

# Criminal Law News

Volume 54, Number 2  
January 2025

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



## 55th Annual Criminal Law Seminar

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**Friday, January 31, 2025**

**Charlottesville DoubleTree Hotel**

Live Only

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**Friday, February 7, 2025**

**Williamsburg DoubleTree Hotel**

Live and Webcast

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# Virginia State Bar

## 55<sup>th</sup> Annual Criminal Law Seminar

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**Friday, January 31, 2025 • Charlottesville DoubleTree Hotel**  
**Friday, February 7, 2025 • Williamsburg DoubleTree Hotel**

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**8:00 Late Registration and Exhibits**

**8:15 Welcome and Opening Remarks**

- *Alison Powers, Seminar Chair*

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

- *Professor Corinna Lain, University of Richmond School of Law / Richmond (Charlottesville seminar only)*
- *Professor Julie McConnell, University of Richmond School of Law / Richmond (Williamsburg seminar only)*

An annual comprehensive review of developments in substantive and procedural criminal law. This session will provide an update on the development of important case law issued over the past year.

**10:15 § 19.2-271.6 and § 19.2-303.6: Making Use of Experts and Their Reports**

- *Bradley R. Haywood, Arlington Public Defenders Office / Arlington*
- *Sharon Kelley, UVA Health / Charlottesville*
- *Daniel Murrie, UVA Health / Charlottesville (Williamsburg seminar only)*

This session will pair a forensic clinician with a criminal defense attorney to demystify the forensic evaluation process from the request to usage in court. They will specifically focus on the introduction of mental health evidence under § 19.2-271.6 and deferrals under § 19.2-303.6.

**11:30 The Download: Cell Phone Technology**

- *Alfred Gray Collins, III, Colonial Heights Commonwealth Attorney's Office / Colonial Heights*
- *Joshua A. Pickens, Intelligence Research Specialist, Special Operations Division, Technical Operations Branch, Bureau of Alcohol, Tobacco, Firearms and Explosives / Richmond*

An Alcohol, Tobacco, Firearms and Explosives Intelligence Research Specialist will discuss the technical download, and an experienced attorney will discuss how the data can help or hurt a case and how to prepare your expert witness.

**12:45 Luncheon Presentation (20 minutes)**

- *Charlottesville: Thomas K. Plofchan, Jr., Westlake Legal Group / Sterling*

Appellate counsel for Ms. Orndoff in the Orndoff v. Commonwealth case and will discuss the interpretation of witness contempt in the Court of Appeals and Virginia Supreme Court.

- *Williamsburg: Hon. Roger Gregory, United States Court of Appeals for the Fourth Circuit / Richmond*

**2:00 Authentication and Admissibility of Electronic Evidence in Virginia**

- *Hon. Gerald I. Fisher, Senior Judge, District of Columbia Superior Court / Washington, DC*

This interactive presentation will discuss the evidence rules and principles governing the admissibility of electronic evidence and will contain illustrative hypotheticals requiring audience participation.

**3:30 The Ethical Attorney: How to Avoid the "Personal and Confidential" Letter**

- *William W. Tunner, ThompsonMcMullan, P.C. / Richmond*
- *Paulo E. Franco, Jr., ThompsonMcMullan, P.C. / Richmond*

No attorney practicing law in Virginia relishes receiving the dreaded envelope from the Virginia State Bar marked "Personal and Confidential." In this hour of ethics, former Assistant Bar Counsel Paulo E. Franco, Jr., and William W. Tunner will provide you with an overview of the Virginia Attorney Disciplinary System and tips for navigating the process should you be on the receiving end of a complaint. They will also offer some tips and ethical considerations concerning fee agreements, such as how to handle flat fees to keep meritless bar complaints from turning into trust account violation cases. The session will conclude with some hypotheticals regarding ethical issues that confront attorneys in the criminal justice system.

