

Criminal Law News

Volume 48, Number 3
January 2019

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

49th Annual Seminar Program and Speakers Confirmed

Chuck Rosenberg to speak in Charlottesville Hon. Rossie D. Alston to speak in Williamsburg



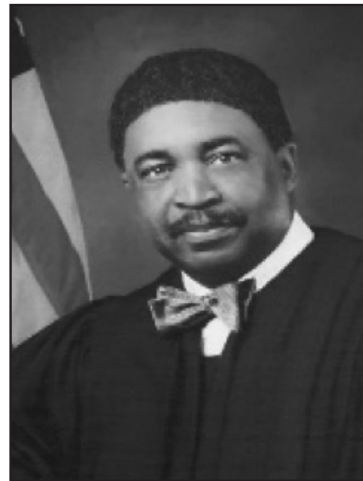
Chuck Rosenberg served as the Administrator (Director) of the Drug Enforcement Administration (DEA), from May 2015 until October 2017. Prior to joining DEA, Chuck served as the Chief of Staff and Senior Counselor to FBI Director Jim Comey (2013-2015). Before rejoining the FBI in 2013, he was a partner at a Washington, D.C. law firm. Chuck also served

as the U. S. Attorney for the Eastern District of Virginia, and for the Southern District of Texas. There, he tried dozens of cases before juries and briefed and argued many of those cases to the U.S. Court of Appeals. Chuck prosecuted cases that ranged from complex financial fraud crimes to violent crimes and espionage.

Chuck's public service includes several senior posts at the Department of Justice, where his work focused on counterterrorism, counterintelligence, national security, and criminal matters, including as Chief of Staff to Deputy Attorney General Jim Comey (2004-2005), Counselor to Attorney General John Ashcroft (2003-2004), and Counsel to FBI Director Robert Mueller (2002-2003).

Chuck currently works as an on-air legal analyst and commentator for MSNBC, as a Senior Counsel for

a Washington, D.C. law firm (handling sensitive internal investigations and white collar criminal matters), and as an adjunct professor at Georgetown University, teaching National Security Law and Policy (Fall 2018). He is a graduate of Tufts University (BA), Harvard University (MPP), and the University of Virginia (JD).



Judge Rossie David Alston, Jr. graduated *cum laude* from Averett College, and the North Carolina Central University School of Law. While at the law school Judge Alston served as an editor of the North Carolina Central Law Journal and was a member of the national competition Moot Court Teams and Client Counseling Teams.

Judge Alston began his legal career with the National Labor Relations Board in Washington, D. C., and ultimately became a partner in the law firm of Smith Hudson Hammond & Alston. In 1998 Judge Alston was elected by the Virginia legislature as a Judge of the Prince William Juvenile and Domestic Relations Court and moved on to the circuit court in 2001. In February 2009 he became the thirty-second judge of the Court of Appeals of Virginia.

Judge Alston is an Emeritus Member of the George
(continued on page 3)

Virginia State Bar

49th Annual Criminal Law Seminar

FEBRUARY 1, 2019 • Doubletree Hotel • CHARLOTTESVILLE
FEBRUARY 8, 2019 • Doubletree Hotel • WILLIAMSBURG

