Criminal Law NEWS

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PUBLISHED BY THE CRIMINAL LAW SECTION OF THE VIRGINIA STATE BAR FOR ITS MEMBERS

Section Sponsors Showcase CLE at 2009 Annual Meeting; Special Screenings of "The Response"

(left to right) Edward B. MacMahon, Jr., of Middleburg (standing); William F. Gould, of Charlottesville (behind podium); Jeff Swartz, Program Co-chair; Terry Kay Rockefeller, a member of September 11th Family for Peaceful Tomorrows, of Arlington, MA; Nina Ginsberg, Program Co-chair; and from the Office of Military Commissions in Washington, DC, Major Daniel Cowhig; Brigadier General Thomas Hemingway; and Lt. Col. Michael E. Savage.

At the Virginia State Bar's Annual Meeting in June, the Section presented the Showcase CLE: ***From Guantanamo to Abu Ghraib- The Changing Landscape of Detention ad Prosecution***. The program featured a panel of military and civilian attorneys with direct involvement at Guantanamo Bay and in a civil suit filed against private contractors at Abu Ghraib, as well as a family member of a 9/11 victim. The program was well received and attended by over 300 bar members and their families.

An additional special adjunct to the program included screenings of an award-winning film "***The Response***," a courtroom drama written and produced by film industry veteran Sig Libowitz which is based on actual transcripts of the Guantanamo Combatant Status Review Tribunals. The film was named the winner of the 2009 ABA Silver Gavel Award as best of the year in Drama & Literature, and it has been accepted as an official selection to seven Academy Award qualifying film festivals in 2010. For more information on the film, visit www.theresponsemovie.com. Thanks to board members Jeff Swartz and Nina Ginsberg who organized these highly successful and provocative events in conjunction with the annual meeting.

The torch has been passed and the officers of the board of governors of the Criminal Law Section for the 2009-2010 bar year are:

CHAIR	RICHARD E. TRODDEN
VICE CHAIR	CAROLYN V. GRADY
SECRETARY	CASEY R. STEVENS

The board also welcomes two new members:

Claire G. Cardwell - Stone & Cardwell, PLC, Richmond. Ms. Cardwell graduated from the University of Richmond School of Law. She previously served as Chief Deputy Commonwealth's Attorney for the City of Richmond, where she tried homicide and other high profile cases. Since returning to private practice in 2002 she has concentrated on criminal defense trials and appeals, personal injury and other general litigation.

James A. Bullard, Jr. - P.C., Richmond. Mr. Bullard graduated from the University of Virginia Law School, and is a member of the Virginia State Bar, Richmond Criminal Bar, Old Dominion Bar Association, and Henrico County Bar Association. His practice is concentrated in the criminal area.

A complete list of the board of governors is set out on the last page of the newsletter.

Chairman's Column

At the end of June I was very fortunate (due to the stellar efforts of my chief deputy, Theo Stamos) to attend a reception hosted by Chief Justice Roberts at the United States Supreme Court. The Chief Justice was honoring the graduates of the Supreme Court Summer Institute for secondary school teachers. This program sponsored by The Supreme Court Historical Society and Street Law, Inc. is designed to help teachers at the secondary level reach their students as they develop an awareness of their rights and duties as citizens. During the Institute teachers observe the Court in session, review cases under consideration and hear lectures by experts on the Court. On this beautiful June day they were in Court for the retirement of Justice Souter and the handing down of the decision in *Ricci Et. Al. v. DeStefano Et. Al.*

The level of enthusiasm manifested by these teachers was palpable. Each one of them said that a Supreme Court decision would never be the same to them again. It was clear that their enthusiasm was contagious and that they could not wait to get back to their students to discuss the weighty issues of rights and responsibilities.

I also could not help but marvel at the generosity of the Chief Justice in taking time out of his busy schedule to address these teachers and to provide wine and hors d'oeuvres in one of the fabulous conference rooms of the Supreme Court. As I listened to the Chief Justice it dawned on me that he was really on to something - the real future of American justice lies in the hands of those who transmit the values of citizenship: the love of our rights and the honor of our civil responsibilities.