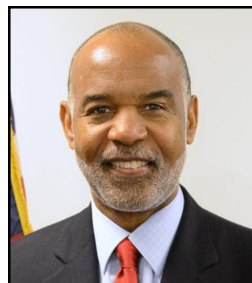
## About the Speakers

### LUNCHEON SPEAKERS



**Thomas K. Plofchan, Jr.** is the manager of Westlake Legal Group, located in Sterling, Virginia. Since 1993, he has represented over 17,000 clients across a variety of cases. He has litigated thousands of criminal matters and more

than a hundred jury trials. In 2023, he was identified by Virginia Lawyers Weekly as one of the top 20 Go To Lawyers for appellate practice. Mr. Plofchan graduated with distinction from the U. S. Naval Academy in 1985. In 1986 he was awarded an M.A. in Government with a specialization in National Security Studies from Georgetown University. In 1992, he received his law degree from the University of Virginia. He is a former Ford Fellow at the University of Virginia School of Law and is widely published. In 2020, Tom was called by the Commonwealth Attorney of Loudoun County and asked to review a case in which a young domestic violence victim was found in contempt by the Circuit Court. This led to more than 260 hours of pro bono legal work, tens of motions, over 300 hundred pages of post-trial and appellate briefing, a successful appeal, a unicorn en banc appeal resulting in a affirmance based on a vote of 8-8 with no opinion, a petition to the Supreme Court, a challenge to the en banc process employed by the Supreme Court, and to development of an expertise in contempt and the limits of a court's authority to render orders of contempt. Given the unique posture of the case following the 8 to 8 affirmance without opinion, Tom will be sharing insights regarding the status of contempt law in Virginia as well as criminal appellate practice.



**Hon. Roger Gregory**, United States Court of Appeals for the 4th Circuit graduated from Virginia State University, and earned his J.D. degree from the University of Michigan Law School. Gregory was nominated by

President George W. Bush and confirmed in 2001. Gregory has served on numerous boards, including: Richmond Metropolitan Chamber of Commerce, Richmond Arts Council, Virginia State University Foundation, Richmond Bar Association, and Central Virginia Legal Aid Society. He served as president of the Friends Association for Children and the Black History Museum and Cultural Center of Virginia. Gregory was chairman of the Industrial Development Authority of Richmond and the executive committee of Richmond Renaissance. He serves as trustee emeritus on the Board of Trustees at the University of Richmond. He serves on the Junior Board of Directors of the John Marshall Foundation. He is a member of the American Bar Association and was keynote speaker for the opening assembly at the 2005 ABA annual meeting in Chicago. He is a member of the National Bar Association and the Old Dominion Bar Association of which Gregory is a past president. He was the recipient of many awards, including the 1997 National Conference of Christians and Jews Humanitarian Award. He was featured in *Ebony* magazine as one of the "56 Most Intriguing Blacks of 2001." In 2002, he received the Pioneer Visionary Award from the National Black Student Leadership Development Conference. In 2003, Judge Gregory received the Dominion Resources Strong Men and Women: Excellence in Leadership Award. Gregory was also awarded the Old Dominion Bar Association's L. Douglas Wilder Vanguard Award. He was also awarded the National Bar Association's Gertrude E. Rush and Equal Justice Awards, and the Thurgood Marshall Award of Excellence. In 2015, he received the Washington Bar Association's Charles Hamilton Houston Merit Medallion.

## About the Speakers

### MODERATOR

**Alison G. Powers** is the Director of Policy and Education for the Virginia Indigent Defense Commission (VIDC). Alison has been with the VIDC since 2010. She worked for seven years as an Assistant Public Defender at the Office of the Public Defender in Fairfax, Va



handling hundreds of cases in General District Court, Juvenile and Domestic Relations District Court and Circuit Court. In 2018, she moved to the administrative office where she manages all training for the VIDC attorneys, staff and court appointed counsel. She is also part of the VIDC's legislative team.