- 8:00** **Late Registration and Exhibits**
- 8:15** **Welcome and Opening Remarks**
- 8:30** **Recent Developments in Criminal Law and Procedure**
 Annual comprehensive review of developments in substantive and procedural Criminal Law.
 • *Professor Corinna B. Lain*
- 10:00** **Coffee Break**
- 10:15** **The New Discovery Rules — Perspectives from the Bench, the Defense, and the Commonwealth**
 After many years and several attempts, the Supreme Court passed new discovery rules. The panel will discuss the changes and impact on practitioners, prosecutors and the court.
 • *Douglas A. Ramseur* • *Hon. Bryan L. Porter* • *Hon. Tyneka L. D. Flythe*
- 11:15** **Memory on the Witness Stand: The Admissibility and Science of Eyewitness Testimony.**
 Research into eyewitness memory of events observed under stress has revealed significant reliability issues. Admissibility of expert witnesses to explain such issues, however, remains mostly premised on the belief that jurors can decide such issues without the assistance of expert testimony. Is it time to revisit the admissibility of expert witness testimony? • *Lori R. Van Wallendael, Ph.D.* • *Seth C. Weston*
- 12:15** **Luncheon Presentations** _____
- | | |
|-------------------------|------------------------------|
| Charlottesville: | Williamsburg: |
| <i>Chuck Rosenberg</i> | <i>Hon. Rossie D. Alston</i> |
-
- 1:30** **Juvenile Law Explained: It Really is Easier than Understanding Your Teenager**
 This session will cover transfer, intent to certify and the serious offender statute - how these options actually work and why they exist. The serious offender statute gives judges wide latitude on review and is based on the idea that adolescents have the potential to be rehabilitated and the statute incentivizes working to do so while they are in DJJ. Also covered - what needs to be in the Order for Commitment and the evidenced-based changes that DJJ has made to the length of stay guidelines for non-serious offender commitments.
 • *Professor Julie E. McConnell* • *Olympia Perkins*
- 2:30** **Are you appealing?**
 Appeals may be lost in the trial stage if one is not careful. Experienced appellate attorneys discuss and explain how to properly make and preserve objections during trial to lay the groundwork for the arguments on appeal. • *Catherine French Zagurskie* • *Leah A. Darron*
- 3:30** **Ethics Update and discussion**
 A well respected defense attorney and prosecutor team up to provide ethics lessons and updates.
 • *Craig Cooley* • *Hon. Nathan R. Green*
- 5:00** **Closing Remarks and Adjournment**

Approved MCLE Credit: 6.5, including 1.5 Ethics

Look for seminar brochure and registration information in mid-December
<http://www.vsb.org/site/sections/criminal/annual-seminar>

Mason Inns of Court and a former faculty member and guest lecturer to the Virginia State Bar Professionalism Committee. He served on the Judicial Ethics Advisory Committee, the Judicial Education Committee, the Criminal Law Section of the Virginia State Bar, the Virginia State Sentencing Commission, the Virginia State Pro Bono Committee, and the Special Commission Reviewing the Rules of Criminal Discovery in the Commonwealth of Virginia. Judge Alston is also an Adjunct Professor at George Mason University and a Distinguished Adjunct Professor at the Antonin Scalia Law School where he received the Dean's Judicial Excellence Award in 2018.



Speakers



Corinna B. Lain is the Roberts & Sandra Moore Professor of Law at the University of Richmond School of Law, where she teaches a variety of courses in the criminal law area, including criminal procedure, evidence, and the death penalty. Professor Lain's scholarship, which challenges conventional wisdom about the role of judicial review in the Supreme Court's criminal procedure,

death penalty, and constitutional law cases, has been published in the top law reviews in the country, including the *Stanford Law Review*, *University of Pennsylvania Law Review*, *UCLA Law Review*, *Georgetown Law Journal*, and *Duke Law Journal*. Professor Lain graduated summa cum laude from the College of William and Mary in 1992, and received her J.D. from the University of Virginia in 1996, where she was elected to Order of the Coif. She clerked on the Tenth Circuit and then prosecuted for three years in Henrico County before entering the academy. She is a recipient of the University of Richmond's Distinguished Educator Award and is also a veteran of the United States Army.



Douglas A. Ramseur is the Capital Defender for Central Virginia based in Richmond, Virginia, responsible for the trial defense of indigent people charged with capital murder in more than thirty jurisdictions. A graduate of James Madison University and the T.C. Williams School of Law at the University of Richmond, Doug was in private practice in Richmond for seven

years before being named the Deputy Capital Defender for Central Virginia in 2002. In 2006, he became a Senior Staff Attorney with the Office of the Georgia Capital Defender. Doug was named the Capital Defender for Southeastern Virginia in 2009 and became the Capital Defender for Central Virginia in 2015. Doug has served as lead counsel for more than three dozen people charged with death penalty offenses throughout Virginia and Georgia. He is an

adjunct professor at The T.C. Williams School of Law and a Past-President of the Virginia Association of Criminal Defense Lawyers. In 2014, Doug was named a Leader in the Law by Virginia Lawyer's Weekly. He was a member of the Virginia Supreme Court's Special Committee on Criminal Discovery and the Virginia State Bar's Criminal Discovery Reform Taskforce where he was one of the principal authors of the new discovery rules.



