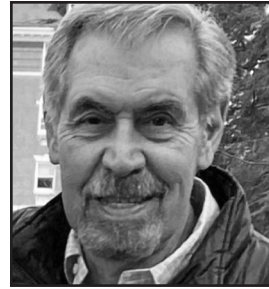
**Christopher Brown** is a native Washingtonian and 1988 graduate of Gonzaga High School. He graduated from Duke University in 1992 with a double major in philosophy and history and was a starting running back on the 1989 ACC Championship



football team. After receiving his Juris Doctor from the Georgetown Law Center he served a judicial clerkship in the D.C. Superior Court. He then began practicing law alongside his father in the family firm which is now known as The Brown Firm PLLC. Christopher E. Brown fulfills the role of principal attorney of The Brown Firm and

is actively practicing as a litigator in the areas of criminal defense, traffic defense, civil litigation, employment and labor law and personal injury. He is admitted to the Virginia State Bar, the District of Columbia Bar and can practice in Virginia and District of Columbia Federal Courts.

**Ronald Bacigal** is an Emiratis Professor at the University of Richmond. He also taught at Duke University, Washington and Lee University, and the National Judicial College. Prior to his retirement Ron presented the annual review of Criminal Law and



Procedure for over forty years. He currently serves as Reporter of criminal decisions for the Virginia Court of Appeals.

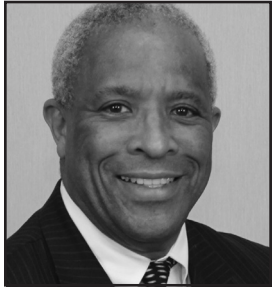
**Stephanie C. Garrison** is a Regional Program Administration Manager with the Virginia Department of Juvenile Justice (DJJ). She earned her Bachelor of Social Work from Virginia Commonwealth University, and is a graduate of the Commonwealth



Management Institute and Virginia Public Safety Leadership Institute. She was recognized for extraordinary system reform achievements while working as a Court Service Unit Director at the Richmond Juvenile and Domestic Relations District Court. Richmond City Council awarded her the 2014 Public Service award. Stephanie has served more than 28 years in the criminal justice field, both adult and juvenile. Presently, she performs administrative functions for Central Region DJJ and manages Court Service Unit Directors. Stephanie has served as vice-president and president of the Virginia Court Service Unit Director's Association, and as the president of the Virginia Juvenile Justice Association. She has presented at an array of juvenile justice conferences. In addition, she has been a frequent guest speaker for

law classes at the University of Richmond and the College of William and Mary.

**Hon. David M. Hicks** was sworn in on June 30, 2015 as one of the six General District Court judges in the city of Richmond. Judge Hicks is the Chief Judge of Richmond General District Court which has two locations.



Prior to his appointment Judge Hicks served six and a half years as Senior Policy Advisor to Richmond Mayor Dwight C. Jones. He is the founding partner of the Hicks Law Group.

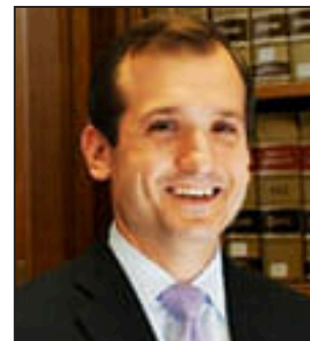
In 1994 he was elected as Commonwealth's Attorney of the state's capital and served three terms. Judge Hicks was the first African American Commonwealth's Attorney for Richmond. In his last year in office, his office prosecuted seventy murder and manslaughter cases. That number represented as many murder and manslaughter cases as prosecuted by any two combined Virginia jurisdictions, and more than in any city of comparable size in the United States.

Born in Plainfield, New Jersey, he received his primary and secondary education in Plainfield public schools. He then attended the University of Virginia where in 1983 he received a bachelor's degree in Economics, and in 1986 a Juris Doctorate from the School of Law.

Mr. Hicks is married to Dr. Valerie Bowman Hicks and is the father of Robert David, Christopher Gabriel, and Jonathan Michael Hicks. He enjoys time with his family, cycling, golf, reading and chess.

# Chair's Column

*J. Daniel Vinson*



In recent years, Virginia has undergone sweeping criminal justice reform. Most, if not all, of these substantive and procedural changes have served to benefit criminal defendants. To name a few, larceny thresholds have been increased, robberies have been divided into lesser grades of offense, the death penalty has been abolished, presumptions against bail have been eliminated, and jury trials no longer include mandatory jury sentencing. Many of the reforms eased the application of previously rigid laws or statutory schemes that I am sure, for most of you, had provided some level of frustration in the past.

As a criminal defense attorney, I welcomed most of these reforms, and I do not want to give any other impression; however, there is a glaring omission to the criminal justice reform advances in Virginia - funding. The current compensation structure that dictates what is paid to court-appointed counsel is arguably unconstitutional. Its parameters invite the ineffective assistance of counsel, violative of the 6th Amendment.

The hourly compensation rate for court-appointed counsel is set by the Supreme Court of Virginia at \$90 per hour. This hourly rate is in line with many states' compensation rate for court-appointed attorneys and is actually on the high side. The compensation rate is not the problem; the problem is compensation caps mandated by Va. Code §19.2-163.

Va. Code §19.2-163 dictates that court-appointed attorneys are to receive a sum, not to exceed \$120, for the representation of an indigent defendant charged with a misdemeanor through trial at the district court level. This suggests that the General Assembly believes that an indigent defendant benefits from the effective assistance of counsel when his or her attorney only spends one hour and twenty minutes on their case. I do

not believe this is possible, especially in the era of body-worn cameras. It is not uncommon for law enforcement to produce multiple hours of body-worn camera footage for every misdemeanor charge they initiate. This means that any court-appointed attorney who watches the applicable body-worn camera footage has already exceeded the time mandated by Va. Code §19.2-163's compensation cap, all before meeting with the defendant, doing any research, or even stepping foot inside a courtroom. This problem is equally present with the compensation cap for felony representations, especially when indigent defendants exercise their Constitutionally protected right to trial by jury.

