

# Criminal Law News

Volume 52, Number 3  
January 2023

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

## 53rd Annual Seminar Program and Speakers Confirmed

### 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

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

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- 8:15AM Welcome and Opening Remarks**
- *George S. 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*
  - *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**

## Speakers

**Corrina Barrett Lane** is a constitutional law scholar who writes about the influence of extralegal norms on Supreme Court decision making, with a particular focus on capital punishment. Her scholarship, which often uses the lens of legal history, has appeared in law journals at Stanford, Duke, UCLA, Georgetown, and the University of Pennsylvania. Professor Lane is an elected member of the American Law Institute, and received the University of Richmond's Distinguished Educator award in 2006. She is a former prosecutor and an Army veteran.



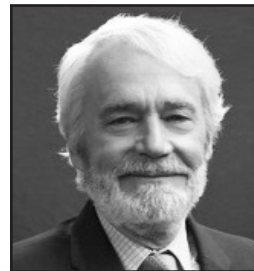
**Hon. Jacqueline S. McClenney** serves as a judge in the Richmond Circuit Court of the 13<sup>th</sup> Judicial Circuit of Virginia. During her tenure on the Richmond General District Court and Richmond Circuit Court benches she served and continues to serve as a Presiding Judge for the Behavioral Health Dockets. Additionally, Judge McClenney was recently appointed to the Judicial Council of Virginia. Prior to her appointment to the bench, she was the Owner and President of McClenney Law Group, PC, a boutique law firm which specialized in legal issues facing children and families, administrative law and small business matters. She began her legal career with Legal Aid in Tidewater Virginia and subsequently worked with Morris & Morris, P.C. and LeClair Ryan. Ms. McClenney earned a B.S.W. in social work from North Carolina A&T and a J.D. from the University of Richmond. She is a Past Chair of Venture Richmond, an organization of community and corporate executives supporting downtown Richmond development. She is a member of Delta Sigma Theta Sorority, Inc. Richmond Alumnae Chapter and the Richmond Chapter of the Links, Incorporated. She is an avid yoga student and instructor of Hot Yoga and a recovering Triathlete.



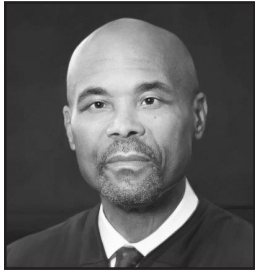
**Ashley Shapiro** is a Deputy Public Defender in Richmond. Ashley previously served as a public defender in Fairfax, Virginia and St. Mary's County, Maryland. She has litigated dozens of jury trials, countless motions, and represented both children and adults. Prior to her current position, Ashley was the Immigration Resource Attorney for the Virginia Indigent Defense in Virginia regarding the immigration consequences of criminal convictions. Ashley is the Legislative Director for Justice Forward Virginia, a criminal justice reform non-profit, and a member of the national Racial Justice Initiative through the Shriver Center on Poverty Law. Ashley graduated with Honors from The George Washington University Law School, where she was a Thurgood Marshall Scholar, earned a Pro Bono Service Certificate, and was awarded a Shapiro Public Service Scholarship. Immediately upon graduation, Ashley clerked for the Maryland Court of Appeals. Prior to law school, she graduated Summa Cum Laude from San Diego State University.



**Dr. Leigh D. Hagan** is board-certified in Forensic Psychology and draws from 40 years of experience when consulting with attorneys on a wide range of criminal matters. Courts in 10 states have qualified him more than 450 times on a wide range of controversies. Appellate courts have ruled favorably on Dr. Hagan's methods and opinions in numerous cases. He contributed to Virginia's statutory definition of intellectual disability in capital cases and to the statutory procedures for assessing juvenile trial competence. Dr. Hagan has presented over 80 CLEs and publications regarding practice standards, mental health evidence, challenges to diagnostic testimony, psychological testing, admissibility of mental health records, direct and cross-examination of therapists, ethical considerations for testifying witnesses, and other topics.



