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

2024 Annual Meeting – Virginia State Bar
May 29–June 1, 2024 • Virginia Beach, Virginia

Combating Elder Abuse and Vulnerable Adult Exploitation in Virginia

Friday May 31, 2024 • Hilton Oceanfront

Presented by Criminal Law Section and Senior Lawyer Conference

Join us for an enlightening seminar where we tackle the pressing issue of elder abuse and vulnerable adult exploitation – an escalating concern in our aging society. Elder abuse, projected to be the fastest-growing crime in the next decade, poses a grave threat to our senior citizens and vulnerable adults, often resulting in serious injuries or the loss of hard-earned savings due to financial scams. As the American population continues to age, millions of seniors are at risk of falling victim to elder abuse, with a growing number falling prey to physical injury, financial exploitation, and other forms of mistreatment. While elder abuse is a crime, the reluctance to report elder abuse incidents makes it challenging for law enforcement and regulatory agencies to track and combat this pervasive issue. In Virginia, recent legislative efforts have been made to safeguard vulnerable adults. This seminar aims to shed light on the alarming rise of elder abuse and highlight what every practitioner should know. It will feature efforts of elder law experts, prosecutors, and estate planning experts to discuss these alarming trends.

Section Lunch & Elections
Friday, May 31 • 11:45 am • Hilton Hotel

Click here to register today!

About the Speakers

MODERATOR

Chuck Slemp, Moderator, serves as Chief Deputy Attorney General of Virginia. He previously served as Commonwealth's Attorney for Wise County and the City of Norton, having been elected in 2015 and reelected in 2019. Prior to his service as a prosecutor, Slemp held the post of Commissioner of Accounts for the Circuit Court of Wise County. He also practiced criminal, domestic relations, and estate administration, and local government law. Slemp is a graduate of the University of Virginia's College at Wise with a degree in business administration, he holds a master's degree from Regent University in Public Policy, completed post-graduate study at Oxford University Hertford College in the United Kingdom, and earned his Juris Doctor degree from Regent School of Law. Slemp has served as co-chair of the Virginia Criminal Justice Conference, as a member of the Virginia State Bar Criminal Section Board of Governors, the Virginia Crime Commission, and an adjunct professor at UVa-Wise, Regent University, and Mary Baldwin University.

PANELISTS

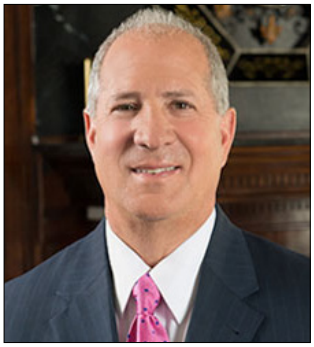
Anne M. Heishman, Commissioner of Accounts for the Fairfax County Circuit Court. She worked as a domestic relations attorney for several years before turning her legal practice to guardianship, conservatorship, estate and trust administration, and contested fiduciary matters. She served as a Guardian ad Litem and a fiduciary for incapacitated adults, including those who have been victims of financial exploitation. Ms. Heishman has been a lecturer and panel participant for seminars presented by the Virginia State Bar, the Virginia Academy of Elder Law Attorneys, the Virginia Trial Lawyers Association, and the Fairfax Bar Association. Ms. Heishman has received an "AV Preeminent" Rating from Martindale-Hubble. She was included in the 2023 Virginia Lawyers Weekly class of Influential Women in the Law. She has also been recognized as a top Elder Law attorney by the Washingtonian, Northern Virginia, Virginia Business, and Arlington magazines. Ms. Heishman received her B.A. from James Madison University and received her law degree from George Mason University.

John Childrey, Senior Assistant Attorney General for the Medicaid Fraud and Elder Abuse Unit Chief section counsel of the Medicaid Fraud Control Unit at the Attorney General's Office. Prior to this, for 20 years I prosecuted cases in Chesterfield and other places when serving as a special prosecutor. I also had a solo practice in Midlothian. My wife Jackie and our two children (15 and 18) live in Chesterfield. We love taking trips in Virginia, especially to state parks. I went to the University of Virginia, majoring in history and economics, then to William and Mary for law school. I follow UVa sports, and I love history and riding my bicycle.

