

Criminal Law News

Volume 52, Number 1
October 2022

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

Criminal Law Section Board Elected to Lead Section in 2022-2023



Front Row: Alison G. Powers, Charles H. Slemph III, Chair Jacqueline M. Reiner, Jessica D. Aber, Joseph D. Platania.
Back Row: Hon. Michael C. Rosenblum, Nia A. Vidal, Benjamin N. Spence, George A. Neskis. **Not pictured:** Ronald J. Bacigal, Hon. Vernida R. Chaney, Hon. Erin J. DeHart, Hon. Michael R. Doucette, Susan O. Fierro, S. Eugene Fishel, IV, Hon. Elizabeth E. Kellas, Hon. Devon R. Paige, Alison G. Powers, Julia H. Sichel, J. Daniel Vinson

**SAVE THE
DATE!**

The 53rd Annual Criminal Law Seminar

Friday, February 3, 2023 Charlottesville DoubleTree Hotel

Friday, February 10, 2023 Williamsburg DoubleTree Hotel

New Board Members

Jessica Aber has been the U.S. Attorney for the



Eastern District of Virginia since October 2021. She began her service to EDVA in 2009 as an Assistant U.S. Attorney and became the District's Deputy Chief for the Criminal Division in 2016. Ms. Aber also served on assignment as counsel

to the Assistant Attorney General for the Criminal Division of the Department of Justice from 2015-16. Before joining the Department, Ms. Aber was an associate at McGuireWoods LLP and served as a law clerk for then-United States Magistrate Judge M. Hannah Lauck on the U. S. District Court for the Eastern District of Virginia. Ms. Aber received her J.D. from William & Mary Law School and her B.A., magna cum laude, from the University of Richmond.

Ben Spence is a trial lawyer specializing in criminal



defense, domestic relations, and general civil litigation. He returned to his hometown of Blackstone, Virginia to practice law in 2014, and founded Spence Law, P.C. in 2018. Mr. Spence serves as a substitute District Court

Judge for courts in the Eleventh Judicial District, and is a member of the Nottoway Committee of Piedmont Habitat for Humanity. He received his B.S. degree from Appalachian State, and his J.D. from UNC at Chapel Hill.

Nia Ayanna Vidal is an Assistant Federal Public



Defender with the Office of the Federal Public Defender in Richmond where she represents indigent defendants charged with federal offenses. A graduate of the Howard University School of Law, Ms. Vidal was a

judicial law clerk for the Honorable U.S. District Court Judge James R. Spencer, prior to beginning her career as an appellate attorney with the Office of the Federal Public Defender in Alexandria. She is a former adjunct professor teaching Lawyering Skills at the University of Richmond School of Law as well as a former adjunct professor at the Virginia Commonwealth University where she taught graduate forensic science students Criminal Law and Procedure. She is currently a member of the U.S. District Court Criminal Justice Act Panel Committee; the Virginia State Bar Standing Committee on Ethics; the Metro Richmond Women's Bar Association; and the Lewis F. Powell, Jr. American Inn of Court.

Chair's Column

Jacqueline M. Reiner, Esquire



Criminal practitioners in Virginia share something special - Each other. I know of no other legal community that matches our collegiality, mentorship, and show stopping talent. From my first day in the courtroom as an Assistant Commonwealth's Attorney for the City of Richmond; I found friends and mentors in not only my own office and other law enforcement agencies, but also among the private defense bar, public defender's office, clerks, and bench. While our courtrooms have hosted some of our greatest achievements and disappointments as trial lawyers - nothing beats the support I see the members of our bar regularly show each other. I love that we collectively cheer on one another's willingness to get in the ring, to get bloodied, and to put forth our best efforts on behalf of our communities day after day. And we appreciate the honor with which we are bestowed; the enormous public trust and responsibility of our roles as counselors and advocates. This is who we are as criminal attorneys.