To those who toil in the service of the Law - whether as prosecutor or defense counsel *Justice* is sometimes a remote concept. We are not always comfortable with the "big" concepts; instead we thrive on the language of statutes and precedents. Every now and then, however, it would serve us well to reflect on whether our collective efforts are contributing to a more just society. With the advent of DNA I know I would be less than honest if I did not admit that I dread a DNA result that would seri-

ously question and, perhaps, overturn a hard fought conviction. In reality, however, I and every prosecutor should be overjoyed by the prospect of the exoneration of the innocent. This is the very essence of justice.

In my more wistful moods I wonder how my colleagues in the defense bar would feel about an "Actual Guilt Project" to bring some form of justice to those we know by virtue of DNA were "wrongfully acquitted." - No, I do not want to abandon the prohibition on double jeopardy but maybe something closer to a "truth commission." Surely many would deem such an exercise as exquisitely quixotic but as I left the Supreme Court that June night I glanced over my shoulder and saw that magnificent inscription: "Equal Justice Under Law" - It made me wonder…

Former Section Chair Harvey Bryant Receives Service Award

Virginia Beach Commonwealth's Attorney Harvey Bryant received the Robert F. Horan, Jr. Service Award from the Virginia Association of Commonwealth's Attorneys at its 70th Annual Meeting in early August. The Horan Award is the highest honor the association bestows on its members and is awarded for "outstanding and dedicated service to the association, to the citizens, and to the commonwealth's attorneys of Virginia." Bryant is the 20th recipient of the award, which is named for the well-known Fairfax County prosecutor who retired in 2007 after serving for 40 years.

United States Supreme Court Criminal Law and Procedure Decisions

Montejo v. Louisiana, 129 S.Ct.2079 (2009). The Court overruled *Michigan v. Jackson* which had forbidden police from initiating interrogation once a suspect had invoked the right to counsel at an arraignment or similar proceeding. The Court reasoned that *Jackson* had established a prophylactic rule to prevent police "badgering" defendants into waiving the right to counsel. *Jackson*, however, was rendered "superfluous" by the *Miranda-Edwards-Minnick* line of cases which provide that "a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but 'badgering' by later requests is prohibited. If that regime suffices to protect the integrity of 'a suspect's voluntary choice not to speak outside his lawyer's presence' before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment right have attached." [Justice Scalia stated that "three layers of prophylaxis is enough"].

Abuelhawa v. U.S., 129 S.Ct. 2102 (2009). Interpreting a federal statute, the Court stated that the term "facilitate" a crime must be understood "with the traditional judicial limitation on applying terms like 'aid,' 'abet,' and 'assist." Thus a person who used the telephone to arrange a misdemeanor purchase of drugs did not "facilitate" a felony.

Bobby v. Bies, 129 S.Ct.2145 (2009). "Mental retardation as a mitigator and mental retardation under *Atkins* [which bars execution of mentally retarded offenders] … are discreet legal issues." Thus a pre-*Atkins* finding that defendant was "mildly mentally retarded" did not constitute a finding that defendant was "so impaired as to fall within *Atkins*." Therefore a new hearing to determine

the extent of defendant's mental retardation was not barred by double jeopardy or issue preclusion considerations. The court also noted that "issue preclusion" was a less confusing term than collateral and direct estoppel. "Issue preclusion is a plea available to prevailing parties. *** [It] does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties."

District Attorney's Office v. Osborne, 129 S.Ct. 2308 (2009). The Court rejected "recognition of a freestanding and far-reaching constitutional right of access to" DNA evidence in post-conviction proceedings. "The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice. That task belongs primarily to the legislature."

Yeager v. U.S., 129 S.Ct. 2360 (2009). "Consideration of hung counts has no place in the issue-preclusion analysis. … To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide. A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is 'based upon an egregiously erroneous foundation.'" [I.e., logically inconsistent verdicts].