**Hon. Junius P. Fulton, III**, has served as a judge of the Court of Appeals of Virginia since 2021. He was the recipient of the 2020 Virginia State Bar Criminal Law Section Harry L. Carrico Professionalism Award. As the longest serving Drug Court judge in the Commonwealth Judge Fulton



oversaw the development and implementation of both the Norfolk Drug Court and Reentry Court dockets. Judge Fulton has chaired or participated in numerous justice system committees, including the Judicial Education Committee of the Judicial Conference of Virginia, Judicial Ethics Advisory Committee, Virginia Criminal Sentencing Commission, State Drug Treatment Court Advisory Committee, Virginia Supreme Court's Special Committee on Problem Solving Dockets, and Circuit Court Judge's Benchbook Committee. He is also a member of the Virginia and National Association of Drug Court Professionals. He has lectured on specialized dockets at a variety of conferences. Prior to his appointment to the bench, Judge Fulton served as an Assistant Commonwealth's Attorney for the City of Norfolk and later in the private practice of law representing litigants in a variety of courts in the Commonwealth. He holds a Bachelor's Degree from the University of Virginia and received his JD from Marshall-Wythe School of Law at the College of William and Mary.

**Craig S. Cooley** has practiced as a trial attorney handling criminal defenses for over 45 years. He has tried over 600 jury trials, and handled over 500 murder cases, including 70 capital defenses. He was co-lead counsel in the case of Commonwealth v. Lee Boyd Malvo (the 17-year-old D.C.



Beltway sniper). A three-time graduate of the University of Richmond, BA, MA, JD, he acknowledges that he has lost to nearly every prosecutor known to exist in the Commonwealth of Virginia. Craig was raised in the Shenandoah Valley. He has been married for 49 1/2 years, establishing his wife, Sarah, as a true saint. They have 3 children and 5 grandchildren. He is a frequent lecturer/presenter at seminars for the Bar and the public. His law practice has included representations around the Commonwealth of Virginia, but he concentrates in the greater Richmond area.

**James O. Broccoletti** is the senior partner of Zoby and Broccoletti, P.C., located in Norfolk, Virginia. He has been in practice since 1978 and has been with the firm since serving as Deputy Commonwealth's Attorney for the City of Norfolk. Mr. Broccoletti is the past chair of



the Criminal Law Section of the Virginia State Bar and the past chair of the State Bar's Committee on Legal Ethics. He served as president of the Board of Directors of the Virginia Capital Case Clearinghouse at Washington and Lee School of Law and is currently the 4th Circuit's representative to the United States Sentencing Commission's Practitioner's Advisory Group. Mr. Broccoletti is a fellow of the American College of Trial Lawyers and a substitute judge for the General District and Juvenile and Domestic Relations Courts for the City of Virginia Beach.

**Hon. Shannon Taylor** is a native of Charlottesville, Virginia, and a 1989 graduate of the University of Virginia. Her first job after college was as a paralegal at the Richmond based firm of Hunton & Williams which inspired her to pursue a career in the law. Shannon received her law degree in 1995



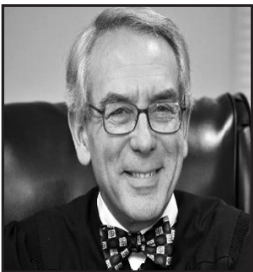
from the University of Richmond. She began her career as a prosecutor in the Commonwealth's Attorney office for the City of Richmond. She was named as a Special Assistant in the US Attorney's office first in 1999 and then again in 2002-2004. Shannon was special counsel for the Richmond Multi-Jurisdictional Grand Jury from 2004-2008. After three years in private practice, Shannon was elected Commonwealth's Attorney for Henrico County in 2011, 2015, and 2019.

**Timothy S. Coyne** is the Deputy Executive Director of the Virginia Indigent Defense Commission. Prior to assuming that role in September 2022, Tim served as the Public Defender for the City of Winchester and Counties of Clarke, Frederick, Page, Shenandoah and Warren from 2004 to 2022. Following graduation from law school,





Tim worked as the *pro se* law clerk for the U.S. District Court for the Eastern District of Virginia in Alexandria handling civil rights actions and habeas corpus petitions filed by prisoners. He then worked as a litigation attorney for the Federal Trade Commission in Washington, D.C. prosecuting civil investment fraud cases. In 1991, Tim and his wife, Beth, moved to Winchester, Virginia to start their own private law practice. Tim also worked as a part-time Assistant Public Defender in Front Royal and Winchester until 1995, and continued to take state and federal court-appointed cases until 2004 when he was appointed as the Public Defender for the Winchester office. Tim also served on the Winchester City Council from 2000 through 2008, and has been actively involved in many community boards and organizations. He was a founding member of the Northern Shenandoah Valley Substance Abuse Coalition, a diverse, community-based organization looking for ways to address the opioid epidemic plaguing the Northern Shenandoah Valley. He received his undergraduate degree from the University of Virginia in 1983, and graduated from the University of Richmond School of Law in 1986.