Bryan Porter is the Commonwealth's Attorney for the City of Alexandria, Virginia. Bryan obtained his law degree from the George Mason University School of Law in 2001. Immediately after passing the bar exam, Bryan was hired as an Assistant Commonwealth's Attorney for the City of Alexandria. During his tenure as an assistant, Bryan conducted the investigation and prosecution of hundreds

of violent offenses, including murders, robberies, shootings, gang offenses, and firearms offenses. Bryan has tried a number of significant, serious cases to juries. Bryan began his first term as Alexandria's elected Commonwealth's Attorney in 2014, and was recently re-elected. Bryan has taught constitutional law and civil liability to thousands of law enforcement officers and prosecutors. He has taught subjects as varied as prosecutorial ethics, search and seizure, interviews and interrogations, electronic evidence, narcotics prosecution and the prosecution of state RICO cases. Bryan has also taught constitutional law to citizens at community events and at the annual Commonwealth's Attorney's Citizen's Academy he initiated in 2017.



Seth C. Weston is a sole practitioner operating the Law Office of Seth C. Weston, PLC, in Roanoke. Mr. Weston has had a unique legal career that has seen him go from patrolling the streets around the U.S. Supreme Court as a police officer, to presenting a case to the U.S. Supreme Court as a lawyer. Mr. Weston was a police officer with the Metropolitan Police Department,

Washington, D.C., for approximately 12 years, serving as a patrol officer, and being recognized as a "Top Cop" by the National Association of Police Organizations for his investigative work in a pipe bombing case, which was featured on America's Most Wanted. He accomplished all this while attending the George Mason University Antonin Scalia Law School at night. In 2003, he began his career as a lawyer as an Assistant Commonwealth's Attorney for the City of Roanoke. He regularly tries cases in all levels of federal and state courts throughout the greater Roanoke Valley and Southwest Virginia and has appeared before and argued cases at all levels of the Virginia appellate court system as well as the United States Supreme Court. He is now serving as the Vice Chair of the Executive Committee of the Board of Governors of the Criminal Law Section of the Virginia State Bar, and is Past President of the Virginia Association of Criminal Defense Lawyers (VACDL).



Dr. Lori Van Wallendael is Associate Professor and Associate Chair of Psychological Science at the University of North Carolina - Charlotte. She earned her Ph.D. in experimental psychology from Northwestern University in 1986 and began teaching at UNC Charlotte that same year. She has published over 20 articles in sources such as *Police Quarterly*, *Annual Review of Law and Social Science*, *Encyclopedia of Psychology and Law*, *Handbook of Eyewitness Psychology*, *Trial Briefs*, and the *Journal of Forensic Psychology Practice*. She teaches courses in Forensic Psychology, Research Methods in Psychology, History and Systems of Psychology, and General Psychology, among others. In 2009 she was a finalist for the Bank of America Award for Excellence in Teaching. Dr. Van Wallendael has testified as an expert witness on eyewitness memory in over 30 criminal trials in North Carolina, South Carolina, Georgia, Kentucky, West Virginia, and Texas.



Julie E. McConnell is a Clinical Law Professor and Director of the Children's Defense Clinic at the University of Richmond School of Law. Previously, she served six years as a prosecutor in the Richmond Commonwealth's Attorney's Office, where she was a supervisor in the Richmond Juvenile and Domestic Relations Court. Prior to becoming a prosecutor, McConnell

served for five years as an assistant public defender and before that as a law clerk for the Honorable James W. Benton in the Virginia Court of Appeals. Before law school, she worked with the Virginia ACLU and as a community organizer and lobbyist for several not-for-profits in the Virginia General Assembly and served as a counselor and special education teacher at a group home for delinquent youths. She earned her law degree from the University of Richmond School of Law and her undergraduate degree from Agnes Scott Women's College. In 2011, she received the Oliver Hill Juvenile and Domestic Relations Court's "Unsung Hero" Award. In 2015, she was appointed by the Governor to a four-year term on the Advisory Committee on Juvenile Delinquency and Prevention and is now serving as co-chair and in 2016, she was selected to serve on the Virginia Bar Association's Commission on the Needs of Children. In 2017, she was selected as the Richmond YWCA's Outstanding Woman in Education. And in 2018, she was honored as the Metropolitan Richmond Women's Bar Association's Woman of Achievement.



