

# Criminal Law News

Volume 52, Number 2  
December 2022

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

## Luncheon speakers confirmed for 2023 Seminar Program

### Timothy Heaphy to speak in Charlottesville Judge Vernida Chaney to speak in Williamsburg



**Timothy J. Heaphy** is Chief Counsel for the Select Committee to Investigate the January 6th Attack on the United States Capitol. He previously served as counsel and senior assistant attorney general at the University of Virginia. He is a former chair of our section and a former U.S. Attorney for the Western District of Virginia, serving from 2009 through 2014. While serving as a partner at the law firm of Hunton Andrews and Kurth, he conducted a comprehensive independent review of the August 11-12, 2017 mass demonstration events [*Unite the Right rally*] in Charlottesville. Heaphy earned a bachelor's degree in English from UVA and a law degree from the UVA School of Law.



**The Hon. Vernida R. Chaney** is a judge on the Court of Appeals of Virginia, elected by the Virginia General Assembly in 2021. She received her B.A. degree from the University of Virginia, her M.B.A. from Virginia Commonwealth University, and her J.D. degree from Howard University School of Law. Prior to her appointment, Judge Chaney practiced in the area of complex criminal litigation. Her client representation has spanned both state and federal courts on the trial and appellate levels. She devoted much of her career to representing indigent clients at the Fairfax Public Defender Office, Northern Virginia Capital Defender Office, and as a United States Criminal Justice Act panel attorney. Judge Chaney currently serves on the Board of Governors of the Virginia State Bar Criminal Law Section. She has also served as President of the Northern Virginia Black Attorneys Association and the Judicial Committee Co-Chair for the Fairfax Bar Association.

## Virginia State Bar 53<sup>rd</sup> Annual Criminal Law Seminar

**February 3, 2023 • Charlottesville • Doubletree Hotel**  
**February 10, 2023 • Williamsburg • Doubletree Hotel**

- 8:15AM Welcome and Opening Remarks**  
• *George A. Neskis*
- 8:30AM Recent Developments and Criminal Law Update (1.5 Hours)**  
An annual comprehensive review of developments in substantive and procedural criminal law.  
• *Professor Corinna Lain, University of Richmond School of Law*
- 10:00AM Break**
- 10:15AM Goodbye, Stamper? Admission of Defendant's Mental Condition (1.0 hour)**  
For so long clients have not been able to introduce evidence of their mental condition in their case in chief, §19.2-271.6 changes that! But how do you do it? This panel will discuss what conditions the statute covers from a clinical perspective, practically how to introduce the evidence and a view from the bench.  
• *Hon. Jacqueline S. McClenney, Richmond Circuit Court*  
• *Ashley R. Shapiro, Virginia Indigent Defense Commission*  
• *Dr. Leigh Hagan, PhD, Forensic Psychologist*
- 11:15AM Break**
- 11:30AM Cross Examination & The Proffer (1.0 hour)**  
A panel discussion about the art of cross examination and tips on what to do when it doesn't quite go your way.  
• *James O. Broccoletti, Zoby & Broccoletti, PC*  
• *Craig S. Cooley, Office of Craig S. Cooley*  
• *Hon. Junius P. Fulton III, Court of Appeals of Virginia*
- 12:30PM Luncheon Presentations (1.0 Hour)**  
• *Charlottesville: Timothy J. Heaphy, former U.S. Attorney, Western District of Virginia*  
• *Williamsburg: Hon. Vernida R. Chaney, Court of Appeals of Virginia*
- 1:30PM Guilty: Now What? (1.5 hours)**  
A comprehensive discussion of issues that arise at sentencing, including recent changes to the guidelines that mitigate the sentencing range and exploring alternative sentencing options.  
• *Timothy S. Coyne, Office of the Public Defender*  
• *Shannon L. Taylor, Commonwealth's Attorney*  
• *Hon. William W. Sharp (ret.), 26th Judicial Circuit*
- 3:00PM Break**
- 3:15PM 2022 Legislative Update (1.0 Hour)**  
Learn about the most recent legislation that affects criminal practice.  
• *Elliott J. Casey, Commonwealth's Attorney's Services Council*
- 4:15PM Break**
- 4:20PM Ethics in Criminal Practice (1.0 Hour)**  
A discussion of ethical issues that can occur in criminal practice.  
• *James M. McCauley, Former VSB Ethics Counsel*
- 5:20PM Closing Remarks and Adjournment**

