Criminal Law News

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

Criminal Law Section Board Begins 2025-2026 term

Mark Colombell, John Childrey, Chuck Slemp, Chair Alison Powers, Anna Lindemann, and Secretary Nia Vidal.

SAVE THE DATE!

See page 7 for details

The 56th Annual Criminal Law Seminar

Friday, January 30, 2026

New Board Members

Hon. Mark R. Colombell is a magistrate judge of the United States District Court for the Eastern District of Virginia, Richmond Division. He assumed office in May 2021. Prior to his appointment to the bench, he was a partner and served on the Executive Committee with the Richmond law firm of Thompson McMullan, P.C., where he practiced since 2003. Judge Colombell graduated from the University of Richmond School of Law in 2002 and earned his undergraduate degree from James Madison University. He is a Past President of the Lewis F. Powell, Jr. American Inn of Court.

Hon. Mike Doucette is a circuit court judge in the 24th Judicial Circuit, sitting in Nelson County and the City of Lynchburg. Previously, he was a member of the Lynchburg Commonwealth's Attorney's Office from 1984 to 2017, serving the last 12 years as the elected Commonwealth's Attorney. He then became the first Executive Director of the Virginia Association of Commonwealth's Attorneys (VACA) in 2018. He is a graduate of the University of Connecticut (1981) and the Marshall-Wythe School of Law, the College of William & Mary (1984). He served overseas with the United States Air Force (1973–76) and the Connecticut Air National Guard (1976-79).

John F. Childrey earned his undergraduate degree in history from UVa, then went to law school at William & Mary. He worked for two firms in Richmond from 1993 to 1998, then joined the Chesterfield Commonwealth's Attorney's Office and worked there until 2012. He then went to work at the Attorney General's office in the Public Safety Division until 2014. He returned to Chesterfield's Commonwealth's Attorney's office from 2014 until 2018. After three years of criminal defense solo practice he returned to the AG's office where he currently serves as Chief Section Counsel of the Medicaid Fraud Control Unit, and as the coordinator of the Elder Abuse Investigation Center.

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Chair's Column

Alison G. Powers, Esquire

Coming Soon: Criminal Record Sealing

In July, 2026, the long-anticipated Virginia Code 19.2-392.5 et seq., Virginia's record sealing law will take effect. This will give hundreds of thousands of people the opportunity to move forward with their lives without the burden of their years-old criminal records! Not all convictions or people will be eligible, but for those that are, this law can provide a fresh start that leads to more stable housing, better employment, and higher education.

The law requires that a person be conviction-free for a ten-year period to remove a felony or a seven-year period to remove a misdemeanor. This waiting period doesn't start until release from incarceration, though, so for some people the wait may be much longer. Any restitution owed will also have to be paid in full before a charge becomes eligible to be sealed.

For the most part, a person will have to petition the court to seal their record and will have to show the record causes or may cause a "manifest injustice" to them. Most often, this is a hindrance to getting housing, employment, or education. However, there will be a few misdemeanors that will seal automatically once the person has been conviction-free for at least 7 consecutive years. These are limited to misdemeanor convictions for petit larceny, concealment, disorderly conduct, some trespassing, and distribution of marijuana.

This new process will also benefit society at large. Reliable housing and employment contribute to a safer, healthier, and more engaged community for everyone. When a person is finally able to obtain more stable employment and housing, they are significantly less likely to commit new crimes or require public assistance and their mental and physical health generally improve. These benefits can then trickle down to their children, helping to break the generational poverty and disenfranchisement that often lead to arrest.

Please keep an eye out for trainings from the Virginia Indigent Defense Commission, the Virginia State Bar, The Virginia State Crime Commission and other local legal services agencies about this new law. Many people will be looking for pro bono help once this law takes effect and we would love for the Criminal Law Section members to take the lead!

By: Alison Powers, with significant technical assistance from Lauren McGarry, Sealing & Expungement Resource Attorney, Virginia Indigent Defense Commission

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FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

US v. Contreras, F.3d 8/14/25 "While the videos might have been disturbing to the jury, unfair prejudice requires a showing of a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence. On our review of the record, we cannot say that the video evidence was so unfairly prejudicial that it risked causing the jury to act irrationally."

US v. Johnson, F.3d 8/5/25 "The police did not intrude on Fourth Amendment-protected curtilage when they conducted a dog sniff in the common hallway just outside defendant's apartment door." Unlike *Kyllo*'s thermal imaging device, an alert by a trained narcotics detection dog "does not expose noncontraband items that otherwise would remain hidden from public view." It exposes "only the presence or absence of narcotics, a contraband item" – which means that it cannot violate any reasonable expectation of privacy. And the hallway directly outside apartment door is not "curtilage" because tenant's right to exclude others from own apartment does not "extend to the common areas of the building."