### FACULTY

**Hon. Alfred Gray Collins, III**, Colonial Heights Commonwealth Attorney graduated from Hampden-Sydney College with a B.A. in Philosophy and received his Juris Doctorate from the University of Richmond. He was in private practice until 2005 when he left to join the Fredericksburg Public Defender's Office. After the public defender's office, he worked in the Hanover Commonwealth Attorney's Office and the City of Colonial Heights Commonwealth's Attorney Office. He was subsequently elected the Commonwealth's Attorney for the City of Colonial Heights. Mr. Collins has handled a variety of cases during his years as both a private and governmental attorney, including the landmark case *Commonwealth v. Matthew Brady*, which established the reliability and admissibility of probabilistic genotype modeling in Virginia, which is now used throughout the United States and abroad. He has been an advocate of using cellular information to help investigate criminal behavior and using those results in court to exonerate or

convict defendants. He has prepared agents from the ATF, FBI, and local law enforcement officers to testify in court using digital information. Mr. Collins is an avid researcher on the American Revolutionary War, a member of the Colonial Heights Historical Society, serves as a board member on the Old Brickhouse Foundation, Eppington Foundation and volunteers at the Jamestown/Yorktown Foundation shooting muskets and artillery.

**Hon. Gerald I. Fisher**, Senior Judge, District of Columbia Superior Court was born and raised in Newport News, Virginia and graduated from the



College of William & Mary with a BA in history. He received his JD Degree from the Columbus School of Law at Catholic University where he was an editor of the law review. After serving as a law clerk at the District of

Columbia Court of Appeals, Judge Fisher became a supervising attorney in the Criminal Division of the D.C. Law Students in Court Program. In 1984, he co-founded the law firm of Fisher, Morin & Kagan-Kans, where he specialized in complex criminal and civil litigation. Since 1984, Judge Fisher has been an adjunct professor of law at the Georgetown University Law Center and has taught courses in civil and criminal trial practice, capital punishment jurisprudence, and evidence. He has also been a frequent lecturer on evidence and other topics to judges and attorneys, and he has served on the faculty of the Harvard Law School's Trial Advocacy Workshop, the Santa Clara University Law School's Death Penalty College, and California Western Law School's Institute for Criminal Defense Advocacy. From 2013 to 2016, Judge Fisher taught evidence as a Distinguished Visiting Jurist at the Peking University School of Transnational Law in Shenzhen, China. Judge Fisher is also a mediator and arbitrator for JAMS, a position he has held since he became a Senior Judge in 2022.

**Paulo E. Franco, Jr.**, *Thompson McMullan*, honed his skills in the courtroom, often being called upon to try the most difficult and complex cases for the Virginia State Bar (VSB). He prides himself on knowing the true value of a case, being a good listener, a good communicator, and a



passionate defender of his clients' interests. For the last 18+ years, he was a prosecutor for the VSB. He has deep knowledge of the regulatory landscape and can serve as an advocate, helping you navigate the system. With experience defending against suspension or license revocation, Paulo is the lawyer tradesmen and certified professionals can turn to should their career be in jeopardy with a licensing authority. Prior to joining the State Bar, Paulo was in private practice for over 16 years, serving design and construction professionals, lawyers, accountants, real estate agents, and more. He also routinely represented design professionals such as architects, mechanical and electrical engineers, and geotechnical engineers who were sued for errors and omissions. In addition to regulatory work, Paulo's practice encompasses all facets of civil litigation, including the representation of injured persons. After law school, Paulo clerked for the Chief Staff Attorney of the Supreme Court of Virginia. He is a first generation American whose family is originally from Medellín, Colombia, and he is fluent in Spanish. When he is not practicing law, Paulo performs with his band, Shockoe Records recording artists *Los Hermanos Alacranes*, which features Paulo's original songs in English and Spanish. They have opened for artists such as *Los Lobos* and performed at the 2023 *Richmond Folk Festival*. Paulo is also an avid road cyclist.