Olymphya Perkins is the director of the Second District Court Service Unit in Virginia Beach, VA. She became the director in 2007 and has 30 years of experience in the juvenile justice field. Ms. Perkins has a BA from the University of Virginia and a MS from the University of Cincinnati. She is also a graduate of the Annie E. Casey Applied Leadership Network (ALN).

Ms. Perkins has implemented Results Based Leadership strategies and transformed the Court Service Unit into a client-focused agency committed to improving outcomes for youth and families. Accomplishments include building strong collaborative relationships with the Virginia Beach Police Department, the Department of Human Services and Virginia Beach City Public School's Renaissance Academy. The Court Service Unit also has two expeditors and a Family Engagement Specialist assigned to the agency through a partnership with Tidewater Youth Services Commission. Staff development includes ongoing leadership and Cognitive Behavioral Intervention training. Data driven successes include reducing the time between receiving a criminal complaint and filing a petition from 60 days to 10 days, increasing the diversion rate for children of color, and reducing the length of stay for youth in detention by 35%.



Senior Assistant Attorney General

Leah A. Darron has worked at the Office of the Attorney General of Virginia for thirty-four years, representing the Commonwealth in criminal cases in Virginia's appellate courts as well as habeas corpus matters in state and federal courts. In addition to handling a full caseload, Leah supervises and mentors a team of junior attorneys. She is also serving a second, three-term on Bar Council for the Virginia State Bar, representing the 13th Judicial Circuit. Leah graduated from the University of Virginia and taught at St. Catherine's School before attending law school at the University of Richmond. She is married to Richard S. Wallerstein, Jr., Judge, Henrico County Circuit Court. They have one child, 26-year-old Adair Wallerstein.

Leah is also serving a second, three-term on Bar Council for the Virginia State Bar, representing the 13th Judicial Circuit. Leah graduated from the University of Virginia and taught at St. Catherine's School before attending law school at the University of Richmond. She is married to Richard S. Wallerstein, Jr., Judge, Henrico County Circuit Court. They have one child, 26-year-old Adair Wallerstein.



Catherine French Zagurskie

is Chief Appellate Counsel for the Virginia Indigent Defense Commission. Throughout her career, she has argued numerous writ and merit cases before the Court of Appeals and the Supreme Court of Virginia. Catherine has presented on appellate topics at various programs, including a three-part webinar series for the National Association

of Criminal Defense Lawyers, and twice at the Annual Indigent Criminal Defense Advanced Skills for the Experienced Practitioner. Prior to her current position at the VIDC, Catherine was a Supervising Public Defender at the Richmond Public Defender's Office.

Catherine is an adjunct professor at the University of Richmond School of Law and a field instructor for the master's program at the VCU School of Social Work. She is a member of the Evidence Committee of the Boyd-Graves Conference, the Supreme Court's Behavioral Health Docket Advisory Committee, and the Governor's Advisory Commission on Opioids and Addiction. Catherine earned a J.D., summa cum laude, and graduated Order of the Coif from Case Western Reserve University, where she served on the Executive Board of the Law Review. Catherine also holds a M.S. in Social

Administration from Case Western Reserve University. Catherine graduated with a B.A., magna cum laude and Phi Beta Kappa, from Smith College.



Craig S. Cooley has been a defense attorney for 42 years in Richmond. Approaching age 72, he believes he has lost more cases than any known living human being. He has tried over 650 jury trials, and handled over 500 murder representations, including 70 capital cases. Thanks to many extremely talented co-counselors, he has had only two death penalty verdicts and only one executed client. He has served

as appointed counsel in over 7,000 cases and hopes eventually to become a “real lawyer.” Mr. Cooley has served as a substitute judge, taught high school for 5 years, taught undergraduates and laws students at the University of Richmond, and is a former Chairman of the Criminal Law Section of the VSB.