Alison Martin, Assistant Commonwealth's Attorney for Henrico County. Alison Martin brings enthusiasm and energy to her practice. She handles all phases of prosecution of sophisticated and complex violent matters, including high profile media cases like the Adam Oakes matter and Comm. v. Nasir Eberhardt, who murdered Highland Springs High School basketball standout Jahiem Dickerson. She is a frequent lecturer and law enforcement trainer on issues related to child abuse, sexual assault, and elder abuse. Additionally, she provides training regarding in-court testimony to law enforcement recruits. She frequently represents the CA's office at forward-facing community events, including presentations at churches related to elder and child abuse. She is married to another lawyer, and they are the proud parents of three boys, ages 15, 12, and 8.

Chair's Column

George Neskis, Esquire



It has been a true honor chairing the Criminal Law Section of this Virginia State Bar this past year. I would like to thank my fellow board members for the incredible job they have done serving our Section, which is the second oldest and second largest of our Bar!

We've had another great year which featured two live seminars in Charlottesville and Williamsburg. We touched on some great topics and had some amazing presenters at both locations. We also had two dynamic luncheon speakers. Ben Chew, lead counsel for Johnny Depp in his defamation suit with Amber Heard, entertained us in Charlottesville; and in Williamsburg, Judge Azcarate, the presiding Judge of that trial, shared her insight and some of the interesting aspects of this media trial turned into a Netflix series.

I also had the distinct honor and great pleasure of presenting our Section's Harry L. Carrico Professionalism Award to Howard Gwynn, the longstanding Commonwealth Attorney for the City of Newport News. His career has been emblematic of the heart of this award as evidenced by the large contingent of attorneys and staff from Howard's office as well as friends and colleagues throughout the Commonwealth who came to honor his tremendous legacy.

I also want to take this opportunity to remind our Section's members that the Virginia State Bar Annual Meeting will be held on May 29 - June 1, 2024 at the Hilton Oceanfront Hotel in Virginia Beach. The Criminal Law Section, along with the Senior Lawyers Conference, will host a CLE session on combating elder abuse and protecting vulnerable adults on Friday, May 31 at 8:30 am. The annual meeting is a wonderful opportunity to combine the business of the Bar with a personal getaway or family vacation. We look forward to seeing you at the Beach!

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

McElrath v. Georgia, 144 S. Ct. 651 (2024). A Georgia jury returned a split verdict - "not guilty by reason of insanity" with respect to malice-murder, and "guilty but mentally ill" as to felony murder and aggravated assault. Georgia argued that the jury's verdicts were inconsistent and thus the verdict of not guilty by reason of insanity was not a valid acquittal. The Supreme Court held that whether an acquittal has occurred for double jeopardy purposes is a question of federal law, and a State's characterization of a ruling is not binding on the Court. Once rendered, a jury's verdict of acquittal is inviolate. The principle "that 'a verdict of acquittal . . . could not be reviewed, on error or otherwise,' " is "perhaps the most fundamental rule in the history of double jeopardy jurisprudence." Whatever the basis for a jury's verdict, the Double Jeopardy Clause prohibits second-guessing the reason for a jury's acquittal. An acquittal is an acquittal, even when a jury returns inconsistent verdicts.

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Zaid v. Dept. of Justice, 96 F.4th 697 (4th Cir. 2024). The purpose of the Freedom of Information Act is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," not to give criminal suspects "earlier or greater access to agency investigatory files than they would otherwise have." The government properly invoked exemption 7(A) of the Act, which permits the withholding of "records or information compiled for law enforcement purposes" whose disclosure "could reasonably be expected to interfere with enforcement proceedings."

US v. George, 95 F.4th 200 (4th Cir. 2024) In our view, the Government was not relieved of its duty to have disclosed its pre-trial knowledge of the inconsistent statement just because Appellant later happened to stumble upon it during trial. At the same time, however, where the withheld evidence is impeaching but the witness was impeached in other ways at trial, we have held that the withheld evidence was not material. in addition to impeaching Frazier with the inconsistent statement itself, Appellant impeached Frazier's credibility in a number of other ways during the trial.