US v. Moore, F.3d 8/1/25 While the district court found that the police officers had probable cause to stop Moore and that there was no evidence of their "invidious or bad faith," it nonetheless relied on statistical evidence that Black drivers were 5.13 times more likely to be stopped in Richmond than White drivers. Viewed in the context of Richmond's history of racial discrimination, the district court granted Moore's motion to dismiss the indictment for selective enforcement in violation of the Equal Protection Clause, concluding that Moore had adequately supported his contention that Richmond Police Department "officers selectively stop Black people, and that this selective enforcement led to his current charges." The court of appeals reversed, finding that Moore's statistical evidence fails to show, to any degree, that the officers who stopped Moore acted with discriminatory purpose.

U.S. v. Krueger, F.3d 7/25/25 The Supreme Court has held that after seizing an item, police must obtain a search warrant within a reasonable amount of time. See *Segura v. United States*, 468 U.S. 796 (1984). Here, Krueger argues, the delay between the seizure of his devices in November 2019 and the federal warrant application in September 2022 – roughly three years – is obviously outside what could be considered reasonable under the Fourth Amendment. The fundamental disconnect in Krueger's "unreasonable delay" argument is that he has asserted his claim against the wrong sovereign. The seizure of his property – and hence any undue infringement on his possessory interests in that property – was executed and maintained by the Commonwealth of Virginia, not by the federal government. Any purported "delay" by police officers working in a federal capacity had no effect on the length of the seizure of Krueger's devices by the state, and thus could not have caused or contributed to an unreasonable seizure of Krueger's property. Accordingly, Krueger's "unreasonably delay" claim provides no ground for suppressing evidence collected by federal officials pursuant to an otherwise valid federal warrant.

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Orndoff v. Commonwealth, Va. 9/25 A witness who appears in a courtroom while voluntarily intoxicated can be held in summary contempt, particularly where the intoxication disrupts orderly adjudication. Here the circuit court observed behavior by Orndoff that was understandably a source of concern for the court. The evidence personally observed by the judge in the courtroom, however, did not establish, beyond a reasonable doubt, that her behavior was attributable to voluntary intoxication. Consequently, holding Orndoff in summary contempt was not appropriate. The Court suggested that if summary contempt is not appropriate, a trial court is not powerless to vindicate its authority. However, it must proceed in a separate

hearing, with the ordinary due process safeguards of notice, opportunity to present evidence, and the opportunity to test the evidence presented against the person charged with contempt. [Three Justices dissented].

Commonwealth v. Hubbard, Va. 9/11 The Fourth Amendment requires a "special justification" for searches that are peculiarly intrusive. A strip search typically involves "an inspection of a naked individual, without any scrutiny of his body cavities." A visual body cavity search goes further and "extends to a visual inspection of the anal and genital areas." A "manual body cavity search," the most intrusive search, entails "some degree of touching or probing of body cavities." We need not delineate the exact definitional distinctions between the various categories of invasive body searches here, because the circumstances of this case justify the officer's conduct no matter what label we put on the challenged search. The officer was patting down the outside of Hubbard's underwear underneath his shorts. The officer later pulled the waistband of Hubbard's underwear out far enough to see the suspected bags of contraband and retrieve them. The bags of cocaine were "just sitting down between [Hubbard's] buttocks and his underwear." Hubbard was physically resisting the search, and if he "were to break the bag," it would have spilled out its contents in the immediate presence of the restraining officers, Hubbard, and the other passenger. The officer had been instructed by his command to not field test "bags of white powder" because of the risk that they may be laced with fentanyl, which "has become so dangerous in today's time that a simple poof of that powder that could reach [their] nostrils could kill [them]." The officer's retrieval of the bag of drugs from Hubbard's underwear was reasonable under the circumstances of this case.

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Williams v Commonwealth, Va.App. 9/16 Clarifies that the balancing tests are different under Virginia Rules of Evidence 2:403 and 2:404 for determining when otherwise admissible evidence must be excluded because of its prejudicial effect. Rule 2:404(b) does not use the "substantially outweighs" standard from Rule 2:403(a). Instead, Rule 2:404(b) permits the introduction of otherwise admissible prior-bad-act evidence only "if the legitimate probative value of such proof outweighs its incidental prejudice." The difference in balancing tests makes it easier for a party to introduce relevant evidence generally than to introduce relevant prior-bad-act evidence. Prior-bad-act evidence that is otherwise admissible must be excluded whenever its probative value is merely outweighed by its incidental prejudice; the prejudice need not substantially outweigh the probative value.