Nathan Green is the Commonwealth’s Attorney for the City of Williamsburg and James City County. He attended George Mason University and the Marshall-Wythe School of Law at the College of William & Mary. He began his career in 1998 as an Assistant Commonwealth’s Attorney for Bob Horan in Fairfax County. He was

first elected Commonwealth’s Attorney in 2007. In addition to serving as the Commonwealth’s Attorney, Nate teaches every year as an adjunct professor at the College of William and Mary, earning the St. George Tucker Outstanding Adjunct Professor of Law Award in 2016. Nate also takes on numerous responsibilities with the state wide Virginia Association of Commonwealth’s Attorneys, elected as the representative for the 2nd District, and appointed to chair the Career Prosecutor Program Committee.



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Chair’s Column Nancy Parr



In light of the fact that the Harry L. Carrico Professionalism Award will be presented during the luncheon in Williamsburg on February 8, 2019, I ask all who read this newsletter to stop and think about what being a “professional” means. This award recognizes dedication to excellence in the profession. The recipient of this award “... performs with competence and ability...[and]...conducts himself/herself with unquestionable integrity, with consummate fairness and courtesy, and with an abiding sense of responsibility.” (Extracted from remarks of Chief Justice Carrico, December 1990 Professionalism Course.)

The simple definition of a professional is “a person who belongs to a learned profession or whose occupation requires a high level of training and proficiency.” The traditional learned professions are law, medicine and the ministry. The simple definition of professionalism is “[t]he practice of a learned art in a characteristically methodical, courteous, and ethical manner.” Black’s Law Dictionary 1246 (8th ed. 2004).

Simply being a professional, which by definition we all are, will not suffice for recognition by the VSB Section on Criminal Law and receipt of the Harry L. Carrico Professionalism Award. Chief Justice Carrico exemplified the highest ideals and aspirations of professionalism in the administration of justice and each recipient of this award since 1992 has risen above the simple definition and has excelled at the practice of the learned art of law.

As actors say “It’s an honor to just be nominated with these incredibly talented people.” It truly is an honor to be nominated by a colleague or an attorney who appears before you for a prestigious award. The nominator not only read the Call for Nominations but thought the nominee was deserving and met the criteria and then actually submitted a letter with the reasons why the nominee is a Carrico Professional. Often we think that a colleague or a judge goes above and beyond what others do in their quest for justice but seldom do we tell her or him. So it really is an honor to be nominated.

To have a very qualified slate of nominees from which to choose makes the selection process engaging and thoughtful. It is rewarding for me, as Chair, to know there are genuinely professional men and women who spend each day working to make the criminal justice system in the Virginia Courts and in the Eastern and Western District Courts better for the practitioners and for the parties.

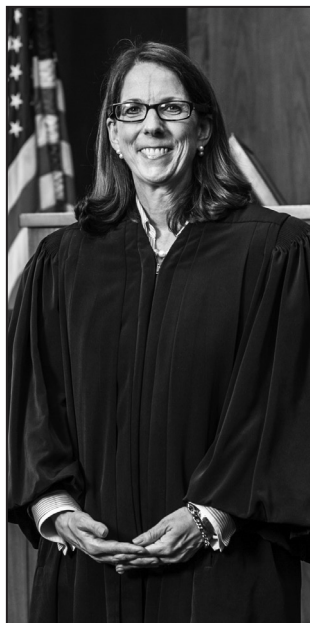
While we may never receive this award, we certainly can and should strive to advance the administration of justice though the high ideals of professionalism. We chose to belong to a learned profession which is characterized by the need of specialized training, the need to maintain confidential relations and the need to adhere to a higher standard of ethics than those who are not in such a profession. Let us all be the best professionals we can be and strive for a colleague to speak kindly of us and maybe one day nominate us.

Congratulations to the Honorable Hannah Lauck, U.S. District Court for the Eastern District of Virginia - a consummate professional. ✧

The Honorable M. Hannah Lauck to Receive the 2019 Professionalism Award

The Honorable M. Hannah Lauck will receive the 2019 Harry L. Carrico Professionalism Award from the VSB Criminal Law Section on February 8, 2019 at the Criminal Law Seminar in Williamsburg. The Carrico award was named for the former Supreme Court of Virginia chief justice who promoted the ideals of professionalism during his 42 years on the state's highest court.

In her nomination, Maria Jankowski wrote: "Most importantly, both on the bench and in the community, Judge Lauck leads by example. Her demeanor and manner in court sets a tone for what is expected of all parties. What she expects is that all parties be professional, well prepared and trustworthy. Judge Lauck ensures that what she expects of others she always demonstrates herself."