**Bradley R. Haywood** is the Chief Public Defender for Arlington County and the City of Falls Church, VA. He is the founder of Justice Forward Virginia, a criminal justice reform advocacy organization that led efforts to pass over a dozen reform bills in the Virginia General



Assembly since 2020, including historic limits on pretextual policing practices, repeal of mandatory jury sentencing, probation reform, and the mental health evidence statute that is the subject of the presentation at this conference. Mr. Haywood is the 2021 recipient of the Arlington County NAACP's Charles P. Monroe Civil Rights Award, and a member of the 2022 class of Virginia Lawyer's Weekly's Leaders in the Law. He is also the author of "Ending Race-Based Pretextual Stops: Strategies For Eliminating America's Most Egregious Police Practice," published in January 2023 in the *Richmond Public Interest Law Review*. Brad is a graduate of the University of Michigan (BA, Philosophy) and Columbia Law School.

**Sharon Kelley, J.D. Phd.**, is a forensic psychologist at the University of Virginia's Institute of Law, Psychiatry, and Public Policy (ILPPP), and the UVA Forensic Clinic within it. She is an Assistant Professor in the Department of Psychiatry and Neurobehavioral Sciences at the University of Virginia School of Medicine and an



Instructor in the UVA School of Law. As a forensic psychologist, Dr. Kelley performs a variety of criminal forensic evaluations in the UVA Forensic Clinic. These include evaluations addressing capital sentencing, competence to stand trial, legal sanity, re-sentencing of juvenile matters, and related issues. She has specialized research and clinical expertise in disputed confessions and waiver of rights. As a researcher, Dr. Kelley has co-authored many peer-reviewed scientific publications in forensic psychology and juvenile justice. She is also part of a research team that investigates cognitive bias in forensic science disciplines as part of a larger research program to improve the scientific underpinnings of forensic science.

*(Charlottesville seminar only)*

**Corinna Barrett Lain** is the S. D. Roberts & Sandra Moore Professor of Law at the University of Richmond School of Law. She is one of the nation's leading authorities on the death penalty, and has published numerous articles, essays, and blog posts about lethal injection over the last decade. Professor Lain has published in the top law reviews in the country, and regularly presents her work at national and international conferences. Professor Lain is also one of the leading voices on criminal justice in Virginia, lecturing at annual conferences for the bench and bar and co-authoring Thompson-West's Virginia Practice Series: Virginia Criminal Procedure, Virginia Offenses and Defenses, Virginia Jury Instructions, and Virginia Criminal Procedure Forms. Professor Lain is a former prosecutor and former sergeant in the Army, as well as a recipient of the University of Richmond's Distinguished Educator Award. Her book "Secrets of the Killing State: The Untold Story of Lethal Injection" is forthcoming Spring 2025.

*(Williamsburg seminar only)*

**Julie McConnell** is a Professor of Law and Director of the University of Richmond School of Law Children's Defense Clinic. She has worked as an advocate for youth justice for more than 25 years and specializes in holistic trauma-informed representation and client-centered practice. She and her students represent disadvantaged youth and parents and adults originally sentenced as children on a pro bono basis. McConnell has served as an Assistant Public Defender at the Richmond Office of the Public Defender and Assistant Commonwealth's Attorney at the Richmond Office of the Commonwealth's Attorney. McConnell is co-editor of the book *Juvenile Law and Practice in Virginia* and consults as a youth legal system expert in Virginia criminal cases and with the International Institute of Justice and the Rule of Law in Valetta, Malta. McConnell is currently Chair of the Virginia Bar Association Commission on the Needs of Children, serves on the Mid-Atlantic Regional Gault Center and Housing Opportunities Made Equal

(HOME) Boards, and is a member of the Advisory Workgroup to Develop Standards for Court-Appointed Counsel for Parents and Guardians in Child Dependency Cases and the Virginia State Bar Third District Disciplinary Committee.