Safford Unified School District v. Redding, 129 S.Ct. 2633 (2009). The Court found the strip search of a 13 year-old student to be unreasonable because "the content of the suspicion failed to match the degree of intrusion." The Fourth Amendment requires "reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts." [However school officials were entitled to qualified immunity because previous law was unclear].

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009). The confrontation clause was violated when the State, rather than offering testimony from the analysts who tested the drugs, introduced notarized certificates stating that the material was cocaine of a certain quantity. [This decision calls into question a number of Virginia decisions admit].

Selected Fourth Circuit Court Of Appeals Decisions

United States v. Crabtree, 565 F.3d 887 (4th Cir. 2009) Federal prosecutors may not introduce into judicial proceedings evidence derived from illegally obtained wiretaps even if the government had nothing to do with the illegal interception. A third party violated the federal wiretapping statute, 18 U.S.C. §2511(1)(a), by intercepting the defendant's telephone conversations. She turned the tapes over to the defendant's probation officer, and they formed the sole evidence the government presented to support some of the supervised release violations with which the defendant was charged. The government argued that the tapes were admissible because Section 2515's exclusionary rule should be understood as containing a "clean hands" exception. The Fourth Circuit declined to recognize a clean-hands exception to the wiretapping statute's exclusionary rule. Further, the court said that its recognition of an impeachment exception to the statute's exclusionary rule is not inconsistent with its refusal to recognize a clean-hands exception.

Virginia Supreme Court Criminal Law and Procedure Decisions

Whitehead v. Commonwealth, 278 Va. 105, 677 S.E.2d 265 (2009). Defendant was convicted of receiving stolen property when she admitted that her boyfriend was

"stealing property, and bringing it back to the apartment, and that [he] was stealing to try and support me and our daughter." The Supreme Court reversed the conviction because "the Court of Appeals was plainly wrong in holding that Whitehead 'received' the property merely because she benefited from the proceeds of its sale."

Commonwealth v. Ferguson, 278 Va. 118, 677 S.E.2d 45 (2009). "Under the totality of the circumstances, we hold that this encounter [between police and the suspect] was one continuous custodial interrogation conducted in such a manner as to deliberately disregard a clear, unambiguous and unequivocal invocation of the right to counsel, and coerce Ferguson to incriminate himself. The person subject to interrogation does not have to repeat his invocation of the right to counsel - once is enough if it is clear, unambiguous and unequivocal as it is in this case." See also, *Zektaw v. Commonwealth*, 278 Va. 127, 677 S.E.2d 49 (2009) ("I'd really like to talk to a lawyer" was a clear unambiguously invocation of the right to counsel).

In Re Commonwealth, 278 Va. 1, 677 S.E.2d 236 (2009). Atkins [of *Atkins v. Virginia*, 536 U. S. 304] was granted a hearing to determine if he was mentally retarded and thus ineligible for a death sentence. "At the conclusion of the two-day evidentiary hearing, the circuit court set aside Atkins' sentence of death and imposed a sentence of life imprisonment without the possibility of parole 'based on the newly discovered evidence of a Brady violation.'" [The Supreme Court noted that "generally, the remedy for a Brady violation is not a reduction in the sentence but a new trial"]. The Commonwealth sought a writ of mandamus to compel the circuit court to vacate its judgment. The Supreme Court held that "mandamus cannot be used by the Commonwealth or any other litigant to collaterally attack or vacate a final judgment entered by a circuit court upon the conclusion of a criminal proceeding." The Court also held that although the case was remanded for a determination of mental retardation, "a circuit court presiding during a remand of a capital murder proceeding retains authority and discretion to resolve [other] legal issues that the litigants raise." [Justices Kinser and Lemons filed a lengthy dissent].

Virginia Court Of Appeals Criminal Law and Procedure Decisions

Cline v. Commonwealth, 53 Va. App. 765, 675 S.E.2d 223 (2009). An ABC agent is not a law-enforcement officer as defined in Code s18.2-57 which makes it a felony to commit "an assault and battery against another knowing or having reason to know that such other person is … a law-enforcement officer as defined hereinafter…."