This is why I am so excited to see everyone again, in person, at our upcoming 53rd Annual Criminal Law Seminar. The event will be offered in both Charlottesville (February 3, 2023) and Williamsburg (February 10, 2023). I am also pleased to announce that for the first time the Criminal Law Section will offer 5 scholarships to members of the Young Lawyers Conference practicing public interest law. Each scholarship will include tuition to one of the seminars and a one night stay at the hosting hotel the preceding evening. In person attendance is required. Please send your statement of interest and your preferred venue to my attention at the Virginia State Bar no later than noon on December 2, 2022.

We are also seeking nominations for the Harry L. Carrico Professionalism Award. This award was established by the Section to recognize an individual (judge, defense attorney, prosecutor, clerk or other citizen) who has made a singular and unique contribution to the improvement of the criminal justice system in the Commonwealth. The award is made in memory of the late Chief Justice of the Supreme Court of Virginia, Harry L. Carrico, who exemplifies the highest ideals and aspirations of professionalism. Chief Justice Carrico was the first recipient of the award. Please help me in this unique opportunity to honor one another. Nominations are due no later than noon on December 2, 2022 and may be sent to my attention at the Virginia State Bar.

Finally, my plea to our members in private practice The creation of an appeal of right is beyond amazing for our clients. I have had the opportunity to speak with the judges in Chesterfield, Hanover, Henrico, and the City of Richmond Circuit Courts. These jurisdictions are in tremendous need of attorneys willing and able to take on court appointed appeals. As criminal lawyers, we embrace our duty to be of service to our community. This is such important work. Please consider making criminal appeals a part of your practice. To that end, I ask you to please send a statement of interest, including your qualifications, to each of these courts or your own local circuit courts. To the extent I can assist you in any way - Please do not hesitate to contact me directly.

Not only do I look forward to seeing you all in February, I hope to hear from you throughout the year as to how the Criminal Law Section can better and best serve our criminal law community. I thank all of you whose doors and phone lines have been open to me for so many years and appreciate the opportunity to serve this criminal law community that I both admire and adore. ✧

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022). The Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.

Vega v. Tekoh, 142 S. Ct. 2095 (2022). A failure to give the *Miranda* warnings does not provide a basis for a 42 U. S. C. §1983 claim.

Denezpi v. United States, 142 S. Ct. 1838 (2022). The Double Jeopardy Clause does not prohibit successive prosecutions by the same sovereign; rather, it prohibits successive prosecutions “for the same offence.” There is no prohibition against successive prosecutions of **distinct offenses** arising from a single act, even if a single sovereign prosecutes them. Denezpi’s single act transgressed two laws: the Ute Mountain Ute Code’s assault and battery ordinance and the United States Code’s proscription of aggravated sexual abuse in Indian country.



FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

United States v. Runner, 43 F.4th 417 (4th Cir. 2022). The predominant purpose of stem pipes has been—and continues to be—to smoke illegal substances. Despite the increased use of glass pipes to ingest legal substances such as CBD oil, it is still reasonable that a police officer would reach the belief that a glass pipe was evidence of a crime supporting probable cause to search the vehicle where the pipe was seen. At least when the plain view of the pipe was accompanied by some corroboration of an anonymous tip that initiated the officers’ investigation.

United States v. Orozco, 41 F.4th 403 (4th Cir. 2022). “It is almost tautological that, where an arrestee attempts to destroy evidence, he is trying to prevent that evidence from being seen by police. And where police have probable cause to believe the arrestee is engaged in drug trafficking, the most reasonable inference is that the item relates to that crime.” The Court also held that “the evidence in the warrant application established probable cause that Orozco was running drug money when arrested. And it shows that he was using his cellphone for navigation at the time. That is enough, without even considering Orozco’s attempt to destroy other electronic evidence, to find the magistrate judge had ample reason to believe that Orozco’s phone would contain evidence of a drug-trafficking conspiracy.”