In 2014, M. Hannah Lauck was unanimously confirmed by the Senate to serve as United States District Judge in the Richmond Division of the Eastern District of Virginia. She is the first woman to serve in this position. Prior to becoming a District Judge, Judge Lauck had served as a United States Magistrate Judge since May of 2005. She is a member of the Virginia and District of Columbia bars, and the Fourth Circuit Judicial Conference.

Judge Lauck received her B.A. in Political Science from Wellesley College, magna cum laude and Phi Beta Kappa, in 1986. She received her J.D. in June 1991 from Yale Law School. After law school, she clerked for the Hon. James R. Spencer in the Richmond Division of the Eastern District of Virginia. Judge Lauck then worked in a Washington, D.C. law firm. In 1994, she began her ten-year tenure as an Assistant U.S. Attorney, prosecuting both civil and criminal cases. Before becoming a judge, Judge Lauck served as a Supervising Litigation Attorney at the headquarters of Genworth Financial, Inc., a Fortune 500 company based in Richmond, Virginia.

Judge Lauck taught at the University of Richmond School of Law as a John Marshall Professor of Judicial Studies from 2010 through 2013. She also taught the second-year lawyering skills program at the University of Richmond for ten years prior to that.

In 2014, Judge Lauck received the Metropolitan Richmond Women Bar Association's Woman of Achievement Award. In 2011, Judge Lauck was named one of Virginia's Leaders in the Law.

Judge Lauck formerly served as the President of the John Marshall American Inn of Court. She has served on the boards of the Richmond Bar Association, Metropolitan Richmond Women's Bar Association, District Four of the National Association of Women Judges, and St. Stephen's Preschool. She currently serves on the Boards of the Federal Bar Association and Higher Achievement in Richmond.

Judge Lauck lives in Richmond with her husband and their two children. ✧

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Stitt, S.Ct. (12/10/2018) "Burglary" in the Armed Career Criminal Act includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation. Such a structure fits the elements of generic burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." It qualifies as a violent felony because an offender who breaks into a mobile home, RV, a camping tent, or another such structure or vehicle creates a risk of violent confrontation.

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Lyles, F.3d (4th cir. 12/14/2018). In refusing to apply Leon's good faith exception, the Court stated: "What we have before us is a flimsy trash pull that produced scant evidence [three marijuana stems and three empty packs of rolling papers] of a marginal offense [marijuana possession] but that nonetheless served to justify the indiscriminate rummaging through a household. Law enforcement can do better." The Court referred to "this astoundingly broad warrant – resembling a general warrant," which authorized, among many other things, the search of every book, record and document in the home. The Court found a lack of probable cause for the search and cautioned that evidence pulled from curbside trash must be viewed with circumspection because trash pulls can be subject to abuse – e.g., anyone may plant evidence in another's trash; guests leave their own residue which winds up in the homeowner's trash.

U.S. v. Terry, F.3d (4th cir. 11/30/2018). "Because the nexus between the agents' illegal conduct [warrantless GPS search] and the evidence is strong, and considering the flagrancy of the constitutional violation in this case, we find that the discovery of the evidence seized during the traffic stop was not sufficiently attenuated from the unlawful GPS search such that the taint of that unlawful search was purged. Thus, the evidence is fruit of the poisonous tree and should have been suppressed. To hold otherwise would allow the government to disregard a constitutional requirement simply by using an illegal GPS search long enough to observe a minor traffic violation. Such a holding would entirely undermine the very purpose of the exclusionary rule: to deter police misconduct."

Lawlor v. Zook, F.3d (4th Cir 11/27/2018). *Lawlor v. Commonwealth*, 285 Va. 187, 251, 738 S.E.2d 847, 883 (2013) approved the rejection of expert testimony on Lawlor's future dangerousness because "a defendant's probability of committing future acts, limited to the penal environment, is irrelevant; and "characteristics alone are not character," because evidence must be peculiar to the defendant's character, history, and background. However, the Fourth Circuit granted Lawlor's federal habeas petition because the Virginia courts made an unreasonable application of clearly established federal law. The Fourth Circuit recognized that evidence of prison dangerousness, particularized to the defendant, is relevant to a consideration of "society as a whole," and the trial court erred in holding that dangerousness in prison was per se irrelevant. I.e., "future dangerousness in society and in prison both are relevant." In addition, the distinction between characteristics and character does not comport with either federal or Virginia law. The trial court had rejected expert testimony because it set forth a set of objective attributes about the defendant and inserted them into a statistical model to predict the probability of defendant's future behavior based on others' past behavior. But prior cases "do not prohibit this type of testimony; rather they require that the testimony be tailored to the individual defendant" which was done in this case.