U.S. v Zelaya-Veliz, 95 F.4th 321 (4th Cir. 2024). "The distinction between what may be searched and what can be seized counsels the government to execute social media warrants through a two-step process. This process–whereby the government first obtains a large amount of account data then seizes only the fruits, evidence, or instrumentalities of enumerated crimes–is crucial to the validity of social media warrants. As in a search of a house, the officers searching the Facebook account data at issue necessarily encountered a host of irrelevant materials. But, just like in a house search, the officers were authorized to seize only the fruits, evidence, or instrumentalities of the crimes for which they had established probable cause." The total lack of a time period in a social media warrant also raises a problem in applying the Fourth Amendment to novel questions posed by digital technology, but the Court applied the good faith exception. "Given the unsettled nature of whether a temporal limitation is required on a warrant authorizing the search and seizure of Facebook account data, we cannot say that a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization… We note, however, that future warrants enhance their claims to particularity by "requesting data only from the period of time during which the defendant was suspected of taking part in the criminal conspiracy."

U.S. v. Wiley, 93 F.4th 619 (4th Cir. 2024) Courts should not attempt to define "reasonable doubt," because attempts to explain the term tend "to alter or to obfuscate" its meaning. Thus, the trial court can restrict counsel from defining the term in closing argument.

U.S. v. Perry, 92 F.th 500 (4th Cir. 2024) Spoliation of evidence, or the destruction of or failure to preserve evidence, can be a due-process violation.

In order to rise to that level, however, the defendant must show that the unpreserved evidence had "an exculpatory value that was apparent before the evidence was destroyed and was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." In addition, the defendant must establish that the police acted in "bad faith" in failing to preserve the evidence. Thus, spoliation will only violate due process where "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant" yet still failed to preserve it. Here the officer believed that it was unnecessary to preserve the dashcam because the stop was sufficiently captured by the bodycam. At most, this shows negligence, not bad faith.

U.S. v. Davis, 94 F.4th 310 (4th Cir. 2024) "We do not hold that cell phones in plain view may always be seized as instrumentalities of a crime. The nature of the alleged crime and the totality of the evidence are critical considerations. The government's seizure of Davis's phone was only justified because officers found the phone together with substantial evidence of drug trafficking—a crime that inherently involves coordination between multiple individuals. … Here, given the substantial quantities of controlled substances that were found on Davis's person and in his bedroom, the extent to which they were packaged for distribution, the evidence of drug trafficking found elsewhere in the common areas of the residence, and the known and obvious connection between drug trafficking and the use of cell phones, the officers executing the search had 'probable cause to associate the [phone] with criminal activity.' As a result, we hold that law enforcement lawfully seized Davis's cell phone as an instrumentality of drug trafficking found in plain view."

US v. Maynard, 90 F.4th 706 (4th Cir. 2024) Rejected argument that requiring witnesses to testify while wearing medical masks violated the Sixth Amendment's Confrontation Clause. "In short, Maynard's trial preserved the Confrontation Clause's core principles—physical presence and the opportunity for cross-examination. We therefore affirm the district court's ruling rejecting Maynard's Confrontation Clause challenge."

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Commonwealth v. Holman, __ Va.__ (2024) "The doctrine against approbation and reprobation applies both to assertions of fact and of law. And it applies to all litigants, whether it is the Commonwealth or a defendant in a criminal case.... There is no 'ends of justice' exception to the approbate and reprobate doctrine."

Sample, v. Commonwealth, __ Va. __, 897 S.E.2d 68 (2024) A comment indicating that a law enforcement officer believes the assailant is in one of the pictures does not make the identification virtually inevitable and thus impermissibly suggestive. Here, the officer's comment was not suggestive and was, in fact, more equivocal than the belief that the assailant was among those pictured. Here, the officer commented, "I have a picture of somebody that I was thinking about, but I don't know if—you said you just saw their eyes." The comment was merely an expression of what a photographic identification unavoidably implies–that the officer believed the assailant might be pictured–not that "this is the man" who did it. The officer did not suggest to the witness that there was some other evidence establishing Sample as the culprit. The officer's comment acknowledged that he was unsure about his suspicion of Sample and had only provided the photograph of Sample because the officer believed Sample roughly matched the description given by the witness. The victim's identification of Sample was constitutionally valid and not violative of his due process rights and protections.