Thompson v. Commonwealth, 54 Va. App. 1, 675 S.E.2d 832 (2009). Court found the pat down of the defendant to be unconstitutional. "We are not prepared to conclude that one who loiters in an 'open market for drug sales' is automatically subject to a pat down. When there are no other relevant facts to suggest a person is involved in the distribution of drugs, such as a hand-to-hand transaction, contact with others, or maintenance of a 'stash,' we are compelled to conclude that the record does not support a reasonable basis for a weapons pat down." The Court also noted, "the common thread in … cases involving high crime areas and nervous behavior is the specific act of a furtive gesture to suggest that the suspect is armed."

Harper v. Commonwealth, 54 Va. App. 21, 675 S.E.2d 841 (2009). The court held that the decision in *Crawford v. Washington*, 541 U.S. 36 (2004) did not change prior holdings that the Confrontation Clause is inapplicable to post-trial sentencing proceedings.

Owens v. Commonwealth, 54 Va. App. 99, 675 S.E.2d 879 (2009). "One engaged in a joint enterprise may be convicted of constructive possession of burglary tools 'although actual custody of the tools at the time was in an accomplice.'"

Ghameshlouy v. Commonwealth, 54 Va. App. 47, 675 S.E.2d 854 (2009). Defendant's notice of appeal identified the Commonwealth of Virginia and not the City as the appellee. This oversight divested the Court of Appeals of authority to hear the appeal because failure to join an indispensable party is a jurisdictional defect that requires dismissal of the appeal. See also, *Woody v.*

Commonwealth, 53 Va. App. 188, 670 S.E.2d 39 (2008). *Roberson v. City of Virginia Beach*, 53 Va. App. 666, 674 S.E.2d 569 (2009).

Brown v. Commonwealth, 54 Va. App. 107, 676 S.E.2d 326 (2009). Although the Federal Rules of Evidence apply the best evidence rule to writing, recording, and photograph, "the best evidence rule in Virginia applies only to writings and, clearly, a videotape is not a writing as understood at common law and as defined by Code s1-257." Therefore, a witness could properly testify as to the contents of a surveillance videotape.

Scott v. Commonwealth, 54 Va. App. 142, 676 S.E.2d 343 (2009). "Because the Ohio trial court did not have jurisdiction to adjudicate the merits of Scott's Virginia probation violation and revoke Scott's Virginia probation, and, in fact, did not consider the jurisdictional issue, the Virginia trial court was not required to give full faith and credit to the Ohio trial court's judgment and was not precluded from adjudicating Scott's probation violation."

Fullwood v. Commonwealth, 54 Va. App. 153, 676 S.E.2d 348 (2009). It is not a violation of double jeopardy to permit "two prosecutions for simultaneously possessing two different types of drugs."

Clark v. Commonwealth, 54 Va. App. 120, 676 S.E.2d 332 (2009). Virginia has merged the common law crime and tort of assault so that the crime occurs when either set of elements is proved. "Although an overt act must be proved to support a conviction under either definition of assault, the intent with which the overt act must have been committed is different under the two definition of assault. Under the criminal definition of assault, the overt act must have been committed with the *actual* '*intent* to inflict bodily harm' *and* the perpetrator must have a present ability to inflict such harm; under the tort law definition, by contrast, the overt act may be committed merely with the 'intent to place the victim in fear or apprehension of bodily farm' where the act 'creates such reasonable fear or apprehension in the victim.'"

Jones v. Commonwealth, 54 Va. App. 219, 677 S.E.2d 61 (2009). "An expert witness in a criminal trial may only testify to those facts within his personal knowledge and may not be permitted to base his opinion of facts not in evidence. …The record shows that Dr. Fierro's opinions were supported by her own observations and examinations of [the deceased's] body that were entirely unrelated to" hospital records not admitted into evidence.