## Chair's Column

Jacqueline M. Reiner, Esquire

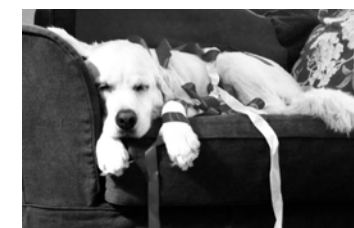


Seasons Greetings! I hope your holidays sparkle with joy and laughter and bring you a chance to rest and recharge. While I wholeheartedly agree that "it's the most wonderful time of the year"; it can also be the most stressful.

From Thanksgiving to well past New Year's Day, I regularly see my caseload double with alcohol and domestic offenses, demands for bonds, and new divorce inquiries. Our community's suffering is so real and so acute; it sometimes seems too selfish to put our own needs first. During the holidays, many of our family responsibilities also grow exponentially. As the days grow shorter; to-do lists grow longer. The sacrifice often ends up being our own self-care.

This holiday season, I invite each of us to give the gift of our time and attention not only to our clients and families, but also to ourselves. If you are feeling an unbearable burn from both ends of the candle, reassess any necessary changes for now and the new year. Just being mindful of the signs of overwhelm may be enough for some. Committing to a more structured self-care plan may be more appropriate for others. The State Bar's website is a great place to start: [https://www.vsb.org/site/members/lawyer\\_well\\_being](https://www.vsb.org/site/members/lawyer_well_being).

Warmest wishes to you all for a safe, healthy, and happy holiday season! ✧



*Maisey Reiner resting and recharging*

## VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

**Hogle v. Commonwealth**, Va.App. (11/15/2022). The exclusionary provision of Code § 46.2-646(E) prohibits law enforcement officers from stopping a motor vehicle for an expired registration sticker under certain circumstances, and provides an exclusionary remedy for a violation of the seizure provision. Hogle was not entitled to the suppression of evidence because the Code section did not retroactively apply to the stop of his vehicle in 2019.

**Cannaday v. Commonwealth**, Va. App. (11/9/2022). When addressing the mandatory minimum incarceration period, the same burdens of production and persuasion and the same standard of proof [preponderance of the evidence] apply to the safety valve provision of Code § 18.2-248(H) as to subsection (C) of the statute.

**Osman v. Commonwealth**, Va. App. (10/25/2022). Because appellant's abduction of J.O. meets the criteria of Code § 18.2-47(D)—appellant is a parent to J.O. and the abduction was punishable as contempt for - violating the March PPO—the trial court erred in denying appellant's motion to strike the felony abduction charge under Code § 18.2-47.8 “It is immaterial that the Commonwealth did not charge appellant with contempt of court in addition to abduction.” The opinion also has a lengthy analysis of the factors governing the constitutional right to speedy trial.

**Clayton v. Commonwealth**, 75 Va. App. 416, 877 S.E.2d 504 (2022) (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.

**Hart v. Commonwealth**, Va. App. 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... We 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**, 75 Va. App. 435, 877 S.E.2d 514 (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.

**Haeefe v. Commonwealth**, 75 Va. App. 591, 878 S.E.2d 422 (2022). (2022). The plain language of Code § 18.2-144 criminalizes the malicious maiming of another person's livestock—regardless of whether the accused had the owner's permission to commit the act.

**Washington v. Commonwealth**, 75 Va. App. 606, 878 S.E.2d 430 (2022). The trial court did not err in rejecting appellant's self-defense theory as he participated in instigating the altercation and did not withdraw despite an ability to do so. Thus he acted deliberately and intentionally, not in the heat of passion.