United States v. Miller, 41 F.4th 302 (4th Cir. 2022). “In this Circuit, ‘[i]t is well established that where a defendant asserts that he did not have the requisite mens rea to meet the elements of the crime but “evidence supports an inference of deliberate ignorance,” a willful blindness instruction to the jury is appropriate.’ Evidence supports an inference of deliberate ignorance if it tends to show that (1) the defendant ‘subjectively believe[s] that there is a high probability that a fact exists’ and (2) the defendant took ‘deliberate actions to avoid learning of that fact.’”

United States v. Gist-Davis, 41 F.4th 259 (4th Cir. 2022). The officers were justified in concluding that Gist-Davis may have been armed and presently dangerous, given his membership in a violent gang whose members often carry weapons, his recent connection to drive-by shootings, and his statement on Facebook threatening gang rivals with the potential use of a weapon at a crowded public event. We therefore hold that the officers were justified in stopping Gist-Davis and in performing a limited, protective search for weapons. The court also held that “because Gist-Davis’ liberty was restricted only temporarily to permit the officers to conduct the protective frisk for weapons, the officers’ use of handcuffs in this crowded public space was permissible as part of the brief investigatory stop and did not transform the stop into a custodial arrest An officer’s suspicion that a suspect is armed and

dangerous can justify the frisk of a suspect's pocket, a purse held by a suspect, or, in this instance, a bag strapped to the suspect's person."

United States v. Mallory, 40 F.4th 166 (4th Cir. 2022). The silent witness rule is a technique by which the parties present classified information to each other, to the jury, and to the court but not to the public. "Under such a rule, the witness would not disclose the information from the classified document in open court. Instead, the witness would have a copy of the classified document before him. The court, counsel and the jury would also have copies of the classified document. The witness would refer to specific places in the document in response to questioning. The jury would then refer to the particular part of the document as the witness answered. By this method, the classified information would not be made public at trial, but the defense would be able to present that classified information to the jury."



VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Hill v. Commonwealth, 876 S.E.2d 173 (2022). An express extension of a period of probation implicitly creates a corresponding period of sentence suspension. A revocation order placing a defendant back on probation necessarily had the effect of resuspending the sentence for the newly imposed period of probation.

Commonwealth v. Kilpatrick, 876 S.E.2d 177(2022). Taken as a whole, the Court finds that the evidence of Kilpatrick's prurient interest in [a juvenile] was overwhelming and, therefore, Dr. Fisher's testimony on motive would not have influenced the jury or would have had but slight effect. Thus, ... any presumed error in excluding Dr. Fisher's expert testimony was harmless



VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Clayton v. Commonwealth, Sept. 13, 2022). "Code § 53.1-203(5) [possession of an unlawful chemical compound by a prisoner] is a strict liability offense, and the Commonwealth was not required to prove Clayton had knowing possession of the chemical compound." There is a lengthy concurrence suggesting that precedent regarding strict liability was wrongly decided.

Heart v. Commonwealth, Sept. 13, 2022). This case requires us to interpret Code § 19.2-306.1 and determine whether its penalty provisions for a "third or subsequent technical violation" apply when a defendant commits a third violation—technical in nature—after two earlier non-technical violations... [W]e conclude that "third or subsequent technical violation" requires three or more "technical violations" before the related penalty provision may apply. Because the trial court reached the opposite conclusion we reverse and remand for resentencing.

Khine v. Commonwealth, Sept. 13, 2022). The trial court did not err in admitting hearsay testimony [under the state of mind exception] that the victim said she planned to tell the defendant that she wanted a divorce. Under the *Hillmon* doctrine, her statement that she was going to "tell the defendant she wanted a divorce" was admissible as evidence that she acted in accordance with her plan. The court also held that because expert testimony supported Khine's affirmative defense that he was totally unable to resist the voice in his head that commanded him to kill his wife, the trial court erred in granting the Commonwealth's motion to strike defendant's insanity defense.