Commonwealth v. Delaune, __ Va. __, 894 S.E.2d 846 (2023) In the present case, Delaune violated the terms of her probation and suspended sentence when she used drugs and absconded from supervision. As the use of a controlled substance is defined as a technical violation in Code § 19.2-306.1(A), Delaune's drug use constituted a technical

violation under the statute. Therefore, the circuit court could not impose a term of active incarceration based on this violation. See Code § 19.2-306.1(C). As Delaune's absconding violation is automatically classified as a second technical violation under Code § 19.2-306.1(A), the circuit court could impose a maximum of 14 days of active incarceration based on this violation. Accordingly, the circuit court erred when it ordered Delaune to serve 60 days of active incarceration in this case.

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Paxton v Commonwealth, 80 Va. App 449, 898 S.E.2d 418 (2024) Trial court erred in admitting defendant's confession. Within moments of defendant's invocation of his right to remain silent, the interrogator "undisputedly posed an interrogatory question. Indeed, while facially claiming to honor defendant's invocation of his right to silence, the interrogator dangled the possibility of defendant escaping criminal liability if he kept talking and provided the interrogator with a 'reasonable explanation' for the circumstances he had outlined. This conduct undermines any claim that the interrogation had in fact ended. We reject the Commonwealth's contention that defendant voluntarily reinitiated the interrogation…. Neither we nor the Supreme Court have ever held that a suspect reinitiated an interrogation based on so vague a statement as asking the interrogating officer, "What?" We require a much clearer statement of intent before we conclude that defendant meant to abandon a right he had unequivocally invoked fewer than 30 seconds earlier." In addition, "when the prosecution's illegally-obtained evidence impels the defendant's testimony, that impelled testimony cannot be used as a loophole to cleanse the illegally-obtained evidence. Indeed, considering that a defendant has a right not to testify that is grounded in the same constitutional protections as Miranda, the defendant's impelled testimony may be viewed as a continuing violation of his privilege against self-incrimination."

Hubbard v Commonwealth, 80 Va. App. 384, 898 S.E.2d 386 (2024). Error in refusing to suppress evidence. A defendant's consent to search his person does not include consent to an intrusive search of the body. The mere fact that Hubbard consented to warrantless searches of his person in his plea agreement did not authorize officers to conduct an intrusive bodily search. All intrusive bodily searches are subject to a heightened standard under the Fourth Amendment. "A warrantless search involving a bodily intrusion, even though conducted incident to a lawful arrest, violates the Fourth Amendment unless three criteria are met: (1)"the police have a 'clear indication' that evidence is located within a suspect's body, (2) the police face exigent circumstances, and (3) the means and procedures employed by the authorities to conduct a search involving an intrusion into the body . . . satisfy 'relevant Fourth Amendment standards of reasonableness.'" "While looking into Hubbard's underwear, officers also visually inspected his anal area, and touched and probed his buttocks while trying to remove the item. Ultimately, we are constrained to hold that the Commonwealth did not present enough evidence below to establish that the invasive search was justified by exigent circumstances, thus satisfying the heightened Fourth Amendment standard."

Diaz v Commonwealth, 80 Va. App. 286, 897 S.E.2d 703 (2024). Screenshots of Facebook posts are "duplicate originals" for purposes of the best evidence rule. Code § 18.2-126(B) states that a person who "willfully and intentionally physically defiles a dead human body" is guilty of a Class 6 felony. "Defile" refers to "acts that disrespect, dishonor, or desecrate a dead body." Putting the body on an ironing board, wrapping it with miscellaneous items including trash bags, enlisting the aid of people who believed they were moving a piece of furniture, packing it into the back of a crowded car, and putting a dolly on top of it—did not comport with the typical respect and reverence with which our society ordinarily treats dead bodies.