**Hon. William W. Sharp** retired as a Judge of the Twenty-Sixth Judicial Circuit in June, 2022. He previously served as a judge of the 26<sup>th</sup> Juvenile and Domestic Relations District Court. He has served as chairman of the State Advisory

Committee on Child Support Litigation and the Virginia Council of Juvenile and Domestic Relations District Court Judges Support Committee. He was lead judge of the Warren County Foster Care Best Practices Team, one of the first eight Best Practices Teams in Virginia, was a participating judge in the Winchester/Frederick County Best Practices Team, and continues to serve as an Advisor to the Virginia Court Improvement Program. He is a Past-President of the Virginia Council of Juvenile and Domestic Relations District Court Judges. Judge Sharp received the 2018 Harry L. Carrico Outstanding Career Service Award from the Judicial Council of Virginia and the 2019 Lelia Baum Hopper Service Award for contributions and dedication to the children and families of Virginia. He graduated from Yale College, and received a J. D. degree from William and Mary.

**Elliott Casey** is a Staff Attorney for the Virginia Commonwealth's Attorneys' Services Council. Elliott 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, 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 US Attorney for the Western District of Virginia. Elliott specializes in digital evidence, Fourth Amendment issues, and complex financial crime. He also instructs law enforcement agencies throughout the Virginia and D.C. area and investigators around the United States. Elliott 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. He was honored with the Virginia IASIU Outstanding Public Service Award in 2022 as well as Virginia Lawyer's Weekly 2022 "Leaders in the Law" award.

**James M. McCauley** is the former Ethics Counsel for the Virginia State Bar, retired as of November 2022. He served as staff liaison to the Virginia State Bar's Standing Committee on Legal Ethics and managed the staff in the Legal Ethics Department and the Legal Ethics Hotline. Mr.



McCauley served on the faculty of the Virginia State Bar's Mandatory Professionalism Course, and taught Professional Responsibility at the University of Richmond School of Law and served on the A B A's Standing Committee on Legal Ethics and Professionalism. In 2018, Mr. McCauley was elected "Leader of the Year" in the *Virginia Lawyers Weekly* "Leaders in the Law" awards program. He served as Chair of the Public Statements Committee for the Association of Professional Responsibility Lawyers. Mr. McCauley is a Fellow of the Virginia Law Foundation and American Bar Foundation. From 2014-2020, he served on the Board of Directors for the Virginia Judges and Lawyers Assistance Program (VJLAP). Mr. McCauley is the 2021 recipient of the Travers Scholarship award given by the Real Property Section of the Virginia State Bar and Virginia Continuing Legal Education.

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

*U.S. v. Robinson*, F.3d (4<sup>th</sup> Cir. 12/9). “The government can prove that “death result[ed]” from a drug in one of two ways. It can prove but-for causation: that “death would not have occurred in the absence” of the drug. Or it can prove that the drug was an independently sufficient cause of the victim’s death, allowing courts to find causation in the “special circumstance” when “multiple, independent causes concurrently cause death.”

*U.S. v. Miller*, F3d (4th Cir 11/29) The district court held that police had reasonable suspicion to extend the traffic stop because the driver was (1) slow to pull over, (2) excessively nervous, and (3) traveling on a known drug corridor. In reversing that decision, the circuit noted: **First**, a driver should be given time to react and be entitled to make certain that a hailing officer intends to pull them over rather than simply pass them on the way to another emergency. **Second**, a driver should be given a meaningful opportunity to reach a safe place to stop. The driver here stopped within a reasonable time and distance. **Second**, a driver’s nervousness is not a particularly good indicator of criminal activity because most everyone is nervous when interacting with the police. “The suspect’s nervousness must therefore be unusual, beyond the norm, or evasive.” The video of the stop shows a lack of such unusual nervousness. **Third**, the mere fact that a person is traveling on a route commonly used to transport drugs, “standing alone, is entitled to very little weight.”



## VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

*Shahan v. Commonwealth*, Va.App. (12/13). The circuit court properly excluded evidence of a

civil suit Shahan filed against the Police Department. “The inferences Shahan would have proposed to the jury based on the filed lawsuit were that the police were biased against him in their investigation and that he would not have filed the lawsuit if he was guilty .... These inferences are so attenuated from the basic fact that Shahan filed a civil lawsuit against the police that they are purely speculative and thus irrational.”