Brown v. Commonwealth, Sept. 6, 2022). "The trial court did not err in denying appellant's motion to dismiss his charges based on a speedy trial

violation. The COVID-19 pandemic falls within the definition of a ‘natural disaster’ under Code § 44-146.16, and the Supreme Court acted within the permissible bounds of its authority under Code § 17.1-330 when it tolled the statutory speedy trial deadlines. Because appellant’s statutory speedy trial deadline was properly tolled, his statutory right to a speedy trial was not violated.”

Canada v. Commonwealth, Aug. 30, 2022). Code § 8.01-390(B), commands courts to rule 911 calls are authentic “if they meet the criteria of the statute regardless of whether those records would have met some other test for authentication. It imposes no mandatory command on the proponent of the evidence, but simply provides an alternative avenue to authenticate 911 calls that does not require live custodian testimony. Accordingly, the Commonwealth had the option of authenticating the call through live testimony of the custodian, by a certificate of authenticity meeting the requirements of Code § 8.01-390(B), or by any other collection of direct and circumstantial evidence that supported a finding that the call was what the Commonwealth said it was. *See* Va. R. Evid 2:901.” The Court also held that the 911 call was nontestimonial and did not fall within the scope of the Confrontation Clause of the Sixth Amendment. [The totality of the circumstances in this case makes clear that the primary purpose for the 911 call was not to create a substitute for trial testimony. The call was geared towards finding and disarming Canada so that there would be no further violence.]

Flannagan v. Commonwealth, Aug. 16 2022). “While Code § 18.2-267 prohibits the use of preliminary breath tests [PBT] results in the guilt phase of DUI offenses, the question of whether a PBT is admissible in cases other than those specifically prohibited under Code § 18.2-267 has not been resolved.... But even “assuming without deciding that PBT results are admissible in those cases where not specifically prohibited by statute, Flannagan’s proffer was not sufficient to demonstrate that a properly calibrated machine was reliable to give an accurate BAC.”

Lucas v. Commonwealth, 75 Va. App. 334 (2022). Defendant “checked off” or pushed off the officer as the officer attempted to handcuff him.

This application of force against the officer removes defendant’s actions from the realm of “mere flight” and squarely provides sufficient evidence to support the conviction for obstruction of justice.

Morris v. Commonwealth, 75 Va. App. 257 (2022). Case of first impression concerning Virginia’s medical amnesty statute, Code § 18.2-251.03, which shields from arrest or prosecution those persons who seek emergency medical assistance because they are experiencing a drug overdose (or who seek emergency medical assistance for others who are experiencing an overdose). The Court held: “A subjective standard determines whether the person in need of emergency medical attention is experiencing an overdose, [and] Drug-induced suicidal ideation that prompts an emergency-room visit qualifies as a ‘life threatening condition’ under Code § 18.2-251.03(A).” [There is a lengthy dissent challenging both of the Court’s holdings]

Street v. Commonwealth, 75 Va. App. 298 (2022). The 2021 statute, Code § 4.1-1302(A), [prohibiting searches based solely on the odor of marijuana] did not apply retroactively to the evidence seized in a 2019 search.

Suhay v. Commonwealth, 75 Va. App. 143 (2022). “Since the circuit court had found that Suhay’s criminal conduct was not caused by, nor had a direct and substantial relationship to, his ASD, the court had to deny Suhay’s request for a deferred disposition.” [“the plain language of Code § 19.2-303.6 required the circuit court to deny Suhay’s request.”]

Ellis v. Commonwealth, 75 Va. App. 162 (2022). “Because the summons was an act of a law enforcement officer and not the act of a court, it cannot be void ab initio. The summons gave Ellis notice of the gravamen of the offense and thus it was not fatally defective. As such, the circuit court did not err by amending the charged offense and convicting Ellis of driving with a suspended license, insurance related, under Code § 46.2302.”