Stilwell v Commonwealth, 80 Va. App. 278, 897 S.E.2d 699 (2024). Code § 18.2-57(B) contains an enhancement elevating misdemeanor assault and battery to a Class 6 felony "if a person intentionally selects the person against whom an assault and battery resulting in bodily injury is committed

because of his race, religious conviction, gender, disability, gender identity, sexual orientation, color, or national origin." The racial epithets combined with the unprovoked nature of the attack support the conviction.

Orndoff, v Commonwealth, 79 Va. App. 676, 896 S.E.2d 826 (2024). Upon rehearing en banc, the judgment of the trial court is affirmed without opinion by an evenly divided Court.

Hamilton v Commonwealth, 79 Va. App. 699, 896 S.E.2d 837 (2024). We hold that the trial court erred in ordering that Hamilton be of good behavior for an additional twenty years from the date of the trial court's September 20, 2022 order until September 20, 2042. We must reverse that requirement in the trial court's order because the trial court will lose jurisdiction over a large portion of that time requiring good behavior no later than August 11, 2036, and the General Assembly has been clear that a court does not have authority to impose requirements for a suspended sentence when the period of suspension for that suspended sentence has expired.

Tatusko v. Commonwealth, 79 Va. App. 721, 896 S.E.2d 848 (2024). At one point, the prosecutor said— "What I find interesting about this case is that"—until interrupted by an objection. At another, the prosecutor remarked, "I found" defense counsel's questions of the two officers "confusing." "Trial judges customarily and understandably accord counsel reasonable latitude in making their arguments." To be sure, "attorneys should assiduously - refrain from injecting their own personal opinion of the evidence, or personal opinion as to the competency of witnesses and the weight to be accorded their testimony." But the trial court did not abuse its discretion in determining that the prosecutor's statements here did not cross that line.

Walker v Commonwealth, 79 Va. App. 737, 896 S.E.2d 855 (2024). The "larceny inference" - that 'once the larceny is established, the unexplained possession of recently stolen goods permits an inference of larceny by the possessor - does not apply to robbery or carjacking. But the defendant's exclusive possession of the recently stolen vehicle and the goods inside it is a "circumstance" that the factfinder may properly consider in determining whether the defendant committed the crime.

Camann v. Commonwealth, 79 Va. App. 427, 896 S.E.2d 370 (2024). The question presented is whether a defendant who possesses a mixture of two controlled substances can be convicted of two violations of Code § 18.2-250 if the Commonwealth proves the defendant's knowing possession of only one controlled substance. The Commonwealth argues that proof that the defendant has knowingly possessed one controlled substance in a mixture permits the defendant to be convicted of as many violations of Code § 18.2-250 as there are drugs in the mixture. We disagree. Every conviction under Code § 18.2-250 requires knowing possession of a controlled substance. Each conviction for drug possession under Code § 18.2-250 requires the Commonwealth to prove that the defendant possessed the substance with knowledge of its nature and character as a controlled substance. In other words, "knowledge is an essential element of the crime."

Cappe v. Commonwealth, 79 Va. App. 387, 896 S.E.2d 351 (2024). Case of first impression dealing with "non-identification" lay opinion – i.e., testimony that the person in the photograph is not the defendant. It was error [although harmless] to exclude such testimony. "Using the same logic that allows a lay witness to identify a person in a video or photo, we find that a lay witness' testimony that a person is not pictured in the video or photo is equally reliable, so long as the lay opinion testimony is based on that witness' personal knowledge, and will assist the trier of fact in understanding the witness' perceptions. A rule that lay witnesses can identify defendants in a video, but cannot challenge or debunk such identifications would be one-sided and systemically unfair."

Creekmore v. Commonwealth, 79 Va. App. 241, 895 S.E.2d 783). Defendant, a licensed psychologist providing counseling services to a child, was guilty of "willfully contributing to, encouraging, or causing any act, omission, or condition that rendered a child …abused or neglected." Code § 18.2-371. By her own actions, including a significant delay in reporting a minor patient's abuse, defendant caused a 15-year-old to remain in her abusive and neglectful home, where additional abuse and neglect continued.