*Laney v. Commonwealth*, Va.App. (12/06) nothing in the Crime Victim and Witness Rights Act prohibits a court from admitting relevant evidence or testimony from other witnesses who do not meet the statutory definition of “victim.” The accommodation defense was rejected because the trial court rejected Laney’s testimony that his only goal was to help his friend and instead concluded that Laney also intended to use the drugs that his friend paid for, thereby profiting from the transaction.

*Bista v. Commonwealth*, Va.App. (11/29). “As a matter of first impression, we must determine whether Code § 19.2-268.3 categorically bars a child victim’s out-of-court statements describing any act directed against the child relating to an offense against children when, as here, the trial court has found the child incompetent to testify. We hold that it does not. Read plainly, Code § 19.2-268.3 does not predicate admissibility on the child’s competency to testify. The record supports the trial court’s conclusion that R.P.’s statements to her parents, teacher, and Bonilla were inherently trustworthy.”

Under Virginia law, witness credibility and competency to testify are distinct determinations, the former reserved to the fact finder and the latter to the trial court. See *Durant v. Commonwealth*, 7 Va. App. 454, 462 (1988) (holding that although a judge presiding in a jury trial determines a witness’s competency to testify, “the weight to be given to the evidence and a determination of the witness’s credibility are matters for the fact finder to decide”). Instructions R and S would have advised the jury that the trial court had already determined that R.P. was unable to discern the truth. Thus, the proffered instructions might have confused the jury by suggesting that the trial court’s competency ruling was a commentary on R.P.’s credibility. By contrast, the trial court’s alternative instruction “fully and fairly” covered the same issue by accurately stating the law while avoiding any such risk. *Fahringer*, 70 Va. App. at 211 (quoting *Joseph*, 249

Va. at 90). Accordingly, we hold that the trial court did not abuse its discretion in denying Bista's proffered jury instructions.

Dissent - "Bista argued below, and on appeal, that his Confrontation Clause rights were violated when the court allowed the jury to watch a 75-minute video depicting the victim's out-of-court testimonial forensic interview without giving Bista the opportunity to cross-examine the victim about that video at trial. And he argued below, and here, that his opportunity to generally cross-examine the victim at her preliminary hearing was not sufficient. I agree."

**Henthorne v. Commonwealth**, Va.App. (11/22) "Here, appellant failed to report to probation within three days of his release from incarceration. Because we hold that a violation of Code § 19.2-306.1(A)(iii) does not require that a probationer must have eventually reported to probation, we conclude that appellant's behavior fell under Code § 19.2-306.1(A)(iii) and constituted a first technical violation. Accordingly, we hold that the trial court erred in sentencing appellant to an active period of incarceration pursuant to Code § 19.2-306.1(C)."

**Holmes v. Commonwealth**, Va.App. (11/22) In this case, although the testimony of Holmes's accomplices corroborates each other, the "danger of collusion between [these three] accomplices and the temptation to exculpate themselves by fixing responsibility upon others" is not alleviated where the sole corroboration is the testimony of another accomplice to the crime. The trial court erred in finding that the accomplice testimony was sufficiently corroborated when it refused a jury instruction on corroboration.

**Gionis v. Commonwealth**, Va.App. (11/22) "The repeal of Code § 18.2-104 involves a substantive right to be free from a harsher penalty for subsequent larceny convictions. The legislation repealing Code § 18.2-104 did not include any language expressing a legislative intent to make the repeal effective retroactively— rather than simply prospectively, which is the presumption. The General Assembly did not even put an emergency clause in the legislation to attempt to move up its effective date. Because there was no such substantive right at the time of the offense or when criminal proceedings began against Gionis, we hold that the trial court did

not err in denying Gionis's motion to consider his offense a misdemeanor."

**Cornell v. Commonwealth**, Va.App. (11/22) *Anders v. California*, 386 U.S. at 744 held that "if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished [to] the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous."

"This precedent does not support permitting counsel to present both frivolous and nonfrivolous issues in the same brief and then seek to withdraw as to those frivolous issues to allow pro se briefing. Because we have held that partial *Anders* briefs are not permitted, we decline to consider the assignments of error raised pursuant to *Anders*."

## MEMBER RESOURCES AREA

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

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# Criminal Law News



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