**Obregon v. Commonwealth**, 75 Va. App. 582, 878 S.E.2d 418 (2022). The trial court abused its discretion in denying appellant's petition for expungement when it required appellant to prove actual manifest injustice. Code § 19.2-392.2 requires only a reasonable possibility of manifest injustice.

**Tuthill v. Commonwealth**, 878 S.E.2d 41 (2022). The trial court did not err in denying appellant's petition to remove his name and identifying information from the Virginia Sex Offender Registry as the plain meaning of Code § 9.1-910(A) requires anyone convicted of multiple Tier 1 offenses to remain on the registry, regardless of the temporal proximity of the crimes, Code § 9.1-910(A)

**McBride v. Commonwealth**, 878 S.E.2d 44 (2022). Under Rule 3A:15 and our prior caselaw, a trial judge has broad discretion over whether to grant a defendant's motion to strike. But once a court grants such a motion and rules that the evidence presented was insufficient, the court may not then allow additional evidence to be presented and change its ruling based on that added evidence.

**Belcher v. Commonwealth**, 878 S.E.2d 19 (2022). Error to impose sentence of one year when the statutory maximum is 12 months. “The difference between ‘twelve months’ and ‘one year’ affects sentences in various ways. A misdemeanor sentence of twelve months or less is served in a local jail, while a sentence of one year or more is a sentence to the Department of Corrections and carries at least the possibility of a prison facility. A criminal defendant has a far more generous opportunity to earn credits allowing for early release on sentences of twelve months or less.... Similarly, if a defendant receives a prison sentence, the trial court loses the ability to suspend or otherwise modify that sentence sixty days after the defendant has been taken into the custody of the Department of Corrections. However, if a defendant receives a jail sentence, the trial court retains the ability to suspend or modify that sentence until it has been completely served. In short, when it comes to criminal sentencings in Virginia, twelve months is not simply another way of expressing one year, and the phrases do not mean the same thing.”

**Harris v. Commonwealth**, 878 S.E.2d 33 (2022). “When a former defense attorney begins working as a prosecutor, the Office of the Commonwealth's Attorney must implement screening procedures to protect the due process rights of any of the former clients of that attorney, should those clients later face

additional criminal proceedings. A court reviewing those procedures should consider a range of factors to decide whether the former defense attorney was effectively screened from a related matter. We find no error here in the court's conclusion that Harris's former attorney was effectively screened from the prosecutor working on his new probation violation proceeding.”

**Maryland v. Commonwealth**, 75 Va. App. 483, 877 S.E.2d 537 (2022). Though subject to the conditions of the home electronic monitoring program, defendant was admitted to bail while awaiting trial, and was not “actually . . . in a . . . state or local correctional facility” during the relevant period of time. Code § 53.1-131.2 grants no authority to a trial court to allow a defendant convicted of voluntary manslaughter to serve any portion of his sentence on home electronic monitoring. Thus, he was not “confined” while on the home electronic monitoring program, and was not entitled to credit against his sentence for the time he was on bail.