It would be disingenuous for me not to acknowledge that Va. Code §19.2-163 allows court-appointed attorneys to apply for fee cap waivers for additional compensation; however, as any court-appointed lawyer knows, these waivers are discretionary and are not necessarily going to be granted by the presiding judge. Additionally, the funds appropriated for payment of these waivers can be exhausted before the end of the fiscal year.

The compensation caps contained in Va. Code §19.2-163 often leaves court-appointed counsel with two options, either shirk their ethical and moral obligations to their indigent clients or provide uncompensated legal counsel. In my experience, the latter is far more common than the former. Perhaps this is why the inadequacies of Va. Code §19.2-163 have gone unaddressed, even during a period of criminal justice reform. This forgotten aspect of criminal justice reform is not limited to funding inadequacies with court-appointed counsel. Both Commonwealth Attorney's and Public Defender's offices will tell you that they too are underfunded and, in turn, understaffed. This is a topic I hope to discuss in a future column. ✧

## FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

*U.S. v. Smith*, F.3d (4th Cir. 12/17). “While the Supreme Court has held that passengers in cars are seized during traffic stops, it has not extended that holding to former passengers who have since exited the vehicle.” When someone leaves personal belongings behind in another’s car, he assumes the risk that the car’s owner will consent to a search of the car or that the car’s contents will come into plain view of the police. ... Fundamentally, ‘a person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects.’” Thus, defendant lacked standing to object to the seizure of items he left in the vehicle.

*U.S. v. Ball*, F.3d (4th Cir. 12/17). Rejected contention that the district court should have exercised its inherent powers to dismiss [the] indictment after a more than two-year delay between the alleged crime and the federal government’s indictment. “In the ordinary course, the time between when a crime is committed and when a defendant is indicted for that crime is regulated by statutes of limitations, not discretionary judicial power.” The Court also rejected defendant’s claim that the prosecution was vindictive.



## VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

*Carter v. Commonwealth*, Va (12/22) The law “requires two preconditions that must be satisfied before a person in lawful possession of the premises can employ reasonable force to expel a trespasser: a command to leave must be issued and the trespasser then must be given a reasonable amount of time,

considering the circumstances, to comply with this command and leave.” Although a command to leave can be made either verbally or non-verbally, defendant did not by her gestures or otherwise issue a non-verbal command to leave before battering a police officer who was lawfully on her porch. When the officer placed his foot to stop the front door from closing, defendant did not issue a command, verbal or non-verbal, to leave before she resorted to force.

*Commonwealth v. Richard*, Va. (12/29/2021). “Wharton’s Rule requires that when a single buyer and a single seller agree to a drug exchange, that agreement does not constitute a conspiracy, only an illegal sale of drugs. That is the single-buyer/seller relationship exception to conspiracy liability.” Wharton’s Rule is not applicable in cases like this where two sellers cooperate to arrange a drug deal with a third party buyer. Thus the trial court correctly refused jury instructions regarding the single-buyer/seller relationship exception to conspiracy liability.



## VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

*Pulley v Commonwealth*, Va.App. (12/28/2021). The evidence “demonstrates a prima facie case of conspiracy to distribute a controlled substance. Accordingly, the trial court did not err in finding [the] statements admissible under the co-conspirator exception to the rule against hearsay.”

*Eberhardt v. Commonwealth*, Va.App. (12/14) The evidence here supports a finding that the appellant acted with at least criminal negligence when he beat [Code § 40.1-103(A)] the child by “striking her ten times with a webbed dog leash, in what he described as “spanking” or “whip[ping]” the child. She “cr[ie]d out . . . during each of these lashes,” and they left numerous linear marks and welts on the girl’s arm, legs, and buttocks, as well as significant bruises, all of which remained visible the next day.”



**Ingram v. Commonwealth**, Va.App. (12/14) Reversed trial court ruling that police conducted an unlawful search. The officer “simply approached two exterior doors at the front of the house in the hopes of speaking to a resident about the dead dog he found in the road by the house. [He] did not use sensory enhancing equipment, approach the home surreptitiously, or engage in a general search of the home.” Because the officer was simply approaching the front door, he was entitled to “keep his eyes open” and rely on his observations obtained from this lawful vantage point.

**Clark v. Commonwealth**, Va. App. (11/23) The trial court abused its discretion in its denial of a competency evaluation for appellant when it explicitly failed to consider counsel’s representations regarding appellant’s competency, a relevant factor that should have been given significant weight. Code § 19.2-169.1(A) specifically references counsel’s representations as a basis for probable cause, and case law states the court should strongly consider counsel’s representations.

**Commonwealth v. Davis**, Va. App. (11/23). Because the record does not reflect that the circuit court weighed all of the Code § 19.2-120(E) factors, and because the court gave improper weight to the length of pre-trial incarceration, we reverse its order granting Davis pre-trial bail.

**Thompson v. Commonwealth**, Va. App. “The crime of possession of marijuana, as proscribed by Code § 18.2-250.1, is complete upon proof of a defendant’s knowing possession of marijuana, under the definition of marijuana in the first sentence of Code § 18.2-247(D). The language in the third sentence of Code § 18.2-247(D), which sets out certain substances that the definition of marijuana “shall not include,” qualifies as an “exception” or “exemption” for purposes of Code § 18.2-263.” the express language of Code § 18.2-263 allocates the burden of proving that statutory exception to the appellant.



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# Criminal Law News



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