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

McGinnis v. Commonwealth, Va. (12/13/2018). Prior to statutory amendment, labor and other services were not subject to common law larceny because neither time nor services may be taken and carried away, which was a necessary element of larceny at common law. In its first interpretation of Code 18.2-181 since the 1978 amendment the Court held that "one could be guilty of passing a worthless check as payment for services as well as goods."

Smith v. Commonwealth, Va. (12/13/2018). Neither prosecution nor defense requested an instruction that "words alone are never sufficient provocation to reduce murder to manslaughter, even though this principle is well established in our case law." The instruction given thus became the law of the case and the Court applied the instruction to determine that there was sufficient evidence to sustain the conviction.

Jones v. Commonwealth, Va. (12/6/2018). Upheld conviction for shooting at an occupied vehicle [Code 18.2-154] while defendant was inside the vehicle when he fired multiple shots. "The location of the shooter is not an element of the offense under this statute. Whether the shooter is outside or inside the car, the discharge of a firearm at an occupied vehicle presents a significant danger of grave harm or death to the occupants of the vehicle. Bullets can unpredictably ricochet off one of the vehicle's surfaces and strike an occupant. Accordingly, we reject the argument that a shooter must be positioned outside of the vehicle to be convicted of shooting 'at' an occupied vehicle under Code 18.2-154."

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Phillips v. Commonwealth, Va.App. (12/14/2018). Petition for a Writ of Actual Innocence denied. "Considering the whole record as it currently stands, there remains a confession by petitioner which (although it has been repeatedly attacked by petitioner) a factfinder at trial could certainly believe. The victim still adamantly maintains that her attacker was an African-American male who was wearing a Chicago Bulls cap, which petitioner was seen carrying in his hand within two hours of the attack and approximately half a mile from the park where the rape occurred. Petitioner admitted that he was in the park around the time of the attack. Finally, petitioner had a gold tooth on the left side of his mouth as the victim told police in the hospital emergency room shortly after the attack. For all of these reasons, we cannot find that *no* rational factfinder would have found proof of guilt beyond a reasonable doubt, which is the standard petitioner must persuade us to reach in order to grant the writ."

Merritt v. Commonwealth, Va.App. (11/13/2018). Code 19.2-128 criminalizes a willful failure to appear, but it does not apply to failure to appear for revocation proceedings. Because defendant was "improperly convicted of conduct not proscribed by the statute," her conviction is reversed under the ends of justice exception. Although ordinarily the court will not consider the ends of justice exception *sua sponte*, this rule does not apply "when a party, [the Commonwealth] even when it is not the party that stands to benefit, raises the issue."

Bennett v. Commonwealth, Va.App. (11/20/2018). Admission of photographs and a silent video did not violate the confrontation clause. "Based on the principle that nonverbal conduct qualifies as a 'statement' for hearsay purposes only if it is intended as an assertion, photographs [and silent videos] generally do not constitute hearsay." An audio recording of the informant's request for specific drugs was also non-hearsay because "the statements were not offered for the literal truth of whether he wanted the specified drugs or the implication that the informant believed that the defendant was a drug dealer." The statements were admitted "solely to give context" to defendant's admissions.

Wakeman v. Commonwealth, Va.App. (11/27/2018). Rejected argument that a nurse could not testify as an expert unless she had been certified as a Sexual Assault Nurse Examiner [SANE]. Rule 2:702(a) of the Virginia Rules of Evidence recognizes experts who possess "a degree of knowledge of the subject matter beyond that of persons of common intelligence and ordinary experience. ... Notably absent from the rule is any requirement that an expert carry a particular certification in order to serve as an expert." ✧

Criminal Law News



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