*(Williamsburg seminar only)*

**Daniel Murrie, PhD.**, is a forensic psychologist who serves as Director of the University of Virginia's Institute of Law, Psychiatry, and Public Policy (ILPPP), and the UVA Forensic Clinic within it. He is a Professor in the Department of Psychiatry and Neurobehavioral Sciences



at the University of Virginia School of Medicine and an Instructor in the UVA School of Law. As a forensic psychologist, Dr. Murrie performs a variety of criminal and civil forensic evaluations in the UVA Forensic Clinic and in a national practice. These include evaluations addressing capital sentencing, competence to stand trial, legal sanity, and psychological injury. He also provides consultation to state systems and advocacy groups seeking to reform forensic service systems, and he serves as a court-appointed monitor overseeing one state system. As a researcher, Dr. Murrie has co-authored over 75 peer-reviewed scientific publications, three books, and dozens book chapters, all addressing forms of forensic psychological evaluation. Much of his research aims to reduce bias and improve reliability in forensic mental health evaluations.

**Joshua A. Pickens**, is an Intelligence Research Specialist with the Bureau of Alcohol, Tobacco, Firearms, and Explosives where he supports criminal cases across the country with regard to violent crime, FFL burglaries, and Explosive related case among others. Prior to working at the ATF, Mr. Pickens was an All-Source Intelligence Analyst with the United States Army and Army Reserve where he led intelligence missions in the Global War on Terror and Operation Iraqi Freedom. Leveraging his experience and training from both within the United States Army and the ATF, Josh has testified in multiple trials providing expert analysis of historical cellular location information, cellular phone data, and social media records and routinely layers this information for demonstratives to show a more

holistic picture of the device's location records. Mr. Pickens is a recipient of several Public Service Awards from the United States Attorney's Office for his work on several notable cases.

**William W. Tunner**, President and Partner, *Thompson McMullan, P.C.* in Richmond. Over the years, Billy Tunner has built a reputation with clients as the one who stays calm in the face of mounting pressure and adversarial forces. General counsel of large national companies, government attorneys, insurance companies, and professionals trust Billy for his counsel and success litigating in Virginia's state and federal courts, and before state agencies. Lead counsel in over 40 jury trials through verdict and countless bench trials and hearings, Billy is trusted by a diverse set of clients, including large and small companies, constitutional



officers, state agencies, universities, and licensed professionals — plus everyday people with a legal problem who just need a loyal lawyer. “No matter the client, they all face challenges of trying to get a fair and just result in an antagonistic, adversarial legal system,” he says. In 2020, Billy was elected President of the firm and began his term January 1, 2021. Billy sits on the Virginia House of Delegates House Ethics Advisory Panel; his appointment runs until 2024. In February 2014, Billy was appointed Special Counsel to the Opportunity Educational Institution by Virginia Gov. Terry McAuliffe. Billy is AV-rated by Martindale-Hubbell, named in Virginia Business magazine as one of the Legal Elite in civil litigation and alternative dispute resolution, and is regularly named in Super Lawyers for his work in civil litigation in Virginia. He was selected as a Leader in the Law 2022 honoree by Virginia Lawyers Weekly and was recently inducted into the Federation of Defense and Corporate Counsel.



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# Chair's Column

*Joseph Daniel Platania*



Friends and Colleagues:

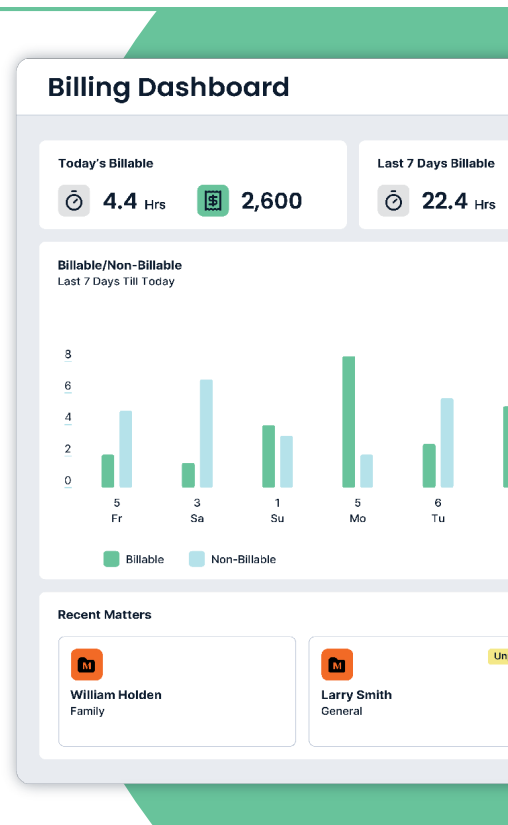
As we prepare for the start of 2025, I'm reminded of the importance of keeping our skill sets up to date with the rapidly changing landscape of the practice of criminal law. Once again, we have two exciting opportunities to spend time in person with one another at our 55th Annual Criminal Law Seminars being held in Charlottesville Friday January 31 and in Williamsburg Friday February 7.