Rodriguez v. Commonwealth, Va.App. 9/9 "Code § 18.2-67.7:1 changed the general prohibition against character evidence to prove propensity by creating a narrow exception in child sexual abuse cases." Although Virginia courts have not expressly addressed a constitutional challenge to the admission of evidence solely to establish propensity, we look to federal courts for guidance and hold: Evidence "of a defendant's prior conviction in prosecutions for felony sexual offenses against a child 'for the purpose of establishing propensity to commit other sexual offenses'" is admissible. However, this conviction was reversed because the trial court should have excluded a juror who affirmatively stated that "it would be very hard" for her to fairly and impartially decide the case based on all the evidence and would be inclined to convict based on Rodriguez's prior convictions alone.

Millspaugh v. Commonwealth, Va.App. 9/2 "Dismissal is the proper remedy when an event occurs while a case is pending on appeal that renders it moot—that is, 'renders it impossible' for this Court to grant appellant the relief requested." Millspaugh is no longer subject to the [emergency substantial risk order]. As a result, even if we agree with Millspaugh that the order should have been limited to only 14 days, there is no relief we can grant because we cannot "undo" the fact that he was subject to the order for extra time.

Commonwealth v. Moore, Va.App. 8/26 Case of first impression. A law-enforcement handler's testimony about his drug dog's nontrained behavioral changes, accepted as credible by the circuit court, can provide probable cause for a search.

Atkins v Commonwealth, Va.App. 8/12 "Even viewed in the light most favorable to the Commonwealth, the evidence here does not support a finding that Atkins's direct actions proceeded beyond merely preparing to commit incest. As the evidence is insufficient to find Atkins committed an overt act, it is insufficient to support his conviction for attempted incest."

Smith v. Commonwealth, Va.App. 7/29 "A statement may become admissible under the adoptive admission exception to the hearsay rule upon a showing of its tacit adoption by a party, as well as by more overt demonstrations of adoption." In criminal cases with multiple co-defendants, the government is the party-opponent of each co-defendant and the co-defendants are not party-opponents to each other. The co-defendant was not a party-opponent to the case, and thus the exception did not apply to him.

Smith v Commonwealth, Va.App. 7/29 The term "solicit" is not defined by Code § 18.2-308.2:2. To solicit is "to make petition to"; "to approach with a request or plea"; "to move to action." And solicitation is "[t]he act or an instance of requesting or seeking to obtain something; a request or petition." Applying the ordinary meaning of the term "solicit" as used in Code § 18.2-308.2:2(N), we conclude the trial court did not err in finding that appellant twice solicited another in purchasing firearms for him. Nothing in the plain language of Code § 18.2-308.2:2(N) requires a "quid pro quo" for a finding of solicitation.

Glover v. Commonwealth, Va.App. 07/22 Revocation of a driver's license under Code § 46.2-391(B) remains in effect indefinitely until a court restores the privilege to drive; it does not expire automatically by operation of law

Burton v. Commonwealth, 85 Va.App. 408 (2025). The trial court abused its discretion by not striking a potential juror who gave multiple responses suggesting inherent bias. The juror was not rehabilitated by a response to one leading question by court

Johnson v. Commonwealth, Va.App. 7/8 Defendant asserted that he was in custody when questioned at the hospital because he was the lone suspect, a uniformed officer was standing at the door of his hospital room, and his medical condition rendered him unable to leave. The court found a lack of custody and listed circumstances relevant to the "in custody" determination. I.e., Whether others were present during questioning, "such as medical staff and visitors and family of the patient." - The "time of day" of questioning, "with questioning that occurs during the middle of the day, as opposed to late at night. - Whether law-enforcement officers accompanied the suspect to the hospital. - Whether the police maintained a constant presence at the patient's hospital room. Whether the suspect was prevented from leaving the hospital by police or, instead, by the patient's medical condition. - The number of officers involved in the questioning. - Whether the suspect agreed to speak or cooperate with police. - Whether "the tone of a police interview with a hospital patient [was] . . . accusatorial," or "friendly and neutral." - The length of the interview. - The timing of the suspect's arrest in relation to the interview.

FIFTY-SIXTH ANNUAL

Criminal Law Seminar

SAVE THE DATE!*

Friday, Jan. 30, 2026 ~ Richmond
8:15 a.m. – 4:30 p.m.

6.0 MCLE hours *pending*

Thursday, January 29, at 6 pm — Reception for all registrants

****NEW THIS YEAR****

Thursday, January 29, at 7 pm — Speaker/Board Dinner

Friday, January 30, at 8:15 am-4:30 pm — 56th Annual Seminar

*New this year, there will be only one (1) location for the seminar (Richmond).
Location and hotel details coming soon.

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