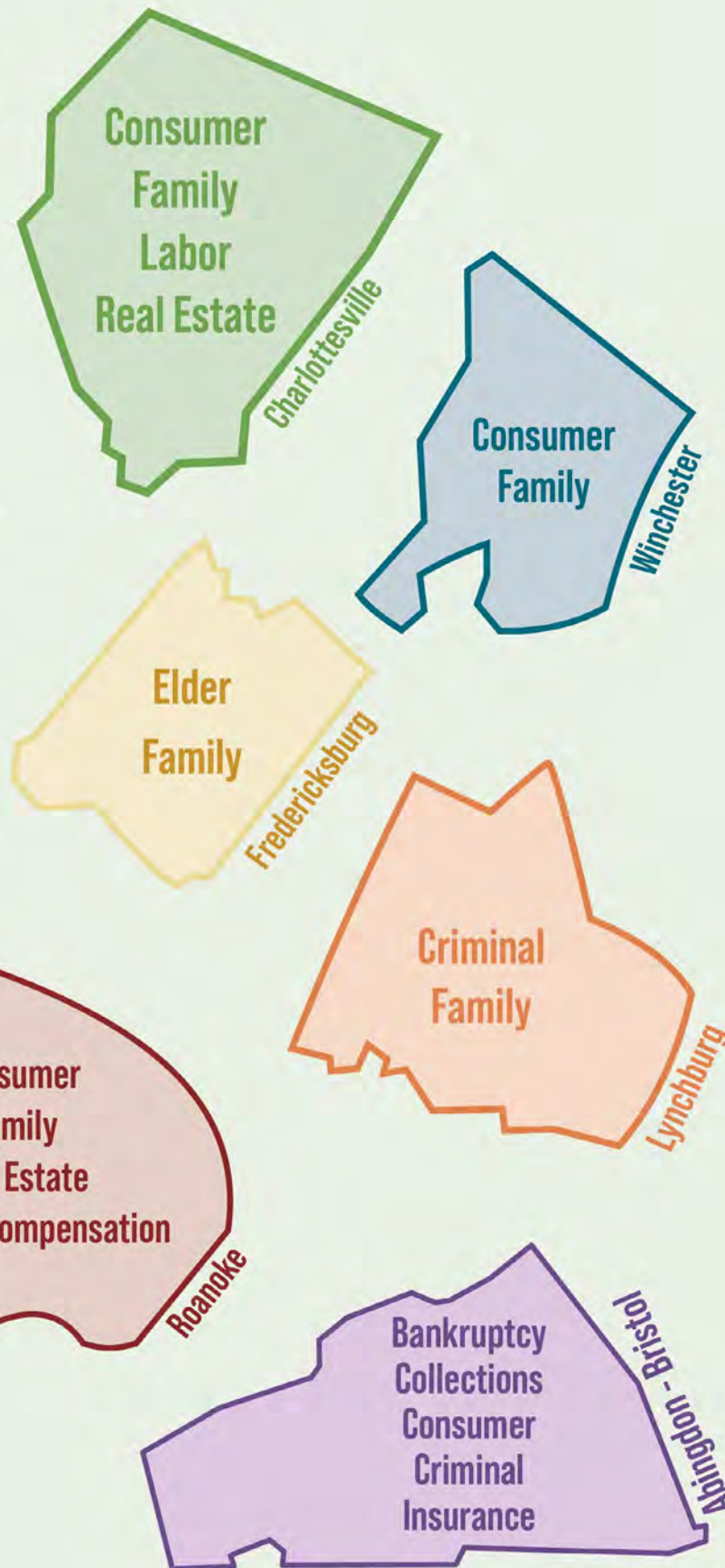
**Turner v. Commonwealth**, 877 S.E.2d 541 (2022). Although the curfew rules recognized exceptions, “the ‘mere possibility of an innocent explanation’ does not necessarily exclude a reasonable suspicion that criminal activity is afoot.” Here the officer's first-hand observation of Turner's driving on the streets during the emergency curfew period amounted to more than a mere “unparticularized suspicion or ‘hunch’ of criminal activity.” As such, the stop was “reasonable within the meaning of the Fourth Amendment.”

**Johnson v. Commonwealth**, 75 Va. App. 475, 877 S.E.2d 533 (2022). Upheld conviction for engaging in an obscene sexual display. Under *Barnes v. Commonwealth*, 61 Va. App. 495 (2013), Johnson had no reasonable expectation of privacy when he invited the librarian to look through the window of his cell to see him masturbating. And any “criticism” of *Barnes*, “no matter how valid,” *Vay v. Commonwealth*, 67 Va. App. 236, 257 (2017), and “even if we agreed,” *Williams v. Commonwealth*, 50 Va. App. 337, 341 n.1 (2007), would not authorize us to ignore its controlling force here.

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Updated September 2022.

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Celebrating 45 Years of Service



# Criminal Law News



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