Our programs begin with a comprehensive review of substantive and procedural developments in Virginia criminal case law over the past year. We will then hear from a criminal defense attorney and forensic clinician about the forensic evaluation process and the introduction and usage of mental health evidence in court. Cellphone evidence has seem-

ingly become part of almost every criminal case and an ATF agent and Commonwealth's Attorney will discuss the technical downloading process and how obtained evidence may be reviewed and evaluated for trial. A Superior Court Judge from the District of Columbia Superior Court will present on the authentication and admissibility of various types of electronic evidence. This interactive session will contain illustrative hypotheticals and involve audience participation.

The seminars will conclude with an ethics review of the pitfalls in criminal practice that get attorneys into trouble with the Virginia State Bar. The programs promise to be entertaining and informative, hope to see you there!

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

***Bullis v. U.S.***, F.4th 11/26 “Once a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause’s bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime.” The rule is that reimposition of a sentence fully served violates the Double Jeopardy Clause, but any component sentence of a consecutive sentence package is not fully served until the aggregate sentence package has been fully served. Bullis’s resentencing did not violate the Double Jeopardy Clause because he had not fully served his sentences on several counts.

***U.S. v. Nsahlai***, F.4th 11/22 “Although evidence that a defendant is the victim of domestic abuse may be admissible in some cases apart from a duress defense, .... A defendant cannot put on a duress defense under the guise of something else.” Defendant offered evidence of domestic abuse to negate a finding of mens rea. Although “the threshold for relevance is a low bar, ... it nonetheless requires that the evidence be ‘worth consideration by the jury’ or have a ‘plus value’ on the question before that body.” The trial court properly excluded generalized allegations that would have negligible, if any, tendency to make any element of the charged offenses more or less probable.

***Balogh v. Virginia***, 120 F.4th 127 “This appeal asks a straightforward legal question: does the First Amendment protect speech amid violence? More specifically, does the First Amendment obligate police officers to protect the constitutional rights of protesters amid violence?” Plaintiff alleges that Charlottesville and state officials violated his First and Fourteenth Amendment rights during his participation in the so-called “Unite the Right” rally. The rally erupted into violence between protesters and counterprotesters, effectively cutting off everyone’s speech and ultimately leading to multiple injuries, widespread property damage, and one death. Despite the mayhem, law enforcement followed directives not to intervene and did little to interrupt the participants’ “mutual combat.”

Plaintiff “would have us seize on these facts to transform the First Amendment from a shield to guard against invasive speech regulations into a sword to wield against violent speech disruptions. We decline to forge such a weapon, and instead affirm the district court’s judgment dismissing the complaint.”



## VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

***Johnson-Bey v. Commonwealth***, Va. 11/27 “In sum, the Court of Appeals correctly rejected Johnson-Bey’s challenge to the entry and enforcement of his 2022 revocation order. He cannot rebut the presumption against retroactive application of the 2021 amendments. Nor can the relief he seeks be justified by construing these amendments as having a prospective application only or as affecting only procedural matters.”

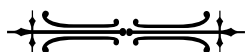
***Commonwealth v. Wallace***, 970 S.E.2d 804 (Va. 2024) “Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is reversible error in the judgment of the Court of Appeals. For the reasons stated in the dissenting opinion of the en banc Court of Appeals, see *Wallace v. Commonwealth*, 79 Va. App. 455, 476-84 (2024), the Court reverses the judgment of the en banc Court of Appeals and affirms the circuit court’s final judgment.”