Turay v. Commonwealth, 79 Va. App. 286, 895 S.E.2d 805 (2023). Turay was detained in response to a report of specific and recent criminal activity

in a particular place. In that context, an officer encounters a suspect not in the vacuum of routine patrol activity, but against the backdrop of that recently reported crime. Thus, a reviewing court must consider the general reasonable suspicion factors in relation to the reported crime. For example, geographic and temporal proximity to the reported criminal activity is vital. The shorter the distance and closer the timing to a specific reported crime, the greater the value of proximity to the reasonable suspicion calculus. The dissent maintained that "the warrantless seizure of Turay violated the Fourth Amendment because, at the time of the seizure, the police lacked particularized reasonable, articulable suspicion that Turay was engaged in criminal activity."

Carter v. Commonwealth, 79 Va. App. 329, 896 S.E.2d 73 (2023). "The police unconstitutionally searched Carter beyond the scope of his consent to a weapons search. Then the police unconstitutionally searched Carter's car based on purported probable cause founded on the evidence from the unconstitutional search of Carter's person. This Court holds that the circuit court erred in denying Carter's motion to suppress the evidence obtained during these unreasonable searches. Accordingly, we reverse the circuit court's order denying the motion to suppress."

Wallace v. Commonwealth, 79 Va. App. 455, 896 S.E.2d 284 (2024). Upon a Rehearing En Banc, the Court reversed defendant's conviction under the Virginia Computer Crimes Act [§ 18.2-152] when she accessed her own bank account via an ATM in order to deposit forged checks. The Court assumed, without deciding, that an ATM was a computer, but held that defendant had "used the computer for an unlawful purpose," not "without authority" as required by the Virginia Computer Crimes Act. A three-judge dissent argued that defendant violated Code § 18.2-152.3 when she used the ATM owned by BB&T "without authority" to utter fraudulent checks and thereby obtain money by false pretenses

Yellock v. Commonwealth, 79 Va. App. 627, 896 S.E.2d 802 (2024). Here, there was virtually no evidence that Yellock and Thomas shared food, shelter, clothing, or utilities. There was also no evidence of comingled assets. Based on the evidence, this factor does not support a finding of cohabitation and assault upon a family member domestic assault and battery in violation of Code § 18.2-57.2.

Russell v. Commonwealth, 79 Va. App. 618, 896 S.E.2d 797 (2024). The September 24, 2021 order imposed a judgment of conviction against Russell. No subsequent order of the trial court modified, vacated, or suspended the conviction. Thus, the trial court lost jurisdiction of the judgment 21 days after the September 24 order and each order entered after that period is a nullity. Because the trial court had no jurisdiction to rule on Russell's motion to withdraw his plea, we have no jurisdiction to entertain an appeal of the same.

Konadu v. Commonwealth, 79 Va. App. 606 (2024). Based on this evidence, a rational trier of fact could reasonably infer that the auto accident resulted not from 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" in violation of Code § 46.2-853.

Griffin v. Commonwealth, 80 Va. App. 84, 897 S.E.2d 258 (2024). In short, the trial court did not err by granting the Commonwealth's motion to nolle prosequi the three MJGJ indictments as there was no evidence in the record of prosecutorial vindictiveness or prejudice to Griffin. The Commonwealth's decision to nolle prosequi the three MJGJ indictments resulted in the dismissal of Griffin's original charges without prejudice — the same relief Griffin had sought in his motion to dismiss — and Griffin received credit for his time served while awaiting trial on the original charges.

Cornelius v. Commonwealth, 80 Va. App. 29, 897 S.E.2d 231 (2024). Appellant has not been deprived of any rights for which he can claim recompense. And although a trial court's choice to transfer a juvenile to DOC sooner than originally ordered may seem harsh, it is nevertheless permitted by statute. See Code § 16.1-285.2(E) (authorizing the trial court to lengthen a juvenile's adult sentence by ordering "(i) the juvenile to begin serving any adult sentence in whole or in part that may include any remaining part of the original determinate period of commitment . . ." In properly exercising that discretion here, the trial court neither deprived appellant of any statutory right nor committed an error of law.

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