The dissent maintained that “because the circuit court never acquired jurisdiction over Ellis’s attempted appeal from the void ab initio GDC conviction order, the circuit court’s conviction order is void ab initio.”

Aley v. Commonwealth, 75 Va. App. 54 (2022) “[Defendant’s] efforts to escape, conceal himself, and allow others to lie to the police evinces his ‘consciousness of guilt’, and further supports the trial court’s finding [him] guilty of felony eluding.”

Ali v. Commonwealth, 75 Va. App. 16 (2022). “The trial court did not err by rejecting the appellant’s claim that his statutory and constitutional speedy trial rights were violated due to the eleven-month delay. The portion caused by the pandemic was valid delay, and the appellant was tried on the very first day that the circuit was able to resume holding jury trials.”

Meade v. Commonwealth, 74 Va. App. 796 (2022). “There is nothing inherently inconsistent about verdicts that acquit a shooter of attempted murder and attempted malicious wounding, but convict him or her of maliciously shooting at an occupied building in violation of Code § 18.2-279.” Attempted murder and attempted malicious wounding contain a specific intent to injure or kill element, and maliciously shooting at an occupied building does not.

Jacks v. Commonwealth, 872 S.E.2d 233 (2022) (en banc). Trial court erred in denying appellant’s appeal from the general district court as untimely because Code § 16.1-132’s ten-day deadline was tolled by the Supreme Court’s emergency Covid-19 orders.

Brown v. Commonwealth, 872 S.E.2d 204 (2022). “Put simply, the actus reus of the crime of abduction under Code § 18.2-47(A) is a taking, transporting, or detention of another, while the mens rea of

the crime is a specific intent to deprive another of her liberty.” Appellant’s conduct met both elements when he blocked the victim’s vehicle in the driveway and refused to move his car to allow the victim to leave and engaged in (belligerent) psychologically-imposing behavior that put the victim in fear of harm.

Howard v. Commonwealth, 872 S.E.2d 212 (2022). Howard alleged error in the circuit court’s decision to join the charges of threatening to burn or bomb, and assault and battery. However, “just as it takes two to tango, it takes at least two offenses to challenge joinder. When Howard pleaded no contest to the charge of assault and battery, he cured his own objection and gave himself the relief he sought from the circuit court—a separate trial on the charge of threatening to burn or bomb. As a result, Howard’s assignment of error as to the charge of threatening to burn or bomb is moot. The Court also rejected defendant’s argument that he could not be convicted under Code § 18.2-83 because he owned the vehicle he threatened to bomb. “[The] statute’s plain language does not draw a distinction based on property ownership.”

Slusser v. Commonwealth, 872 S.E.2d 223 (2022). The Court vacated a criminal-restitution order for a rental house destroyed by fire. “The restitution computation for the value of the house should not have been reduced by the value that [the owner] received from selling the land. By conflating the value of the land and the value of the improvements, the trial court appears to have ‘considered and given significant weight’ to ‘an irrelevant or improper factor.’”

MEMBER RESOURCES AREA

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

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Updated September 2022.

FIFTY-THIRD ANNUAL

CRIMINAL LAW SEMINAR 2023

February 3, 2023

Doubletree by Hilton, Charlottesville
Lunch Speaker: Timothy J. Heaphy,
Former US Attorney, WDVA

February 10, 2023

Doubletree by Hilton, Williamsburg
Lunch Speaker: Hon. Vernida R. Chaney Court of
Appeals of Virginia

8:15 a.m. – 5:00 p.m.

7.0 (2.0 ethics) CLE hours pending

Topics Include:

Recent Developments and Criminal Law Update
Mental Health and Diminished Capacity
Cross Examination
Sentencing Guidelines
Legislative Update
Ethics

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CALL FOR NOMINATIONS

HARRY L. CARRICO PROFESSIONALISM AWARD
 VSB Section on Criminal Law

The Harry L. Carrico Professionalism Award was established in 1991 by the Section on Criminal Law of the Virginia State Bar to recognize an individual (judge, defense attorney, prosecutor, clerk, or other citizen) who has made a singular and unique contribution to the improvement of the criminal justice system in the Commonwealth of Virginia.