***Bista v. Commonwealth***, 907 S.E.2d 482 (Va. 2024). “Undoubtedly, a child’s mental condition is an important factor for a trial court to consider when assessing both the child’s competency to testify and the admissibility of the child’s out-of court statements under Code § 19.2-268.3. These determinations, however, are ultimately based on the consideration of different legal standards. Accordingly, a trial court may reach differing conclusions regarding a child’s competency to testify and the trustworthiness of the child’s out of court statements. After considering the totality of the circumstances surrounding a child’s

out-of-court statements—as required by Code § 19.2-268.3(B)(1)—a trial court may determine that the statements at issue are ‘inherently trustworthy’ in a case where the child who made the statements is not competent to testify at trial.”

The Court also held that “Bista had a constitutionally sufficient opportunity to cross-examine R.P. at the preliminary hearing. Although Bista may have been able to cross-examine R.P. in even more detail after he learned additional facts later in the proceedings, the cross-examination that occurred at the preliminary hearing was not constitutionally infirm. “The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”

**King v Commonwealth**, 907 S.E.2d 159 (Va. 2024). Conviction under Code § 18.2-102 [felony unauthorized use of another’s vehicle]. Defendant argued that to be an owner of a vehicle requires the alleged victim/owner to have registered the vehicle and to have received a certificate of title from DMV. In this case, the alleged victim had not registered the vehicle nor received a certificate of title from DMV. Conviction upheld because “the trial court sitting as factfinder made an express finding that [the alleged victim] had received the car by gift, and thus, was the owner of the car.”



## VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

**Lane v. Commonwealth**, Va.App. 11/26 “The trial court deliberately erred when it imposed a two-month active sentence for Lane’s first technical violation” We are concerned that this trial court, and any other trial court judge at odds with the sentencing limitations for technical violations in Code § 19.2-306.1, could simply impose a sentence short enough to evade our review in order to moot any challenge to an improper sentence. Given the unique circumstances here, this case falls under the

“capable of repetition, yet evading review” exception to the mootness doctrine, and as a result is not moot. As such, the trial court’s order is vacated.

**Williams v. Commonwealth**, Va.App. 11/19 “The record supports the trial court’s rulings that [in response to a Batson challenge] the prosecutor provided a facially race-neutral justification for his strike of the challenged juror and that the stated reason was not pretextual. Further, the evidence was sufficient to prove that Williams drove his vehicle in a manner that proved the offense of felony eluding of a law-enforcement officer. As a result, we affirm his conviction.

**Benefield v Commonwealth**, Va.App. 11/19 “The trial court found that Benefield had not proven by a preponderance of the evidence that he was not an SVP anymore and found that the Commonwealth had proven by clear and convincing evidence that he remained an SVP. These statements demonstrate that the trial court did not apply the correct legal standard. ... The trial court erred by applying conflicting standards of proof when it should have considered only whether the Commonwealth proved that Benefield remained an SVP by clear and convincing evidence. We reverse the judgment,”

**Bazemore v. Commonwealth**, 82 Va. App. 478, 907 S.E.2d 531 (2024). Rather than demonstrating due diligence, defense counsel sought to take advantage of the witness’ absence for mere tactical purposes. In short, given the foregoing and the defendant’s lack of providing any corroboration that he had even obtained posted service after subpoenaing the witness, defendant had not shown that the trial court was plainly wrong in finding that defendant failed to satisfy the due diligence requirement — or that the witness was actually unavailable. Therefore, we certainly cannot say the trial court erred in refusing to admit the witness’ hearsay statement at trial.

**Joyce v. Commonwealth**, 82 Va. App. 519, 907 S.E.2d 552 (2024). Reversed felony conviction of uttering a forged bank note, in violation of Code § 18.2-170. “The prop bill did not ‘purport to be the note or bill of a banking company’ under Code § 18.2-170(2). Rather, it purported to be fake money to be used as a prop in a movie. We conclude that Joyce did not violate Code § 18.2-170(3) because he

did not employ a forged or false bill as those terms are used in Code § 18.2-170(1) or (2).”