Midkiff v. Commonwealth, 54 Va. App. 323, 678 S.E.2d 287 (2009). Because individuals who possess child pornography are collectors and tend to keep their collection, it was not unreasonable, under the good faith exception of Leon, for the searching officer to believe "there was probable cause that the images of child pornography, downloaded sixteen months prior, could still be in appellant's possession." The court also held that "the images and digital movies of child pornography … did not constitute 'writings' under the best evidence rule." ["In Virginia, the best evidence rule has been limited to writings"].

Ngomondjami v. Commonwealth, 54 Va. App. 310, 678 S.E.2d 281 (2009). The Court affirmed earlier decisions that operating a vehicle does not require that the vehicle be moved. [Defendant was found unconscious in a vehicle with the motor running]. The Court also held that Code s46.2-943 [rather than Code s19.2-295.1's notice provision] is the controlling statute when the Commonwealth offers defendant's DMV record upon conviction of a traffic offense.

Draghia v. Commonwealth, 54 Va. App. 291, 678 S.E.2d 272 (2009). The Court of Appeals lacks "subject matter jurisdiction to address the writ of error coram vobis," which defendant filed to attack his 15 year old conviction.

Atkins v. Commonwealth, 54 Va. App. 340, 678 S.E.2d 834 (2009). "Obstruction of justice does not occur when a person fails to cooperate fully with an officer or when the person's conduct merely renders the officer's task more difficult or frustrates [his or her] investigation. Thus, an accused hiding or seeking to escape an officer

by merely running away is not such an obstruction as the law contemplates." The Court also held that the defendant's giving a false name when arrested was not a violation of Code s18.2-460(D) which applies to false statement in the course of an investigation of a *crime by another*.

Sanford v. Commonwealth, 54 Va. App. 357, 678 S.E.2d 842 (2009). "It is the confluence of IQ (or mental age) *and* adaptive skills that are relevant to the establishment of mental incapacity." Here a sixteen year-old with an IQ of 346 and an inability to assess cause-effect relationships in social interaction lacked the mental capacity to understand the nature or consequences of an act of sodomy.

West v. Commonwealth, 54 Va. App. 345, 678 S.E.2d 836 (2009). A warrantless entry of defendant's dwelling was justified by the existence of probable cause to arrest, and the exigencies of allowing the defendant an opportunity to commit additional violent crimes and/or destroy DNA evidence of this crime.

Kolesnikoff v. Commonwealth, Va. App., S.E.2d (7/28/09). Defendant acted "in the nature of a baby-sitter, i.e., one entrusted with the care of the child for a limited period of time, " and thus "maintained a custodial or supervisory relationship" sufficient for conviction of custodial indecent liberties in violation of Code s18.2-370.1

Jones v. Commonwealth, Va. App., S.E.2d (7/28/09). Proper mitigation evidence includes "circumstances surrounding the offense, the history and background of the defendant, circumstances that tend to explain the offense, defendant's criminal record, mental condition and intellectual function of defendant, and the age of defendant." Defendant's incarceration on charges arising from the same incident, that were ultimately *nolle prosequied*, was not relevant evidence to be presented to the jury during the sentencing stage.

Seaborn v. Commonwealth, Va. App., S.E.2d (7/28/09). The streets in a residential apartment complex constituted a highway when the Commonwealth "established the public's 'free and unrestricted' use of the street, and no evidence appears in the record that suggests the roads were marked as private or prohibited to public traffic, or that nonresidents driving on the streets had been arrested for trespassing."

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Don't miss the opportunity to receive your newsletters electronically!

Beginning with this issue, the section will limit printed issues of the newsletter to those members who do not have an email address listed as part of their official address of record with the Virginia State Bar. If you have not already provided your email to the bar, you may do so at https://member.vsb.org/vsbportal/. You will be given the opportunity to limit the use of your email address on this site.

Please visit http://www.vsb.org/site/sections/criminal/ to find this and all future issues of the section's newsletter. This site is available **only** to Section members. **Username:** criminallawmember; **Password:** CLmember09.

Criminal Law NEWS

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