The award is made in memory of the Honorable Harry L. Carrico, former Chief Justice of the Supreme Court of Virginia, who exemplified the highest ideals and aspirations of professionalism in the administration of justice in Virginia. Chief Justice Carrico was the first recipient of the award, which was instituted at the 22nd Annual Criminal Law Seminar in February 1992.

Although the award will only be made from time to time at the discretion of the Board of Governors of the Criminal Law Section, the Board will invite nominations annually. Nominations will be reviewed by a selection committee consisting of former chairs of the section.

Criteria

The award will recognize an individual who meets the following criteria:

- ◆ Demonstrates a deep commitment and dedication to the highest ideals of professionalism in the practice of law and the administration of justice in the Commonwealth of Virginia;
- ◆ Has made a singular and unique contribution to the improvement of the criminal justice system in Virginia, emphasizing professionalism as the basic tenet in the administration of justice;
- ◆ Represents dedication to excellence in the profession and “performs with competence and ability and conducts himself/herself with unquestionable integrity, with consummate fairness and courtesy, and with an abiding sense of responsibility.” (Remarks of Chief Justice Carrico, December 1990, Course on Professionalism.)

Prior Recipients

The Honorable Harry L. Carrico	1992	Rodney G. Leffler	2007
James C. Roberts, Esquire	1993	Prof. Ronald J. Bacigal	2008
Oliver W. Hill, Esquire	1995	Hon. Jere M.H. Willis Jr.	2010
Hon. Robert F. Horan	1996	Melinda Douglas	2012
Reno S. Harp III, Esquire	1997	Claire G. Cardwell	2013
Hon. Richard H. Poff	1998	Gerald T. Zerkin	2014
Hon. Dennis W. Dohnal	1999	Hon. Jerrauld C. Jones	2015
Hon. Paul F. Sheridan	2000	Hon. Michael N. Herring	2016
Hon. Donald H. Kent	2001	Philip J. Hirschkop	2017
Craig S. Cooley, Esquire	2002	Hon. Martin F. Clark Jr.	2018
Prof. Robert E. Shepherd	2003	Hon. M. Hannah Lauck	2019
Richard Brydges, Esquire	2004	Hon. Junius P. Fulton III	2020
Overton P. Pollard, Esquire	2005	Hon. Donald W. Lemons	2022
Hon. Paul B. Ebert	2006		

Submission of Nomination

Please submit your nomination on the form below, describing specifically the manner in which your nominee meets the criteria established for the award. If you prefer, nominations may be made by letter.

Nominations should be addressed to **Jacqueline M. Reiner**, Chair, Criminal Law Section, and mailed to the Virginia State Bar Office: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. **Nominations must be received no later than December 2, 2022.** Please be sure to include your name and the full name, address, and phone number of the nominee.

If you have questions about the nomination process, please contact Maureen D. Stengel, Director of Bar Services, Virginia State Bar, at (804) 775-0517 or stengel@vsb.org.

HARRY L. CARRICO PROFESSIONALISM AWARD
 NOMINATION FORM

Please complete this form and return it to the Virginia State Bar, 1111 East Main Street, Suite 700, Richmond, VA 23219-0026 or email stengel@vsb.org. **Nominations must be received no later than December 2, 2022.**

Name of Nominee: _____

Profession: _____

Employer/Firm/Affiliation: _____

Address of Nominee: _____

City _____ State _____ Zip _____

Name of person making nomination _____ Telephone _____
 (Please print)

Email _____ Signature _____

(Please attach an additional sheet explaining how the nominee meets the criteria for the Harry L. Carrico Professionalism Award.)

Criminal Law News



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

Virginia State Bar Criminal Law Section Board of Governors 2022-2023

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