***Khine v. Commonwealth***, 82 Va. App. 530, 907 S.E.2d 557 (2024). The record before this Court on appeal shows that Khine’s own actions both leading up to and during the murder were “inconsistent with the notion of an individual having no mental power or control over his or her own conduct.” In short, Khine admitted that if he had not listened to the voice in his head, nothing would have happened. He repeatedly stated that he felt very angry and upset with his wife, and he noted that he did not feel like ignoring the voice. Khine even acknowledged that he actually felt in control of his body while he was choking his wife to death. Furthermore, he stated that he stopped choking her long enough to go back to work when he realized it was time for him to return to work that morning. Therefore, for all these reasons, we cannot say that the trial court was plainly wrong or without credible evidence in finding that Khine failed to meet his burden of persuasion — or that the trial court erred in finding as a matter of law that Khine had not established the affirmative defense of insanity by reason of an irresistible impulse.

***Ballard v. Commonwealth***, 82 Va. App. 404, 907 S.E.2d 495 (2024). The Commonwealth was not precluded from prosecuting appellant for being a felon in possession of a firearm after having been convicted of willfully discharging a weapon in public; the discharge of the firearm was not the same criminal act underlying the felon in possession of a firearm charge,

***Womack v. Commonwealth***, 82 Va. App. 289, 906 S.E.2d 650 (2024). Evidence firearm located beneath appellant’s feet in floorboard and inference he attempted to conceal it proved appellant had knowledge of presence of firearm sufficient to show possession.

***Grimaldo v Commonwealth***, 82 Va. App. 304, 906 S.E.2d 657 (2024). The prospective juror had assented to generalized questions asking if she could follow the law and jury instructions. Once asked about her specific experience, [as a victim of sexual assault] however, she provided only equivocal responses about her ability to be an impartial and

fair juror. I.e., “I would hope ... but, I don’t know. It’s hard.” Because there was reasonable doubt about her ability to remain impartial as a victim of sexual assault, the trial court abused its discretion in denying defendant’s motion to strike the juror.

***Justice v. Commonwealth***, 82 Va. App. 237, 906 S.E.2d 237 (2024). “Defendant gave the methadone-laden medication to her infant son, is familiar with methadone, and gave testimony that was contradicted by its own terms and by the scientific evidence. We thus conclude that a rational trier of fact could have held that Justice possessed the requisite willfulness. We affirm her convictions for felony child neglect and felony homicide.”

***Perez Flores v. Commonwealth***, 82 Va. App. 249, 906 S.E.2d 165 (2024). Defendant was stopped for a red taillight violation, governed by subsection A of Code § 46.2-1013 which requires vehicles to have two red rear taillights and has no exclusionary rule. Because no exclusionary remedy applies when a law enforcement officer stops a vehicle for a suspected violation of Code § 46.2-1013(A), we affirm the trial court’s refusal to suppress evidence. “The fact that the district court heard evidence and granted the motion to suppress before granting the motion to nolle pros does not change the outcome... Code § 19.2-60 reinforces this conclusion by stating that if a motion to suppress ‘is granted by a court not of record . . . the ruling shall have no effect on any hearing or trial in a court of record.’”

The court also held that “A judgment of dismissal which is intended to be and is a disposition on the merits of a claim is a final judgment on the merits.” But a nolle pros is not a dismissal. A nolle prosequi dismisses the action “without a determination of guilt.” In this way, a nolle pros is a mere “discontinuance” of the action, which, “if entered before jeopardy attached, does not act as an acquittal and does not bar further prosecution for the offense.”

***Cisneros v. Commonwealth***, Va.App 9/24 When the period of suspension imposed in a revocation order exceeds the maximum period allowed by statute “an error of this nature would render a revocation order, at most, voidable rather than void ab initio.”

# 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 2024-2025

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